No. 22-660

In The Supreme Court of the United States

TREVOR MURRAY,

Petitioner,

v.

UBS SECURITIES, LLC AND UBS AG,

Respondents.

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

BRIEF OF *AMICI CURIAE*
U.S. SENATOR CHARLES E. GRASSLEY,
U.S. SENATOR RON WYDEN, AND
THE GOVERNMENT ACCOUNTABILITY PROJECT
IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

I. IDENTITY OF *AMICI CURIAE*

Individual *Amici curiae* are United States Senator Ron Wyden of Oregon, and United States Senator Charles E. Grassley of Iowa.

Senator Charles E. Grassley is the Chair of the bipartisan U.S. Senate Whistleblower Protection Caucus. He co-authored the whistleblower protection provision of SOX and the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, the statute from which the burden of proof in SOX originates. He was also an original co-sponsor and key supporter of the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465. In more than thirty years legislating for effective whistleblower protection laws and programs, Senator Grassley has cultivated a unique expertise in what makes whistleblowing work and the invaluable role that whistleblowers play in protecting taxpayers and investors alike. Senator Grassley thus has a strong interest in ensuring that the Court interprets SOX in accordance with the plain text and congressional intent.

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[1] Pursuant Supreme Court Rules 37.6 and 37.2(a), undersigned counsel states: (a) no party's counsel authored this brief in whole or in part; (b) no person or entity other than the *amici* or their counsel contributed money to its preparation or submission; and (c) counsel of record for all parties were notified of *amici's* intent to file this brief on February 6, 2023, *i.e.*, ten days before the due date for this brief.

Senator Ron Wyden serves as Vice-Chairman of the bipartisan 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 with Senator Grassley the resolution for National Whistleblower Appreciation Day and co-sponsored the COVID-19 Whistleblower Protection Act.

Senators Wyden and Grassley are longtime advocates for whistleblowers in the public and private sectors. They both urge the Court to grant certiorari to correct a growing misinterpretation of the language of SOX that threatens to undermine its critical role in enabling employees to disclose corporate fraud.

Amicus Government Accountability Project is a 45-year-old non-profit, non-partisan public interest organization specializing in legal advocacy to protect government and private sector "whistleblowers" who expose institutional misconduct that undermines the public interest.

II. *AMICI'S* PURPOSE IN SUBMITTING THIS BRIEF

Amici submit this brief to preserve the burdens of proof Congress established in the Sarbanes-Oxley Act of 2002 ("SOX"), Pub.L. 107–204, as well as to uphold the virtually identical legal burdens that Congress codified in the Wendell H. Ford Aviation

Investment and Reform Act for the 21st Century of 2000 ("AIR-21"), Pub.L. 106-181, 49 U.S.C. §42121, and the sixteen virtually identical whistleblower protection statutes Congress has enacted since 2000. (These statutes, comprising AIR-21 and its progeny (including SOX), are listed in Appendix A to this brief).

FACTUAL AND PROCEDURAL BACKGROUND

This case concerns the respective, and very different, burdens of proof that securities fraud whistleblowers and their employers must shoulder in whistleblower-protection suits under SOX.

In April 2011, three years after the nationwide collapse of the fraudulent mortgage-backed securities market triggered the greatest stock market crash since 1929, a prominent Wall Street firm, respondent UBS Securities, LLC, hired petitioner Trevor Murray for its mortgage-backed securities department. UBS assigned him to write reports for its clients, research that UBS promised would be unbiased and, therefore, trustworthy. Although SEC regulations required analysts like Murray to certify such reports reflected their "independent" judgment, SEC Regulation AC, 17 C.F.R. §242.501 (2015), UBS' sales team pressured him to "play ball" by bending his reports to boost their sales and UBS' bottom line.

Murray refused and blew the whistle on these potential SEC violations to UBS' senior leadership in January 2012. UBS terminated him one month later.

Two years later, Murray filed a civil whistleblower complaint against UBS in the U.S. District Court for the Southern District of New York

under SOX. As part of Murray's *prima facie* case under SOX, he alleged that UBS violated SOX §1514A because his January 2012 whistleblowing disclosures were a "contributory factor" in UBS' decision to fire him just a month later. In defense, UBS argued Murray's whistleblowing played no role in its decision to fire him. A jury believed Murray and awarded him damages of $903,300.

On August 5, 2022, the U.S. Court of Appeals for the Second Circuit overturned the verdict. It held the district court should have instructed the jury that SOX whistleblowers have the burden of proving their employer acted with a specific state of mind, a "retaliatory intent—*i.e.*, an intent to 'discriminate against an employee ... because of' lawful whistleblowing activity.'" *Murray v. UBS Securities, LLC*, 43 F.4th 254, 256 (2d Cir.2022)(quoting *Tompkins v. Metro-N. Commuter R.R. Co.*, 983 F.3d 74, 82 (2d Cir.2020)).

Murray petitioned the Second Circuit for rehearing and rehearing *en banc*, which that court denied on September 15, 2002. On January 13, 2023, Murray petitioned this Court for a writ of certiorari. His petition is pending.

SUMMARY OF ARGUMENT

This Court should grant Murray's pending petition for a writ of certiorari for six reasons.

1. This Court alone can resolve the deep and widening split among the Circuit Courts of Appeals on whistleblowers' burdens of proof in SOX cases, as well as in private actions whistleblowers bring under both the statute SOX was "modeled" after—AIR-21—

and the other fifteen virtually identical statutes that are likewise "patterned" on AIR-21.

2. *Murray* is likely to have an outsized influence, nationwide, on how SOX cases are decided because the Second Circuit has long been regarded as "the country's preeminent court" and, indeed, as the "Mother Court" on securities law.

3. The Second Circuit's decision on the elements of claims and the burdens of proof in SOX cases also is likely to sway undecided Circuits on identical burden of proof questions in non-SOX cases brought under AIR-21 and AIR-21's non-SOX progeny.

4. *Murray* reached the wrong result because it ignored SOX's crucial "context" and "structure and internal logic."

5. *Murray* also reached the wrong result because it ignored AIR-21, the whistleblowing protection statute that this Court repeatedly said SOX "tracked," was "patterned" after, and was "modeled" upon.

6. *Murray* additionally reached the wrong result because it ignored that SOX is a remedial statute and consequently failed to construe SOX "broadly," in light of its remedial purposes.

STATUTORY BACKGROUND

Congress enacted SOX "after a series of celebrated accounting debacles." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010). Those "debacles," which were epitomized by the decade-long shareholder frauds of a FORTUNE "Top 10" company, the Enron Corporation, caused significant "spillover economic

effects" throughout the Nation, including massive bankruptcies, widespread job losses, and diminished confidence in the securities markets. *Skilling v. United States*, 561 U.S. 358, 376 (2010).

As this Court explained in *Lawson v. FMR LLC,* 571 U.S. 429 (2014)—quoting S.Rep. 107-46 (2002), which the Court described as "'**official legislative history**' of Sarbanes–Oxley," 571 U.S. at 435, n.1 (emphasis added)—Congress learned that "Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a 'corporate code of silence,'" an informal but stringently enforced program that effectively "discourage[d] employees from reporting fraudulent behavior …." *Id.* at 447 (quoting S.Rep. 107-146, pp. 10, 2).

In 2002, while debating whether to enact SOX, Congress found that although "then-existing" whistleblower protection statutes protected many federal civil service and private-sector whistleblowers from employer retribution for protected disclosures, "there [was] no similar protection for employees of publicly traded companies." *Lawson*, 571 U.S. at 435.

As Congress subsequently explained its rationale for enacting a related AIR-21 statute, "[t]he function of the whistleblower is in many respects similar to that of a canary in a coal mine. They are there to warn of [sic] us of impending dangers." House-Senate Conference Report on the American Recovery and Reinvestment Act of 2009 ("ARRA"), H1536-02, 155 Cong.Rec. H1307-03 (Feb. 12, 2009). In enacting SOX, Congress stressed that the absence of protection for whistleblowers ill-served investors and the country overall because "in complex securities fraud investigations, employees 'are [often] the only

firsthand witnesses to the fraud.'" *Lawson*, 571 U.S. at 435 (quoting S.Rep. 107-146 at 10).

Congress "identified the lack of whistleblower protection as 'a significant deficiency'" in deterring misconduct, alerting Congress about hidden chicanery in the securities industry, and protecting the public. *Lawson*, 571 U.S. at 435, n.1. To alleviate this "deficiency," Congress "installed whistleblower protection in [SOX] as one means to ward off another Enron debacle." *Id.* at 448 (citing S.Rep. 107-146 at 2–11). Accordingly, SOX §1514A(a) prohibits "publicly traded companies" from treating employees "who provide evidence of fraud" differently "in the terms and conditions of employment because of" their protected whistleblowing activity. *Id.*

Congress chose to protect securities industry whistleblowers by creating a private right of action for them in SOX §1514A(b)(2). Although Congress determined those whistleblowers needed protection through a private right of action, Congress realized it did not need to reinvent the wheel and to create a wholly new scheme of protection, formulate new burdens of proof, or articulate new standards for meeting those burdens. Instead, Congress expressly specified §1514A(b)(2) suits would be "governed by [AIR-21's] legal burdens of proof." §1514A(b)(2)(cross-referencing 49 U.S.C. §42121(b)).

SOX's "official legislative history" explains that Congress chose AIR-21's overall scheme—and AIR-21's burdens of proof, which differed for whistleblowers and employers—"[b]ecause we had already extended whistleblower protection to non-civil service employees" just two years earlier in enacting AIR-21 (for airline workers), and so "Congress designed §1514A to '**track ... as closely**

as possible" the protections afforded by §42121." *Lawson,* 571 U.S. at 457 (emphasis added; quoting S.Rep. 107-146 at 30).

SOX, like AIR-21, establishes a two-tiered burden-shifting framework. The only thing an AIR-21 (or SOX) plaintiff needs to do to satisfy her *prima facie* burden is to demonstrate, by a **preponderance-of-the-evidence**, that her whistleblowing "was a **contributing factor** in the unfavorable personnel action alleged." 49 U.S.C. §42121(b)(iii)(emphasis added). If she does, the burden shifts to her employer to "demonstrate[] **by clear-and-convincing evidence** that [it] would have taken the same unfavorable personnel action in the absence of that behavior," §42121(b)(iv)(emphasis added), *i.e.*, that it had a legitimate rather than an impermissible motive for its actions. The whistleblower prevails unless the employer meets that heightened burden.

SOX is hardly the only whistleblower-protection statute that derives from, and expressly incorporates AIR-21's two-tiered burden-shifting framework. So do fifteen other statutes derived from AIR-21. In turn, AIR-21's scheme and burdens derive from the Whistleblower Protection Act of 1989 ("WPA"), Pub.L. 101-12, 103 Stat. 16. *See Singletary v. Howard Univ.,* 939 F.3d 287, 297 n.2 (D.C. Cir.2019); *Majali v. Dept. of Labor*, 294 Fed.Appx. 562, 566 (11th Cir.2008).[2]

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[2] *See also Leshinsky v. Telvent GIT, S.A.*, 942 F.Supp.2d 432, 448-50 (S.D.N.Y.2013); Jonathan Lee, *Whistle with a Purpose*, 93 WASH. U.L.REV. 1613, 1634 (2016).

For that reason, it is useful to review the WPA's history, purpose, and structure. Before the WPA was enacted, the Civil Service Reform Act of 1978 ("CSRA"), Pub.L. 95–454, 92 Stat. 1111, governed whistleblowing claims by federal civil-service workers. The CSRA "defined a prohibited personnel practice as 'tak[ing] or fail[ing] to take a personnel action ... as a reprisal for' a protected disclosure of information." *Marano v. Dept. of Justice*, 2 F.3d 1137, 1140 (Fed.Cir.1993)(Clevinger, J.)(quoting 5 U.S.C. §2302(b)(8)). By the time the CSRA was a decade old, Congress had come to recognize that the CSRA's "reprisal for" test imposed an "'excessively heavy burden … on the employee'" and, "in effect, had gutted the CSRA's protection of whistleblowers." *Id.* (citing the "WPA's Explanatory Statement," 135 Cong.Rec. 5033 (1989)).

"Thus, in 1989 Congress amended the CSRA's statutory scheme with the WPA, thereby **substantially reducing a whistleblower's burden** to establish his case, and 'send[ing] a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing.'" *Marano,* 2 F.3d at 1140 (emphasis added; quoting 135 Cong.Rec. 5033). "Rather than being required to prove that the whistleblowing disclosure was a 'significant' or '**motivating'** factor, the whistleblower under the WPA … **must evidence only** that his protected disclosure played a role in, or was 'a **contributing** factor' to, the personnel action taken." *Id.* (quoting 135 Cong.Rec. 5033)(emphasis added). Significantly,

> 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, 2 F.3d at 1140 (emphasis added; quoting 135 Cong.Rec. 5033).

Therefore, "under the WPA"—and under SOX and AIR-21, which are "modeled" or "patterned" on the WPA—"**a whistleblower need not demonstrate the existence of a retaliatory motive** on the part of the employer taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Marano,* 2 F.3d at 1140 (emphasis added; citing S.Rep. 413, 100th Cong., 2d Sess. 16 (1988)). *See Araujo v. N.J. Transit Rail Ops. Inc.*, 708 F.3d 152, 158 (3d Cir.2013).

Rather than requiring a whistleblower to prove a "retaliatory intent" as part of a *prima facie* case, the WPA—and AIR-21 and the AIR-21 statutes, like SOX, which originate from the WPA—turns the table, creating a reverse burden of proof. This burden not only requires a whistleblower **defendant** to prove a non-retaliatory motive but also to do so by **clear-and-convincing** evidence. The employer "'bear[s] a heavy burden,'" Congress explained, because it "'controls most of the cards—the drafting of the documents supporting the [challenged] decision, the testimony of witnesses who participated in the decision, and the records that could document whether similar personnel actions have been taken in other cases.'" *Miller v. Dept. of Justice*, 842 F.3d

1252, 1258 (Fed. Cir.2016)(quoting 135 Cong.Rec. H747–48 (daily ed., March 21, 1989)).

AIR-21 enacted this burden-shifting scheme, burdens, and standards, and SOX did so as well, with SOX carefully "track[ing]" AIR-21's formulation "as closely as possible," *Lawson,* 571 U.S. at 437. In particular, SOX scrupulously copied AIR-21's standards because they are "'much easier for a plaintiff to satisfy' than previous standards." *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, the clear-and-convincing test that employer-defendants must meet "'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)).

Reducing the burden on whistleblowers is sound policy because "an employer will rarely admit retaliatory motives in firing an employee," *San Juan v. IBP, Inc.*, 160 F.3d 1291, 1297 (10th Cir.1998), just as it is the unusual "wolf [who] comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988)(Scalia, J., dissenting). Thus, it is typically impossible for a whistleblower to prove her corporate employer's intent. *Miller,* 842 F.3d at 1258. For these reasons, Congress "intended that [whistleblower defendant] companies … face a difficult time defending themselves." *Stone,* 115 F.3d at 1572. *See Whitmore v. Dept. of Labor*, 680 F.3d 1353, 1367 (Fed.Cir.2012).

ARGUMENT

I. ONLY THIS COURT CAN RESOLVE THE DEEP AND WIDENING SPLIT AMONG THE CIRCUITS ON WHISTLEBLOWERS' BURDENS OF PROOF IN SOX CASES AND IN CASES THAT ARE BROUGHT UNDER NEARLY IDENTICAL STATUTES.

Murray ruled a SOX plaintiff must "prove that the employer took the adverse employment action against [him] with retaliatory intent" as part of his case in chief. 43 F.4th at 256 (citation omitted). The Second Circuit acknowledged its "retaliatory intent" requirement "departs from the approach of the Fifth and Ninth Circuits," creating a 2:1 split. *Id.* at 261, n.7 (citing *Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 263 (5th Cir.2014), and *Coppinger-Martin v. Solis*, 627 F.3d 745, 750 (9th Cir.2010)). The Second Circuit undercounted the split, however, because the Fourth and Tenth Circuits also conflict with *Murray* on the parties' respective burdens. *See Feldman v. Law Enforcement Assoc. Corp.*, 752 F.3d 339, 348 (4th Cir.2014); *Lockheed Martin Corp. v. Dept. of Labor*, 717 F.3d 1121, 1136, 1137 (10th Cir.2013). This produces a 4:1 split against the Second Circuit in SOX cases and SOX cases alone.[3]

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[3] The U.S. Labor Department's Administrative Review Board ("ARB") agrees with those four Circuits, holding "proof of actual discriminatory or retaliatory intent [i]s not required." *Petitt v. Delta Airlines, Inc.,* ARB No.2021-0014, 2022 WL 1091413, *11 (March 29, 2022). The ARB's agreement matters because most Circuits defers to it since "Congress has explicitly delegated to the Secretary of Labor authority to enforce the whistleblower provisions" of AIR-21 statutes. *TransAm Trucking, Inc. v. Admin. Rev. Bd.,* 833 F.3d 1206, 1210 (10th

This 4:1 split, while significant, minimizes the true division among the Circuits. This is so because, as discussed above, SOX is far from *sui generis*. Instead, the respective burdens of a SOX claim were "borrowed" from AIR-21, which provided the "model" and "pattern" for SOX. *Lawson,* 571 U.S. at 437. In particular, "Congress designed [SOX] §1514A to 'track ... as closely as possible' the protections afforded by [AIR-21] §42121." *Id.* at 457 (citations omitted). *See id.* at 434, 435, 437, 438, and 459. The same is true regarding the sixteen statutes, including SOX, that Congress patterned and modeled on AIR-21's two-tiered, burden-shifting provisions.

Murray acknowledged that SOX was functionally indistinguishable from other statutes patterned on AIR-21. This explains why *Murray* relied solely on the Second Circuit's decision in *Tompkins*, which had construed the Federal Railroad Safety Act ("FRSA"), 9 U.S.C. §20109(a), another cousin of AIR-21. This also explains why the Second Circuit wrote that two FRSA decisions (from the Seventh and Eighth Circuits) should be counted on its side of the Circuit split, bringing the tally to 4:3. *Murray*, 43 F.4th at 261 n.7 (citing *Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir.2018), and *Kuduk v. BNSF Ry. Co.,* 768 F.3d 786, 791 (8th Cir.2014)).

Cir.2016). *See, e.g., U.S. Dept. of Labor*, 814 Fed.Appx. 490, 492 (11th Cir.2020); *Northrop Grumman Sys. Corp. v. U.S. Dept. of Labor,* 927 F.3d 226, 232 (4th Cir.2019); *Nielsen v. AECOM Tech. Corp.*, 762 F.3d 214, 220 (2d Cir.2014); *Wiest v. Lynch*, 710 F.3d 121, 131 (3d Cir.2013).

Regardless of how many Circuits are on each side of the split—*i.e.*, whether they divide 2:1, 4:1, or 4:3—a significant split exists and it will not be resolved without this Court's intervention. Given the nationwide uncertainty the split reflects and perpetuates, and the lack of uniformity it causes, this Court should resolve through this case.

II. *MURRAY* IS LIKELY TO HAVE AN OUTSIZE INFLUENCE ON HOW SOX CASES ARE DECIDED NATIONWIDE BECAUSE THIS COURT HAS LONG REGARDED AS "THE MOTHER COURT" ON SECURITIES LAW

As discussed above, while five Circuits (including the Second, in *Murray*) have decided what burdens a whistleblower must shoulder in SOX cases, eight Circuits have not. Although only four Circuits are squarely arrayed against *Murray* on SOX, that ruling is likely to have a disproportionate effect on undecided Circuits, which often have "deferred to the Second Circuit because of" what Judge Bork characterized as "its 'preeminence in the field of securities law.'" *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 260 (2010)(citations omitted).

Indeed, any Second Circuit decision involving securities law will be markedly influential because it "has long been the country's preeminent court in th[at] field." Karen Patton Seymour, *Securities and Financial Regulation in the Second Circuit*, 85 FORDHAM L. REV. 225, 225 (2016)(footnotes omitted). In the last 50 years, the Second Circuit has "produced nearly five times as many securities law opinions as the average federal appellate court," been "responsible for one-third of all securities opinions issued by appellate courts," and authored

more than two-thirds of the opinions that are cited "in securities law casebooks." *Id.* (footnotes omitted).

This trend holds true in SOX cases. While the Second Circuit covers only 7.1% of the Nation's population, a recent Westlaw search established that since 2002 it has issued 21.5% of all SOX opinions nationwide, probably because New York City is home to the world's largest securities market.

It is hardly unexpected, then, that numerous members of this Court have characterized the Second Circuit as the "'judicial oak'" and "the 'Mother Court'" for securities law. *Morrison v. Natl. Australia Bank Ltd.*, 561 U.S. 247, 276 (2010)(Stevens and Ginsburg, JJ., concurring)(quoting, respectively, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975)(Rehnquist, J.), and *id.* at 762 (Blackmun, Douglas, and Brennan, JJ., dissenting)).

In sum, numerous courts "have long looked to [the Second Circuit] for guidance in deciding … securities law issues." Seymour, 85 FORDHAM L. REV. at 226. It would be regrettable if the Circuits that have not ruled on SOX's burdens were to follow the Second Circuit's lead.

III. THE SECOND CIRCUIT'S ERRONEOUS DECISION ON SOX'S BURDENS OF PROOF ALSO IS LIKELY TO SWAY UNDECIDED CIRCUITS IN NON-SOX CASES BROUGHT UNDER OTHER CLONES OF AIR-21.

Congress did not write SOX on a blank slate. Instead, as this Court has repeatedly emphasized, SOX was "borrowed" from AIR-21, which provided the "model" and "pattern" for SOX. *Lawson,* 571 U.S.

at 437. In particular, "Congress designed [SOX] §1514A to 'track ... as closely as possible' the protections afforded by [AIR-21] §42121." *Id.* at 457 (citations omitted). *See id.* at 434, 435, 437, 438, and 459.

Besides SOX, fifteen other whistleblower protection statutes are "modeled" and "patterned" on AIR-21. Like SOX, these statutes track AIR-21 protections, including AIR-21's shifting, two-tiered burdens of proof scheme, a scheme in which whistleblowers need only meet a low, preponderance-of-the-evidence standard of proof and are not required to prove their employer's intent or state of mind. This scheme not only requires employers to demonstrate their actions were innocent of retaliatory intent but to satisfy a higher, clear-and-convincing standard of proof in doing so.

Given the Second Circuit's prestige and given that SOX's relevant features are identical to those of AIR-21 and its other progeny, it is likely that *Murray* will have disproportionate influence on courts that have not decided the parties' respective burdens of proof in AIR-21 related cases. This is important because AIR-21 and its progeny safeguard whistleblowers—and the public—throughout the economy, in industries such as aviation, consumer products, food, healthcare, nuclear energy, pipelines, and surface transportation.

IV. THE SECOND CIRCUIT REACHED THE WRONG RESULT IN *MURRAY* BECAUSE IT IGNORED SOX'S "CONTEXT" AND "STRUCTURE AND INTERNAL LOGIC."

Exactly at the same time that Congress created a private, "**civil** action to protect against retaliation

in fraud cases," §1514A, it amended a longstanding **criminal** statute authorizing prosecutions for retaliation in fraud cases. 18 U.S.C. §1513(e). Although both provisions aim to deter and punish retaliation against whistleblowers, they differ in two critical ways. First, § 1513(e) requires prosecutors to prove employers discriminated against whistleblowers "knowingly, with the intent to retaliate"; second, that proof must be established beyond a reasonable doubt. By contrast, §1514A contains no similar requirement and demands no similar standard of proof.

The Second Circuit erred in *Murray* because it ignored the plain textual and structural differences between §1514A and §1513(e) and because it flouted the cardinal rules on how courts must construe adjacent and simultaneously enacted statutory provisions. The Second Circuit also erred by effectively erasing the second part of the AIR-21 test, §42121(B)(ii), which imposes a stiff burden on defendant-employers: they must show innocent reasons for their actions, *i.e.*, reasons independent of whistleblowing disclosures, and must do so through clear-and-convincing evidence.

A close textual analysis of SOX's "context," "structure and internal logic"—all of which the Second Circuit failed to consider—demonstrates that a SOX complainant need not even address whether her employer's motives were retaliatory as part of her *prima facie* case. *Murray* erred in holding otherwise.

In construing SOX's provisions (and the AIR-21 provisions SOX expressly incorporate), it is crucial to examine how those provisions fit within "the structure and internal logic of the statutory scheme."

Lockhart v. United States, 577 U.S. 347, 351 (2016). *See McCullen v. Coakley*, 573 U.S. 464, 503 (2014)(Scalia, Kennedy, & Thomas, JJ., concurring). As Justice Scalia explained: "[t]he text must be construed as a whole" and "in view of its structure," with "**context [being] the primary determinant of meaning**." Antonin Scalia and Bryan A. Gardner, READING LAW 167 (2012)(emphasis added).

In particular, courts should view overlapping and adjacent provisions of a statute through the lens of the *Russello-Loughrin* canon of construction. "[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). Accordingly,

> 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)(emphasis added; citations and footnote omitted).

Furthermore, "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other"—as is true here because Congress enacted SOX just two years after AIR-21—"it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005)(citing *Northcross v. Board of Ed. of Memphis City Schools*, 412 U.S. 427, 428 (*per curiam*)).

The *Russello-Loughrin* canon applies with particular force here. There are two reasons why.

First, at precisely the same time Congress created a private, "**civil** action to protect against retaliation in fraud cases," §1514A (emphasis added), Congress augmented that "civil … protect[ion]"—and increased its own and the SEC's ability to obtain information from whistleblowers—by amending a longstanding **criminal** statute, 18 U.S.C. §1513. Section 1513(e) bars an employer from

> **knowingly, with the intent to retaliate**, tak[ing] any action harmful to any person['s] … employment … for providing to a law enforcement officer any truthful information relating to … any Federal offense.

Violators of this criminal prohibition are subject to ten years imprisonment.

Importantly, "**18 U.S.C. §1513(e), by cross-referencing Sarbanes–Oxley** and other laws, protects disclosures made to a variety of individuals and entities in addition to the SEC." *Digital Realty Tr., Inc. v. Somers,* 138 S.Ct. 767, 774 (2018). *See id. at* 781. And Congress did more than simply "cross-referenc[e]" §1514A and §1513(e). Instead, Congress added §1514A—Title VIII of SOX—to the U.S. Code through Pub.L. 107-204 on July 30, 2002, while Congress amended §1513(e)—Title XI of SOX—through the same Public Law, 107-204, on the same date, July 30, 2002.

The fact that Congress expressly inserted an "**intent to retaliate**" requirement in one section of SOX, §1513(e)—while simultaneously omitting the same carefully chosen three words from an adjacent SOX section, §1514A—proscribes a court from

"inserting words Congress chose to omit." *Lomax v. Ortiz-Marquez*, 140 S.Ct. 1721, 1725 (2020)(citing *Virginia Uranium, Inc. v. Warren*, 139 S.Ct. 1894, 1900 (2019)(lead opinion of Gorsuch, J.)). *See Alabama v. North Carolina*, 560 U.S. 330, 352 (2010)(per Scalia, J.)(federal courts "cannot add provisions to a federal statute.")(citing *Connecticut Nat. Bank v. Germain,* 503 U.S. 249, 254 (1992)).[4]

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[4] Congress' evolving retaliation standards for use in WPA cases provide a similar example. In 1978, Congress enacted WPA §4(a)(2), 5 U.S.C. §2302(b)(8), to prohibit actions "in reprisal for" whistleblowing. In 1989, Congress amended §2302(b)(8) "to improve the protections for federal employees who disclose … government mismanagement or fraud." S.Rep. 100-413, 100th Cong. 2d Sess. 14 (1988) at 1. Congress effected this "improve[ment]" by replacing the phrase "in reprisal for" with "because of." Pub.L. 101-12, §4(a)(2), 103 Stat. 32. This substitution was designed to rectify the then-prevailing judicial interpretation of the WPA, as exemplified by two recent decisions requiring whistleblowers to prove their employers' retaliatory intent. S.Rep. 100-413, at 13, 15-16 (1988)(citing *Starrett v. Special Counsel*, 792 F.2d 1246, 1253 n.12 (4th Cir.1986)(holding whistleblowers must prove, as part of their *prima facie* case, that their employers' "motivation for the adverse [personnel] action was an improper one"), and *Harvey v. M.S.P.B.*, 802 F.2d 537, 548 & n.5 (D.C.Cir.1986)(same; quoting *Starrett*). *See also* S.Rep. 112-155, 112rd Cong. 2d Sess. (2012), at 5 (explaining similar changes to a companion provision of the WPA, 5 U.S.C. §2302(f)(2)). *See generally Marano*, 2 F.3d at 1140-41.

Importantly, the Federal Circuit's universally followed burden-shifting test for WPA cases makes clear that it is the **defendant—not the whistleblower**—who "carri[es]" the "burden of establishing by clear and convincing evidence that it would have taken the personnel action … in the absence of the disciplined employee's protected disclosure(s)," *i.e.*, proving that its intent was innocent; the whistleblower has no burden to prove invidious intent. *Carr v. Social Security Admin.*, 185 F.3d

Second, the *Russello-Loughrin* canon applies with equal force to AIR-21's reverse burden of proof. As discussed the Statutory Background section, above, the first part of the AIR-21 test, §42121(B)(i), imposes a limited burden on whistleblowers: in order for them to meet their *prima facie* burden, all they must do is demonstrate (by a preponderance-of-the-evidence) that a protected disclosure was a contributing factor in an adverse personnel action. By contrast, the second part of the AIR-21 test, §42121(B)(ii), establishes a "tough" burden for the employer: it must establish innocent reasons for its actions, *i.e.*, reasons independent of whistleblowing disclosures, and it must do so by clear-and-convincing evidence. *Araujo*, 708 F.3d at 159.

Significantly, Congress included a "clear-and-convincing" requirement in one sub-section of the statute, AIR-21 §42121(B)(ii), while simultaneously omitting a "clear-and-convincing" requirement in SOX's adjacent sub-section, §42121(B)(i). If Congress had wished to impose mirror-image burdens and standards of proof—to prove or disprove retaliatory intent—on both parties of a case, it knew how to draft accordingly. Congress did not. And that omission is fatal to the Second Circuit's conclusion.

Indeed, any interpretation of SOX that would

1318, 1323 (Fed. Cir.1999). Every Circuit has embraced the "*Carr* factors," including four Circuits just since 2020. *See DuPage Reg'l. Office of Educ. v. Dept. of Educ.*, 21-3339, 2023 WL 355662, *18 (7th Cir. Jan. 23, 2023); *Weber v. Dept. of Veterans Affairs*, 19-2004, 2022 WL 1797321, *2 (4th Cir. June 2, 2022); *Marcato v. U.S. A.I.D.*, 11 F.4th 781, 786 (D.C. Cir.2021); *Huang v. DHS*, 844 Fed.Appx. 942, 944 (9th Cir.2021).

allow an employer's ostensibly legitimate reasons to dictate the §42121(B)(i) decision in a "contributing factor" analysis would render §42121(B)(ii) unnecessary surplusage. Simply put, if the employee must overcome supposedly independent, neutral, non-retaliatory reasons for an adverse action in order to establish the employee's *prima facie* case, there is no reason for the employer to present an affirmative defense at all. That would render the employer's burden of proof in §42121(B)(ii) superfluous.

This is not the way Congress wrote the statute. And this is not the way statutes should be construed. Reading §42121(B)(ii) to make it superfluous violates one of the "most basic of interpretative canons," which posits 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 v. United States*, 556 U.S. 303, 314 (2009)(citing *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). "The rule against superfluities complements the principle that courts are to interpret the words of a statute in context." *Hibbs,* 542 U.S. at 101 (citation omitted).

Notably, "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen'l Revenue Corp.*, 568 U.S. 371, 386 (2013)(per Thomas, J.; internal quotation marks omitted; citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011)(per Alito, J.)). 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).

V. THE SECOND CIRCUIT REACHED THE WRONG RESULT IN *MURRAY* BECAUSE IT IGNORED AIR-21, THE WHISTLEBLOWING PROTECTION STATUTE *LAWSON* REPEATEDLY SAID SOX "TRACKED," WAS "PATTERNED" AFTER, AND WAS "MODELED" UPON.

Murray's holding is incorrect because the Second Circuit ignored both SOX's "official legislative history," and the statute at the center of that history: "the 2000 Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"), 49 U.S.C. §42121." *Lawson,* 571 U.S. at 434. According to *Lawson,* "Congress borrowed [SOX] §1514A's [whistleblower] prohibition against retaliation from … AIR-21." *Id. Lawson* reiterated the same point five more times.[5] And to further allay any confusion, *Lawson* cited AIR-21 or §42121 twenty-nine (29) times in the course of a nineteen-page opinion.

For these reasons, it would seem §42121 and AIR-21 would be hard to ignore. But the Second Circuit ignored AIR-21 and §42121, just as it never mentioned *Lawson* or S. Rep. 107-146.

Lawson's citation to S.Rep. 107-146, and SOX's legislative history was anything but casual. *Lawson* regarded the Senate Report as sufficiently important

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[5] *See Lawson,* 571 U.S. at 437 ("Congress modeled §1514A on [AIR-21's] anti-retaliation provision"); *id.* (SOX "'track[s] [AIR-21's] protections as closely as possible'")(quoting S.Rep. 107-146 at 30); *id.* at 438 ("Congress modeled §1514A on §42121"); *id.* at 459 (followed "§42121's pattern"); *id.* at 434 ("AIR 21 and §1514A" have "parallel statutory texts and whistleblower protective aims").

to reference it in the opinion's first sentence and fourteen times thereafter. *Lawson*'s first footnote characterized S.Rep. 107-146 as "'**the official legislative history**'" of SOX's "whistleblower protection provision." 571 U.S. at 435 n.1 (emphasis added). This Court also cited S.Rep. 107-146 as authoritative seven times in another SOX case, *Yates v. United States*, 574 U.S. 528 (2015).

The Second Circuit inexplicably failed to mention AIR-21 or *Lawson,* and failed to heed *Lawson*, which led it to the wrong result in *Murray*.

VI. *MURRAY* ALSO REACHED THE WRONG RESULT BECAUSE IT IGNORED SOX'S STATUS AS A REMEDIAL STATUTE AND FAILED TO CONSTRUE SOX IN LIGHT OF ITS REMEDIAL PURPOSES

It is a long-honored "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 S.E.C. v. Zandford*, 535 U.S. 813, 819 (2002). Conversely, courts ought not construe a remedial statute in ways "'incompatible with ... Congress' regulatory scheme'" or that would "'destroy one of [a remedial statute's] major purposes.'" *Digital Realty,* 138 S.Ct. at 778 (citations omitted).

SOX is a "remed[ial]" statute that was enacted to protect and incentivize whistleblowers who "publicize alleged corporate misconduct." *Guyden v. Aetna, Inc.*, 544 F.3d 376, 384 (2d Cir.2008)(citations omitted). *See Digital Realty,* 138 S.Ct. at 778; *Halliburton*, 771 F.3d at 265. "Congress installed whistleblower protection in the Sarbanes–Oxley Act ['SOX'] as one means to ward off another Enron debacle," *Lawson,* 571 U.S. at 447, a financial

catastrophe that produced significant "spillover economic effects" nationwide, prompting business and personal bankruptcies, inducing massive job losses, and undermining public confidence in the securities markets. *Skilling,* 561 U.S. at 376.

SOX provided remedies to whistleblowing employees—who "'are [often] the only firsthand witnesses to the fraud'"—in order to prevent the recurrence of fraudulent advertising, stock manipulation, and accounting fraud that sunk Enron and threatened to sink the Nation's economy. *Lawson,* 571 U.S. at 434 (quoting S.Rep. 107–146, p.2). After "Congress identified the lack of whistleblower protection [in the existing law] as 'a significant deficiency'" in protecting the investing public, it "installed whistleblower protection in [SOX] as one means to ward off another Enron debacle." *Id.* at 447 (citation omitted).

Murray did not acknowledge SOX's remedial purposes much less do as this Court's precedents require: "construe[] [SOX] broadly to effectuate its purposes." *Tcherepnin*, 389 U.S. at 336.

CONCLUSION

This Court should grant the petition for a writ of certiorari for the foregoing reasons.

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APPENDIX A

Relevant statutes directly affected by this case 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) P.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).