20-4202 21-56

United States Court of Appeals for the Second Circuit

TREVOR MURRAY,

Plaintiff-Appellee-Cross-Appellant

v.

UBS SECURITIES LLC AND UBS AG

Defendants-Appellants-Cross-Appellees

On Appeal from the United States District Court
for the Southern District of New York—No. 14-cv-0927,
Judge Katherine Polk Failla

AMENDED CONSENT *AMICUS CURIAE* BRIEF OF SENATOR RON WYDEN AND REPRESENTATIVE JACKIE SPEIER AND IN SUPPORT OF THE PLAINTIFF-APPELLEE-CROSS-APPELLANT

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IDENTITY AND INTERESTS OF THE *AMICI CURIAE* [1]

Senator Ron Wyden (D-OR) is a duly elected member of the United States Senate.

Senator Wyden is Vice-Chair of the bi-partisan U.S. Senate Whistleblower Protection Caucus. He was the original sponsor of legislation in the House of Representatives that ultimately became the Energy Reorganization Act whistleblower amendments for protection of nuclear workers, 42 U.S.C. §5851—the precedential private-sector whistleblower protection statute. H.R. 3941, as introduced in 1991 and ultimately enacted, incorporated the two-part test at issue in this proceeding. Senator Wyden also co-sponsored the resolution for National Whistleblower Appreciation Day and the COVID-19 Whistleblower Protection Act. Senator Wyden's office coordinates the Senate Whistleblower Caucus.

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[1] Pursuant Fed.R.App.P. 29(a)(4)(E), undersigned counsel states: (i) no party's counsel has authored this *amicus curiae* brief in whole or in part; (ii) no party or a party's counsel has contributed money that was intended to fund the preparation or submission of this brief; and (iii) no person—other than the *amici* or their counsel—has contributed money that was intended to fund the preparation or submission of this brief.

Representative Jackie Speier (D-CA) is a duly elected member of the United States House of Representatives .

Representative Speier is currently Co-Chair of the U.S. House of Representatives Whistleblower Protection Caucus. Representative Speier is the Chair of the House Armed Services Subcommittee on Military Personnel and serves on the following committees: the House Armed Services Committee; the House Permanent Select Committee on Intelligence; and the House Committee on Oversight and Reform. She is also Co-Chair of the Democratic Women's Caucus, the Congressional Armenian Caucus, the Bipartisan Task Force to End Sexual Violence, and the Gun Violence Prevention Task Force.

Representative Speier believes that whistleblowers serve an invaluable resource to their organizations and, as stewards of the federal budget, Congress relies heavily on their willingness to come forward and expose abuse and waste. Defending all whistleblowers' ability to expose various kinds of malicious behavior without fear of reprisal is absolutely necessary. If whistleblowers fear that they will be retaliated against for simply coming forward, Congress will lose a source of information that we depend on to speak up when no one else will. That is why the

Whistleblower Protection Act of 1989 defended whistleblowers and placed the burdens of proof on employers when retaliatory measures are subject to debate or question. By supporting whistleblowers and protecting them from retaliation, Congress can continue to hold employers accountable when they attempt to subvert the law behind the veil of secrecy.

A. *AMICI'S* PURPOSE IN SUBMITTING THIS CONSENT BRIEF[2]

Senator Wyden and Representative Speier submit this brief *amicus curiae* to defend the burdens of proof Congress established in 2002 in the Sarbanes Oxley ("SOX") Act, 18 U.S.C. §1514(b)(2)(c), as well as to uphold the substantially similar legal burdens that Congress codified in the Whistleblower Protection Act of 1989 ("WPA"), 5 U.S.C. §2302(b)(8)-(9), the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century of 2000 ("AIR-21"), 49 U.S.C. §42121(b)(2)(B), the Energy Reorganization Act of 1974 ("ERA") 42 U.S.C. §5801 *et seq*., and the approximately twenty other whistleblower protection laws Congress has enacted in the last 30 years, seventeen of which are administered by the

[2] As noted in the attached Motion for Leave to File an *Amicus Curiae* Brief, **all parties have consented** to the filing of this brief.

Department of Labor using the AIR-21 burdens of proof. (These statutes—besides SOX, AIR-21, and the WPA—are listed in attached Appendix A.)

ARGUMENT

INTRODUCTION AND SUMMARY OF ARGUMENT

The statutory burdens of proof Congress established in the SOX Act are under siege in this case because the Defendants-Appellants-Cross-Appellees, UBS Securities LLC and UBS AG (collectively, "UBS"), relying on inapposite *dicta* in this Court's six-month old decision in *Tompkins v. Metro-N. Commuter R.R. Co.*, 983 F.3d 74 (2d Cir.2020), broadly contend:

> [t]he text and context of the SOX retaliation provision, …, together with this Court's precedent interpreting similar statutory language, make clear that **evidence of retaliatory intent is a necessary** component of a retaliation claim under the statute.

UBS Br. at 16 (emphasis added).

The key word is "**necessary**." To be sure, "evidence of retaliatory intent," *id.*—or the absence of such intent—might be relevant to and thus properly could be considered in almost any case involving workplace discrimination, the key question is which party can—or even must—establish "retaliatory intent."

There are three reasons why this Court should reject UBS' contention that it is "necessary" for a complaining employee-whistleblower to establish such intent as part of her/his *prima facie* burden in every SOX case.

First, contrary to UBS' argument, its proposed construction finds no support in SOX's "text and context." In fact, it runs counter to the interpretations of SOX's text and context (and those of apposite whistleblower protection enactments) rendered by other Circuits.

Second, UBS' proposed construction ignores or contradicts three elements (besides "text and context") that this Court and the Supreme Court repeatedly have deemed indispensable in construing a statute, specifically a statute's "'structure, history, and purpose.'" *L.S. v. Webloyalty.com, Inc.*, 954 F.3d 110, 115 (2d Cir.2020)(quoting *Abramski v. United States*, 573 U.S. 169, 179 (2014)(internal quotation marks and citation omitted). Indeed, UBS' proposed construction would have the Court completely ignore a key provision of the SOX Act, 18 U.S.C. §1513(e), while simultaneously treating another central SOX provision, 18 U.S.C. §1514(b)(2)(c)(ii), as meaningless surplusage.

Third, UBS' proposed construction ignores and thereby undermines interpretations by Article III courts that emphasize "[t]he well-established intent of Congress supports a broad reading of the [SOX]'s protections," *Rhinehimer v. U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 810 (6th Cir.2015), and that stress SOX's specific purpose of creating a "burden-shifting framework that is … **much easier** for a plaintiff to satisfy than the *McDonnell-Douglas* standard," and substantially **"tough[er]"** for an employer/defendant. *Araujo v. N.J. Transit Rail Operations, Inc*., 708 F.3d 152, 158-59 (3rd Cir.2013).

In the final analysis, UBS's contention that an employee/ whistleblower has the burden of proving an employer's retaliatory animus and discriminatory intent constitutes a radical challenge to what Congress enacted, what key members of Congress said about those enactments, and what this and other courts have said about burdens of proof in whistleblower retaliation cases. UBS' proposal, if adopted, would smuggle into SOX the burden-shifting framework and standards Supreme Court crafted nearly 50 years ago for use in Title VII and First Amendment discrimination cases, despite the fact that Congress considered—and expressly rejected—those frameworks and standards in

enacting SOX and related statutes.

I. CONGRESS CAREFULLY DESIGNED SOX'S SHIFTING BURDENS OF PROOF TO MAKE IT "MUCH EASIER" FOR WHISTLEBLOWER EMPLOYEE-COMPLAINTS TO PREVAIL

A. BURDENS OF PROOF ARE IMPORTANT IN ALMOST EVERY CASE, AND OUTCOME-DETERMINATIVE IN MANY

This Court and the Supreme Court have often noted that the allocation of burdens of proof, and the standards for satisfying such burdens can be "outcome determinative" in many civil cases. *Goldman Sachs Group, Inc. v. Arkansas Teacher Ret. System*, 141 S.Ct. 1951, 1958 (U.S. June 21, 2021). *See United States Parcel of Prop.*, 337 F.3d 225, 233 (2d Cir.2003).

The questions of which party has a burden, whether a burden is heavy or light, how it can be satisfied, and whether and under what circumstances a burden may shift certainly can be critical in whistleblower retaliation and other employment discrimination cases.

B. THE DIFFERENT BURDENS OF PROOF FOR EMPLOYEE-COMPLAINANTS AND EMPLOYER/RESPONDENTS ARE PARTICULARLY IMPORTANT IN SOX CASES

Eight years ago, this Court explained: "[t]he relevant burdens of proof for whistleblower retaliation claims under §1514A [of the SOX Act] are contained in" the AIR-21 Act, 49 U.S.C. §42121(b). *Bechtel v. Admin. Rev. Bd., U.S. Dept. of Labor*, 710 F.3d 443, 447 (2d Cir.2013)(footnote and citations omitted).[3] Pursuant to §42121(b), and the dozens of decisions interpreting that section in the last two decades, in order to establish a *prima facie* case under AIR-21, and "[t]o prevail under" SOX §1514A:

> an employee must prove by a preponderance of the evidence that (1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action.

Bechtel, 710 F.3d at 447 (citations omitted).

"If the employee establishe[s] these four elements, the employer may avoid liability if it can prove 'by clear and convincing evidence' that it 'would have taken the same unfavorable personnel action in the absence of that protected behavior.'" *Id.* (citations omitted). *See* 18 U.S.C.

[3] SOX §§1514A(b)(2)(A) and (B) expressly adopt "the legal burdens of proof" and "the rules and procedures set forth in" AIR-21, specifically those articulated in 49 U.S.C. §42121(b). *See Bechtel,* 710 F.3d at 447 n.3.

§1514A(b)(2),(3), 49 U.S.C. §42121(b), 29 C.F.R. §§1980.100–1980.115 (construing AIR-21).

These statutory burdens of proof frameworks form the cornerstones of a longstanding, consistent, and remarkably bi-partisan congressional campaign to make it "much easier" for government and private sector employees to prevail when they suffer workplace retaliation for their lawful exposures of government and corporate misconduct and sue their employers for statutory relief.

In repeatedly enacting whistleblower laws with these statutory frameworks of the disparate burdens of proof, Congress explicitly made public policy choices that the pre-existing common-law burdens of proof that the Supreme Court had fashioned in non-whistleblower retaliation cases—specifically the *Mt. Healthy* and *McDonnell-Douglas* and frameworks[4]—were inadequate to protect whistleblowers' rights and to vindicate Congress' purposes in enacting statutes like SOX.

[4] See *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977)(for use in discrimination actions under the First Amendment) and *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973)(for use in employment discrimination cases under Title VII of the Civil Rights Act of 1964).

C. CONGRESS DELIBERATELY DESIGNED DIFFERENT BURDENS OF PROOF FOR EMPLOYEE-COMPLAINANTS AND EMPLOYER-RESPONDENTS IN SOX CASES IN ORDER TO ADVANCE IMPORTANT CONGRESSIONAL POLICIES OF PREVENTING AND PUNISHING CORPORATE FRAUD

The Supreme Court explained the critical importance of the SOX Act in *Lawson v. FMR LLC*, 571 U.S. 429 (2014), stressing that SOX:

> **aims to "prevent and punish corporate and criminal fraud, protect the victims of such fraud, preserve evidence of such fraud, and hold wrongdoers accountable for their actions**." … Of particular concern to Congress was abundant evidence that Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a "corporate code of silence"; that code, Congress found, "discourage[d] employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally." When employees of Enron and its accounting firm, Arthur Andersen, attempted to report corporate misconduct, Congress learned, they faced retaliation, including discharge. As outside counsel advised company officials at the time, Enron's efforts to "quiet" whistleblowers generally were not proscribed under then-existing law. **Congress identified the lack of whistleblower protection as "a significant deficiency" in the law, for in complex securities fraud investigations, employees "are [often] the only firsthand witnesses to the fraud**."

571 U.S. at 434-35 (emphasis added; internal quotation marks, citations, and omitted). These are broad, "far-reaching objective[s]. *Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 778 (2018).

Like the ERA, which "serves a "broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality." *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir.1984), SOX has a broad "remedial and deterrent function." *Guyden v. Aetna, Inc.*, 544 F.3d 376, 384 (2d Cir.2008). *See Halliburton, Inc. v. Admin. Rev. Bd.,* 771 F.3d 254, 265 (5th Cir.2014)("the text of SOX plainly evinces a broad[] remedial scope"). As Senator Patrick Leahy, one of the statute's authors explained, SOX was "**intentionally written to sweep broadly**, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market." 149 Cong. Rec. S1725–01, S1725, 2003 WL 193278 (Jan. 29, 2003) (emphasis added).

This is important in SOX cases because "[i]t is a 'familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). *See Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 932–33

(11th Cir.1995)(a "broad" interpretation of whistleblowing statutes is appropriate because it "promotes the remedial purposes of the statute and avoids the unwitting consequence of preemptive retaliation, which would allow the whistleblowers to be fired … with impunity for internal complaints before they have a chance to bring them before an appropriate agency."); *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir.1984)(accord).

D. IN DESIGNING SOX, CONGRESS DELIBERATELY CHOSE TO ESCHEW THE *MT. HEALTHY* AND *MCDONNELL-DOUGLAS* BURDEN-SHIFTING FRAMEWORKS

The legal framework governing First Amendment retaliation claims under *Mt. Healthy* is well-established. "**Plaintiff has the initial burden of showing that an improper motive** played a substantial part in defendant's action …." *Scott v. Coughlin*, 344 F.3d 282, 288 (2d Cir.2003)(emphasis added; citations omitted). If the plaintiff demonstrates these factors, "[t]he burden then shifts to defendant to show it would have taken exactly the same action absent the improper motive." *Id.* (citations omitted).

The legal framework governing Title VII retaliation claims under *McDonnell-Douglas* is equally well-know. Under *McDonnell-Douglas'*

burden-shifting test, the plaintiff must establish "a *prima facie* case of discrimination by showing," *inter alia,* that "the circumstances give rise to an inference of discrimination." *Vega v. Hempstead Union Free School Dist.,* 801 F.3d 72, 83 (2d Cir.2015). Once an employee has made out a *prima facie* case, "[t]he burden then shifts to the employer to 'articulate some legitimate, nondiscriminatory reason' for the disparate treatment." *Id.* (quoting *McDonnell-Douglas*, 411 U.S. at 802). "If the employer articulates such a reason for its actions, the burden shifts back to the plaintiff to prove that the employer's reason was in fact pretext for discrimination." *Id.* (internal quotation marks omitted).

Notably, under *McDonnell-Douglas,* all that an employer must do to meet its burden of production is "to introduce evidence **which, taken as true**, would permit the conclusion that there was a nondiscriminatory reason for the adverse action." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993)(emphasis in the original). Moreover a "'defendant need not persuade the court that it was actually motivated by the proffered reasons.'" *Id.* at 510 (citation omitted).

E. BURDEN-SHIFTING IN SOX CASES IS SIGNIFICANTLY DIFFERENT THAN THE BURDEN-SHIFTING FRAMEWORKS USED IN *MT. HEALTHY* AND *MCDONNELL-DOUGLAS* CASES

As *Bechtel v. ARB/DOL* reflects, the legal framework for burden-shifting framework used in SOX and related whistleblower retaliation cases is quite different than the frameworks used in First Amendment retaliation cases (per *Mt. Healthy*) and Title VII retaliation cases (per *McDonnell-Douglas*). Deliberately so.

On the one hand, AIR-21's bifurcated test—*i.e.*, the test SOX expressly adopts—creates a "'burden-shifting framework that is … **much easier for a plaintiff** to satisfy than the *McDonnell-Douglas* standard.'" *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir.2015)(quoting *Araujo*, 708 F.3d at 158-59). On the other hand, for defendant-employers, AIR-21 requires that they produce evidence that satisfies the higher "clear and convincing" standard. "'For employers, this is a tough standard, and not by accident.'" *Araujo*, 708 F.3d at 159 (quoting *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir.1997)).

Because the employee/plaintiff in the instant case sued UBS pursuant to SOX, the focus of statutory analysis here is on SOX's anti-retaliation provision, 18 U.S.C. §1514A, which incorporates the two

requirements of AIR-21, 49 U.S.C. §42121(B), *i.e.,* the ones set out in §42121(B), sub-sections (i) and (ii):

> **(i) Required showing by complainant**—The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a *prima facie* showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> **(ii) Showing by employer**—Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

AIR-21's language and structure creates a bright-line, two-step process. Sub-section (i) plainly requires an employee/complainant to "make[] a *prima facie* showing" that his protected activity "was a contributing factor in the unfavorable personnel action to alleged in the complaint."

The whistleblowing employee must do nothing less—but also nothing more.

F. NUMEROUS COURTS OF APPEALS AGREE WITH THE FOURTH AND THIRD CIRCUITS THAT, UNDER SOX, AN EMPLOYEE'S BURDEN IS "MUCH EASIER" THAN AN EMPLOYER'S AS WELL AS BEING "MUCH EASIER" THAN A PLAINTIFF'S BURDEN UNDER THE *MT. HEALTHY* AND *MCDONNELL-DOUGLAS* FRAMEWORKS

An employee's burden under statutes indistinguishable from SOX is among the lightest in any civil case, especially in any employment discrimination case. Indeed, "the required showing to establish causation for a claimant under [SOX] Section 806 [*i.e.,* §1514A] is **less onerous** than the showing required under Title VII." *Lockheed Martin Corp. v. Admin. Rev. Bd., U.S. Dept. of Labor*, 717 F.3d 1121, 1137 (10th Cir.2013)(emphasis added). "[T]he '**burden-shifting framework that is applicable to FRSA cases is much easier for a plaintiff to satisfy than the *McDonnell-Douglas* standard**.…'" *Lee,* 802 F.3d at 631 (4th Cir.2015)(emphasis added quoting *Araujo,* 708 F.3d at 158–59 (3rd Cir.2013)). Numerous Circuits agree.[5]

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[5] *See Kosmicki v. Burlington N. & Santa Fe R. Co.*, 545 F.3d 649, 651 (8th Cir.2008)("A 'minimal evidentiary showing satisfies a plaintiff's burden of production' at the *prima facie* stage" in an AIR-21-related case.); *Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 76 (2d Cir.2005)("*prima facie* burden [i]s 'minimal' and '*de minimis*.'")(citation omitted). *See also Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 480 (6th

1. Under SOX, an Employee/Complainant Faces a Comparatively Minimal—"much easier"—Burden of Proof

Unlike UBS' assumption that all anti-discrimination provisions are alike and UBS' abbreviated analysis, the *Araujo* court carefully examined the text, structure, history, and purpose of AIR-21's framework, 49 U.S.C. §42121(b)(2)(B)(i)-(ii), and then explained:

> The plaintiff-employee need only show that his protected activity was a "contributing factor" in

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Cir.2003); *Barrett v. Lombardi*, 239 F.3d 23, 27 (1st Cir.2001). *Cf. Sirois v. Long Island R.R. Co.*, 797 Fed. Appx. 56, 58–59 (2d Cir.2020)(unpublished Summary Order)("FRSA retaliation claims are evaluated under the burden-shifting test" of AIR-21. "Because 'Congress intended [this burden-shifting framework] to be protective of plaintiff-employees,' it is 'much easier for a plaintiff to satisfy than the *McDonnell-Douglas* standard.'")(quoting *Araujo*, 708 F.3d at 159-60)).

Last year, this Court explained just how "much easier" and "less onerous" it is for a plaintiff to establish a *prima facie* case under AIR-21.

> A plaintiff can establish a *prima facie* case that his protected activity was a contributing factor in the adverse action by ... circumstantial evidence ... includ[ing] [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.

Sirois, 797 Fed. Appx. at 56, 59–60 (brackets in the original; citation omitted).

> the retaliatory discharge or discrimination, not the sole or even predominant cause. … In other words, "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." The term "contributing factor" is a term of art that has been elaborated upon in the context of other whistleblower statutes. The Federal Circuit noted the following in a WPA case:
>
> > The words "a contributing factor" ... mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. **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.
>
> *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed. Cir.1993)(quoting 135 Cong. Rec. 5033 (1989)(Explanatory Statement on the WPA))(emphasis added by Federal Circuit). **Furthermore, an employee "need not demonstrate the existence of a retaliatory motive** on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Id.*, 2 F.3d at 1141.

Araujo, 708 F.3d at 158-59 (footnote and additional citations omitted; emphasis added).

2. Under SOX, an Employer-/Respondent Must Satisfy a Comparatively Higher—Much "tough[er]"—Burden of Proof

In contrast to the minimal, "much easier," burden AIR-21—and SOX—imposes on complaining whistleblowing employees, AIR-21 sub-section (ii) imposes a significantly greater burden on employers.

> **Once the employee asserts a *prima facie* case,** the burden shifts to the employer to demonstrate, "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. §42121(b)(2)(B)(ii). … **To meet the [clear and convincing] burden, the employer must show that "the truth of its factual contentions are highly probable.**"

Araujo, 708 F.3d at 159 (emphasis added; quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)(internal quotation marks and parallel citations omitted).

As the Third Circuit further explained in *Araujo*, Congress' decision to reject the *McDonnell-Douglas* burden-shifting approach and to replace it with the AIR-21 approach was deliberate: it was intended not only to make whistleblower cases "much easier" for employees but simultaneously much "' tough[er]'" for employers. 708 F.3d at 159

(citation omitted). This marked yet another effort by Congress to put its thumb on the employees' side of the scale.

> It is worth emphasizing that **the AIR–21 burden-shifting framework** that is applicable to FRSA cases **is <u>much easier</u> for a plaintiff** to satisfy than the *McDonnell-Douglas* standard. As the Eleventh Circuit noted in a case under the Energy Reorganization Act, 42 U.S.C. §5851, a statute that uses a similar burden/n-shifting framework, **"[f]or employers, this is a tough standard, and not by accident."** *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir.1997). The Eleventh Circuit stated that the standard is " tough" because **Congress intended for companies in the nuclear industry to "face a difficult time defending themselves**," due to a history of whistleblower harassment and retaliation in the industry. *Id.*

Araujo, 708 F.3d at 159 (emphasis added).

Overall, Congress' deliberate decision to establish a low burden of proof for employee/complainants—one that does not require any showing of retaliatory motive—cannot be squared with UBS' contention that SOX claims are close kin to garden-variety intentional tort claims and therefore require proof of retaliatory animus.

G. THE SUPREME COURT AND NUMEROUS CIRCUITS HAVE REJECTED ARGUMENTS IDENTICAL TO ONES UBS ADVANCES HERE

Two years ago, the Ninth Circuit carefully considered—and squarely spurned—an argument identical to UBS', *i.e.*, that a whistleblowing complainant must prove "discriminatory intent." In *Frost v. BNSF Railway Co.*, 914 F.3d 1189, 1195 (9th Cir. 2019), an employer/respondent argued that because the Federal Railroad Safety Act ("FRSA"), like the SOX Act,

> is a "discrimination statute" … that plaintiffs must therefore affirmatively prove that their employers acted with discriminatory intent or animus in order to bring claims for unlawful retaliation. We recognize that the FRSA, by its terms, describes and forbids intentional retaliation, 49 U.S.C. §20109(a), meaning that employers must act with impermissible intent or animus to violate the statute. **What [the railway] misses is that the only proof of discriminatory intent that a plaintiff is required to show is that his or her protected activity was a "contributing factor" in the resulting adverse employment action**. Showing that an employer acted in retaliation for protected activity is the required showing of intentional discrimination; **there is no requirement that FRSA plaintiffs separately prove discriminatory intent.** 49 U.S.C. §42121(b)(2)(B). Indeed, in *Tamosaitis v. URS Inc.*, 781 F.3d 468 (9th Cir.2015), we reviewed claims under the Energy Reorganization Act's [ERA's] whistleblower retaliation protections that

> employ the same statutory framework as the FRSA. *Id.* at 480. We explained: "**Under this framework, the presence of an employer's subjective retaliatory animus is irrelevant**. All a plaintiff must show is that his 'protected activity was a contributing factor in the adverse [employment] action.'" *Id.* at 482 (quoting 29 C.F.R. §24.104(f)(1)). … Rather, **the employer's retaliatory motive was established by proving that the protected conduct was a contributing factor to the employer's adverse action.**

Frost, 914 F.3d at 1195 (emphasis added; citing a SOX case, *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir.2010)).[6]

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[6] The Supreme Court and the Fifth, Third, and Federal Circuits agree with the Ninth Circuit, as does the Department of Labor's Administrative Review Board ("ARB"), which is charged with adjudicating cases under SOX, AIR-21, and related statutes. *See, e.g., Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 779 (2018)(under Dodd-Frank Act provisions similar to SOX's, a whistleblowing "employee can recover under the statute without having to demonstrate" what "motivated" his employer to retaliate against him); *Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 263 (5th Cir.2014)("'a whistleblower ***need not*** demonstrate the existence of a retaliatory motive on the part of the [employer] in order to establish that his [protected conduct] was a contributing factor to the personnel action.'")(emphasis and bracketed material in the original; citation omitted); *Araujo v. N.J. Transit, supra*, 708 F.3d at 161 (3d Cir.2013)(employee "is not required to provide evidence of motive"); *Kewley v. Dept. of Health and Human Services*, 153 F.3d 1357, 1362 (Fed. Cir.1998)("'under the WPA ... a whistleblower need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to

II. THE "STRUCTURE AND INTERNAL LOGIC" OF THE SOX ACT, THE WPA, THE AIR-21 ACT, AND ALL RELATED AIR-21 STATUTES FURTHER MANIFEST CONGRESS' INTENT BY INCREASING AN EMPLOYER'S BURDEN OF PROOF AND SHIFTING THE CONTEXT FOR THE INTRODUCTION OF AN EMPLOYER'S EVIDENCE ON INTENT TO PROOF OF ITS AFFIRMATIVE DEFENSE

The Supreme Court had admonished that if a statute's language is "plain," courts "must enforce it according to its terms." *King v. Burwell*, 576 U.S. 473, 486 (2015). Nonetheless, "'oftentimes the 'meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'" *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).[7] Consequently, "when deciding whether

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establish that [her] disclosure was a contributing factor to the personnel action ....'")(citation omitted); *Dick v. Tango Transport*, ARB No. 14-054, 2016 WL 4942415, *8 & n. 63 (Admin.Rev.Bd. Aug. 30, 2016) (citing *Araujo;* "The AIR-21 complainant need not demonstrate the existence of a retaliatory motive on the part of the employer taking the alleged prohibited personnel action, that the respondent's reason for the unfavorable personnel action was pretext, or that the complainant's activity was the sole or even predominant cause.") *But see Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir.2014)(under the FRSA, "the contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity.").

[7] *See Jones v. United States*, 527 U.S. 373, 388-89 (1999)(opinion for the Court by Thomas, J.); *Yates v. United States*, 574 U.S. 528, 554-55 (2015)(Kagan, J., joined by Scalia, Kennedy, & Thomas, JJ., dissenting);

[statutory] language is plain, [courts] must read the words 'in their context and with a view to their place in the overall statutory scheme.'" *King,* 576 U.S. at 486 (quoting *Brown & Williamson*, 529 U.S. at 133 (internal quotation marks omitted)). *See Util. Air Reg. Group v. E.P.A.*, 573 U.S. 302, 319-20 (2014).

A. SOX'S "STRUCTURE AND INTERNAL LOGIC" REFLECT ITS PRO-WHISTLEBLOWER/EMPLOYEE STANCE

In construing SOX and the AIR-21 provisions it expressly incorporates, it is crucial to heed the separation and juxtaposition of distinct statutory provisions and to understand how each provision fits within "the structure and internal logic of the statutory scheme." *Lockhart v. United States*, 577 U.S. 347, 351 (2016). *See Maracich v. Spears,* 570 U.S. 48, 75-76 (2013). The reason why is it is essential to read a provision's words "in their context" is because "a court's most important duty, after all, is 'to construe statutes, not isolated provisions.'" *King,* 576 U.S. at 486 (citation omitted). *See Graham Cty. Soil & Water Conserv. Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010).

Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 575 (1995); *Davis v. Dept. of Treas.* 489 U.S. 803, 809 (1989).

B. THE *RUSSELLO-LOUGHRIN* CANON IS DISPOSITIVE HERE

The Supreme Court has "ha[s] often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." *Loughrin v. United States*, 573 U.S. 351, 358 (2014)(citations and footnote omitted). "[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of words in related—particularly adjacent—statutory provisions. *Russello v. United States*, 464 U.S. 16, 23 (1983). *See Corley v. United States*, 556 U.S. 303, 314-16 (2009).

The *Russello-Loughrin* interpretive canon that Congress acts intentionally when it omits language in one provision that included in another provision, especially an adjacent provision in the same statute—applies with particular force here and is dispositive in the context of SOX and AIR-21.

There are two reasons why.

First, the fact that Congress included a mental state/retaliatory intent provision in one section of SOX, §1513(e) a provision that expressly prohibits persons from exacting revenge on other persons "knowingly,

with the intent to retaliate"—demonstrates that Congress knew how to draft such provisions when it so chose and that Congress' decision to not include a comparable provision in §1514A effectively proscribes a court from reading an intent-to-retaliate provision into §1514A.

SOX §1513(e) expressly provides that:

> [w]hoever **knowingly**, **with the intent to retaliate**, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be fined under this title or imprisoned not more than 10 years, or both.

(Emphasis added). Section 1514A contains no comparable language. The absence of any comparable "knowing, with … intent" provision in §1514A can only be construed as an intentional choice on Congress' part and not as an inadvertent omission or scrivener's error.

Second, the *Russello-Loughrin* canon applies with equal force to the burdens established by AIR-21 (which, as noted above, were expressly adopted and incorporated by Congress in drafting the SOX Act). The first part of the AIR-21 test, 49 U.S.C. §42121(B)(i), establishes a circumscribed role for an employee/complainant: all he or she needs to do

is to "make[] a *prima facie* showing that any [protected] behavior … was a contributing factor in the unfavorable personnel action alleged in the complaint." The second part of the AIR-21 test, and the second sub-section of the relevant statutory provision, §42121(B)(ii), establishes prescribes a circumscribed role for the employer/respondent to "demonstrate[], by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence" of the employee's protected activities.

The *Russello-Loughrin* canon is telling here, too. As discussed above, Congress evidenced its ability both to specifically include a "clear and convincing" requirement in one sub-section of the statute, *i.e.,* in AIR-21 sub-section (ii), and to explicitly exclude a "clear and convincing" "require[ment]" in the statute's only other relevant provision, *i.e.*, AIR-21 sub-section (ii).[8] If Congress had wished to impose an identical burden on

[8] *Dept. of Homeland Sec. v. MacLean*, 574 U.S. 383 (2015), provides a paradigmatic example of how the Supreme Court employs this canon. There, the Government argued that the word "law" in one section of a statute meant the same thing as the phrase "law, rule, or regulation" in another section. *Id.* at 392. Writing for the Court, Chief Justice Roberts "rejected that argument as 'simply contrary to any reasonable interpretation of the text,'" explaining "that a statute that referred to 'laws' in one section and 'law, rule, or regulation' in another 'cannot,

all parties and at all stages of a case to demonstrate retaliatory intent, it knew how to draft accordingly. Congress did not. And that omission is fatal to UBS's argument.

In sum, if there is any ambiguity in the specific words Congress chose or the statutory scheme Congress enacted or if there is any uncertainty about their import, those words and that scheme should be viewed through the lens of the *Russello-Loughrin* canon, which leads to the conclusion that Congress intended that, pursuant to SOX's (and AIR-21's) bifurcated scheme, different burdens and standards of proof from *Mt. Healthy* and *McDonnell-Douglas* apply to employers in whistleblower cases.[9]

Although UBS might regard SOX's burden-shifting framework as unwise or unnecessary, such judgments are reserved to Congress alone. Indeed, even Article III courts must "**defer to legislative judgment as**

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unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places.'" *Id.* (quoting *Dept. of Treasury, IRS v. FLRA*, 494 U.S. 922, 932 (1990)). See *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S., 629 (2013).

[9] For an example of the proper application of these canons to FRSA's anti-retaliation sections, *see Reed v. Norfolk So. Ry. Co.*, 740 F.3d 420 (7th Cir.2014); *Norfolk So. Ry. Co. v. Perez*, 778 F.3d 507 (6th Cir.2015).

to the wisdom and necessity … of a particular measure." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977). Pursuant to the Separation of Powers, Article III courts do not have the discretion to ignore legislative choices or to substitute their own preferences; rather, courts must "emphatically" **refuse to sit as a "super legislature** to weigh the wisdom of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963)(emphasis added). See *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1940 (U.S. June 17, 2021)(federal courts have no authority to " second-guess Congress' decision").[10]

Among the "most basic of interpretative canons," is the maxim that "[a] statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley,* 556 U.S. at 314 (internal quotation marks and citations omitted). Notably, "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen. Revenue Corp*., 568 U.S. 371, 386 (2013)(internal quotation marks and citations omitted). Courts must be

[10] *See Husted v. A. Philip Randolph Inst*., 138 S. Ct. 1833, 1848 (U.S. 2018); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005); *Williamson v. Lee Optical of Oklahoma Inc*., 348 U.S. 483, 487 (1955).

especially "'hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.'" *Id.* (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011)). *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004). This is particularly important where, as here, the companion section "occupies so pivotal a place in the statutory scheme," *Duncan v. Walker*, 533 U.S. 167, 174 (2001), indeed a place as "pivotal" as any other.

Any interpretation of SOX or AIR-21 that would allow an employer to present its ostensibly legitimate reasons for its actions during the sub-section (i) stage of a case would render sub-section (ii) surplusage. Simply put, if the statute permits an employer to present much of its evidence (including its allegedly "legitimate," non-discriminatory/non-retaliatory reasons) in rebuttal to an employee at the *prima facie*/contributing factor stage, and if the statute requires a factfinder not only to weigh those assertedly legitimate reasons during the same stage but to use the same "preponderance" scale used during the *prima facie* stage, there is no reason to have a second stage at all.

If the factfinder determines that the employer's evidence outweighs the whistleblower's at the first stage, there is no need for a second stage

inasmuch as the employer already has won and the whistleblower's claim has been found wanting. Indeed, if an employer prevails at the first stage, carrying out the second stage becomes a meaningless, wasteful exercise for all concerned. The same true holds true if the employer loses at the first stage. If an employer's evidence is found wanting at the first stage, where the scales are level, it is inconceivable that the same evidence could succeed at the second stage, where the "clear and convincing" standard tilts the scales against the employer.

If there is no need for a second stage, there is no need for a second sub-section, for sub-section (ii). But this is not the way Congress wrote the statute. Reading it so that sub-section (ii) is redundant violates one of the most fundamental canons of construction, the admonition against reading a statute so that any part is rendered worthless, redundant, unnecessary, insignificant, or superfluous. Instead, under this "most basic of interpretative canons, ... [a] statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley*, 556 U.S. at 314. As noted above, this canon against surplusage "is strongest when," as here, "an

interpretation would render superfluous another part of the same statutory scheme. *Marx,* 568 U.S.at 386.

III. INTERPRETING SOX AS IMPOSING A STRINGENT CAUSATION STANDARD ON EMPLOYEE-WHISTLEBLOWERS WOULD UNDERMINE SOX'S EFFECTIVENESS, WEAKEN CORPORATE COMPLIANCE PROGRAMS, EXPOSE INVESTORS TO MORE RISKS, ENDANGER THE ECONOMY, AND FRUSTRATE CONGRESS' PURPOSES

Congress passed the SOX Act "after a series of celebrated accounting debacles." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.,* 561 U.S. 477 2010). Those disasters, led by the massive Enron and Arthur Anderson scandals, inflicted significant "spillover **economic** effects" through the nation, prompting bankruptcies and massive job losses countrywide and undermining public confidence in the domestic and international securities markets. *Skilling v. United States*, 561 U.S. 358, 376 (2010).

To encourage employees to report fraud and thereby give companies timely opportunities to prevent wrongdoing, Congress included a strong whistleblower protection provision in SOX. As the Senate Committee Report on SOX §1519 explained:

> the Enron scandal and others like it expose a culture, supported by law, that discourage

> employees from reporting fraudulent behavior not only to the proper authorities, such as the FBI and the SEC, but even internally. This 'corporate code of silence' not only hampers investigations, but also creates a climate where ongoing wrongdoing can occur with virtual impunity. The consequences of this corporate code of silence for investors in publicly traded companies, in particular, and for the stock market, in general, are serious and adverse, and they must be remedied.

S. Rep. No. 107-146 at 5 (2002).

Individual Senate sponsors of SOX—of both political parties—stressed the dangers of erecting barriers to whistleblowers coming forward. Senator Richard Durbin said that SOX Section 806, codified at 18 U.S.C. §1514A, "creates protections for corporate whistleblowers. We need them. If insiders don't come forward, many times you don't know what is happening in large corporations." *Senate Banking Committee Legis. History, Vol. III, at 1294.* Senator Lindsay Graham stated that the whistleblower protection provisions of the statute are "designed to prevent investors from corporate greed." Senate Banking Comm. Legis.

History, Vol. III, at 1461. Other members of the Senate Banking Committee echoed the remarks of Senators Graham and Durbin.[11]

The U.S. Chamber of Commerce has similarly extolled the critical role that whistleblowing corporate insiders play in identifying and preventing wrongdoing. In the Chamber's December 7, 2010 "public comments" letter to the SEC, at 3-4, regarding "Proposed Rules for Implementing the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934", the Chamber explained:

> Effective compliance programs rely heavily on internal reporting of potential violations of law and corporate policy to identify instances of non-compliance. These internal reporting mechanisms are cornerstones of effective compliance processes because they permit companies to discover instances of potential wrongdoing, to investigate the underlying facts, and to take remedial actions, including voluntary disclosures to relevant authorities, as the circumstances may warrant ... Moreover, if the effectiveness of corporate compliance programs in identifying potential

[11] *See, e.g.,* Remarks of Senator Patrick Leahy, Banking Comm. Legis. History, Vol. III, at 1231-33, 1273 (protecting whistleblowers advances SOX's goals of transparency, forthright financial decision making, and accountability); Remarks of Senator Barbara Boxer, id. at 1526 (characterizing SOX §806 as an "antifraud protection measure" and describing a proposed House Bill as "weak" due to its failure to protect whistleblowers).

> wrongdoing is undermined, their attendant benefits, such as promotion of a culture of compliance within corporations, as well as their value to enforcement efforts, will likewise be diminished.[12]

Public companies have invested substantial resources in establishing and maintaining corporate compliance programs. If employees of public companies cannot speak up without legitimate protection against retaliation, then corporate compliance programs will be weakened and companies, and their current and potential shareholders, will be deprived of the opportunity to identify, remediate, and prevent fraud.

CONCLUSION

In the final analysis, embracing UBS' arguments and discarding the statutory structure for burdens of proof in SOX would do precisely what Congress legislated to end -- imposing an onerous causation burden on corporate whistleblowers. The result would weaken SOX and likely dissuade whistleblowers from putting their careers on the line to identify

[12] The full text of the Chamber's December 10, 2010 letter to the SEC is available at http://www.sec.gov/comments/s7-33-10/s73310-110.pdf.

fraud. Unscrupulous securities industry employers might win but the investing public, and the Nation as a whole, would surely lose.

Respectfully submitted on this 12th day of July by:

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed.R.App.P. 32(g)(1), undersigned counsel of record for the *amici curiae* states that this *Amicus Curiae* brief has been prepared in a proportionally spaced typeface using Microsoft Word, Century Schoolbook, 14-point font.

2. Exclusive of the table of contents; table of authorities; certificate of compliance; and certificate of service, this brief contains exactly 6,943 words.

3. I understand that a material misrepresentation can result in the Court's striking this brief and imposing sanctions. If the Court so directs, I will provide an electronic version of this brief and a copy of the word or line printout.

Dated: July 13, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2021, a true and correct copy of the foregoing Brief for *Amici Curiae* Senator Ron Wyden and Representative Jackie Speier was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system, and that service on counsel of record will be accomplished by this system.

I also hereby certify that on July 13, 2021, I caused six (6) paper true and correct hard/paper copies of the foregoing Brief for *Amici Curiae* Senator Ron Wyden and Representative Jackie Speier to be sent to the Clerk of the Court via the U.S. Postal Service, First-Class Mail, postage pre-paid.

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APPENDIX A

Relevant statutes directly affected by this proceeding include:

- The 1992 amendments to the **Energy Reorganization Act ("ERA")** amendments and **Energy Policy Act of 2005 ("EPA")** (U.S. government and corporate nuclear workers), 42 U.S.C. §5851(b)(3) (Pub. L. 93-438, Title II, §211, formerly §210, as added Pub. L. 95-601, §10, Nov. 6, 1978, 92 Stat. 2951; renumbered §211 and amended Pub. L. 102-486, Title XXIX, §2902(a) to (g), (h)(2), (3), Oct. 24, 1992, 106 Stat. 3123, 3124; Pub. L. 109-58, Title VI, §629, Aug. 8, 2005, 119 Stat. 785.) (Current through Pub. L. 117-24 with the exception of Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022);

- **Federal Rail Safety Act ("FRSA")** (U.S. rail workers) 49 U.S.C. §20109(c)(2)(A)(i) (Pub. L. 103-272, §1(e), July 5, 1994, 108 Stat. 867; Pub. L. 110-53, Title XV, §1521, Aug. 3, 2007, 121 Stat. 444; Pub. L. 110-432, Div. A, Title IV, §419, Oct. 16, 2008, 122 Stat. 4892.) (Current through Pub. L. 117-24 with

the exception of Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022);

- **National Transit Systems Security Act ("NTSSA")** (U.S. public transportation) 6 U.S.C. §1142(c)(2)(B) (Pub. L. 110-53, Title XIV, §1413, Aug. 3, 2007, 121 Stat. 414.) (Current through Pub. L. 117-24 with the exception of Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022);

- **Consumer Product Safety Improvement Act ("CPSIA")** (U.S. corporate retail products) 15 U.S.C. §2087 (b)(2)(B), (b)(4) (Pub. L. 92-573, §40, as added Pub. L. 110-314, Title II, §219(a), Aug. 14, 2008, 122 Stat. 3062.) (Current through Pub. L. 117-24 with the exception of Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022);

- **Surface Transportation and Assistance Act ("STAA")** (U.S. corporate trucking industry) 49 U.S.C. §31105(b)(1) (Pub. L. 103-272, §1(e), July 5, 1994, 108 Stat. 990; Pub. L. 110-53, Title XV, §1536, Aug. 3, 2007, 121 Stat. 464.) (Current through

Pub. L. 117-24 with the exception of Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022);

- **Patient Protection and Affordable Care Act ("PPACA", "ACA" or "Obamacare")**, Pub. L. 111-148, sec. l558(b)(2) (111th Cong., 2d Sess.), 124 Stat. 119 through 124 Stat. 1025 (Current through Pub. L. 117-12);

- **Food Safety Modernization Act ("FSMA")** (U.S. food industry) 21 U.S.C. §399(d) (June 25, 1938, c. 675, §1013, formerly §1012, as added Pub. L. 111-353, Title IV, §402, Jan. 4, 2011, 124 Stat. 3968; renumbered §1013, Pub. L. 114-255, Div. A, Title III, §3073(b)(1), Dec. 13, 2016, 130 Stat. 1137.) (Current through Pub. L. 117-24 with the exception of Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022);

- **Moving Ahead for Progress in the 21st Century Act ("MAP 21")**, 49 U.S.C. §30171(b)(2)(B), (c)(3) (Added Pub. L. 112-141, Div. C, Title I, §31307(a), July 6, 2012, 126 Stat. 765.) (Current through Pub. L. 117-24 with the exception of Pub. L.

116-283, Div. A, Title XVIII, which takes effect January 1, 2022);

- **Pipeline Safety Improvement Act ("PSIA")**, 49 U.S.C. §60109 (Pub. L. 103-272, §1(e), July 5, 1994, 108 Stat. 1315; Pub. L. 103-429, §6(75), Oct. 31, 1994, 108 Stat. 4388; Pub. L. 104-304, §§7, 20(i), Oct. 12, 1996, 110 Stat. 3800, 3805; Pub. L. 107-355, §14(a), (b), Dec. 17, 2002, 116 Stat. 3002, 3005; Pub. L. 109-468, §§9, 14, 16, Dec. 29, 2006, 120 Stat. 3493, 3496; Pub. L. 112-90, §§5(e), 22, Jan. 3, 2012, 125 Stat. 1908, 1917; Pub. L. 114-183, §§19(a), 25, June 22, 2016, 130 Stat. 527, 530; Pub. L. 116-260, Div. R, Title I, §§108(b)(1), 120(b), (d), 122, Title II, §202(a), Dec. 27, 2020, 134 Stat. 2223, 2235, 2236, 2237.) (Current through Pub. L. 117-24 with the exception of Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022);

- **Seaman's Protection Act ("SPA")**, 46 U.S.C. §2114(b) (Added Pub. L. 98-557, §13(a), Oct. 30, 1984, 98 Stat. 2863; amended Pub. L. 107-295, Title IV, §428, Nov. 25, 2002, 116 Stat. 2127; Pub. L. 111-281, Title VI, §611(a), Oct. 15, 2010,

124 Stat. 2969.) (Current through Pub. L. 117-24 with the exception of Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022);

- **Consumer Financial Protection Act ("CFPA")**, 12 U.S.C. §5567 (Pub. L. 111-203, Title X, §1057, July 21, 2010, 124 Stat. 2031.) (Current through Pub. L. 117-24 with the exception of Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022);

- **Taxpayer First Act ("TFA")**, 26 U.S.C. §7623(d) (Aug. 16, 1954, c. 736, 68A Stat. 904; Pub. L. 94-455, Title XIX, §1906(b)(13)(A), Oct. 4, 1976, 90 Stat. 1834; Pub. L. 104-168, Title XII, §1209(a), July 30, 1996, 110 Stat. 1473; Pub. L. 109-432, Div. A, Title IV, §406(a)(1), Dec. 20, 2006, 120 Stat. 2958; Pub. L. 115-123, Div. D, Title II, §41108(a) to (c), Feb. 9, 2018, 132 Stat. 158; Pub. L. 116-25, Title I, §1405(b), July 1, 2019, 133 Stat. 998.) Current through Pub. L. 117-24 with the exception of Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022;

- **Criminal Antitrust Anti-Retaliation Act ("CAARA")**, 15 U.S.C. §7a-3 (Pub. L. 108-237, Title II, §216, as added Pub. L. 116-257, §2, Dec. 23, 2020, 134 Stat. 1147.) (Current through Pub. L. 117-24 with the exception of Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022); and

- **Anti-Money Laundering Act ("AMLA")**, 31 U.S.C. §5323(g) & (j) (Added Pub. L. 98-473, Title II, §901(e), Oct. 12, 1984, 98 Stat. 2135; amended Pub. L. 116-283, Div. F, Title LXIII, §6314(a), Jan. 1, 2021, 134 Stat. 4598.) (Current through Pub. L. 117-24 with the exception of Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022).

Congress also included the same burdens of proof in three corporate whistleblower laws not administered by the U.S. Department of Labor

- The American Recovery and Reinvestment Act of 2009 ("ARRA") (U.S. Stimulus Law) Pub. L. 111-5, Section 1553(c)(l); and

- Two provisions of the **National Defense Authorization Act of 2013**, P.L. 112-139, sections 827, 28, (111th Cong., 2d Sess.), 10 U.S.C. §2409(c)(6) (Added Pub. L. 99-500, Title I, §101(c) [Title X, §942(a)(1)], Oct. 18, 1986, 100 Stat. 1783-82, 1783-162; Pub. L. 99-591, Title I, §101(c) [Title X, §942(a)(1)], Oct. 30, 1986, 100 Stat. 3341-82, 3341-162; Pub. L. 99-661, Div. A, Title IX, formerly Title IV, §942(a)(1), Nov. 14, 1986, 100 Stat. 3942; renumbered Title IX, Pub. L. 100-26, §3(5), Apr. 21, 1987, 101 Stat. 273; amended Pub. L. 102-25, Title VII, §701(k)(1), Apr. 6, 1991, 105 Stat. 116; Pub. L. 102-484, Div. A, Title X, §1052(30)(A), Oct. 23, 1992, 106 Stat. 2500; Pub. L. 103-355, Title VI, §6005(a), Oct. 13, 1994, 108 Stat. 3364; Pub. L. 104-106, Div. D, Title XLIII, §4321(a)(10), Feb. 10, 1996, 110 Stat. 671; Pub. L. 110-181, Div. A, Title VIII, §846, Jan. 28, 2008, 122 Stat. 241; Pub. L. 112-239, Div. A, Title VIII, §827(a) to (f), Jan. 2, 2013, 126 Stat. 1833; Pub. L. 113-291, Div. A, Title VIII, §856, Title X, §1071(c)(10), Dec. 19, 2014, 128 Stat. 3460, 3509; Pub. L. 114-261, §1(a)(1), Dec. 14, 2016, 130 Stat. 1362.) Current through Pub. L. 117-24 with the exception of

Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022) and 41 U.S.C. §4712(c)(6) (Added Pub. L. 112-239, Div. A, Title VIII, §828(a)(1), Jan. 2, 2013, 126 Stat. 1837; amended Pub. L. 113-66, Div. A, Title X, §1091(e), Dec. 26, 2013, 127 Stat. 876; Pub. L. 114-261, §1(a)(2), (3)(A), Dec. 14, 2016, 130 Stat. 1362; Pub. L. 116-260, Div. U, Title VIII, §801, Dec. 27, 2020, 134 Stat. 2297.) (Current through Pub. L. 117-24 with the exception of Pub. L. 116-283, Div. A, Title XVIII, which takes effect January 1, 2022).