

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

TREVOR MURRAY,)
)
) Petitioner,)
)
) v.) No. 22-660
)
UBS SECURITIES, LLC, ET AL.,)
)
) Respondents.)

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6 UBS SECURITIES, LLC, ET AL.,)

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8 - - - - -

10 Washington, D.C.

11 Tuesday, October 10, 2023

13 The above-entitled matter came on for
14 oral argument before the Supreme Court of the
15 United States at 10:04 a.m.

17 APPEARANCES:

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19 of the Petitioner.

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25 the Respondents.

1	C O N T E N T S	
2	ORAL ARGUMENT OF:	PAGE:
3	EASHA ANAND, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF:	
6	ANTHONY A. YANG, ESQ.	
7	For the United States, as amicus	
8	curiae, supporting the Petitioner	30
9	EUGENE SCALIA, ESQ.	
10	On behalf of the Respondents	58
11	REBUTTAL ARGUMENT OF:	
12	EASHA ANAND, ESQ.	
13	On behalf of the Petitioner	96
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

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2
3
4
5
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11
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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 22-660, Murray versus UBS Securities.

Ms. Anand.

ORAL ARGUMENT OF EASHA ANAND

ON BEHALF OF THE PETITIONER

MS. ANAND: Thank you, Mr. Chief Justice, and may it please the Court:

Congress passed the Sarbanes-Oxley Act in the wake of the Enron meltdown to encourage whistleblowers to report misconduct that could threaten the finances of millions. The question in this case is how claims that an employer acted with retaliatory intent are to be proven.

The plain text of the statute answers that question. District court actions shall be governed by the burdens of proof in AIR21. AIR21, in turn, places exactly one burden of proof on plaintiff, to show that his protected conduct was a contributing factor in the unfavorable personnel action.

The burden then shifts to the defendant to prove that it would have taken the

1 same unfavorable personnel action in the absence
2 of the protected conduct, in essence, that it
3 did not act with retaliatory intent.

4 The Second Circuit held that the
5 contributing factor element required a showing
6 of retaliatory intent. UBS does not defend that
7 holding, nor could it. UBS instead contends
8 that in addition to showing the contributing
9 factor element, a plaintiff must separately show
10 retaliatory intent.

11 But UBS never grappled with the plain
12 text of the statute, which says that an action
13 shall be governed by the burdens in AIR21. And
14 having now disclaimed any requirement that a
15 plaintiff show animus, UBS never explains what
16 its proposed retaliatory intent element would
17 amount to, other than the second step of the
18 burden-shifting framework, a showing that the
19 employer would not have taken the adverse action
20 in the absence of the protected conduct.

21 I welcome this Court's questions.

22 JUSTICE THOMAS: If you did not have
23 the burden-shifting framework, would there be an
24 intent requirement?

25 MS. ANAND: So, yes, Your Honor. That

1 is, the burden-shifting framework is designed to
2 prove the intent element. Absent the
3 burden-shifting framework, the default rule
4 would apply and plaintiff would just have to
5 show intent.

6 JUSTICE THOMAS: Well, it just seems
7 that the substantive statute provides for
8 but-for -- but-for causation and has an intent
9 requirement. But you're saying the burden-of-
10 proof requirement seems to -- framework seems to
11 eviscerate that substantive requirement.

12 MS. ANAND: I wouldn't say
13 "eviscerate." I would say it's how you prove
14 that substantive requirement. So, for instance,
15 in Title VII, the same language, "discriminate
16 because of," can either be proven entirely by
17 the plaintiff or, depending on the type of case,
18 Congress has sometimes said there's a
19 burden-shifting framework that comes in. You
20 just have to show a motivating factor, and then
21 the burden shifts.

22 In other words, this --

23 JUSTICE SOTOMAYOR: I'm a bit confused
24 by that answer. I understand the meaning of
25 "discriminate" means to treat someone

1 differently. And I don't know how you can prove
2 intent other than to show by action that
3 something has -- someone has discriminated:
4 they fired someone, they demoted someone, they
5 treated them differently in some way. They
6 discriminated against them.

7 So I don't think there's any question
8 that there was an intent to fire this person,
9 correct?

10 MS. ANAND: That's correct, Your
11 Honor.

12 JUSTICE SOTOMAYOR: And so the
13 causation issue is not about intent -- or the
14 issue is not about the intent to fire someone.
15 The issue is what relationship does it have to
16 the act?

17 MS. ANAND: That's exactly right, Your
18 Honor.

19 JUSTICE SOTOMAYOR: So I don't know
20 where your answer to Justice Thomas comes that
21 if there wasn't this burden-shifting, that we
22 would have a different kind of intent. We would
23 still be charging people with did they fire them
24 because of this, correct?

25 MS. ANAND: That's exactly right, Your

1 Honor. The question would just be who has to
2 prove that, that the firing was because of the
3 protected conduct or trait. The default rule is
4 plaintiff. In this case, Congress has chosen to
5 put a burden-shifting framework in the statute
6 that gives the plaintiff an initial burden
7 before the burden shifts to the defendant.

8 JUSTICE SOTOMAYOR: So the question --

9 JUSTICE KAVANAUGH: What --

10 JUSTICE SOTOMAYOR: -- of intent, as
11 you said, might arise in motivating factor cases
12 because then the jury has to find out whether
13 this was more important or not than other
14 reasons, correct --

15 MS. ANAND: So --

16 JUSTICE SOTOMAYOR: -- basically?

17 MS. ANAND: -- that's correct, Your
18 Honor. The analogy to Title VII is just to say
19 that Congress is entitled to come up with
20 different schemes to prove this same thing,
21 namely, that the employer took the adverse
22 employment action because of the protected trait
23 or conduct.

24 JUSTICE KAVANAUGH: What do you think
25 "contributing factor" means? Because I think

1 both sides' positions have difficulty hanging
2 together completely because of the interaction
3 of "contributing factor" and, as you call it,
4 step 2. At least for me, that's the -- I'm
5 trying to figure out how those fit together.

6 So what do you think "contributing
7 factor" means?

8 MS. ANAND: So, Your Honor, I think
9 the -- the simplest answer is that it's a term
10 of art drawn from the Whistleblower Protection
11 Act. And for a generation, the definition
12 adopted by the Federal Circuit has been, alone
13 or in combination with other factors, affects
14 the -- the adverse employment action.

15 JUSTICE KAVANAUGH: And, in your
16 brief, I think on 29, you said that knowledge by
17 the employer of the protected activity plus
18 temporal proximity would be good enough in this
19 particular statute to show a contributing
20 factor. Is that correct?

21 MS. ANAND: Yes, Your Honor. So
22 that's actually in the text of the Whistleblower
23 Protection Act. Right. It's the first time
24 Congress uses this "contributing factor"
25 language. So they give an example of what would

1 suffice, and they say knowledge plus temporal
2 proximity.

3 So, again, what you've got at that
4 point is protected conduct, so someone had
5 objectively reasonable evidence of securities
6 fraud and recorded -- and reported it; you've
7 got the fact that they were fired; you've got
8 the employer's knowledge; and they were fired
9 shortly after reporting objectively reasonable
10 evidence of securities fraud.

11 JUSTICE KAVANAUGH: Yeah, that's a
12 sensible scheme, I think. I'm not sure it maps
13 completely onto the term "contributing factor,"
14 but I -- I understand where you're getting that
15 as a term of art.

16 MS. ANAND: That's right, Your Honor.
17 And, again, in the Whistleblower Protection Act,
18 Congress explained what "contributing factor"
19 meant. Subsequently, it didn't put that
20 explanation in the statute, presumably because,
21 in future statutes, it thought that term was
22 adequately defined.

23 JUSTICE BARRETT: But it's tricky,
24 though, because --

25 JUSTICE ALITO: Well, as I

1 understand --

2 CHIEF JUSTICE ROBERTS: Justice Alito.

3 JUSTICE ALITO: As I understand your
4 argument, intent plays no role whatsoever in --
5 discriminatory intent plays no role whatsoever
6 in what the plaintiff must prove.

7 MS. ANAND: So that's right, Your
8 Honor, that the plaintiff can get the burden to
9 shift without showing discriminatory intent,
10 although I think what Congress believed is that
11 at the point where you've shown this protected
12 conduct, temporal proximity, and adverse action,
13 there's something like a presumption, as the SG
14 put it, of intent, and that's why we shift the
15 burden.

16 JUSTICE ALITO: So in -- let's say
17 that an individual engages in protected
18 activity, an employee engages in protected
19 activity, and, as a result of that, the employer
20 investigates the employee's performance and
21 finds that the employee actually has embezzled a
22 hundred thousand dollars.

23 The -- the plaintiff would not have to
24 show that the decision to discharge was based in
25 any way on the -- that the -- the motivation,

1 the thinking of the decisionmaker was based in
2 any way on the protected activity? That would
3 be up to the employer then to show by clear and
4 convincing evidence that person would have been
5 discharged upon the discovery of this even if
6 there had never been protected activity? That's
7 your argument?

8 MS. ANAND: So, yes, Your Honor. That
9 is, obviously, at step 2, the employer wins
10 because they can show anyone who embezzled a
11 hundred thousand dollars would have gotten fired
12 whether or not they'd engaged in protected
13 activity. But that's right. Congress believed
14 that employees shouldn't have to have evidence
15 of what was in the head of the decisionmaker at
16 the moment of the decision before the burden
17 shifted.

18 JUSTICE ALITO: The key language in
19 that part of the statute is that the protected
20 activity was a contributing factor in the
21 unfavorable personnel action alleged in the
22 complaint.

23 So you read "unfavorable personnel
24 action" to mean simply discharge. But can it
25 not also be read to mean discriminatory

1 discharge, the unfavorable personnel action
2 alleged in the complaint is the discriminatory
3 discharge?

4 MS. ANAND: So I -- I don't think so,
5 Your Honor, and that's because that would render
6 the contributing factor language superfluous;
7 that is, if you had to say -- if you had to
8 prove as part of it that there was a
9 discriminatory discharge, what would it -- once
10 you've shown there's a discriminatory discharge,
11 by definition, the protected conduct was a
12 contributing factor. In fact, you've shown a
13 much higher standard.

14 JUSTICE ALITO: No, I don't quite
15 understand your -- I don't understand that
16 answer. Could you explain it to me again?

17 MS. ANAND: Sure. So, if an employee
18 has to show discriminatory discharge --

19 JUSTICE ALITO: Right.

20 MS. ANAND: -- that means they have to
21 show that the -- that the employer was motivated
22 and would not have taken the action --

23 JUSTICE ALITO: No, it doesn't mean
24 but-for. It means that it played some role in
25 the -- in the discharge decision. It was a

1 contributing factor to the discharge decision.

2 MS. ANAND: So, if Your Honor's
3 question is whether the -- the contributing
4 factor has to be to the decision rather than
5 just some part of the causal chain, I'll just
6 say that I don't know that this case is exactly
7 the right case to draw that distinction if
8 there's something below retaliatory intent.

9 Remember, in this case, during the
10 jury deliberations, there's a second instruction
11 given that uses "affects the decision." That's
12 the language. It's at JA 180.

13 And so, if this Court thinks there's
14 some lesser showing than retaliatory intent that
15 has to do with affecting the decision versus
16 just being part of the causal chain, this case
17 wouldn't be the right case to make that
18 determination.

19 JUSTICE BARRETT: But doesn't it --
20 don't you have to do that if you're going to
21 show -- if you're going to rule out the
22 hypotheticals that UBS raises and the ones that
23 the Chamber of Commerce did in its amicus brief,
24 things that happened in the causal chain, like
25 the whistleblowing alienates the customer, the

1 customer takes her business elsewhere, and then
2 the department is eliminated, and so, even
3 though the employer was very supportive of the
4 whistleblowing, she loses her job because
5 there's no work left.

6 I took your brief, your reply brief,
7 to say no, no, no, no, no, that wouldn't happen.
8 Is it your position that those kinds of
9 hypotheticals only get ruled out at step 2 by
10 the clear-and-convincing-evidence standard or,
11 as Justice Alito's saying, if you have to show
12 some sort of link between the discharge and the
13 decision, it seems like some of them might get
14 ruled out at the first step?

15 MS. ANAND: So I think that's right,
16 Your Honor. So two responses. The first is
17 Marano in the Federal Circuit, right, the case
18 that interprets "contributing factor," seems to
19 say those cases get to the second step, right?

20 So, in that case, the fact pattern is
21 a whistleblower reports. As a result, the
22 employer cleans house, fires everyone related to
23 this unit, and the plaintiff is discharged as
24 part of that.

25 And Marano says, because there's no

1 requirement of retaliatory intent at the first
2 step, that gets to the second stop. If the
3 employer is telling the truth that they were
4 just cleaning house, that --

5 JUSTICE BARRETT: But that's not the
6 hypothetical. Could you address in the
7 hypothetical where the employer is grateful for
8 the information, cleans house, and the customer
9 leaves? So it's not cleaning house within the
10 employer. I might not have been clear.

11 Do you know what example I'm talking
12 about from the brief?

13 MS. ANAND: Yes, the Sara.

14 JUSTICE BARRETT: Okay. Yeah.

15 MS. ANAND: Sara, the Sara example,
16 that's right. So our position is that that is
17 resolved at the second step because the employer
18 at that point can show that they would have
19 fired the plaintiff even if the customer had
20 left for a different reason.

21 JUSTICE BARRETT: But why wouldn't it
22 -- why couldn't it be resolved in part at the
23 first step because you have to show that it's a
24 link in the -- to the decision, a contributing
25 factor, not substantial, you don't have to use

1 motive -- show motivating, but it played a role
2 in the decision --

3 MS. ANAND: Right.

4 JUSTICE BARRETT: -- even if not a
5 determinative one, some role.

6 MS. ANAND: So -- and I don't want to
7 fight you too hard on this because, again, in
8 our case, there's an instruction that says
9 "affected the decision."

10 JUSTICE BARRETT: But the way we write
11 the opinion affects other cases too obviously.

12 MS. ANAND: Sure. So I take it that
13 is not what the Second Circuit meant by
14 "retaliatory intent." So you at least have to
15 reverse the Second Circuit, right, because the
16 Second Circuit required some sort of animus
17 showing. It did not believe that the
18 instruction at JA 180, which says "affected the
19 decision," was sufficient.

20 But, if Your Honors decide to write an
21 opinion that says "affected the decision," I
22 think that's not quite consistent with Marano
23 and the definition there, but it's certainly an
24 interpretation of the statute we'd be
25 comfortable with so long as you don't say

1 there's some higher showing than that.

2 JUSTICE ALITO: What do you mean --

3 JUSTICE GORSUCH: Counsel --

4 JUSTICE ALITO: -- by -- what do you
5 mean by "animus"? I mean, we -- we use that
6 term a lot. We toss it around. What do you --
7 what does it mean here? Does it mean something
8 different than some sort of discriminatory
9 intent?

10 MS. ANAND: So yes, Your Honor. This
11 Court has distinguished between discriminatory
12 intent, which simply means you want to treat
13 someone differently on account of or because of
14 the protected trait or conduct --

15 JUSTICE ALITO: Right, right.

16 MS. ANAND: -- and animus, which is
17 sort of like you have a bad motive in your
18 heart. And so this Court has routinely said
19 that in discrimination statutes, there's no
20 requirement to show animus.

21 JUSTICE GORSUCH: And --

22 MS. ANAND: And, indeed, I think UBS
23 disclaims any animus requirement at Footnote 3.

24 JUSTICE GORSUCH: -- counsel, I --
25 I -- I -- that's where I want to pick up --

1 MS. ANAND: Yeah.

2 JUSTICE GORSUCH: -- and -- and so I'm
3 sorry for interrupting, but --

4 MS. ANAND: Please.

5 JUSTICE GORSUCH: -- I -- I wonder, is
6 that enough for the day?

7 The Second Circuit opinion can be read
8 in various ways, one of which possible reading
9 is, in addition to an intent to discriminate,
10 you have to prove a further intent or a motive
11 to retaliate.

12 And we've rejected that in the Title
13 VII context many times, saying you may have a
14 further intent of trying to equalize men and
15 women as groups, you may have a further intent
16 of wishing to discriminate on the basis of
17 motherhood. Irrelevant. Intent to discriminate
18 is enough for the day.

19 Could we simply say that and not get
20 into how this statute overall works, which seems
21 to me to raise a bunch of other questions that
22 may be more than we need to do for today?

23 React to that.

24 MS. ANAND: So I think that's correct,
25 Your Honor. I think that that would be enough

1 to reverse the Second Circuit. I -- I think you
2 may have to address UBS's position, which is
3 that "contributing factor" means what plaintiff
4 said it means, but there's some sort of separate
5 freestanding retaliatory intent element.

6 JUSTICE GORSUCH: No, that -- that's
7 what I'm saying. We -- we would reject the idea
8 --

9 MS. ANAND: Yes.

10 JUSTICE GORSUCH: -- that there is a
11 freestanding further intention or motivation
12 requirement and say it is simply discrimination,
13 intent to discriminate, that's all that's
14 required, vacate/remand.

15 MS. ANAND: I -- I think that's right,
16 Your Honor. Say a contributing factor doesn't
17 require some sort of animus showing, there's no
18 separate freestanding retaliatory intent
19 element, and whether "contributing factor" means
20 affect --

21 JUSTICE GORSUCH: Period? Period?
22 Would period be okay there?

23 MS. ANAND: Period -- period --

24 JUSTICE GORSUCH: Would that be okay
25 there?

1 MS. ANAND: Yeah. Period would be
2 okay with us there.

3 JUSTICE GORSUCH: Okay. All right.

4 MS. ANAND: Yeah.

5 JUSTICE KAVANAUGH: You probably need
6 a little more, right?

7 (Laughter.)

8 MS. ANAND: All right.

9 JUSTICE JACKSON: Can I ask you -- was
10 someone else?

11 JUSTICE SOTOMAYOR: One follow-up on
12 that.

13 JUSTICE JACKSON: Oh, go ahead.

14 JUSTICE SOTOMAYOR: In your brief, you
15 said that if the Court disagrees with the Second
16 Circuit, which is what my colleague is
17 suggesting, the proper course would be to remand
18 for consideration of whether the jury was
19 adequately instructed.

20 In your reply brief, though, you say
21 that we should reinstate the jury verdict and
22 remand only for proceedings on your
23 cross-appeal.

24 So which is it?

25 MS. ANAND: So we think that it would

1 be proper to reinstate the jury verdict because
2 we think that what you should do is say that
3 "contributing factor" is a term of art that
4 means "tends to affect in any way," which will
5 obviate --

6 JUSTICE SOTOMAYOR: Well, if I have
7 problems with that language, and I think that
8 that's what some of my colleagues are alluding
9 to, which is it's -- I know the Federal Circuit
10 has adopted it, but we haven't.

11 And in your brief, you don't actually
12 use that language. You go around it. And I
13 think there's reasons for that, because that's
14 not the definition of "contributing factor."

15 You say -- you say it's something that
16 helps bring about. I think that is a better
17 formulation. So why don't we just remand and
18 let the Second Circuit think about what the
19 proper charge should be?

20 MS. ANAND: So two responses, Your
21 Honor.

22 First, I just want to note that for
23 this to be a term of art, this Court doesn't
24 have to decide it. So, for instance, in
25 *Helsinn*, similarly, this Court relied on a

1 Federal Circuit case to conclude that something
2 was a term of art. So I just want to make that
3 clear, that you can conclude "contributing
4 factor" is a term of art without having a
5 Supreme Court decision on point.

6 JUSTICE SOTOMAYOR: Well, that --
7 that's -- there's -- there were a lot of reasons
8 for that, not the least of which is that
9 Congress did tend to adopt it as a term of art,
10 but not in this case. They created this term of
11 art.

12 MS. ANAND: That's -- that's right,
13 Your Honor.

14 JUSTICE SOTOMAYOR: The Congress did.
15 So -- well, putting that aside --

16 MS. ANAND: So -- so -- okay. So --
17 so that's my first-line answer.

18 JUSTICE SOTOMAYOR: Okay.

19 MS. ANAND: The second-line answer is,
20 even if you conclude that you're not sure about
21 the "tends to affect in any way" jury
22 instruction, remember, there's a second jury
23 instruction in this case that is "affects the
24 decision." Someone with knowledge because of
25 that knowledge affected the decision.

1 And so, if you conclude that's the
2 right formulation --

3 JUSTICE SOTOMAYOR: All right.

4 MS. ANAND: -- then I think you can
5 still --

6 CHIEF JUSTICE ROBERTS: Thank you.
7 Thank you, counsel.

8 Normally, in the law in these types of
9 cases, there is a distinction between liability
10 and causation. In a car accident, you're
11 speeding and you hit a car and injure the person
12 or allegedly injure the person, the speeding is
13 liability, right? Whether that has resulted in
14 an injury, whether it's caused it is -- is a
15 different question.

16 Now your position merges those two,
17 right? You don't separately look for liability
18 and causation?

19 MS. ANAND: So I think there are two
20 different types of causation we're talking about
21 here. So, for liability, yes, you have to show
22 you acted because of the protected activity.
23 There's still the causal connection between what
24 the employer did and your damages, right?

25 There -- that -- there's a separate

1 causation inquiry that looks more like the
2 speeding example you gave, which is, given that
3 the employer suspended or demoted or discharged,
4 what damages is the employer liable for? So
5 causation comes in again at that step.

6 But I think, in every discrimination
7 case, right -- this is EEOC versus
8 Abercrombie -- the core question is did the
9 employer take the action because of the
10 protected trait or conduct.

11 CHIEF JUSTICE ROBERTS: Well, that's
12 causation. And I think your friend on the other
13 side draws the sharp distinction between
14 liability and causation. And your position is
15 that there is no distinction of that sort?

16 MS. ANAND: So I'm not sure my friend
17 on the other side has an example -- having
18 disclaimed animus, it's not clear what
19 "discriminate" would mean, other than acting on
20 account of or because of.

21 And this is -- again, in EEOC versus
22 Abercrombie, this Court interprets the term
23 "discriminate" and says it's got three parts.
24 You've got to show adverse action, because of,
25 protected trait.

1 Now "because of" in discrimination law
2 is sort of a -- sort of merges causation and
3 intent because the forbidden intent is to act
4 because of the protected trait.

5 CHIEF JUSTICE ROBERTS: Thank you.

6 Justice Thomas?

7 Justice Alito?

8 Justice Sotomayor?

9 Justice Kagan?

10 JUSTICE KAGAN: Ms. Anand, on page 5
11 of your reply brief, you note that the -- this
12 is what you say: The United States offers two
13 additional persuasive observations. And then
14 you describe the United States' position.

15 Two additional persuasive
16 observations. I would have thought that the
17 United States' position is either in conflict or
18 at least in tension with yours, so I was
19 wondering if you could explain to me why you
20 think that's not so or whether you really think
21 it is so.

22 MS. ANAND: So, Your Honor, I think
23 the differences are semantic; that is, both we
24 and the United States agree that all you have to
25 do is run through the burden-shifting framework,

1 step 1; contributing factor, step 2; and then
2 you end up with isolating those employers who
3 engaged in discrimination. Whether it is, as
4 the United States says, because, after step 1,
5 there's a presumption that can be rebutted by
6 the employer or whether it's, as we say,
7 because, after step 2, the employer has not been
8 able to show a lack of retaliatory intent, I'm
9 not sure it matters, right? That's a semantic
10 distinction. The point is you get through both
11 steps and then --

12 JUSTICE KAGAN: So you're saying
13 there's no practical difference, but the sort of
14 analytic way that the argument spools out is
15 different?

16 MS. ANAND: I think that's right, Your
17 Honor, but, again, because the jury's always
18 instructed on both steps and the plaintiff has
19 to win on both steps, I'm not sure it matters.

20 CHIEF JUSTICE ROBERTS: Justice
21 Gorsuch?

22 Justice Kavanaugh?

23 JUSTICE KAVANAUGH: Just on that
24 "tends to affect" language that Justice
25 Sotomayor was asking about, I want to make sure

1 I have your answer. Your answer is that we
2 don't need to address that because the follow-up
3 jury instruction after the question was raised
4 by the jury didn't use "tends to affect," is
5 that --

6 MS. ANAND: That's correct, Your
7 Honor.

8 JUSTICE KAVANAUGH: Okay.

9 MS. ANAND: And, again, the Second
10 Circuit's holding was based on this requirement
11 that there be some retaliatory intent component.
12 So, as long as you don't agree with that, as
13 between the two jury instructions, I'm not sure
14 this Court has to make a -- a decision.

15 JUSTICE KAVANAUGH: And then going
16 back to my original questions about knowledge of
17 the protected activity and temporal proximity,
18 and you said that's basically what it means --
19 that's what you said in your brief -- do jury
20 instructions, however, usually define
21 "contributing factor" in that way?

22 MS. ANAND: So, no, Your Honor, and
23 that's because, in the Whistleblower Protection
24 Act, it's -- it's -- it's illustrative, right?
25 So the "such as," this shall be sufficient.

1 JUSTICE KAVANAUGH: Mm-hmm.

2 MS. ANAND: And so the jury doesn't
3 necessarily need to find those two elements. In
4 virtually every case, that's how it's proven,
5 right? That's the sort of standard way that
6 plaintiffs prove their case. But it's
7 illustrative, not exhaustive.

8 JUSTICE KAVANAUGH: And I think, as
9 the jury here had confusion, lots of juries
10 probably have confusion trying to figure out
11 what "contributing factor" means before they do
12 step 2. Is that not your understanding from
13 reviewing cases of this sort?

14 MS. ANAND: I don't think so, Your
15 Honor. That is, remember, again, you've got to
16 show protected activity, someone reported fraud.
17 You've got to show a retaliatory discharge. In
18 almost every case I've seen, the plaintiff's
19 also showing knowledge by the employer.

20 And so the best way to establish a
21 causal connection between the protected activity
22 and the discharge is to show that it happened
23 pretty close in time; that is, most juries don't
24 believe there's a causal connection if you -- if
25 someone's fired a year or two after they report

1 protected conduct.

2 JUSTICE KAVANAUGH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Barrett?

5 Justice Jackson?

6 JUSTICE JACKSON: Can I just clarify?
7 Way back at the beginning, perhaps in your
8 introduction, you talked about discriminatory
9 intent. And so I'm just trying to understand,
10 do you believe that there is an element of
11 intent at work here and it's being taken care of
12 by the burden-shifting test, or intent is not an
13 element at all in this framework or in this
14 area?

15 MS. ANAND: So we believe that
16 Congress designed the burden-shifting framework
17 to address discriminatory intent. Does that --

18 JUSTICE JACKSON: And so -- but you
19 have to have it in order to be liable for this,
20 but you -- but what -- you've defined it as the
21 employer taking the action because of protected
22 conduct, not some sort of animus or something
23 like that?

24 MS. ANAND: That's exactly right. So,
25 properly understood, discriminatory intent is

1 basically exactly what the second step of the
2 burden-shifting framework shows.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 counsel.

6 Mr. Yang.

7 ORAL ARGUMENT OF ANTHONY A. YANG
8 FOR THE UNITED STATES, AS AMICUS CURIAE,
9 SUPPORTING THE PETITIONER

10 MR. YANG: Mr. Chief Justice, and may
11 it please the Court:

12 The Second Circuit held that SOX
13 requires retaliatory intent, which the court
14 determined to mean prejudice and conscious
15 disfavor of the employee because of
16 whistleblowing. The court also stated that that
17 interpretation was identical to its
18 interpretation requiring proof of discriminatory
19 animus in the railroad safety whistleblowing
20 context. That holding, which exactly tracked
21 Respondents' arguments, is incorrect.

22 First, the term "discriminate against"
23 means differential treatment that injures a
24 protected individual. That is the same meaning
25 as in Title VII, and this Court's Title VII

1 cases makes clear that discrimination does not
2 turn on such motive or animus. All that's
3 required is that the decision to treat
4 differently be made because of the protected
5 activity.

6 Second, Congress directed that SOX
7 claims be adjudicated using AIR21's burdens of
8 proof, which requires proof that the protected
9 activity, not retaliatory intent, was a
10 contributing factor in the employer's decision.
11 That simply requires that the protected activity
12 played a part in producing the decision.

13 JUSTICE THOMAS: Mr. Yang, is there
14 any difference or daylight between your position
15 and Petitioner's position?

16 MR. YANG: I -- I believe there is,
17 and maybe I can help illustrate this with
18 looking at three different options to look at.

19 One is a pure chain-of-causation type
20 of an approach, that if you set a domino in
21 effect and it ends up in a retaliatory decision,
22 even if the decision didn't consider the first
23 domino, that is, the retaliatory intent -- or
24 the -- the -- the whistleblowing, that chain of
25 causation is enough.

1 And I think that goes to the
2 hypothetical, Justice Barrett, that you were
3 asking about.

4 That's not our position. In fact, the
5 -- that was a prior problem, chain of causation,
6 that the ARB reversed course in 2019 in the
7 Thorstenson and Yowell cases that we cite late
8 in our brief. What -- now the approach is is
9 the -- which we think is our -- is our position,
10 which we think is right, is that "contributing
11 factor" requires proof that the protected
12 behavior itself was a factor that played a role,
13 not necessarily determinative, but just a role
14 in producing the decision.

15 That can be proven inferentially
16 through causation -- temporal proximity and
17 knowledge. But what -- the ultimate question
18 that the jury has to find or the fact finder has
19 to find is it had some role.

20 JUSTICE ALITO: In the
21 decisionmaking --

22 MR. YANG: In the --

23 JUSTICE ALITO: -- in the adverse
24 decision?

25 MR. YANG: -- in the decision.

1 JUSTICE ALITO: So that --

2 MR. YANG: And that -- so -- so that
3 is not -- does not occur if the decision is
4 based only, for instance, on the employee's
5 misconduct, even if the misconduct was revealed
6 by a chain of dominos that started with the
7 whistleblowing.

8 JUSTICE ALITO: No, I understand that.
9 But that reads discriminatory intent of some
10 kind into the final factor that the employee
11 plaintiff must prove.

12 MR. YANG: I -- I think that is right.
13 If we only looked at the prohibition, we would
14 probably agree a lot with Respondent here. But
15 Congress has told us how to adjudicate that
16 question. And let me illustrate --

17 JUSTICE ALITO: Well, I -- I -- I --
18 you're losing me. I -- I understand --

19 MR. YANG: I --

20 JUSTICE ALITO: -- I understand
21 Petitioner's position --

22 MR. YANG: Mm-hmm.

23 JUSTICE ALITO: -- that no
24 discriminatory intent need be proven by the
25 employee plaintiff. But what you just said a

1 minute ago was that some species of
2 discriminatory intent --

3 MR. YANG: Mm-hmm.

4 JUSTICE ALITO: -- is inherent in what
5 the employee plaintiff must prove.

6 MR. YANG: Right.

7 JUSTICE ALITO: Right?

8 MR. YANG: Yes, but --

9 JUSTICE ALITO: Okay.

10 MR. YANG: -- the way you prove it is
11 by proving that the protected activity was a
12 contributing factor; that is, it played a role
13 in the decision. So --

14 JUSTICE ALITO: Yeah. Okay.

15 MR. YANG: -- let me -- let me
16 explain. There's been a debate about causation
17 and intent and how the two are separate. But,
18 in this context --

19 JUSTICE ALITO: Well, I just want to
20 understand, what is the difference between that
21 position and what the -- and the position of UBS
22 in the Second Circuit?

23 MR. YANG: Well, like --

24 JUSTICE ALITO: They said that they
25 wanted an instruction that says there has to be

1 discriminatory intent. And you just admitted
2 that there must be some proof of discriminatory
3 intent.

4 MR. YANG: Their position goes
5 further. They call it retaliatory intent. And
6 retaliatory intent, they mean animus. And
7 animus is some kind of desire to harm because
8 of. That is not required.

9 Secondly, I think their position just
10 doesn't work on the text.

11 JUSTICE ALITO: I mean, if you
12 discriminate against somebody because that
13 person engaged in protected activity, are you
14 not retaliating against that person because the
15 person engaged in protected activity?

16 MR. YANG: I -- I don't think you
17 would say that you're retaliating all the time.
18 For instance, in the employers, there are
19 instances where the employer goes: We've got a
20 whistleblower, I want to protect the
21 whistleblower, I'm going to move the
22 whistleblower to a different shift, different
23 responsibilities because I'm concerned that
24 other people might take action.

25 That good-hearted employer is still

1 discriminating on the basis of the
2 whistleblowing. So there --

3 JUSTICE JACKSON: Mr. Yang, can I --

4 MR. YANG: And also, there's a
5 distinction --

6 JUSTICE JACKSON: -- can I just -- is
7 the response to Justice Alito -- is the key to
8 it the definition of "retaliatory intent" that
9 Petitioner just put forward?

10 In other words, I understood her
11 presentation and the -- that argument to be that
12 discriminatory intent is taking an action
13 because of the protected conduct.

14 So, if that is the definition, then
15 haven't we solved the problem of there seeming
16 to be discord in the way that Justice Alito
17 points out?

18 MR. YANG: I'm not -- I think that
19 would be discriminatory intent. Retaliatory
20 intent would be --

21 JUSTICE JACKSON: Yes, discriminatory
22 intent.

23 MR. YANG: -- would be some -- yes, we
24 agree -- we definitely agree with that, but let
25 -- let me explain the burden-shifting because I

1 think this is relevant.

2 JUSTICE JACKSON: Okay.

3 MR. YANG: In this context, intent and
4 causation, although they often are different
5 concepts, they merge.

6 The intent underlying the decision,
7 that is, the reasons for the decision and what
8 caused the decision to be made, is effectively
9 the same because the decisionmaker's reasons are
10 the cause for the decision.

11 That's why, when you look at the
12 burden-shifting scheme, it asks did the
13 protected behavior play a role in and produce,
14 which is contributing factor, the decision.
15 It's a real low bar and you can prove it
16 circumstantially.

17 If so, even if it wasn't the but-for
18 cause of the decision, it is enough intent to be
19 shown here that you're treating them differently
20 that you go to the forbidden offense --

21 JUSTICE GORSUCH: Counsel?

22 MR. YANG: -- which makes sense
23 because they have -- the employer has more
24 information about the decision.

25 JUSTICE GORSUCH: Counsel?

1 MR. YANG: Yes.

2 JUSTICE GORSUCH: The same question I
3 asked Petitioner.

4 MR. YANG: Mm-hmm.

5 JUSTICE GORSUCH: What if we simply
6 said, you're correct that retaliation as a
7 further motive, we talk about motives, you
8 talked about animus, it really is just a further
9 intention beyond the intention to discriminate
10 is not a thing under this statute. And to the
11 extent the Second Circuit thought it was, it's
12 mistaken. The question is whether there was
13 discrimination, period.

14 MR. YANG: I -- I think the Court
15 could issue that decision. I -- I think it
16 would leave a lot left to be decided.

17 JUSTICE GORSUCH: Oh, my goodness,
18 yes.

19 (Laughter.)

20 MR. YANG: But -- but -- but I -- but
21 I also think it doesn't -- and I --

22 JUSTICE GORSUCH: That's sometimes a
23 bug, and sometimes it's a virtue.

24 MR. YANG: Exactly. But, here, I
25 don't think it's that hard, and let me just make

1 another run at the distinction between intent
2 and causation because I --

3 JUSTICE GORSUCH: Before you do,
4 though --

5 MR. YANG: Yeah.

6 JUSTICE GORSUCH: -- you -- you agree
7 that would be an acceptable place to stop?

8 MR. YANG: Oh, I -- I'm certain, if
9 the Court wants to do that, that is an
10 acceptable place. We're not going to fight you
11 on that.

12 JUSTICE GORSUCH: All right. Have at
13 it.

14 MR. YANG: But I -- I think, though,
15 that Respondents' position just doesn't work on
16 the text. Retaliatory intent has to be a
17 response to the whistleblowing behavior just by
18 nature of the concept of retaliation.

19 So, if the adverse action is taken
20 with retaliatory intent, which they say has to
21 be shown, then the whistleblowing will always be
22 a contributing factor. And if that's true,
23 you've -- you've made the -- made the
24 contributing factor inquiry superfluous, and
25 that's just not right.

1 Congress sought in the contributing
2 factor standard -- and this goes all the way
3 back to the WPA and Mt. Healthy. If you look at
4 the way that the Court has analyzed these
5 employment decisions, there's been a
6 burden-shifting scheme. Congress tweaked it to
7 lower the standard to a contributing factor, and
8 it did so because intent and causation here are
9 really --

10 JUSTICE BARRETT: Counsel --

11 MR. YANG: -- the same thing.

12 JUSTICE BARRETT: -- counsel, would it
13 be enough at the first stage to show temporal
14 proximity to the adverse employment decision?

15 MR. YANG: It would be enough for a
16 decisionmaker to find -- make a finding.
17 There's a distinction between the proof --

18 JUSTICE BARRETT: Not enough for
19 liability. I just mean, would that be
20 sufficient to carry the employee's burden? That
21 -- that's what Petitioner says.

22 MR. YANG: It -- it -- it -- it might
23 be but not necessarily.

24 JUSTICE KAVANAUGH: Plus -- plus
25 knowledge, right?

1 MR. YANG: Plus knowledge. There's a
2 difference between the evidence that you use to
3 prove the fact that you have to prove, and I
4 think your question goes to the evidence. You
5 could -- you could infer --

6 JUSTICE BARRETT: Sure, because
7 knowledge is a separate element. I'm only
8 talking -- knowledge and the fact that he
9 engaged in public protected activity, all of
10 that is separate.

11 MR. YANG: And --

12 JUSTICE BARRETT: But, once you get to
13 that shifting --

14 MR. YANG: Mm-hmm. What the -- what
15 the government's position is is what you have to
16 -- what the fact finder has to find is that the
17 protected activity played a part in producing
18 the decision, right?

19 JUSTICE BARRETT: Right.

20 MR. YANG: That's what the fact finder
21 has to find.

22 JUSTICE BARRETT: Right.

23 MR. YANG: The way you prove that, you
24 can prove that and allow an inference to be made
25 of the ultimate finding by saying knowledge and

1 temporal proximity. And, frankly, that's no
2 different than when, like, true intent is
3 involved because, if someone's factual theory in
4 a Title VII case is this person hates me because
5 I'm of this protected trait, and you show that
6 you have that protected trait, and you show
7 that, you know, that decision and the adverse --
8 the adverse action, like, are in close temporal
9 proximity, knowledge, and -- that's a way of
10 proving intent. It's not unique to this
11 contributing factor context. It's just true
12 generally.

13 JUSTICE BARRETT: So, when you say not
14 necessarily, maybe it could be the difference
15 of, you know, how long the temporal -- or how
16 great the temporal proximity is? Like, hey,
17 listen, if it was within two weeks of
18 discovering about the protected activity versus
19 six months?

20 MR. YANG: And other things. The --
21 the fact finder has to look at all the evidence
22 when making this determination of circumstantial
23 -- contributing factor.

24 So the fact finder may say, oh, you
25 know what, there's really good documentation of

1 your misbehavior and all these other things, and
2 if the fact finder can find that the misbehavior
3 was the only reason and that there was no
4 contributing --

5 JUSTICE BARRETT: And can consider
6 that at step 1?

7 MR. YANG: At step 1. That's, I
8 think, a big difference between our position and
9 Petitioner's.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas?

13 Justice Alito?

14 JUSTICE ALITO: How do you root your
15 interpretation in the language of the statute?

16 So was a contributing factor in the
17 unfavorable personnel action alleged in the
18 complaint? Does unfavorable personnel action
19 alleged in the complaint mean simply in a
20 discharge case discharge, or does it mean
21 discriminatory discharge?

22 MR. YANG: I -- I'm not sure it
23 ultimately makes a difference because the first
24 part of the sentence, that is, the -- the
25 protected activity has to be a contributing

1 factor in the employment decision, is -- is --
2 goes to the question of discriminatory
3 treatment, right? This is the discussion that
4 we've had now about intent and causation.

5 I -- I will say that the "as alleged
6 in the complaint" does, if -- this is on page, I
7 believe, 13A of our brief -- but, if you look at
8 what has to be alleged in the complaint, it is
9 discharge or other discrimination by the person
10 in violation of the provision.

11 That -- so you'd also have to show
12 that that person is, for instance, a securities
13 -- a company with securities that are publicly
14 traded. That's part of the -- the retaliatory
15 -- or the adverse action inquiry. So --

16 JUSTICE ALITO: I -- I -- I -- I don't
17 really understand the answer, but --

18 MR. YANG: Ultimately, it is the --

19 JUSTICE ALITO: The employee plaintiff
20 under this scheme has to show that the protected
21 behavior, any behavior described in paragraphs 1
22 through 4, was a contributing factor in the
23 unfavorable personnel action alleged in the
24 complaint.

25 MR. YANG: Mm-hmm.

1 JUSTICE ALITO: So "unfavorable
2 personnel action alleged in the complaint" could
3 be read to mean the discharge with no intent
4 requirement, or it could be read to mean
5 discriminatory discharge because that's what is
6 prohibited by the statute.

7 Doesn't it have to be one or the
8 other? And what is your position on which of --

9 MR. YANG: I think it's more the -- I
10 think it's more the latter.

11 JUSTICE ALITO: It's the latter?

12 MR. YANG: Sorry, the former. It's
13 the discharge, because discriminatory, all that
14 means -- the discriminatory means differential
15 treatment because of the protected activity, and
16 that's what this sentence is getting to.

17 JUSTICE ALITO: Well, if that's how
18 you read it, then I don't understand your answer
19 about how discriminatory intent figures in this
20 at all. It seems to me then you are taking
21 exactly the same petition -- position as the
22 Petitioner. But I must be missing something.

23 MR. YANG: Hmm. I think there's some
24 daylight between us, and I think the reason is
25 is that we think that when you ask whether it

1 was a contributing factor in the unfavorable
2 personnel action, the thing that has to be a
3 contributing factor has to be the protected
4 behavior itself, not some chain of events that
5 gets to the ultimate outcome.

6 JUSTICE ALITO: Thank you.

7 CHIEF JUSTICE ROBERTS: Justice
8 Sotomayor?

9 JUSTICE SOTOMAYOR: I may be confused
10 because I don't know that I understood the other
11 side to be saying anything different.

12 MR. YANG: I think that's probably --
13 I think that's --

14 JUSTICE SOTOMAYOR: If that's how you
15 --

16 MR. YANG: -- probably best addressed
17 to the other side then because I --

18 JUSTICE SOTOMAYOR: All right. They
19 can await it.

20 MR. YANG: -- I -- I -- I think this
21 case is a little confusing. I -- I do think
22 that if you take a look at the three options --
23 chain of causation, our position, and then
24 retaliatory intent, which, again, makes the
25 contributing factor inquiry superfluous -- I

1 think that helps to clarify, and you could ask
2 the parties what their views are on those three.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 JUSTICE KAGAN: Okay, Ms. Anand, when
5 you get up, I thought that you were saying the
6 exact same thing, but you'll tell me if that's
7 incorrect.

8 Let me ask you, Mr. -- Mr. Yang, when
9 -- when Justice Gorsuch gave his relatively
10 bare-bones disposition and you said, well, that
11 leaves a lot on the table, you know, I wouldn't
12 say you couldn't do it. Of course, you can do
13 it. Happy if you're overturning the Second
14 Circuit, but it leaves a lot on the table.

15 Could you tell me what it leaves on
16 the table and why you think -- whether you think
17 there are any reasons not to leave those things
18 on the table?

19 MR. YANG: Well, I think maybe my
20 exchange with Justice Alito may reflect that. I
21 mean, it's one thing to say that retaliatory
22 intent's not required because, you know,
23 retaliation is not required, is not the same,
24 you know, you don't have to take this act to
25 injure someone else. That's one thing.

1 And it -- and it solves the way that
2 the Second Circuit decided the case. But it
3 does not answer, well, does -- is discriminatory
4 intent required? And what does that mean? And
5 what -- you know, how do you prove that? What
6 does that -- how does that relate to the
7 contributing factor burden-shifting scheme?

8 And so I think this -- that might
9 forestall another need to address this issue,
10 but it's pretty minimalist. I don't want to
11 fight you if that's where the Court sits. I
12 don't want to fight you on that, but I think
13 what that may mean is, at some point in the
14 future, we have to --

15 JUSTICE KAGAN: Have this conversation
16 all over again?

17 MR. YANG: Maybe.

18 CHIEF JUSTICE ROBERTS: Justice
19 Gorsuch?

20 JUSTICE GORSUCH: I don't think
21 anybody wants to have this conversation all over
22 again.

23 (Laughter.)

24 MR. YANG: I certainly don't.

25 JUSTICE GORSUCH: However, it -- this

1 is our first look at this statute, and that's
2 normally a -- a reason to be careful. And I
3 guess I'm just not sure what exactly you think
4 we would be leaving seriously awry if we were to
5 take this narrow approach that Justice Kagan and
6 I have been asking about. What would be -- what
7 would be the danger of taking that approach?
8 I'd like to understand it if there is one.

9 MR. YANG: Well, the danger, I think,
10 is simply that there's no -- you're not going to
11 err in -- in going that route. The question is
12 what you're leaving --

13 JUSTICE GORSUCH: Well, that's good.
14 That's a good day. That's a good start.

15 MR. YANG: Well, the -- the question
16 is what you're leaving on the table, right,
17 because --

18 JUSTICE GORSUCH: What -- yeah. What
19 is it that we're leaving on the table that you
20 think we really need to clean up today?

21 MR. YANG: The -- what you propose, I
22 believe, is simply interpreting 1514A(a), right?
23 Let's ignore the burden-shifting and just look
24 at what this prohibition means, right, and it
25 doesn't mean retaliatory intent.

1 JUSTICE GORSUCH: That was the QP on
2 which we granted the case.

3 MR. YANG: Well, that is -- that --

4 JUSTICE GORSUCH: That's true, right?

5 MR. YANG: It is certainly true, but
6 the whole -- like, the way this -- these cases
7 are adjudicated is through the burden-shifting
8 scheme. That's just as a practical matter how
9 these cases are adjudicated. So -- and, again,
10 I don't want to fight you, Justice Gorsuch, on
11 this. I'm just saying --

12 JUSTICE GORSUCH: Well, what do you
13 want me to say about the burden-shifting regime
14 that's going to be intelligent and useful and
15 surely correct?

16 MR. YANG: Well, I think what you
17 could say is that the contributing factor
18 requires that the protected behavior, not
19 intent, right, because it's a means of inferring
20 intent, the protected behavior was a
21 contributing factor, which means it played a
22 role in -- in -- in producing the decision,
23 right, and that that's all that you need to
24 show, and then you -- the burden shifts to the
25 -- the employer to -- to make out its

1 affirmative defense.

2 I think that would go a long way in
3 solving some of the issues that come up. You
4 could also, if you want to, say that's not a
5 chain-of-causation type of -- of inquiry, but,
6 you know, again, I don't want to step on the --
7 the Court's prerogatives about how a right's
8 explained here.

9 JUSTICE GORSUCH: No, no, I appreciate
10 that. Thank you very much.

11 CHIEF JUSTICE ROBERTS: Justice
12 Kavanaugh?

13 JUSTICE KAVANAUGH: Well, a follow-up
14 on that. The reason you think retaliatory
15 intent is not part of the employee's burden, as
16 I understand it, is in part because, as Justice
17 Gorsuch says, it's not there, but that's
18 confirmed or underscored by the fact that it's
19 step 2 of the burden-shifting framework that
20 gets at retaliatory intent. Is that not --

21 MR. YANG: I think that's true, that
22 the step 2 --

23 JUSTICE KAVANAUGH: Or is that not
24 right?

25 MR. YANG: No, no, no. Step 2 can --

1 can address two types of circumstances. One,
2 the employer can say: Look, taking our decision
3 as a given, like, we would -- like, if you look
4 at the decision, the contributing -- the
5 protected activity was so remote, like, we would
6 have reached the decision the same way.

7 But it also allows employers to do
8 something else, which is the employers can say:
9 Yeah, we had a bad actor supervisor. The guy
10 fired the employee because of the protected
11 activity. He hates whistleblowers. But, by the
12 way, we also had a RIF going on that was
13 completely independent. We would have gotten to
14 the same way -- the same result.

15 So there's two things -- and the
16 employer can prove that too. So there's two --

17 JUSTICE KAVANAUGH: So the usual case
18 -- correct me if I'm wrong -- is going to be
19 where the person made a report of wrongdoing,
20 protected activity, and the employer says -- and
21 the person gets fired, and the employer says:
22 We fired them because they were a poor
23 performer, because we're doing a reduction in
24 force, because they were embezzling, and not
25 because of the protected activity. And then the

1 jury has to weigh is the employer telling the
2 truth or not, which is exactly what the closing
3 arguments in this case were?

4 MR. YANG: I think that's exactly --
5 that -- that, I think, is the typical case.

6 JUSTICE KAVANAUGH: Okay.

7 CHIEF JUSTICE ROBERTS: Justice
8 Barrett?

9 JUSTICE BARRETT: How does your
10 articulation of the contributing factor test
11 rule out the chain of causation? You said have
12 some effect in producing the decision.

13 MR. YANG: Yeah. And I think -- I
14 think you actually have to say -- look also at
15 the text and say, when -- when Congress talked
16 about a contributing factor in the personnel
17 action, they're talking about the decision to
18 take that action.

19 JUSTICE BARRETT: Right.

20 MR. YANG: And that requires that they
21 actually consider the protected behavior, not
22 something that was caused by the protected
23 behavior in a long chain that could be quite
24 tenuous.

25 JUSTICE BARRETT: Okay. And just one

1 other question that goes to Justice Gorsuch's
2 point about how much we need to decide.

3 Do you think that there's a risk that
4 if we only say, listen, there's no extra element
5 of retaliatory intent required, and we say
6 nothing more, that it would leave open the
7 possibility that lower courts would say: Oh,
8 okay, I guess that just means, you know, chain
9 of causation? Is that part of your concern,
10 like, that it would send the --

11 MR. YANG: I don't know that the
12 courts are inclined to go that way at this point
13 now that the ARB has -- has corrected its
14 position since 2019. You never know. You know,
15 I think, if you look at the excellent briefing
16 in this case on both sides, including the amici,
17 I think there are a lot of questions to be
18 raised. Some of them are more central than the
19 others.

20 And so I -- you know, again, I would
21 leave the Court to decide what's -- what's best
22 to do in this case.

23 CHIEF JUSTICE ROBERTS: Justice
24 Jackson?

25 JUSTICE JACKSON: So isn't the real

1 risk of not going farther that it leaves open
2 the possibility that courts will think there is
3 still something more to do than the
4 burden-shifting test?

5 And I think the reason why that's kind
6 of happening is because, as I read the
7 Respondents' brief, they have separated
8 causation from intent, and they suggest that the
9 burden-shifting goes to something called
10 causation in this world and that that doesn't
11 cover intent, which is why, whether you have --
12 whether the level of that intent is retaliatory
13 animus or something else, I think, if we just
14 eliminate retaliatory -- retaliatory animus,
15 there's still the question of, is there this
16 intent element outside of the burden-shifting?

17 And my understanding is your argument
18 and Petitioner's argument is no, that the
19 burden-shifting takes care of whatever intent,
20 discriminatory intent, exists in this world, and
21 so it would be a real benefit to make that
22 clear, I think.

23 MR. YANG: I think the Court could
24 definitely conclude that. I think, if the Court
25 doesn't address the role of the burden-shifting

1 scheme, you likely will leave open for
2 litigation a cogent argument made by the other
3 side which ultimately doesn't work because I
4 think --

5 JUSTICE JACKSON: Well, let me -- let
6 me also give you the opportunity to answer that
7 question directly --

8 MR. YANG: Yeah. Yeah.

9 JUSTICE JACKSON: -- because what I'm
10 struggling with is trying to understand how
11 causation and intent are different in this
12 world. When you're talking about the reason, I
13 guess, for the person's having been fired,
14 whether you say it as, you know, employer, what
15 caused you to fire this person, that's
16 causation, or, employer, why did you follow --
17 fire this person, that's intent, it seems to me
18 they both get at the same thing.

19 So can you respond? You -- you've
20 said a couple times they're different, and maybe
21 you can help us understand why that's the case.

22 MR. YANG: Oh, I don't think I said
23 generally these concepts --

24 JUSTICE JACKSON: Oh, they're --
25 they're not different.

1 MR. YANG: They're not different --

2 JUSTICE JACKSON: I'm sorry, they're
3 not different. Yes.

4 MR. YANG: -- and they are the same.

5 JUSTICE JACKSON: Yes.

6 MR. YANG: And I -- you know, I --
7 again, it's the intent underlying a decision are
8 the reasons for the decision, and when you ask
9 what caused the decision to be made, it is the
10 same thing because the decisionmaker's reasons
11 are what caused the decision to be made.

12 So I think, in this particular
13 context, the -- and I think this is reflected --
14 if you go back to Mt. Healthy, right, it talks
15 about a rule of causation, but it's all talk --
16 it's talking about the decision, right? It's
17 all over -- page 3 of our brief just goes
18 through, and you -- you can see how many times
19 the word "decision" comes in. That was always
20 the case.

21 When the -- the WPA language was
22 adopted, Attorney General Thornburgh said, look,
23 this "contributing factor" language says you
24 have to contribute to the decision. And when
25 the -- the MSPB's regulations were issued, they

1 say it has to affect the decision.

2 So this is an unusual context where
3 intent and causation don't have a meaningful
4 difference. And I think, frankly, the Court's
5 decisions in the Title VII context reflect that
6 too.

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Scalia.

11 ORAL ARGUMENT OF EUGENE SCALIA
12 ON BEHALF OF THE RESPONDENTS

13 MR. SCALIA: Thank you, Mr. Chief
14 Justice, and may it please the Court:

15 In Sarbanes-Oxley, Congress employed a
16 phrase, "discriminate because of," that has long
17 been recognized to require a plaintiff to show
18 discriminatory intent. It is this transplanted
19 phrase with its rich soil that decides this
20 case.

21 Congress also incorporated in
22 Sarbanes-Oxley the contributing-factor standard
23 of the AIR21 statute to address a distinct issue
24 that this Court and Congress occasionally
25 grapple with, and that is the causation standard

1 in a discrimination case.

2 But just as Congress did not eliminate
3 an intent requirement in Title VII when it
4 adopted the reduced motivating factor causation
5 test in Title VII, so in Sarbanes-Oxley it did
6 not eliminate an intent requirement by
7 incorporating the reduced contributing-factor
8 causation test of AIR21.

9 Put differently, the Petitioner errs
10 by overreading the burdens-of-proof provision of
11 AIR21. That provision addresses a distinct
12 element, causation. It does not purport to
13 address all the elements a plaintiff must
14 establish, not that she's a covered employee,
15 not that her employer is a covered employer, and
16 not that she was separated with retaliatory
17 intent.

18 Finally, Petitioner and the government
19 err in relying on the Whistleblower Protection
20 Act, or the WPA. That law lacks the
21 "discriminate because of" language which frames
22 this case, and, indeed, Congress removed the
23 phrase that the action had to be taken as a
24 reprisal for protected activity.

25 For these reasons and others,

1 Petition -- Petitioner cannot overcome the
2 strong presumption that discriminatory intent is
3 plaintiff's burden in a Sarbanes-Oxley
4 retaliation case.

5 I welcome the Court's questions.

6 JUSTICE THOMAS: Mr. Scalia, the
7 Petitioner indicated earlier that you could use
8 a motivating factor to prove -- demonstrate
9 an -- an unlawful employment practice under
10 Title VII.

11 And contributing, I think her analogy
12 was that the contributing factor here -- the
13 contributing-factor test here is similar to the
14 motivating factor under Title VII.

15 How would you respond to that?

16 MR. SCALIA: Justice Thomas, I agree
17 that the Title VII framework is a framework very
18 similar to the framework that we have with
19 Sarbanes-Oxley in AIR21, a much closer analogy,
20 by the way, than the Whistleblower Protection
21 Act, which we heard relatively about today.

22 JUSTICE THOMAS: Mm-hmm.

23 MR. SCALIA: But, as I said, there was
24 a intent requirement to Title VII before
25 motivating factor was added, and there remains

1 one now, and it does not arise from motivating
2 factor.

3 What this Court said in Nassar is that
4 the motivating factor test does not add a
5 substantive bar. Rather, it defines the
6 causation standard for a violation defined
7 elsewhere. Same thing here.

8 The violation is described in
9 Sarbanes-Oxley. Sarbanes-Oxley looks over to
10 AIR21 solely for causation. There's no way that
11 that AIR21 provision could carry the weight
12 Petitioner wants to give it. As I mentioned in
13 my opening, it leaves out elements of a
14 Sarbanes-Oxley case.

15 JUSTICE JACKSON: Where -- where in
16 the statute does it say causation? I'm sorry,
17 you say it looks over to pick up or reference
18 causation, and I guess I'm trying to understand
19 why you're saying that, because it doesn't seem
20 to suggest or say that that's what it's doing.

21 MR. SCALIA: Justice Jackson, I think
22 it's widely recognized by the practicing bar
23 that this is a test of the causal role that's
24 played. I believe that is the Petitioner's
25 position as well, but it's a reduced causal test

1 just as this Court --

2 JUSTICE JACKSON: Understood. But
3 how -- how is that different than intent? Tell
4 me -- tell me what is different about a
5 determination that the adverse action was caused
6 by the protected activity and that the employer
7 -- you know, the adverse action -- that the
8 protected activity was a contributing factor or
9 was intended because of the -- because of the
10 protected activity?

11 MR. SCALIA: Justice Jackson, this
12 Court's cases recognize that the discriminatory
13 intent required under Title VII and other
14 similar laws and causation are actually
15 importantly distinct.

16 Now I would concede there are times
17 when the evidence used to establish causation
18 will also be evidence used to show intent as
19 well, but take, for example, this Court's
20 decision in *Babb v. Wilkie* a few terms ago.

21 This Court held that there could be
22 discriminatory intent and liability for it under
23 a special provision of the age discrimination
24 law applicable to federal workers with no
25 causation.

1 The Court gave an example of a manager
2 that has to make a promotion decision, rates one
3 worker a 90, rates another worker an 85, and
4 then, because he doesn't like older people,
5 rates the younger worker down to an 80.

6 JUSTICE JACKSON: But that's animus.
7 We're not -- I thought -- are you saying that
8 animus has to be a part of this? Is that what
9 you mean by discriminatory intent?

10 MR. SCALIA: No, we are not saying
11 that animus is necessary. But we are saying
12 that differential treatment for intentional
13 reasons. The way this Court defined it in Staub
14 was to intend for discriminatory reasons that
15 the adverse action occurred. This Court called
16 that the scienter that's required.

17 So, in the Wilkie -- in the Babb v.
18 Wilkie case, this Court said there was
19 discriminatory intent, even though there wasn't
20 causation, because the older worker already had
21 a lower score.

22 JUSTICE BARRETT: So is that what you
23 would contemplate -- I'm just wondering what
24 kind of proof you would use to show intent that
25 would be different than the causation

1 burden-shifting framework.

2 You would say that the employee has to
3 show that the employer harbored some sort of
4 discriminatory intent with what evidence? Like,
5 how do you show it?

6 MR. SCALIA: Sometimes it will be the
7 same evidence that's used to show cause, but
8 other times there's evidence such as I made a
9 complaint and my boss had a very angry reaction,
10 or I made a complaint and immediately afterward
11 there was a lot of hustling about among the
12 managers and I could tell that they were angry.
13 Or my manager immediately began treating me
14 differently.

15 There often is additional evidence of
16 intent. And let me -- again, a question that's
17 been presented here is, how much would we
18 disturb the waters if we were to sort of glom
19 together causation and intent? My answer is
20 immensely.

21 Take this Court's --

22 JUSTICE KAGAN: Well, I -- I -- I
23 don't understand that, Mr. Scalia, because
24 everything that you just said, that seems to me
25 exactly the question that the burden-shifting

1 mechanism is all about.

2 The employee comes in and says -- and
3 says all of those things, I made a complaint and
4 then terrible things started happening to me.

5 And the employer says, no, not at all,
6 I mean, that these terrible things had nothing
7 to do with the complaint. It was because you
8 were a terrible worker or because you embezzled
9 money.

10 So all of that is exactly what the
11 burden-shifting mechanism is designed to suss
12 out, and that's exactly the way you just
13 explained what your intent requirement is. So,
14 at that point, I guess I just don't see what one
15 is doing differently from the other.

16 MR. SCALIA: And, again, there often
17 can be overlap in the actual evidence required,
18 but in terms of the impact for the case, it's
19 very important.

20 Take, again, the Staub case. This was
21 the "cat's paw" case. You -- you had
22 retaliatory intent on the part of the immediate
23 managers. It had some sort of remote causal
24 role, but this Court very carefully looked both
25 at intent and at causation as each -- as

1 elements that had to be satisfied. That is
2 fundamental to discrimination law.

3 And, by the way, I want to --

4 JUSTICE KAGAN: Well, that's just
5 saying that even with this intent to
6 discriminate, you might fall below the threshold
7 at which the intent matters, right? And then
8 the question is, you know, how much, what is a
9 contributing factor, and how is that different
10 from a motivating factor, and, you know, are you
11 saying that you took the decision exclusively
12 because of the -- the prohibited reason or
13 partly because of the prohibited reason, and, if
14 partly, how much because of the prohibited
15 reason?

16 So those questions would have to be
17 answered, but -- but it's still the exact same
18 question. There's no here's where we have
19 intent and here's where we have causation.

20 MR. SCALIA: Your Honor, where I begin
21 is that the "discriminate because of" language
22 is language this Court has recognized from time
23 immemorial requires discriminatory intent, an
24 intent element, and then causation must be
25 established too.

1 The Petitioner has argued -- she
2 began, Petitioner's counsel, by saying that this
3 was -- how to handle claims that somebody acted
4 with retaliatory intent. Her argument is that
5 gets determined at the second step. But that's
6 simply not true.

7 She has admitted in her brief that
8 retaliatory intent actually doesn't necessarily
9 get discerned at the second step because an
10 employer that did have retaliatory intent but
11 nonetheless would have separated the person
12 anyway wins. That's the old Price Waterhouse
13 case.

14 On the other hand, an employer that
15 lacked retaliatory intent can still lose at that
16 second step. So, Justice Kagan --

17 JUSTICE KAVANAUGH: How?

18 MR. SCALIA: Many, many different
19 ways. First of all, the Halliburton case is a
20 Fifth Circuit case, an old Fifth Circuit case,
21 that Plaintiff cited as establishing the circuit
22 split here. The protected activity there was
23 the employee complained within the company. He
24 then explained to the SEC. The SEC told the
25 general counsel, we're going to be conducting an

1 investigation, at which point the general
2 counsel, as a general counsel does, sent out a
3 notice to employees to retain documents.

4 What he said was the SEC is
5 investigating Mr. Menendez's allegations. This
6 is the employee. Mr. Menendez said: That hold
7 notice was retaliatory action because it made my
8 colleagues angry that I had said they were
9 violating the law. And so that was the
10 protected activity.

11 If that employer is forced to prove
12 without any prior showing of intent that it
13 would have let that employ -- that it would have
14 sent out the hold notice anyway, that's
15 impossible. It sent out the hold notice for
16 what were quite possibly very good-faith reasons
17 because the complaint was made.

18 Or another example, these things
19 happen: An employee, lawyer at a company,
20 complains to the SEC, and woven throughout his
21 complaint is privileged, confidential
22 information. The employer says: I do not want
23 to be represented by a lawyer who discloses my
24 privileged information to the SEC. I'm going to
25 have to let you go.

1 Those things -- that employer is not
2 going to be able to prove that he would have
3 done the same thing absent the complaint to the
4 SEC, because it was the complaint to the SEC
5 that disclosed privileged information, which for
6 innocent, good-faith, non-retaliatory reasons
7 led to the separation.

8 And then, finally, because this is
9 important too, there's a long series of cases
10 now under the FRSA, the Federal Railroad Safety
11 Act, where plaintiff makes a complaint, there's
12 an investigation, it's found that actually the
13 plaintiff engaged in -- in misconduct at some
14 point, and he's let go.

15 And those cases were being forced to
16 go to the second step. Employers sometimes
17 weren't able to meet it. And the courts
18 eventually realized this doesn't work, this
19 chain of causation, and they introduced an
20 intent element to discipline it.

21 Now --

22 JUSTICE BARRETT: But, Mr. Scalia --

23 CHIEF JUSTICE ROBERTS: Counsel --

24 JUSTICE BARRETT: -- why wouldn't the
25 government's test -- in your example about the

1 revealing privilege -- privileged information,
2 why wouldn't the government's test take care of
3 that? Because the government said: No, chain
4 of causation isn't enough; it has be a
5 contributing factor to the decision. And,
6 there, the decision, you know, the contributing
7 factor, was the revelation of privileged
8 material, not the complaint itself.

9 MR. SCALIA: Justice Barrett, that
10 sounds like intent to me. That sounds like
11 you're getting inside the heads of the
12 decisionmakers --

13 JUSTICE BARRETT: But at the burden --

14 MR. SCALIA: -- and asking --

15 JUSTICE BARRETT: But at the
16 burden-shifting stage, right, not independently?
17 So is it -- I mean, maybe I'm just confused
18 about your position. I thought your position
19 was that there was an independent element of
20 intent that was separate and apart from the
21 burden-shifting framework? Is that right?

22 MR. SCALIA: I'm saying that one thing
23 that needs to be established in order for the
24 burden to shift is that there was retaliatory
25 intent. The -- and in response to, Justice

1 Alito, I believe, a question you were asking,
2 AIR21 refers to whether the protected activity
3 was a contributing factor to the unfavorable
4 personnel action alleged in the complaint.

5 If you go to Sarbanes-Oxley, the
6 unfavorable personal -- personnel action alleged
7 in the complaint is, under Section 1, taken with
8 discrimination.

9 CHIEF JUSTICE ROBERTS: Counsel --

10 MR. SCALIA: So the contributing
11 factor has to be contributing to an action that
12 has that discriminatory intent --

13 JUSTICE GORSUCH: Mr. Scalia --

14 MR. SCALIA: -- as part of it.

15 JUSTICE GORSUCH: --if I -- let me --
16 let me see if I understand it, and -- and tell
17 me where I'm going wrong.

18 As you read the statute, there has to
19 be mens rea and causation, causation established
20 through this burden-shifting mechanism only, and
21 you read that because "discriminate because of"
22 has traditionally had a mens rea requirement in
23 it and Title VII and a whole bunch of other
24 statutes.

25 The other side says, in this

1 particular new, novel regime, those two are
2 collapsed into the causation requirement.

3 So far so good?

4 MR. SCALIA: I think that's
5 accurate --

6 JUSTICE GORSUCH: Okay.

7 MR. SCALIA: -- Justice Gorsuch.

8 JUSTICE GORSUCH: The one thing we can
9 maybe all agree on, though, is that whatever
10 mens rea requirement does not -- is an intent to
11 discriminate and not with a further motive or
12 further intention of retaliation. One could
13 intend to discriminate for benign reasons, for
14 example, and -- in the Title VII context, what
15 some people think of as benign reasons. I -- I
16 want to equalize pay for men and women as a
17 whole, one example the Court has used.

18 Can we agree on that much, that the
19 further intent to retaliate or motive is not
20 part of the statute?

21 MR. SCALIA: Unfortunately, no. I
22 think the two --

23 JUSTICE GORSUCH: No? No? Oh, we
24 were so close.

25 (Laughter.)

1 MR. SCALIA: Two intents are --

2 JUSTICE GORSUCH: We had two out of
3 three.

4 MR. SCALIA: Two intents are required,
5 Justice Gorsuch. First, to take the action.
6 Now that's the -- the base level of intent,
7 that's required even in a disparate impact case,
8 right? Even in disparate impact, which we say
9 doesn't require intent, requires intent not to
10 hire the employee, not to promote the employee.

11 What Staub said is there needs to be
12 intent for discriminatory reasons that the
13 adverse action occurred. So there needs to be
14 intent to take the action but to do it for a
15 reason the law prohibits.

16 And, Justice Gorsuch, I think to
17 substitute the -- the plaintiff needs to show
18 discriminatory intent for a requirement that the
19 plaintiff show retaliatory intent would just
20 engender confusion in a -- what everybody
21 recognizes to be a retaliation case.

22 In -- in Lawson, which was this
23 Court's prior Sarbanes-Oxley whistleblower
24 decision, the word "retaliate" was used 50
25 times. So --

1 JUSTICE GORSUCH: Yeah, but if I -- if
2 I intend to treat you differently -- that's my
3 mens rea, your -- your -- your mens rea --
4 because of a protected trait, why isn't that
5 retaliation?

6 MR. SCALIA: And the best instruction
7 to elicit that is one which refers to
8 retaliatory intent under a statute which is
9 intended to target --

10 JUSTICE GORSUCH: Why wouldn't a
11 statute --

12 MR. SCALIA: -- retaliatory intent.

13 JUSTICE GORSUCH: Why wouldn't -- why
14 wouldn't an instruction saying, if you intend to
15 treat somebody differently because of a
16 protected trait, you are liable? What would --
17 what issue would you have with an instruction
18 like that?

19 MR. SCALIA: I think the instruction
20 needs to make clear that it was intended to do
21 it for a reason that the law regards as improper
22 because --

23 JUSTICE GORSUCH: Yeah. A whistle --

24 MR. SCALIA: -- here, because an
25 adverse reaction to --

1 JUSTICE GORSUCH: To whistleblowing.

2 MR. SCALIA: -- to -- to the
3 whistleblowing.

4 JUSTICE GORSUCH: I intend to treat
5 you differently because of your whistleblowing
6 activity, period. No word -- "retaliate"
7 doesn't appear in that sentence. What's wrong
8 with that -- what's wrong with that instruction?
9 How would you reverse me if I gave that
10 instruction?

11 MR. SCALIA: Obviously, it wasn't an
12 instruction that was given here.

13 JUSTICE GORSUCH: No, I -- I -- right.
14 Right. Right.

15 MR. SCALIA: We can talk about the
16 other flaws in the instructions that were given
17 here that we think are independent reasons to
18 affirm the Second Circuit. But, again, if
19 you're instructing a jury about retaliatory
20 intent in a case that's involving Sarbanes-Oxley
21 whistleblower retaliation --

22 JUSTICE GORSUCH: I just don't see
23 those words in this statute.

24 MR. SCALIA: -- I think it becomes a
25 little bit confusing for a jury.

1 JUSTICE GORSUCH: I see discrimination
2 in this statute, and I see whistleblowing
3 activity, and I know there's a causation
4 requirement, but I don't see the retaliation in
5 this statute.

6 MR. SCALIA: Yeah.

7 JUSTICE GORSUCH: So help me out.
8 You're asking me to read things into a statute
9 that aren't there, aren't you, counsel?

10 MR. SCALIA: And, as I said,
11 Petitioner's counsel began by describing this as
12 a statute that requires retaliatory intent. The
13 question presented is whether it's established
14 that the --

15 JUSTICE JACKSON: But, counsel, can I
16 just ask you -- I agree with Justice Gorsuch in
17 the sense that I don't see certain things in the
18 statute, but I was curious in your briefing as
19 to why you left out the other sort of actus reus
20 parts of the statute. You -- you've reduced it
21 all down to "discriminate because of," what you
22 say is the heart of the statute.

23 But, before the word "discriminate,"
24 we have the company may not or "no company may
25 discharge, demote, suspend, threaten, harass, or

1 in any other manner discriminate."

2 And the reason why I think that might
3 be important is that if you are right that there
4 is some sort of mens rea that relates to
5 retaliation, I guess I at least would have
6 thought that Congress would write this
7 differently, right? That you would have a
8 statute that would say one may not, comma, you
9 know, purposefully or with retaliatory intent
10 harass, demote, suspend, et cetera. But that's
11 not the way this is written.

12 So it seems like "discriminate" is not
13 necessarily doing the work that give -- in light
14 of the entire sentence, doing the work that you
15 want it to do.

16 MR. SCALIA: Your Honor, the -- the
17 word "discriminate" does appear. It says "or in
18 any other manner discriminate," which --

19 JUSTICE JACKSON: Yes.

20 MR. SCALIA: -- has been read to mean
21 that the others are forms of discrimination.
22 But this Court, under Title VII, certainly has
23 understood that "discharge" is modified by
24 discriminate; "fail to promote" modified by
25 discriminate. Our position, it modifies all.

1 But, if you need more, Justice
2 Jackson, I would point you to subsection (c),
3 which refers to the relief that's available, and
4 that refers specifically to the plaintiff
5 receiving the seniority he would have had in the
6 absence of the discrimination. This statute
7 plainly does contemplate that --

8 JUSTICE JACKSON: But -- but it -- but
9 it couldn't --

10 MR. SCALIA: -- all those foregoing
11 acts are discriminatory.

12 JUSTICE JACKSON: But you reject the
13 view that when it says "discriminate or in any
14 other manner discriminate," that just means any
15 other manner treat the person differently and is
16 not necessarily carrying with it the kind of
17 separate intent to discriminate, and to the
18 extent it is there, it's in the burden-shifting
19 test as to how you prove that intent?

20 MR. SCALIA: We believe that
21 "discriminate" as used in this context does
22 again modify all the actions that would trigger
23 liability, and that needs to be an intent to
24 discriminate. That is how the word
25 "discriminate" in the statute has been

1 understood.

2 Again, I take you to Nassar. This
3 Court's decision regarding Title VII refers to
4 the motivating factor test as a test of
5 causation. Intent resides elsewhere.

6 Also, remember that the finding after
7 the second step is actually of a violation. The
8 Petitioner's position is that a violation can be
9 found under this statute without ever having
10 established the improper intent.

11 CHIEF JUSTICE ROBERTS: Counsel --

12 JUSTICE ALITO: Could you read --

13 CHIEF JUSTICE ROBERTS: -- both of
14 your -- the counsel on the other side said that
15 discrimination is simply treating people
16 differently.

17 I gather it's the essence of your
18 position that that's not true?

19 MR. SCALIA: It's treating people
20 differently in a way that is harmful to a
21 protected individual and, additionally, under
22 this Court's cases for decades, which, of
23 course, were established law when this law was
24 enacted, it -- it needs to be intentional
25 discrimination.

1 So that's our position, that we don't
2 quarrel generally with their description of
3 discriminate itself, but we add this Court has
4 been crystal-clear that that discrimination
5 needs to be intentional. Otherwise, again,
6 we're back at -- at disparate impact among other
7 things.

8 CHIEF JUSTICE ROBERTS: Well,
9 intentional -- there must be more to that term
10 if you think that those sentences from your
11 adversaries are -- are wrong because you can
12 intentionally treat people differently, but you
13 think that's not necessarily discrimination?

14 MR. SCALIA: It's intentionally for
15 discriminatory reasons treating them
16 differently. So you are intentionally treating
17 them differently but for a reason the law
18 prohibits. That, I believe, is just ingrained
19 --

20 JUSTICE KAGAN: So I -- I -- I --

21 MR. SCALIA: -- in the "discriminate
22 against because of" language. Excuse me.

23 JUSTICE KAGAN: -- I think that
24 basically is ingrained in all of our
25 discrimination statutes. They all have some

1 requirement that a prohibited factor came into a
2 decision and that it was there in your head when
3 you made the decision.

4 But what all of our decisions have
5 recognized is the tent -- intent is a very
6 difficult thing to prove, and, as a result of
7 that, what Congress has done, and sometimes this
8 Court has done it, has set up burden-shifting
9 mechanisms. You do this first. Then we'll give
10 you a chance to do that.

11 They're all -- those burden-shifting
12 mechanisms are geared to trying to figure out
13 what was in his head when he made the decision.
14 Was the prohibited consideration in his head in
15 the requisite way? But, because that's hard to
16 say directly, we'll shift burdens and tell
17 different people to do different things.

18 And that's exactly what this statute
19 does and says that's the way you figure out
20 whether the whistleblowing activity was in his
21 head in the prohibited way.

22 MR. SCALIA: Your Honor, I agree with
23 much of that, that these burden-shifting schemes
24 have been developed to get at both causation but
25 also intent. But, ultimately, both also are

1 required as part of the plaintiff's case.

2 I'm simply unaware of any decision
3 under Title VII on which this was plainly framed
4 where intent was not also something that the
5 plaintiff had to show.

6 And, remember, under Title VII's
7 motivating factor, again, the plaintiff who
8 shows that wins. Now they may not get
9 reinstatement or back pay, but they've won.
10 They get attorneys' fees and -- and -- and --
11 and they have shown a violation.

12 This statute operates the same way.
13 It's quite unusual to think that those -- that
14 burden-shifting operates to produce that result
15 with causation suddenly just becoming combined
16 with intent and not simply asking the jury to
17 make a separate finding --

18 JUSTICE KAVANAUGH: Could I --

19 MR. SCALIA: -- on that point.

20 JUSTICE KAVANAUGH: -- could I ask a
21 question then about how the case -- this case
22 and usual cases develop? Someone engages in
23 protected activity or a report of misconduct and
24 then a few weeks later, a few months later, is
25 fired.

1 Then the case goes to the litigation
2 and the jury, and the plaintiff says: I was
3 fired because I engaged in the protected
4 activity. The employer, as here, comes in and
5 says: No, we fired you because you were a poor
6 performer or because we had money issues and
7 needed to eliminate the position.

8 Then, at that point and in this case,
9 in the closing arguments, you know, your counsel
10 said you're going to hear two different versions
11 of events. And then Murray's counsel got up and
12 said, you just heard a speech. It was a slick
13 presentation for sure, but it was not the truth.
14 It's a smoke screen.

15 In other words, the jury had to decide
16 between two different versions of events, which
17 the burden was on you to show that your version
18 was correct, but you were able to present to the
19 jury this idea that no, we didn't do it, we
20 didn't intend to do it because of the protected
21 activity. We did it for another reason, right?

22 Didn't that defense get to the jury?

23 MR. SCALIA: Yes, it -- it did, Your
24 Honor, although the way, of course, these
25 instructions functioned, first of all, they got

1 there by just showing that the protected
2 activity tended to affect in any way --

3 JUSTICE KAVANAUGH: Well, there was --

4 MR. SCALIA: -- the decision.

5 JUSTICE KAVANAUGH: -- a follow-up
6 instruction on that. But put that aside. The
7 ultimate question was who's telling the truth
8 about why this person, Murray, was fired.

9 MR. SCALIA: And -- and, Justice
10 Kavanaugh, that's another part of the reason why
11 the innocent employer, if forced to make that
12 defense without a prior intent showing, may lose
13 even though there's no wrongful intent, because
14 the -- showing by clear and convincing evidence
15 --

16 JUSTICE KAVANAUGH: But they'll
17 have -- to pick up on Justice Kagan's point, I'm
18 sorry to interrupt, but the -- the employer will
19 have the information that shows, okay, we fired
20 10 other employees as well who hadn't engaged in
21 the protected activity for the same reason.

22 Or here's our list of performance
23 ratings and, see, we fired these other people
24 who had the same performance rating. That's how
25 the employer wins these cases, but they -- the

1 employer has the information.

2 Once you put that in, then the jury,
3 as was went on in the closing arguments here,
4 has to figure out is that enough to show that
5 the protected activity wasn't the -- you know,
6 whatever the -- the reason.

7 MR. SCALIA: Justice Kavanaugh,
8 ideally, you have that evidence and you put it
9 in. But part of the problem is that often you
10 may not, and you may not have it in a way that's
11 clear and convincing.

12 In a reduction-in-force case, for
13 example, by definition, you're letting go people
14 that you thought were doing just fine.
15 Sometimes you're making fine distinctions.
16 That's -- or sometimes you don't have
17 comparators. The person engaged in misconduct
18 that's pretty --

19 JUSTICE KAVANAUGH: Yeah, I agree.

20 MR. SCALIA: -- pretty unusual.

21 JUSTICE KAVANAUGH: You're -- you're
22 stuck there under the -- under plaintiff's
23 version. I agree with that.

24 MR. SCALIA: And -- and, Justice
25 Kavanaugh, that's another reason why the

1 innocent employer loses under the second prong
2 even when there is no retaliatory intent, which
3 is where Petitioner's counsel began.

4 And then, with respect to the
5 instruction, what the judge did was first sent
6 the jury back to her original instruction about
7 "tend to affect in any way." And although she
8 used words that took "tend" out, she still --
9 still said "affect any way." And there was
10 evidence here that the employee's direct
11 manager, who had supposedly received the
12 whistleblowing complaint, actually tried to find
13 him another position.

14 So the jury could have used that to
15 say, yeah, I guess it kind of had an effect
16 because he heard the whistleblowing and tried to
17 find another position.

18 If there had been an restrict --
19 intent instruction --

20 JUSTICE KAVANAUGH: Well, if the jury
21 believed Schumacher -- I think that's the name
22 -- you would have won, right?

23 MR. SCALIA: Well, but if the jury had
24 been told that it had to have been found that
25 Schumacher had an intent to retaliate or an

1 intent to discriminate, although, again, I
2 think, in a retaliation case, using intent to
3 discriminate might be somewhat confusing, would
4 require explanation. We're not saying animus.

5 If the jury had been required to find
6 that too about Mr. Schumacher, not just that it
7 tended to affect or even affected but that there
8 was an intent --

9 JUSTICE KAVANAUGH: You don't think --

10 MR. SCALIA: -- that was a reaction --

11 JUSTICE KAVANAUGH: Sorry to prolong
12 it, but you don't think the jury instructions
13 allowed the jury to get at that by saying is
14 Schumacher telling the truth when he says, I'm
15 firing -- or you're being fired for something
16 other than the report? You don't think the jury
17 -- that was before the jury?

18 MR. SCALIA: I think that the jury was
19 given too easy a path to find against UBS in a
20 case that was --

21 JUSTICE KAVANAUGH: Because of the
22 burden flip probably?

23 MR. SCALIA: Because of the burden
24 flip and because a basic element of a
25 discrimination case, intent to discriminate,

1 intent to retaliate, was taken out.

2 And for a jury trying to find
3 agreement four days before Christmas, as was the
4 case here, those things make a difference.

5 JUSTICE JACKSON: Mr. --

6 MR. SCALIA: That element should not
7 have been --

8 JUSTICE ALITO: Suppose you were --
9 suppose you were drafting jury instructions.
10 Part of the instructions presumably would
11 involve the burden-shifting features of the
12 statute.

13 What, if anything, would you instruct
14 a jury that the plaintiff has to prove before
15 you get to that part of the instructions?

16 MR. SCALIA: I -- I'm sorry, Justice
17 Alito. Before I get to the burden-shift part of
18 the instruction?

19 JUSTICE ALITO: Exactly what do you
20 think should be -- should the jury be
21 instructed?

22 MR. SCALIA: I think the --

23 JUSTICE ALITO: Walk us through that.

24 MR. SCALIA: -- the -- the jury should
25 be instructed --

1 JUSTICE ALITO: What's the first step?

2 MR. SCALIA: The jury should be
3 instructed to find the elements in the
4 Plaintiff's case. Sometimes they're stipulated,
5 but that would include that there was protected
6 activity. That would include the contributing
7 factor. That would also include that there was
8 an intent to take the action for retaliatory
9 reasons. And then it would -- then there are
10 cases that now do this because the --

11 JUSTICE ALITO: Okay. You would --
12 before you get to anything about the
13 burden-shifting, the jury -- the plaintiff would
14 have to show that the protected activity was,
15 what, a but-for cause, a motivating cause, some
16 cause? What would -- what would you do -- what
17 would you ask the jury to decide before this
18 burden-shifting scheme entered the picture?

19 MR. SCALIA: Justice Alito, the way
20 that is typically done, should be done, is to
21 show that it played some role in furthering, in
22 bringing about the adverse action. That's a
23 proper, I think, description of contributing
24 factor. It's not the one that was given. It's
25 one the government has now begun using but had

1 not been used with the jury. But not
2 motivating. It's recognized that contributing
3 is a lower level than motivating.

4 JUSTICE ALITO: But that sounds like
5 you're -- you're working your argument about
6 discriminatory intent into the burden-shifting
7 framework, not requiring something outside the
8 burden-shifting framework.

9 MR. SCALIA: It is outside. This is a
10 question about the impact of the protected
11 activity. Did it contribute, did it further the
12 decision that was made? Separately is the
13 instruction to be given regarding whether there
14 was an intent to take this discriminatory
15 action.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas, anything further?

19 Justice Sotomayor?

20 JUSTICE SOTOMAYOR: Give me the --

21 CHIEF JUSTICE ROBERTS: Justice Kagan
22 -- oh, I'm sorry.

23 JUSTICE SOTOMAYOR: Give me the
24 instruction. Intent to do what? Intent to have
25 the whistleblowing contribute in some way to the

1 firing? Because I -- but why isn't that the
2 burden shifting already?

3 MR. SCALIA: An intent to --

4 JUSTICE SOTOMAYOR: To do what?

5 MR. SCALIA: -- separate the employee
6 in reaction -- in retaliation for or --

7 JUSTICE SOTOMAYOR: But that wasn't
8 the only reason. They have multiple reasons.
9 So don't you have to tell the jury it has to be
10 -- you're right back in the circle. You're
11 right back in the circle because you can't get
12 out of contributing factor because it doesn't
13 have to be the only reason or it only has to be
14 a part reason.

15 MR. SCALIA: That -- that's correct,
16 Your Honor. It has to show that there -- that
17 intent played a role, that it played a role in
18 the separation decision, but it does not --

19 JUSTICE SOTOMAYOR: So how is that
20 different than the burden shifting?

21 MR. SCALIA: Because it's a
22 requirement of the intent, the mens rea, what
23 this Court called the scienter, that's basic to
24 discrimination claims.

25 JUSTICE SOTOMAYOR: Okay.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?

2 JUSTICE KAGAN: I mean, Congress could
3 definitely have written a statute like that that
4 sets up here's the protected activity, there was
5 a contributing factor, and there was -- the
6 employer intended for the protected activity to
7 be a contributing factor.

8 That's a sensible statute. But, if
9 that were the statute, you don't need the second
10 step of the burden-shifting analysis. You've
11 already done everything that the second step of
12 the burden-shifting analysis does.

13 The reason why you have the second
14 step of the burden-shifting analysis is
15 precisely to make that determination of whether
16 the employer actually acted in part or in whole
17 for that reason, understanding that the employer
18 has the information, and so it makes sense to
19 put that question on the employer's side of who
20 has the burden to do what.

21 MR. SCALIA: But, respectfully,
22 Justice Kagan, as I've sought to explain, the
23 second step does not discern the employer's
24 retaliatory motive or the absence of it. The
25 Petitioner is saying that's where it's

1 determined. But, remember, the employer that
2 has a retaliatory motive can still win there.
3 And, as I've explained, the employer that lacks
4 it can still lose.

5 So that's not the step at which it's
6 ascertained whether there is retaliatory intent.
7 What's ascertained there is whether this action
8 would have been taken even in the absence of the
9 protected activity, including that intent.

10 CHIEF JUSTICE ROBERTS: Justice
11 Gorsuch?

12 Justice Kavanaugh?

13 Justice Barrett?

14 JUSTICE BARRETT: One question,
15 Mr. Scalia. I want to pose a variation of the
16 question that Justice Gorsuch asked your friends
17 on the other side. If we disagreed with you
18 that intent was an independent element and we
19 think intent, as Justice Kagan was just
20 suggesting, is wrapped into the burden-shifting
21 framework, would you like us to just stop there,
22 or do you think it would be valuable to say
23 something more about the contributing factor in
24 the burden-shifting test?

25 MR. SCALIA: Certainly, we think the

1 Court should proceed to address the second
2 issue. That has been briefed by the parties.
3 It was integral to the court's decision below.
4 If you read where it said that there had to be
5 retaliatory intent -- by the way, retaliatory
6 intent, it did not say there had to be animus.
7 If you read that, immediately in the same place,
8 it explained the problems with the instruction
9 that was being given. That is a widely used
10 instruction that the government has backed away
11 from here. So has Petitioner.

12 I think you are leaving an enormous
13 amount unsettled in whistleblower law if you do
14 not address that and you do not address also the
15 discriminatory or retaliatory intent that is
16 required to be established.

17 JUSTICE BARRETT: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice
19 Jackson?

20 JUSTICE JACKSON: And would we also
21 cover how you would go about proving the
22 retaliatory intent? And I just ask -- and this
23 is just a short question -- which is ordinarily
24 my understanding is that a burden-shifting test
25 is used precisely because of the reasons that

1 Justice Kagan pointed out, that we don't require
2 sort of direct evidence of what is in -- in the
3 head of an employer.

4 So, if this is a separate element, are
5 you suggesting that we have two burden-shifting
6 tests operating in this environment, one that
7 relates to causation and uses the contributing
8 factor and another that relates to intent and I
9 guess uses motivating or but-for or because or
10 something?

11 MR. SCALIA: No. We are suggesting
12 just a single burden shift still, which is, as
13 we've explained, a defense to relief. But the
14 plaintiff's burden, when the plaintiff is done
15 with this case, it's been shown to be a
16 violation. And we submit it would be --

17 JUSTICE JACKSON: No, I understand,
18 but I guess my question is just you would
19 require the plaintiff to bring direct evidence
20 of this intent? It couldn't do it during the --
21 sort of the ordinary way that it's done in
22 discriminatory -- in discrimination cases?

23 MR. SCALIA: Not at all, Justice
24 Jackson. There would need to be a finding of
25 intent, but that can be inferred from

1 circumstantial evidence. We would not require
2 direct evidence. We're merely saying that it
3 would be so remarkable under a discrimination
4 statute or a retaliation statute to find a
5 violation, as SOX does, without even finding
6 that there was retaliatory intent.

7 JUSTICE JACKSON: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 MR. SCALIA: Thank you.

11 CHIEF JUSTICE ROBERTS: Rebuttal,
12 Ms. Anand?

13 REBUTTAL ARGUMENT OF EASHA ANAND
14 ON BEHALF OF THE PETITIONER

15 MS. ANAND: Thank you, Your Honor.

16 I want to start by addressing Justice
17 Kagan's question about the relationship between
18 our position and the SG's position.

19 So we agree on two key things. First,
20 "contributing factor" cannot include an animus
21 requirement, and it cannot include retaliatory
22 intent to the extent that means something more
23 than the JA 180 language of "affects the
24 decision."

25 Second, the burden-shifting framework

1 is how you capture discrimination. And I don't
2 think I heard my friend on the other side give
3 you an example of why Justice Gorsuch's proposed
4 instruction, which is step 2 of the
5 burden-shifting framework, doesn't adequately
6 capture -- doesn't adequately exclude innocent
7 employers, setting aside the
8 clear-and-convincing-evidence standard, which,
9 of course, was Congress's prerogative.

10 And this Court has already held that's
11 what discrimination means, right? That's --
12 that's Bostock. Discrimination has occurred if
13 changing the employee's sex would have yielded a
14 different choice. That's Abercrombie. Three
15 elements for discriminate, adverse action,
16 because of protected activity. So you're not --
17 you're not breaking any new ground here. And
18 I'm happy to explain Staub and Halliburton that
19 my friend on the other side cited if there are
20 questions about those.

21 To the extent this Court is inclined
22 to decide between the JA 130 formulation, which
23 is "tends to affect in any way," which is our
24 preferred formulation, or the JA 180 "affects
25 the decision in any way," and, again, I don't

1 think you need to do that because both
2 instructions were in this case, but to the
3 extent this Court is inclined to choose between
4 them, I'd like to say a few words on why I think
5 the JA 130 formulation is the preferred one.

6 So, first, the statute notably doesn't
7 say "contributing factor in the decision." And
8 that's notable because, as the SG's Office
9 explained, Mt. Healthy does use the "in the
10 decision" formulation, so it's notable that
11 Congress chose not to use that.

12 Second, this would collapse the
13 difference between contributing and motivating
14 factor, right? So motivating factor, Price
15 Waterhouse. If we ask the decisionmaker to list
16 the reasons and they were truthful, the
17 protected trait would be on that list. That's
18 basically saying it's a contributing factor in
19 the decision. And Congress chose to use
20 "contributing factor" and not "motivating
21 factor" in this context.

22 And, third, Marano seems to have
23 defined this authoritatively a generation ago.
24 Congress was well aware of that definition when
25 it incorporated it into SOX.

1 So, again, for us to win, you just
2 have to say no animus and contributing factor
3 and no retaliatory intent to the extent it means
4 more than "affects the decision," and
5 burden-shifting framework is all you need to
6 show to get at discrimination.

7 If you want to go further and choose
8 between these two instructions, I've given you
9 my position on why the JA 130 formulation is
10 preferable.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 counsel.

13 The case is submitted.

14 (Whereupon, at 11:32 a.m., the case
15 was submitted.)

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Official - Subject to Final Review

<p>1</p> <p>1 [6] 26:1,4 43:6,7 44:21 71:7</p> <p>7</p> <p>10:04 [2] 1:15 3:2</p> <p>11:32 [1] 99:14</p> <p>130 [3] 97:22 98:5 99:9</p> <p>13A [1] 44:7</p> <p>1514A(a) [1] 49:22</p> <p>180 [4] 13:12 16:18 96:23 97:24</p>	<p>15 68:7 71:4,6,11 73:5,13, 14 89:8,22 90:15 93:7 97:15</p> <p>actions [2] 3:18 78:22</p> <p>activity [49] 8:17 10:18,19 11:2,6,13,20 23:22 27:17 28:16,21 31:5,9,11 34:11 35:13,15 41:9,17 42:18 43:25 45:15 52:5,11,20,25 59:24 62:6,8,10 67:22 68:10 71:2 75:6 76:3 81:20 82:23 83:4,21 84:2,21 85:5 89:6,14 90:11 92:4,6 93:9 97:16</p> <p>actor [1] 52:9</p> <p>acts [1] 78:11</p> <p>actual [1] 65:17</p> <p>actually [11] 8:22 10:21 21:11 53:14,21 62:14 67:8 69:12 79:7 86:12 92:16</p> <p>actus [1] 76:19</p> <p>add [2] 61:4 80:3</p> <p>added [1] 60:25</p> <p>addition [2] 4:8 18:9</p> <p>additional [3] 25:13,15 64:15</p> <p>additionally [1] 79:21</p> <p>address [12] 15:6 19:2 27:2 29:17 48:9 52:1 55:25 58:23 59:13 94:1,14,14</p> <p>addressed [1] 46:16</p> <p>addresses [1] 59:11</p> <p>addressing [1] 96:16</p> <p>adequately [4] 9:22 20:19 97:5,6</p> <p>adjudicate [1] 33:15</p> <p>adjudicated [3] 31:7 50:7, 9</p> <p>admitted [2] 35:1 67:7</p> <p>adopt [1] 22:9</p> <p>adopted [4] 8:12 21:10 57:22 59:4</p> <p>adversaries [1] 80:11</p> <p>adverse [18] 4:19 7:21 8:14 10:12 24:24 32:23 39:19 40:14 42:7,8 44:15 62:5,7 63:15 73:13 74:25 89:22 97:15</p> <p>affect [11] 19:20 21:4 22:21 26:24 27:4 58:1 84:2 86:7, 9 87:7 97:23</p> <p>affected [5] 16:9,18,21 22:25 87:7</p> <p>affecting [1] 13:15</p> <p>affects [7] 8:13 13:11 16:11 22:23 96:23 97:24 99:4</p> <p>affirm [1] 75:18</p> <p>affirmative [1] 51:1</p> <p>afterward [1] 64:10</p> <p>age [1] 62:23</p> <p>ago [3] 34:1 62:20 98:23</p> <p>agree [14] 25:24 27:12 33:14 36:24,24 39:6 60:16 72:9,18 76:16 81:22 85:19,23</p>	<p>96:19</p> <p>agreement [1] 88:3</p> <p>ahead [1] 20:13</p> <p>AIR21 [10] 3:19,20 4:13 58:23 59:8,11 60:19 61:10,11 71:2</p> <p>AIR21's [1] 31:7</p> <p>AL [1] 1:6</p> <p>alienates [1] 13:25</p> <p>ALITO [47] 9:25 10:2,3,16 11:18 12:14,19,23 17:2,4, 15 25:7 32:20,23 33:1,8,17, 20,23 34:4,7,9,14,19,24 35:11 36:7,16 43:13,14 44:16, 19 45:1,11,17 46:6 47:20 71:1 79:12 88:8,17,19,23 89:1,11,19 90:4</p> <p>Alito's [1] 14:11</p> <p>allegations [1] 68:5</p> <p>alleged [10] 11:21 12:2 43:17,19 44:5,8,23 45:2 71:4, 6</p> <p>allegedly [1] 23:12</p> <p>allow [1] 41:24</p> <p>allowed [1] 87:13</p> <p>allows [1] 52:7</p> <p>alluding [1] 21:8</p> <p>almost [1] 28:18</p> <p>alone [1] 8:12</p> <p>already [4] 63:20 91:2 92:11 97:10</p> <p>although [5] 10:10 37:4 83:24 86:7 87:1</p> <p>amici [1] 54:16</p> <p>amicus [4] 1:22 2:7 13:23 30:8</p> <p>among [2] 64:11 80:6</p> <p>amount [2] 4:17 94:13</p> <p>analogy [3] 7:18 60:11,19</p> <p>analysis [3] 92:10,12,14</p> <p>analytic [1] 26:14</p> <p>analyzed [1] 40:4</p> <p>ANAND [62] 1:18 2:3,12 3:6,7,9 4:25 5:12 6:10,17,25 7:15,17 8:8,21 9:16 10:7 11:8 12:4,17,20 13:2 14:15 15:13,15 16:3,6,12 17:10,16,22 18:1,4,24 19:9,15, 23 20:1,4,8,25 21:20 22:12, 16,19 23:4,19 24:16 25:10, 22 26:16 27:6,9,22 28:2,14 29:15,24 47:4 96:12,13,15</p> <p>angry [3] 64:9,12 68:8</p> <p>animus [23] 4:15 16:16 17:5,16,20,23 19:17 24:18 29:22 30:19 31:2 35:6,7 38:8 55:13,14 63:6,8,11 87:4 94:6 96:20 99:2</p> <p>another [10] 39:1 48:9 63:3 68:18 83:21 84:10 85:25 86:13,17 95:8</p> <p>answer [13] 5:24 6:20 8:9 12:16 22:17,19 27:1,1 44:17 45:18 48:3 56:6 64:19</p>	<p>answered [1] 66:17</p> <p>answers [1] 3:17</p> <p>ANTHONY [3] 1:20 2:6 30:7</p> <p>anybody [1] 48:21</p> <p>anyway [2] 67:12 68:14</p> <p>apart [1] 70:20</p> <p>appear [2] 75:7 77:17</p> <p>APPEARANCES [1] 1:17</p> <p>applicable [1] 62:24</p> <p>apply [1] 5:4</p> <p>appreciate [1] 51:9</p> <p>approach [4] 31:20 32:8 49:5,7</p> <p>ARB [2] 32:6 54:13</p> <p>area [1] 29:14</p> <p>aren't [2] 76:9,9</p> <p>argued [1] 67:1</p> <p>argument [18] 1:14 2:2,5, 11 3:4,7 10:4 11:7 26:14 30:7 36:11 55:17,18 56:2 58:11 67:4 90:5 96:13</p> <p>arguments [4] 30:21 53:3 83:9 85:3</p> <p>arise [2] 7:11 61:1</p> <p>around [2] 17:6 21:12</p> <p>art [8] 8:10 9:15 21:3,23 22:2,4,9,11</p> <p>articulation [1] 53:10</p> <p>ascertained [2] 93:6,7</p> <p>aside [3] 22:15 84:6 97:7</p> <p>asks [1] 37:12</p> <p>Assistant [1] 1:20</p> <p>Attorney [1] 57:22</p> <p>attorneys' [1] 82:10</p> <p>authoritatively [1] 98:23</p> <p>available [1] 78:3</p> <p>await [1] 46:19</p> <p>aware [1] 98:24</p> <p>away [1] 94:10</p> <p>awry [1] 49:4</p>	<p>becomes [1] 75:24</p> <p>becoming [1] 82:15</p> <p>began [4] 64:13 67:2 76:11 86:3</p> <p>begin [1] 66:20</p> <p>beginning [1] 29:7</p> <p>begun [1] 89:25</p> <p>behalf [8] 1:18,24 2:4,10, 13 3:8 58:12 96:14</p> <p>behavior [10] 32:12 37:13 39:17 44:21,21 46:4 50:18, 20 53:21,23</p> <p>believe [11] 16:17 28:24 29:10,15 31:16 44:7 49:22 61:24 71:1 78:20 80:18</p> <p>believed [3] 10:10 11:13 86:21</p> <p>below [3] 13:8 66:6 94:3</p> <p>benefit [1] 55:21</p> <p>benign [2] 72:13,15</p> <p>best [4] 28:20 46:16 54:21 74:6</p> <p>better [1] 21:16</p> <p>between [20] 14:12 17:11 23:9,23 24:13 27:13 28:21 31:14 34:20 39:1 40:17 41:2 43:8 45:24 83:16 96:17 97:22 98:3,13 99:8</p> <p>beyond [1] 38:9</p> <p>big [1] 43:8</p> <p>bit [2] 5:23 75:25</p> <p>boss [1] 64:9</p> <p>Bostock [1] 97:12</p> <p>both [12] 8:1 25:23 26:10, 18,19 54:16 56:18 65:24 79:13 81:24,25 98:1</p> <p>breaking [1] 97:17</p> <p>brief [15] 8:16 13:23 14:6,6 15:12 20:14,20 21:11 25:11 27:19 32:8 44:7 55:7 57:17 67:7</p> <p>briefed [1] 94:2</p> <p>briefing [2] 54:15 76:18</p> <p>bring [2] 21:16 95:19</p> <p>bringing [1] 89:22</p> <p>bug [1] 38:23</p> <p>bunch [2] 18:21 71:23</p> <p>burden [22] 3:20,24 5:21 7:6,7 10:8,15 11:16 40:20 50:24 51:15 60:3 70:13,24 83:17 87:22,23 91:2,20 92:20 95:12,14</p> <p>burden-of [1] 5:9</p> <p>burden-shift [1] 88:17</p> <p>burden-shifting [50] 4:18, 23 5:1,3,19 6:21 7:5 25:25 29:12,16 30:2 36:25 37:12 40:6 48:7 49:23 50:7,13 51:19 55:4,9,16,19,25 64:1, 25 65:11 70:16,21 71:20 78:18 81:8,11,23 82:14 88:11 89:13,18 90:6,8 92:10, 12,14 93:20,24 94:24 95:5 96:25 97:5 99:5</p>
<p>2</p> <p>2 [10] 8:4 11:9 14:9 26:1,7 28:12 51:19,22,25 97:4</p> <p>2019 [2] 32:6 54:14</p> <p>2023 [1] 1:11</p> <p>22-660 [1] 3:4</p> <p>29 [1] 8:16</p>	<p>actor [1] 52:9</p> <p>acts [1] 78:11</p> <p>actual [1] 65:17</p> <p>actually [11] 8:22 10:21 21:11 53:14,21 62:14 67:8 69:12 79:7 86:12 92:16</p> <p>actus [1] 76:19</p> <p>add [2] 61:4 80:3</p> <p>added [1] 60:25</p> <p>addition [2] 4:8 18:9</p> <p>additional [3] 25:13,15 64:15</p> <p>additionally [1] 79:21</p> <p>address [12] 15:6 19:2 27:2 29:17 48:9 52:1 55:25 58:23 59:13 94:1,14,14</p> <p>addressed [1] 46:16</p> <p>addresses [1] 59:11</p> <p>addressing [1] 96:16</p> <p>adequately [4] 9:22 20:19 97:5,6</p> <p>adjudicate [1] 33:15</p> <p>adjudicated [3] 31:7 50:7, 9</p> <p>admitted [2] 35:1 67:7</p> <p>adopt [1] 22:9</p> <p>adopted [4] 8:12 21:10 57:22 59:4</p> <p>adversaries [1] 80:11</p> <p>adverse [18] 4:19 7:21 8:14 10:12 24:24 32:23 39:19 40:14 42:7,8 44:15 62:5,7 63:15 73:13 74:25 89:22 97:15</p> <p>affect [11] 19:20 21:4 22:21 26:24 27:4 58:1 84:2 86:7, 9 87:7 97:23</p> <p>affected [5] 16:9,18,21 22:25 87:7</p> <p>affecting [1] 13:15</p> <p>affects [7] 8:13 13:11 16:11 22:23 96:23 97:24 99:4</p> <p>affirm [1] 75:18</p> <p>affirmative [1] 51:1</p> <p>afterward [1] 64:10</p> <p>age [1] 62:23</p> <p>ago [3] 34:1 62:20 98:23</p> <p>agree [14] 25:24 27:12 33:14 36:24,24 39:6 60:16 72:9,18 76:16 81:22 85:19,23</p>	<p>AL [1] 1:6</p> <p>alienates [1] 13:25</p> <p>ALITO [47] 9:25 10:2,3,16 11:18 12:14,19,23 17:2,4, 15 25:7 32:20,23 33:1,8,17, 20,23 34:4,7,9,14,19,24 35:11 36:7,16 43:13,14 44:16, 19 45:1,11,17 46:6 47:20 71:1 79:12 88:8,17,19,23 89:1,11,19 90:4</p> <p>Alito's [1] 14:11</p> <p>allegations [1] 68:5</p> <p>alleged [10] 11:21 12:2 43:17,19 44:5,8,23 45:2 71:4, 6</p> <p>allegedly [1] 23:12</p> <p>allow [1] 41:24</p> <p>allowed [1] 87:13</p> <p>allows [1] 52:7</p> <p>alluding [1] 21:8</p> <p>almost [1] 28:18</p> <p>alone [1] 8:12</p> <p>already [4] 63:20 91:2 92:11 97:10</p> <p>although [5] 10:10 37:4 83:24 86:7 87:1</p> <p>amici [1] 54:16</p> <p>amicus [4] 1:22 2:7 13:23 30:8</p> <p>among [2] 64:11 80:6</p> <p>amount [2] 4:17 94:13</p> <p>analogy [3] 7:18 60:11,19</p> <p>analysis [3] 92:10,12,14</p> <p>analytic [1] 26:14</p> <p>analyzed [1] 40:4</p> <p>ANAND [62] 1:18 2:3,12 3:6,7,9 4:25 5:12 6:10,17,25 7:15,17 8:8,21 9:16 10:7 11:8 12:4,17,20 13:2 14:15 15:13,15 16:3,6,12 17:10,16,22 18:1,4,24 19:9,15, 23 20:1,4,8,25 21:20 22:12, 16,19 23:4,19 24:16 25:10, 22 26:16 27:6,9,22 28:2,14 29:15,24 47:4 96:12,13,15</p> <p>angry [3] 64:9,12 68:8</p> <p>animus [23] 4:15 16:16 17:5,16,20,23 19:17 24:18 29:22 30:19 31:2 35:6,7 38:8 55:13,14 63:6,8,11 87:4 94:6 96:20 99:2</p> <p>another [10] 39:1 48:9 63:3 68:18 83:21 84:10 85:25 86:13,17 95:8</p> <p>answer [13] 5:24 6:20 8:9 12:16 22:17,19 27:1,1 44:17 45:18 48:3 56:6 64:19</p>	<p>arguments [4] 30:21 53:3 83:9 85:3</p> <p>arise [2] 7:11 61:1</p> <p>around [2] 17:6 21:12</p> <p>art [8] 8:10 9:15 21:3,23 22:2,4,9,11</p> <p>articulation [1] 53:10</p> <p>ascertained [2] 93:6,7</p> <p>aside [3] 22:15 84:6 97:7</p> <p>asks [1] 37:12</p> <p>Assistant [1] 1:20</p> <p>Attorney [1] 57:22</p> <p>attorneys' [1] 82:10</p> <p>authoritatively [1] 98:23</p> <p>available [1] 78:3</p> <p>await [1] 46:19</p> <p>aware [1] 98:24</p> <p>away [1] 94:10</p> <p>awry [1] 49:4</p>	<p>becomes [1] 75:24</p> <p>becoming [1] 82:15</p> <p>began [4] 64:13 67:2 76:11 86:3</p> <p>begin [1] 66:20</p> <p>beginning [1] 29:7</p> <p>begun [1] 89:25</p> <p>behalf [8] 1:18,24 2:4,10, 13 3:8 58:12 96:14</p> <p>behavior [10] 32:12 37:13 39:17 44:21,21 46:4 50:18, 20 53:21,23</p> <p>believe [11] 16:17 28:24 29:10,15 31:16 44:7 49:22 61:24 71:1 78:20 80:18</p> <p>believed [3] 10:10 11:13 86:21</p> <p>below [3] 13:8 66:6 94:3</p> <p>benefit [1] 55:21</p> <p>benign [2] 72:13,15</p> <p>best [4] 28:20 46:16 54:21 74:6</p> <p>better [1] 21:16</p> <p>between [20] 14:12 17:11 23:9,23 24:13 27:13 28:21 31:14 34:20 39:1 40:17 41:2 43:8 45:24 83:16 96:17 97:22 98:3,13 99:8</p> <p>beyond [1] 38:9</p> <p>big [1] 43:8</p> <p>bit [2] 5:23 75:25</p> <p>boss [1] 64:9</p> <p>Bostock [1] 97:12</p> <p>both [12] 8:1 25:23 26:10, 18,19 54:16 56:18 65:24 79:13 81:24,25 98:1</p> <p>breaking [1] 97:17</p> <p>brief [15] 8:16 13:23 14:6,6 15:12 20:14,20 21:11 25:11 27:19 32:8 44:7 55:7 57:17 67:7</p> <p>briefed [1] 94:2</p> <p>briefing [2] 54:15 76:18</p> <p>bring [2] 21:16 95:19</p> <p>bringing [1] 89:22</p> <p>bug [1] 38:23</p> <p>bunch [2] 18:21 71:23</p> <p>burden [22] 3:20,24 5:21 7:6,7 10:8,15 11:16 40:20 50:24 51:15 60:3 70:13,24 83:17 87:22,23 91:2,20 92:20 95:12,14</p> <p>burden-of [1] 5:9</p> <p>burden-shift [1] 88:17</p> <p>burden-shifting [50] 4:18, 23 5:1,3,19 6:21 7:5 25:25 29:12,16 30:2 36:25 37:12 40:6 48:7 49:23 50:7,13 51:19 55:4,9,16,19,25 64:1, 25 65:11 70:16,21 71:20 78:18 81:8,11,23 82:14 88:11 89:13,18 90:6,8 92:10, 12,14 93:20,24 94:24 95:5 96:25 97:5 99:5</p>
<p>3</p> <p>3 [3] 2:4 17:23 57:17</p> <p>30 [1] 2:8</p>	<p>actor [1] 52:9</p> <p>acts [1] 78:11</p> <p>actual [1] 65:17</p> <p>actually [11] 8:22 10:21 21:11 53:14,21 62:14 67:8 69:12 79:7 86:12 92:16</p> <p>actus [1] 76:19</p> <p>add [2] 61:4 80:3</p> <p>added [1] 60:25</p> <p>addition [2] 4:8 18:9</p> <p>additional [3] 25:13,15 64:15</p> <p>additionally [1] 79:21</p> <p>address [12] 15:6 19:2 27:2 29:17 48:9 52:1 55:25 58:23 59:13 94:1,14,14</p> <p>addressed [1] 46:16</p> <p>addresses [1] 59:11</p> <p>addressing [1] 96:16</p> <p>adequately [4] 9:22 20:19 97:5,6</p> <p>adjudicate [1] 33:15</p> <p>adjudicated [3] 31:7 50:7, 9</p> <p>admitted [2] 35:1 67:7</p> <p>adopt [1] 22:9</p> <p>adopted [4] 8:12 21:10 57:22 59:4</p> <p>adversaries [1] 80:11</p> <p>adverse [18] 4:19 7:21 8:14 10:12 24:24 32:23 39:19 40:14 42:7,8 44:15 62:5,7 63:15 73:13 74:25 89:22 97:15</p> <p>affect [11] 19:20 21:4 22:21 26:24 27:4 58:1 84:2 86:7, 9 87:7 97:23</p> <p>affected [5] 16:9,18,21 22:25 87:7</p> <p>affecting [1] 13:15</p> <p>affects [7] 8:13 13:11 16:11 22:23 96:23 97:24 99:4</p> <p>affirm [1] 75:18</p> <p>affirmative [1] 51:1</p> <p>afterward [1] 64:10</p> <p>age [1] 62:23</p> <p>ago [3] 34:1 62:20 98:23</p> <p>agree [14] 25:24 27:12 33:14 36:24,24 39:6 60:16 72:9,18 76:16 81:22 85:19,23</p>	<p>AL [1] 1:6</p> <p>alienates [1] 13:25</p> <p>ALITO [47] 9:25 10:2,3,16 11:18 12:14,19,23 17:2,4, 15 25:7 32:20,23 33:1,8,17, 20,23 34:4,7,9,14,19,24 35:11 36:7,16 43:13,14 44:16, 19 45:1,11,17 46:6 47:20 71:1 79:12 88:8,17,19,23 89:1,11,19 90:4</p> <p>Alito's [1] 14:11</p> <p>allegations [1] 68:5</p> <p>alleged [10] 11:21 12:2 43:17,19 44:5,8,23 45:2 71:4, 6</p> <p>allegedly [1] 23:12</p> <p>allow [1] 41:24</p> <p>allowed [1] 87:13</p> <p>allows [1] 52:7</p> <p>alluding [1] 21:8</p> <p>almost [1] 28:18</p> <p>alone [1] 8:12</p> <p>already [4] 63:20 91:2 92:11 97:10</p> <p>although [5] 10:10 37:4 83:24 86:7 87:1</p> <p>amici [1] 54:16</p> <p>amicus [4] 1:22 2:</p>		

Official - Subject to Final Review

<p>burdens [4] 3:19 4:13 31:7 81:16 burdens-of-proof [1] 59:10 business [1] 14:1 but-for [6] 5:8,8 12:24 37:17 89:15 95:9</p> <hr/> <p style="text-align: center;">C</p> <p>California [1] 1:18 call [2] 8:3 35:5 called [3] 55:9 63:15 91:23 came [2] 1:13 81:1 cannot [3] 60:1 96:20,21 capture [2] 97:1,6 car [2] 23:10,11 care [3] 29:11 55:19 70:2 careful [1] 49:2 carefully [1] 65:24 carry [2] 40:20 61:11 carrying [1] 78:16 Case [62] 3:4,15 5:17 7:4 13:6,7,9,16,17 14:17,20 16:8 22:1,10,23 24:7 28:4,6,18 42:4 43:20 46:21 48:2 50:2 52:17 53:3,5 54:16,22 56:21 57:20 58:20 59:1,22 60:4 61:14 63:18 65:18,20,21 67:13,19,20,20 73:7,21 75:20 82:1,21,21 83:1,8 85:12 87:2,20,25 88:4 89:4 95:15 98:2 99:13,14 cases [17] 7:11 14:19 16:11 23:9 28:13 31:1 32:7 50:6,9 62:12 69:9,15 79:22 82:22 84:25 89:10 95:22 cat's [1] 65:21 causal [9] 13:5,16,24 23:23 28:21,24 61:23,25 65:23 causation [54] 5:8 6:13 23:10,18,20 24:1,5,12,14 25:2 31:25 32:5,16 34:16 37:4 39:2 40:8 44:4 46:23 53:11 54:9 55:8,10 56:11,16 57:15 58:3,25 59:4,8,12 61:6,10,16,18 62:14,17,25 63:20,25 64:19 65:25 66:19,24 69:19 70:4 71:19,19 72:2 76:3 79:5 81:24 82:15 95:7 cause [6] 37:10,18 64:7 89:15,15,16 caused [7] 23:14 37:8 53:22 56:15 57:9,11 62:5 central [1] 54:18 certain [2] 39:8 76:17 certainly [5] 16:23 48:24 50:5 77:22 93:25 cetera [1] 77:10 chain [13] 13:5,16,24 31:24 32:5 33:6 46:4,23 53:11,23 54:8 69:19 70:3 chain-of-causation [2]</p>	<p>31:19 51:5 Chamber [1] 13:23 chance [1] 81:10 changing [1] 97:13 charge [1] 21:19 charging [1] 6:23 CHIEF [32] 3:3,9 10:2 23:6 24:11 25:5 26:20 29:3 30:4,10 43:10 46:7 47:3 48:18 51:11 53:7 54:23 58:8,13 69:23 71:9 79:11,13 80:8 90:16,21 92:1 93:10 94:18 96:8,11 99:11 choice [1] 97:14 choose [2] 98:3 99:7 chose [2] 98:11,19 chosen [1] 7:4 Christmas [1] 88:3 circle [2] 91:10,11 Circuit [24] 4:4 8:12 14:17 16:13,15,16 18:7 19:1 20:16 21:9,18 22:1 30:12 34:22 38:11 47:14 48:2 67:20,20,21 75:18 Circuit's [1] 27:10 circumstances [1] 52:1 circumstantial [2] 42:22 96:1 circumstantially [1] 37:16 cite [1] 32:7 cited [2] 67:21 97:19 claims [4] 3:15 31:7 67:3 91:24 clarify [2] 29:6 47:1 clean [1] 49:20 cleaning [2] 15:4,9 cleans [2] 14:22 15:8 clear [9] 11:3 15:10 22:3 24:18 31:1 55:22 74:20 84:14 85:11 clear-and-convincing-evidence [2] 14:10 97:8 close [3] 28:23 42:8 72:24 closer [1] 60:19 closing [3] 53:2 83:9 85:3 cogent [1] 56:2 collapse [1] 98:12 collapsed [1] 72:2 colleague [1] 20:16 colleagues [2] 21:8 68:8 combination [1] 8:13 combined [1] 82:15 come [2] 7:19 51:3 comes [6] 5:19 6:20 24:5 57:19 65:2 83:4 comfortable [1] 16:25 comma [1] 77:8 Commerce [1] 13:23 company [5] 44:13 67:23 68:19 76:24,24 comparators [1] 85:17 complained [1] 67:23 complains [1] 68:20 complaint [21] 11:22 12:2</p>	<p>43:18,19 44:6,8,24 45:2 64:9,10 65:3,7 68:17,21 69:3,4,11 70:8 71:4,7 86:12 completely [3] 8:2 9:13 52:13 component [1] 27:11 concede [1] 62:16 concept [1] 39:18 concepts [2] 37:5 56:23 concern [1] 54:9 concerned [1] 35:23 conclude [5] 22:1,3,20 23:1 55:24 conduct [13] 3:22 4:2,20 7:3,23 9:4 10:12 12:11 17:14 24:10 29:1,22 36:13 conducting [1] 67:25 confidential [1] 68:21 confirmed [1] 51:18 conflict [1] 25:17 confused [3] 5:23 46:9 70:17 confusing [3] 46:21 75:25 87:3 confusion [3] 28:9,10 73:20 Congress [27] 3:11 5:18 7:4,19 8:24 9:18 10:10 11:13 22:9,14 29:16 31:6 33:15 40:1,6 53:15 58:15,21,24 59:2,22 77:6 81:7 92:2 98:11,19,24 Congress's [1] 97:9 connection [3] 23:23 28:21,24 conscious [1] 30:14 consider [3] 31:22 43:5 53:21 consideration [2] 20:18 81:14 consistent [1] 16:22 contemplate [2] 63:23 78:7 contends [1] 4:7 context [11] 18:13 30:20 34:18 37:3 42:11 57:13 58:2,5 72:14 78:21 98:21 contribute [3] 57:24 90:11,25 contributing [73] 3:22 4:5,8 7:25 8:3,6,19,24 9:13,18 11:20 12:6,12 13:1,3 14:18 15:24 19:3,16,19 21:3,14 22:3 26:1 27:21 28:11 31:10 32:10 34:12 37:14 39:22,24 40:1,7 42:11,23 43:4,16,25 44:22 46:1,3,25 48:7 50:17,21 52:4 53:10,16 57:23 60:11,12 62:8 66:9 70:5,6 71:3,10,11 89:6,23 90:2 91:12 92:5,7 93:23 95:7 96:20 98:7,13,18,20 99:2</p>	<p>contributing-factor [3] 58:22 59:7 60:13 conversation [2] 48:15,21 convincing [3] 11:4 84:14 85:11 core [1] 24:8 correct [13] 6:9,10,24 7:14,17 8:20 18:24 27:6 38:6 50:15 52:18 83:18 91:15 corrected [1] 54:13 couldn't [4] 15:22 47:12 78:9 95:20 Counsel [27] 17:3,24 23:7 30:5 37:21,25 40:10,12 43:11 58:9 67:2,25 68:2,2 69:23 71:9 76:9,11,15 79:11,14 83:9,11 86:3 90:17 96:9 99:12 couple [1] 56:20 course [6] 20:17 32:6 47:12 79:23 83:24 97:9 COURT [49] 1:1,14 3:10,18 13:13 17:11,18 20:15 21:23,25 22:5 24:22 27:14 30:11,13,16 38:14 39:9 40:4 48:11 54:21 55:23,24 58:14,24 61:3 62:1,21 63:1,13,15,18 65:24 66:22 72:17 77:22 80:3 81:8 91:23 94:1 97:10,21 98:3 Court's [12] 4:21 30:25 51:7 58:4 60:5 62:12,19 64:21 73:23 79:3,22 94:3 courts [4] 54:7,12 55:2 69:17 cover [2] 55:11 94:21 covered [2] 59:14,15 created [1] 22:10 cross-appeal [1] 20:23 crystal-clear [1] 80:4 curiae [3] 1:22 2:8 30:8 curious [1] 76:18 customer [4] 13:25 14:1 15:8,19</p> <hr/> <p style="text-align: center;">D</p> <p>D.C. [3] 1:10,21,24 damages [2] 23:24 24:4 danger [2] 49:7,9 day [3] 18:6,18 49:14 daylight [2] 31:14 45:24 days [1] 88:3 debate [1] 34:16 decades [1] 79:22 decide [7] 16:20 21:24 54:2,21 83:15 89:17 97:22 decided [2] 38:16 48:2 decides [1] 58:19 decision [74] 10:24 11:16 12:25 13:1,4,11,15 14:13 15:24 16:2,9,19,21 22:5,24,25 27:14 31:3,10,12,21,22 32:14,24,25 33:3 34:13 37:6,7,8,10,14,18,24 38:15 40:</p>	<p>14 41:18 42:7 44:1 50:22 52:2,4,6 53:12,17 57:7,8,9,11,16,19,24 58:1 62:20 63:2 66:11 70:5,6 73:24 79:3 81:2,3,13 82:2 84:4 90:12 91:18 94:3 96:24 97:25 98:7,10,19 99:4 decisionmaker [4] 11:1,15 40:16 98:15 decisionmaker's [2] 37:9 57:10 decisionmakers [1] 70:12 decisionmaking [1] 32:21 decisions [3] 40:5 58:5 81:4 default [2] 5:3 7:3 defend [1] 4:6 defendant [2] 3:25 7:7 defense [4] 51:1 83:22 84:12 95:13 define [1] 27:20 defined [5] 9:22 29:20 61:6 63:13 98:23 defines [1] 61:5 definitely [3] 36:24 55:24 92:3 definition [8] 8:11 12:11 16:23 21:14 36:8,14 85:13 98:24 deliberations [1] 13:10 demonstrate [1] 60:8 demote [2] 76:25 77:10 demoted [2] 6:4 24:3 Department [1] 1:21 14:2 depending [1] 5:17 describe [1] 25:14 described [2] 44:21 61:8 describing [1] 76:11 description [2] 80:2 89:23 designed [3] 5:1 29:16 65:11 desire [1] 35:7 determination [4] 13:18 42:22 62:5 92:15 determinative [2] 16:5 32:13 determined [3] 30:14 67:5 93:1 develop [1] 82:22 developed [1] 81:24 difference [10] 26:13 31:14 34:20 41:2 42:14 43:8,23 58:4 88:4 98:13 differences [1] 25:23 different [29] 6:22 7:20 15:20 17:8 23:15,20 26:15 31:18 35:22,22 37:4 42:2 46:11 56:11,20,25 57:1,3 62:3,4 63:25 66:9 67:18 81:17,17 83:10,16 91:20 97:14 differential [3] 30:23 45:14 63:12 differently [18] 6:1,5 17:13 31:4 37:19 59:9 64:14 65:</p>
---	--	---	---	---

Official - Subject to Final Review

<p>15 74:2,15 75:5 77:7 78:15 79:16,20 80:12,16,17</p> <p>difficult [1] 81:6</p> <p>difficulty [1] 8:1</p> <p>direct [4] 86:10 95:2,19 96:2</p> <p>directed [1] 31:6</p> <p>directly [2] 56:7 81:16</p> <p>disagreed [1] 93:17</p> <p>disagrees [1] 20:15</p> <p>discern [1] 92:23</p> <p>discerned [1] 67:9</p> <p>discharge [2] 10:24 11:24 12:1,3,9,10,18,25 13:1 14:12 28:17,22 43:20,20,21 44:9 45:3,5,13 76:25 77:23</p> <p>discharged [3] 11:5 14:23 24:3</p> <p>discipline [1] 69:20</p> <p>disclaimed [2] 4:14 24:18</p> <p>disclaims [1] 17:23</p> <p>disclosed [1] 69:5</p> <p>discloses [1] 68:23</p> <p>discord [1] 36:16</p> <p>discovering [1] 42:18</p> <p>discovery [1] 11:5</p> <p>discriminate [38] 5:15,25 18:9,16,17 19:13 24:19,23 30:22 35:12 38:9 58:16 59:21 66:6,21 71:21 72:11,13 76:21,23 77:1,12,17,18,24, 25:78:13,14,17,21,24,25 80:3,21 87:1,3,25 97:15</p> <p>discriminated [2] 6:3,6</p> <p>discriminating [1] 36:1</p> <p>discrimination [28] 17:19 19:12 24:6 25:1 26:3 31:1 38:13 44:9 59:1 62:23 66:2 71:8 76:1 77:21 78:6 79:15,25 80:4,13,25 87:25 91:24 95:22 96:3 97:1,11,12 99:6</p> <p>discriminatory [47] 10:5,9 11:25 12:2,9,10,18 17:8,11 29:8,17,25 30:18 33:9,24 34:2 35:1,2 36:12,19,21 43:21 44:2 45:5,13,14,19 48:3 55:20 58:18 60:2 62:12,22 63:9,14,19 64:4 66:23 71:12 73:12,18 78:11 80:15 90:6,14 94:15 95:22</p> <p>discussion [1] 44:3</p> <p>disfavor [1] 30:15</p> <p>disparate [3] 73:7,8 80:6</p> <p>disposition [1] 47:10</p> <p>distinct [3] 58:23 59:11 62:15</p> <p>distinction [8] 13:7 23:9 24:13,15 26:10 36:5 39:1 40:17</p> <p>distinctions [1] 85:15</p> <p>distinguished [1] 17:11</p> <p>District [1] 3:18</p>	<p>disturb [1] 64:18</p> <p>documentation [1] 42:25</p> <p>documents [1] 68:3</p> <p>doing [6] 52:23 61:20 65:15 77:13,14 85:14</p> <p>dollars [2] 10:22 11:11</p> <p>domino [2] 31:20,23</p> <p>dominos [1] 33:6</p> <p>done [8] 69:3 81:7,8 89:20, 20 92:11 95:14,21</p> <p>down [2] 63:5 76:21</p> <p>drafting [1] 88:9</p> <p>draw [1] 13:7</p> <p>drawn [1] 8:10</p> <p>draws [1] 24:13</p> <p>during [2] 13:9 95:20</p> <hr/> <p style="text-align: center;">E</p> <hr/> <p>each [1] 65:25</p> <p>earlier [1] 60:7</p> <p>EASHA [5] 1:18 2:3,12 3:7 96:13</p> <p>easy [1] 87:19</p> <p>EEOC [2] 24:7,21</p> <p>effect [3] 31:21 53:12 86:15</p> <p>effectively [1] 37:8</p> <p>either [2] 5:16 25:17</p> <p>element [19] 4:5,9,16 5:2 19:5,19 29:10,13 41:7 54:4 55:16 59:12 66:24 69:20 70:19 87:24 88:6 93:18 95:4</p> <p>elements [6] 28:3 59:13 61:13 66:1 89:3 97:15</p> <p>elicit [1] 74:7</p> <p>eliminate [4] 55:14 59:2,6 83:7</p> <p>eliminated [1] 14:2</p> <p>elsewhere [3] 14:1 61:7 79:5</p> <p>embezzled [3] 10:21 11:10 65:8</p> <p>embezzling [1] 52:24</p> <p>employ [1] 68:13</p> <p>employed [1] 58:15</p> <p>employee [18] 10:18,21 12:17 30:15 33:10,25 34:5 44:19 52:10 59:14 64:2 65:2 67:23 68:6,19 73:10,10 91:5</p> <p>employee's [6] 10:20 33:4 40:20 51:15 86:10 97:13</p> <p>employees [3] 11:14 68:3 84:20</p> <p>employer [55] 3:15 4:19 7:21 8:17 10:19 11:3,9 12:21 14:3,22 15:3,7,10,17 23:24 24:3,4,9 26:6,7 28:19 29:21 35:19,25 37:23 50:25 52:2,16,20,21 53:1 56:14,16 59:15,15 62:6 64:3 65:5 67:10,14 68:11,22 69:1 83:4 84:11,18,25 85:1</p>	<p>86:1 92:6,16,17 93:1,3 95:3</p> <p>employer's [4] 9:8 31:10 92:19,23</p> <p>employers [6] 26:2 35:18 52:7,8 69:16 97:7</p> <p>employment [6] 7:22 8:14 40:5,14 44:1 60:9</p> <p>enacted [1] 79:24</p> <p>encourage [1] 3:12</p> <p>end [1] 26:2</p> <p>ends [1] 31:21</p> <p>engaged [9] 11:12 26:3 35:13,15 41:9 69:13 83:3 84:20 85:17</p> <p>engages [3] 10:17,18 82:22</p> <p>engender [1] 73:20</p> <p>enormous [1] 94:12</p> <p>enough [11] 8:18 18:6,18, 25 31:25 37:18 40:13,15, 18 70:4 85:4</p> <p>Enron [1] 3:12</p> <p>entered [1] 89:18</p> <p>entire [1] 77:14</p> <p>entirely [1] 5:16</p> <p>entitled [1] 7:19</p> <p>environment [1] 95:6</p> <p>equalize [2] 18:14 72:16</p> <p>err [2] 49:11 59:19</p> <p>errs [1] 59:9</p> <p>ESQ [4] 2:3,6,9,12</p> <p>ESQUIRE [2] 1:18,24</p> <p>essence [2] 4:2 79:17</p> <p>establish [3] 28:20 59:14 62:17</p> <p>established [7] 66:25 70:23 71:19 76:13 79:10,23 94:16</p> <p>establishing [1] 67:21</p> <p>ET [2] 1:6 77:10</p> <p>EUGENE [3] 1:24 2:9 58:11</p> <p>even [17] 11:5 14:2 15:19 16:4 22:20 31:22 33:5 37:17 63:19 66:5 73:7,8 84:13 86:2 87:7 93:8 96:5</p> <p>events [3] 46:4 83:11,16</p> <p>eventually [1] 69:18</p> <p>everybody [1] 73:20</p> <p>everyone [1] 14:22</p> <p>everything [2] 64:24 92:11</p> <p>evidence [21] 9:5,10 11:4, 14 41:2,4 42:21 62:17,18 64:4,7,8,15 65:17 84:14 85:8 86:10 95:2,19 96:1,2</p> <p>eviscerate [2] 5:11,13</p> <p>exact [2] 47:6 66:17</p> <p>exactly [17] 3:20 6:17,25 13:6 29:24 30:1,20 38:24 45:21 49:3 53:2,4 64:25 65:10,12 81:18 88:19</p> <p>example [13] 8:25 15:11, 15 24:2,17 62:19 63:1 68:</p>	<p>18 69:25 72:14,17 85:13 97:3</p> <p>excellent [1] 54:15</p> <p>exchange [1] 47:20</p> <p>exclude [1] 97:6</p> <p>exclusively [1] 66:11</p> <p>Excuse [1] 80:22</p> <p>exhaustive [1] 28:7</p> <p>exists [1] 55:20</p> <p>explain [6] 12:16 25:19 34:16 36:25 92:22 97:18</p> <p>explained [8] 9:18 51:8 65:13 67:24 93:3 94:8 95:13 98:9</p> <p>explains [1] 4:15</p> <p>explanation [2] 9:20 87:4</p> <p>extent [6] 38:11 78:18 96:22 97:21 98:3 99:3</p> <p>extra [1] 54:4</p> <hr/> <p style="text-align: center;">F</p> <hr/> <p>fact [13] 9:7 12:12 14:20 32:4,18 41:3,8,16,20 42:21,24 43:2 51:18</p> <p>factor [84] 3:22 4:5,9 5:20 7:11,25 8:3,7,20,24 9:13, 18 11:20 12:6,12 13:1,4 14:18 15:25 19:3,16,19 21:3,14 22:4 26:1 27:21 28:11 31:10 32:11,12 33:10 34:12 37:14 39:22,24 40:2, 7 42:11,23 43:16 44:1,22 46:1,3,25 48:7 50:17,21 53:10,16 57:23 59:4 60:8, 12,14,25 61:2,4 62:8 66:9, 10 70:5,7 71:3,11 79:4 81:1 82:7 89:7,24 91:12 92:5, 7 93:23 95:8 96:20 98:7, 14,14,18,20,21 99:2</p> <p>factors [1] 8:13</p> <p>factual [1] 42:3</p> <p>fail [1] 77:24</p> <p>fall [1] 66:6</p> <p>far [1] 72:3</p> <p>farther [1] 55:1</p> <p>features [1] 88:11</p> <p>Federal [6] 8:12 14:17 21:9 22:1 62:24 69:10</p> <p>fees [1] 82:10</p> <p>few [4] 62:20 82:24,24 98:4</p> <p>Fifth [2] 67:20,20</p> <p>fight [5] 16:7 39:10 48:11, 12 50:10</p> <p>figure [5] 8:5 28:10 81:12, 19 85:4</p> <p>figures [1] 45:19</p> <p>final [1] 33:10</p> <p>Finally [2] 59:18 69:8</p> <p>finances [1] 3:14</p> <p>find [15] 7:12 28:3 32:18,19 40:16 41:16,21 43:2 86:12, 17 87:5,19 88:2 89:3 96:4</p> <p>finder [6] 32:18 41:16,20 42:21,24 43:2</p>	<p>finding [6] 40:16 41:25 79:6 82:17 95:24 96:5</p> <p>finds [1] 10:21</p> <p>fine [2] 85:14,15</p> <p>fire [5] 6:8,14,23 56:15,17</p> <p>fired [17] 6:4 9:7,8 11:11 15:19 28:25 52:10,21,22 56:13 82:25 83:3,5 84:8, 19,23 87:15</p> <p>fires [1] 14:22</p> <p>firing [3] 7:2 87:15 91:1</p> <p>first [20] 3:4 8:23 14:14,16 15:1,23 21:22 30:22 31:22 40:13 43:23 49:1 67:19 73:5 81:9 83:25 86:5 89:1 96:19 98:6</p> <p>first-line [1] 22:17</p> <p>fit [1] 8:5</p> <p>flaws [1] 75:16</p> <p>flip [2] 87:22,24</p> <p>follow [1] 56:16</p> <p>follow-up [4] 20:11 27:2 51:13 84:5</p> <p>Footnote [1] 17:23</p> <p>forbidden [2] 25:3 37:20</p> <p>force [1] 52:24</p> <p>forced [3] 68:11 69:15 84:11</p> <p>foregoing [1] 78:10</p> <p>forestall [1] 48:9</p> <p>former [1] 45:12</p> <p>forms [1] 77:21</p> <p>formulation [7] 21:17 23:2 97:22,24 98:5,10 99:9</p> <p>forward [1] 36:9</p> <p>found [3] 69:12 79:9 86:24</p> <p>four [1] 88:3</p> <p>framed [1] 82:3</p> <p>frames [1] 59:21</p> <p>framework [23] 4:18,23 5:1,3,10,19 7:5 25:25 29:13, 16 30:2 51:19 60:17,17,18 64:1 70:21 90:7,8 93:21 96:25 97:5 99:5</p> <p>frankly [2] 42:1 58:4</p> <p>fraud [3] 9:6,10 28:16</p> <p>freestanding [3] 19:5,11, 18</p> <p>friend [4] 24:12,16 97:2,19</p> <p>friends [1] 93:16</p> <p>FRSA [1] 69:10</p> <p>functioned [1] 83:25</p> <p>fundamental [1] 66:2</p> <p>further [13] 18:10,14,15 19:11 35:5 38:7,8 72:11,12,19 90:11,18 99:7</p> <p>furthering [1] 89:21</p> <p>future [2] 9:21 48:14</p> <hr/> <p style="text-align: center;">G</p> <hr/> <p>gather [1] 79:17</p> <p>gave [4] 24:2 47:9 63:1 75:9</p> <p>geared [1] 81:12</p>
--	---	---	---	---

Official - Subject to Final Review

<p>General [5] 1:20 57:22 67:25 68:1,2 generally [3] 42:12 56:23 80:2 generation [2] 8:11 98:23 gets [5] 15:2 46:5 51:20 52:21 67:5 getting [3] 9:14 45:16 70:11 give [8] 8:25 56:6 61:12 77:13 81:9 90:20,23 97:2 given [10] 13:11 24:2 52:3 75:12,16 87:19 89:24 90:13 94:9 99:8 gives [1] 7:6 glom [1] 64:18 good-faith [2] 68:16 69:6 good-hearted [1] 35:25 goodness [1] 38:17 GORSUCH [64] 17:3,21,24 18:2,5 19:6,10,21,24 20:3 26:21 37:21,25 38:2,5,17,22 39:3,6,12 47:9 48:19,20,25 49:13,18 50:1,4,10,12 51:9,17 71:13,15 72:6,7,8,23 73:2,5,16 74:1,10,13,23 75:1,4,13,22 76:1,7,16 93:11,16 Gorsuch's [2] 54:1 97:3 got [10] 9:3,7,7 24:23,24 28:15,17 35:19 83:11,25 gotten [2] 11:11 52:13 governed [2] 3:19 4:13 government [4] 59:18 70:3 89:25 94:10 government's [3] 41:15 69:25 70:2 granted [1] 50:2 grapple [1] 58:25 grappled [1] 4:11 grateful [1] 15:7 great [1] 42:16 ground [1] 97:17 groups [1] 18:15 guess [9] 49:3 54:8 56:13 61:18 65:14 77:5 86:15 95:9,18 guy [1] 52:9</p>	<p>hates [2] 42:4 52:11 head [6] 11:15 81:2,13,14,21 95:3 heads [1] 70:11 Healthy [3] 40:3 57:14 98:9 hear [2] 3:3 83:10 heard [4] 60:21 83:12 86:16 97:2 heart [2] 17:18 76:22 held [4] 4:4 30:12 62:21 97:10 help [3] 31:17 56:21 76:7 helps [2] 21:16 47:1 Helsinn [1] 21:25 higher [2] 12:13 17:1 hire [1] 73:10 hit [1] 23:11 Hmm [1] 45:23 hold [3] 68:6,14,15 holding [3] 4:7 27:10 30:20 Honor [28] 4:25 6:11,18 7:1,18 8:8,21 9:16 10:8 11:8 12:5 14:16 17:10 18:25 19:16 21:21 22:13 25:22 26:17 27:7,22 28:15 66:20 77:16 81:22 83:24 91:16 96:15 Honor's [1] 13:2 Honors [1] 16:20 house [4] 14:22 15:4,8,9 however [2] 27:20 48:25 hundred [2] 10:22 11:11 hustling [1] 64:11 hypothetical [3] 15:6,7 32:2 hypotheticals [2] 13:22 14:9</p>	<p>25 incorporating [1] 59:7 incorrect [2] 30:21 47:7 indeed [2] 17:22 59:22 independent [4] 52:13 70:19 75:17 93:18 independently [1] 70:16 indicated [1] 60:7 individual [3] 10:17 30:24 79:21 infer [1] 41:5 inference [1] 41:24 inferentially [1] 32:15 inferred [1] 95:25 inferring [1] 50:19 information [9] 15:8 37:24 68:22,24 69:5 70:1 84:19 85:1 92:18 ingrained [2] 80:18,24 inherent [1] 34:4 initial [1] 7:6 injure [3] 23:11,12 47:25 injures [1] 30:23 injury [1] 23:14 innocent [4] 69:6 84:11 86:1 97:6 inquiry [5] 24:1 39:24 44:15 46:25 51:5 inside [1] 70:11 instance [5] 5:14 21:24 33:4 35:18 44:12 instances [1] 35:19 instead [1] 4:7 instruct [1] 88:13 instructed [5] 20:19 26:18 88:21,25 89:3 instructing [1] 75:19 instruction [24] 13:10 16:8,18 22:22,23 27:3 34:25 74:6,14,17,19 75:8,10,12 84:6 86:5,6,19 88:18 90:13,24 94:8,10 97:4 instructions [10] 27:13,20 75:16 83:25 87:12 88:9,10,15 98:2 99:8 integral [1] 94:3 intelligent [1] 50:14 intend [6] 63:14 72:13 74:2,14 75:4 83:20 intended [4] 62:9 74:9,20 92:6 intent [177] 3:16 4:3,6,10,16,24 5:2,5,8 6:2,8,13,14,22 7:10 10:4,5,9,14 13:8,14 15:1 16:14 17:9,12 18:9,10,14,15,17 19:5,13,18 25:3,3 26:8 27:11 29:9,11,12,17,25 30:13 31:9,23 33:9,24 34:2,17 35:1,3,5,6 36:8,12,19,20,22 37:3,6,18 39:1,16,20 40:8 42:2,10 44:4 45:3,19 46:24 48:4 49:25 50:19,20 51:15,20 54:5 55:8,11,12,16,19,20 56:11,17,</p>	<p>57:7 58:3,18 59:3,6,17 60:2,24 62:3,13,18,22 63:9,19,24 64:4,16,19 65:13,22,25 66:5,7,19,23,24 67:4,8,10,15 68:12 69:20 70:10,20,25 71:12 72:10,19 73:6,9,9,12,14,18,19 74:8,12 75:20 76:12 77:9 78:17,19,23 79:5,10 81:5,25 82:4,16 84:12,13 86:2,19,25 87:1,2,8,25 88:1 89:8 90:6,14,24,24 91:3,17,22 93:6,9,18,19 94:5,6,15,22 95:8,20,25 96:6,22 99:3 intent's [1] 47:22 intention [4] 19:11 38:9,9 72:12 intentional [4] 63:12 79:24 80:5,9 intentionally [3] 80:12,14,16 intents [2] 73:1,4 interaction [1] 8:2 interpretation [4] 16:24 30:17,18 43:15 interpreting [1] 49:22 interprets [2] 14:18 24:22 interrupt [1] 84:18 interrupting [1] 18:3 introduced [1] 69:19 introduction [1] 29:8 investigates [1] 10:20 investigating [1] 68:5 investigation [2] 68:1 69:12 involve [1] 88:11 involved [1] 42:3 involving [1] 75:20 Irrelevant [1] 18:17 isn't [4] 54:25 70:4 74:4 91:1 isolating [1] 26:2 issue [8] 6:13,14,15 38:15 48:9 58:23 74:17 94:2 issued [1] 57:25 issues [2] 51:3 83:6 itself [4] 32:12 46:4 70:8 80:3</p>	<p>19 28:2,9 32:18 53:1 75:19,25 82:16 83:2,15,19,22 85:2 86:6,14,20,23 87:5,12,13,16,17,18 88:2,9,14,20,24 89:2,13,17 90:1 91:9 jury's [1] 26:17 Justice [292] 1:21 3:3,10 4:22 5:6,23 6:12,19,20 7:8,9,10,16,24 8:15 9:11,23,25 10:2,2,3,16 11:18 12:14,19,23 13:19 14:11 15:5,14,21 16:4,10 17:2,3,4,15,21,24 18:2,5 19:6,10,21,24 20:3,5,9,11,13,14 21:6 22:6,14,18 23:3,6 24:11 25:5,6,7,8,9,10 26:12,20,22,23,24 27:8,15 28:1,8 29:2,3,3,5,6,18 30:3,4,10 31:13 32:2,20,23 33:1,8,17,20,23 34:4,7,9,14,19,24 35:11 36:3,6,7,16,21 37:2,21,25 38:2,5,17,22 39:3,6,12 40:10,12,18,24 41:6,12,19,22 42:13 43:5,10,12,13,17 44:16,19 45:1,11,17 46:6,7,9,14,18 47:3,3,4,9,20 48:15,18,18,20,25 49:5,13,18 50:1,4,10,12 51:9,11,11,13,16,23 52:17 53:6,7,7,9,19,25 54:1,23,23,25 56:5,9,24 57:2,5 58:7,8,14 60:6,16,22 61:15,21 62:2,11 63:6,22 64:22 66:4 67:16,17 69:22,23,24 70:9,13,15,25 71:9,13,15 72:6,7,8,23 73:2,5,16 74:1,10,13,23 75:1,4,13,22 76:1,7,15,16 77:19 78:1,8,12 79:11,12,13 80:8,20,23 82:18,20 84:3,5,9,16,17 85:7,19,21,24 86:20 87:9,11,21 88:5,8,16,19,23 89:1,11,23 91:4,7,19,25 92:1,1,2,22 93:10,10,12,13,14,16,19 94:17,18,18,20 95:1,17,23 96:7,8,11,16 97:3 99:11</p>
<p style="text-align: center;">H</p> <p>Halliburton [2] 67:19 97:18 hand [1] 67:14 handle [1] 67:3 hanging [1] 8:1 happen [2] 14:7 68:19 happened [2] 13:24 28:22 happening [2] 55:6 65:4 Happy [2] 47:13 97:18 harass [2] 76:25 77:10 harbored [1] 64:3 hard [3] 16:7 38:25 81:15 harm [1] 35:7 harmful [1] 79:20</p>	<p style="text-align: center;">I</p> <p>idea [2] 19:7 83:19 ideally [1] 85:8 identical [1] 30:17 ignore [1] 49:23 illustrate [2] 31:17 33:16 illustrative [2] 27:24 28:7 immediate [1] 65:22 immediately [3] 64:10,13 94:7 immemorial [1] 66:23 immensely [1] 64:20 impact [5] 65:18 73:7,8 80:6 90:10 important [4] 7:13 65:19 69:9 77:3 importantly [1] 62:15 impossible [1] 68:15 improper [2] 74:21 79:10 inclined [3] 54:12 97:21 98:3 include [5] 89:5,6,7 96:20,21 including [2] 54:16 93:9 incorporated [2] 58:21 98:</p>	<p>8,11,12,16,19,20 56:11,17,</p>	<p style="text-align: center;">J</p> <p>JA [7] 13:12 16:18 96:23 97:22,24 98:5 99:9 JACKSON [34] 20:9,13 29:5,6,18 30:3 36:3,6,21 37:2 54:24,25 56:5,9,24 57:2,5 58:7 61:15,21 62:2,11 63:6 76:15 77:19 78:2,8,12 88:5 94:19,20 95:17,24 96:7 job [1] 14:4 judge [1] 86:5 juries [2] 28:9,23 jury [43] 7:12 13:10 20:18,21 21:1 22:21,22 27:3,4,13,</p>	<p style="text-align: center;">K</p> <p>Kagan [18] 25:9,10 26:12 47:3,4 48:15 49:5 64:22 66:4 67:16 80:20,23 90:21 92:1,2,22 93:19 95:1 Kagan's [2] 84:17 96:17 KAVANAUGH [34] 7:9,24 8:15 9:11 20:5 26:22,23 27:8,15 28:1,8 29:2 40:24 51:12,13,23 52:17 53:6 67:17 82:18,20 84:3,5,10,16 85:7,19,21,25 86:20 87:9,11,21 93:12 key [3] 11:18 36:7 96:19 kind [7] 6:22 33:10 35:7 55:5 63:24 78:16 86:15 kinds [1] 14:8</p>

Official - Subject to Final Review

<p>knowledge ^[14] 8:16 9:1,8 22:24,25 27:16 28:19 32: 17 40:25 41:1,7,8,25 42:9</p>	<p>lower ^[4] 40:7 54:7 63:21 90:3</p>	<p>modifies ^[1] 77:25 modify ^[1] 78:22 moment ^[1] 11:16 money ^[2] 65:9 83:6 months ^[2] 42:19 82:24 morning ^[1] 3:4 most ^[1] 28:23 motherhood ^[1] 18:17 motivated ^[1] 12:21 motivating ^[19] 5:20 7:11 16:1 59:4 60:8,14,25 61:1, 4 66:10 79:4 82:7 89:15 90:2,3 95:9 98:13,14,20 motivation ^[2] 10:25 19:11 motive ^[9] 16:1 17:17 18: 10 31:2 38:7 72:11,19 92: 24 93:2 motives ^[1] 38:7 move ^[1] 35:21 Ms ^[57] 3:6,9 4:25 5:12 6:10, 17,25 7:15,17 8:8,21 9:16 10:7 11:8 12:4,17,20 13:2 14:15 15:13,15 16:3,6,12 17:10,16,22 18:1,4,24 19:9, 15,23 20:1,4,8,25 21:20 22: 12,16,19 23:4,19 24:16 25: 10,22 26:16 27:6,9,22 28:2, 14 29:15,24 47:4 96:12,15 MSPB's ^[1] 57:25 Mt ^[3] 40:3 57:14 98:9 much ^[9] 12:13 51:10 54:2 60:19 64:17 66:8,14 72:18 81:24 multiple ^[1] 91:8 MURRAY ^[3] 1:3 3:5 84:8 Murray's ^[1] 83:11 must ^[9] 4:9 10:6 33:11 34: 5 35:2 45:22 59:13 66:24 80:9</p>	<p>notable ^[2] 98:8,10 notably ^[1] 98:6 note ^[2] 21:22 25:11 nothing ^[2] 54:6 65:6 notice ^[4] 68:3,7,14,15 novel ^[1] 72:1</p>	<p>Otherwise ^[1] 80:5 out ^[25] 7:12 8:5 13:21 14:9, 14 26:14 28:10 36:17 50: 25 53:11 61:13 65:12 68:2, 14,15 73:2 76:7,19 81:12, 19 85:4 86:8 88:1 91:12 95:1 outcome ^[1] 46:5 outside ^[3] 55:16 90:7,9 over ^[5] 48:16,21 57:17 61: 9,17 overall ^[1] 18:20 overcome ^[1] 60:1 overlap ^[1] 65:17 overreading ^[1] 59:10 overturning ^[1] 47:13</p>
<p style="text-align: center;">L</p>	<p style="text-align: center;">M</p>	<p style="text-align: center;">N</p>	<p style="text-align: center;">O</p>	<p style="text-align: center;">P</p>
<p>lack ^[1] 26:8 lacked ^[1] 67:15 lacks ^[2] 59:20 93:3 language ^[16] 5:15 8:25 11:1 18 12:6 13:12 21:7,12 26: 24 43:15 57:21,23 59:21 66:21,22 80:22 96:23 late ^[1] 32:7 later ^[2] 82:24,24 latter ^[2] 45:10,11 Laughter ^[4] 20:7 38:19 48: 23 72:25 law ^[12] 23:8 25:1 59:20 62: 24 66:2 68:9 73:15 74:21 79:23,23 80:17 94:13 laws ^[1] 62:14 Lawson ^[1] 73:22 lawyer ^[2] 68:19,23 least ^[5] 8:4 16:14 22:8 25: 18 77:5 leave ^[5] 38:16 47:17 54:6, 21 56:1 leaves ^[6] 15:9 47:11,14,15 55:1 61:13 leaving ^[5] 49:4,12,16,19 94:12 led ^[1] 69:7 left ^[4] 14:5 15:20 38:16 76: 19 lesser ^[1] 13:14 letting ^[1] 85:13 level ^[3] 55:12 73:6 90:3 liability ^[8] 23:9,13,17,21 24:14 40:19 62:22 78:23 liable ^[3] 24:4 29:19 74:16 light ^[1] 77:13 likely ^[1] 56:1 link ^[2] 14:12 15:24 list ^[3] 84:22 98:15,17 listen ^[2] 42:17 54:4 litigation ^[2] 56:2 83:1 little ^[3] 20:6 46:21 75:25 LLC ^[1] 1:6 long ^[7] 16:25 27:12 42:15 51:2 53:23 58:16 69:9 look ^[14] 23:17 31:18 37:11 40:3 42:21 44:7 46:22 49: 1,23 52:2,3 53:14 54:15 57:22 looked ^[2] 33:13 65:24 looking ^[1] 31:18 looks ^[3] 24:1 61:9,17 lose ^[3] 67:15 84:12 93:4 loses ^[2] 14:4 86:1 losing ^[1] 33:18 lot ^[8] 17:6 22:7 33:14 38: 16 47:11,14 54:17 64:11 lots ^[1] 28:9 low ^[1] 37:15</p>	<p>made ^[17] 31:4 37:8 39:23, 23 41:24 52:19 56:2 57:9, 11 64:8,10 65:3 68:7,17 81:3,13 90:12 manager ^[3] 63:1 64:13 86: 11 managers ^[2] 64:12 65:23 manner ^[4] 77:1,18 78:14, 15 many ^[4] 18:13 57:18 67:18, 18 maps ^[1] 9:12 Marano ^[4] 14:17,25 16:22 98:22 material ^[1] 70:8 matter ^[2] 1:13 50:8 matters ^[3] 26:9,19 66:7 mean ^[26] 11:24,25 12:23 17:2,5,5,7,7 24:19 30:14 35:6,11 40:19 43:19,20 45: 3,4 47:21 48:4,13 49:25 63:9 65:6 70:17 77:20 92: 2 meaning ^[2] 5:24 30:24 meaningful ^[1] 58:3 means ^[23] 5:25 7:25 8:7 12:20,24 17:12 19:3,4,19 21:4 27:18 28:11 30:23 45: 14,14 49:24 50:19,21 54:8 78:14 96:22 97:11 99:3 meant ^[2] 9:19 16:13 mechanism ^[3] 65:1,11 71: 20 mechanisms ^[2] 81:9,12 meet ^[1] 69:17 melttdown ^[1] 3:12 men ^[2] 18:14 72:16 Menendez ^[1] 68:6 Menendez's ^[1] 68:5 mens ^[7] 71:19,22 72:10 74:3,3 77:4 91:22 mentioned ^[1] 61:12 merely ^[1] 96:2 merge ^[1] 37:5 merges ^[2] 23:16 25:2 might ^[9] 7:11 14:13 15:10 35:24 40:22 48:8 66:6 77: 2 87:3 millions ^[1] 3:14 minimalist ^[1] 48:10 minute ^[1] 34:1 misbehavior ^[2] 43:1,2 misconduct ^[6] 3:13 33:5, 5 69:13 82:23 85:17 missing ^[1] 45:22 mistaken ^[1] 38:12 Mm-hmm ^[7] 28:1 33:22 34:3 38:4 41:14 44:25 60: 22 modified ^[2] 77:23,24</p>	<p>name ^[1] 86:21 namely ^[1] 7:21 narrow ^[1] 49:5 Nassar ^[2] 61:3 79:2 nature ^[1] 39:18 necessarily ^[8] 28:3 32:13 40:23 42:14 67:8 77:13 78: 16 80:13 necessary ^[1] 63:11 need ^[14] 18:22 20:5 27:2 28:3 33:24 48:9 49:20 50: 23 54:2 78:1 92:9 95:24 98:1 99:5 needed ^[1] 83:7 needs ^[8] 70:23 73:11,13, 17 74:20 78:23 79:24 80:5 never ^[4] 4:11,15 11:6 54: 14 new ^[2] 72:1 97:17 non-retaliatory ^[1] 69:6 nonetheless ^[1] 67:11 nor ^[1] 4:7 Normally ^[2] 23:8 49:2</p>	<p>objectively ^[2] 9:5,9 observations ^[2] 25:13,16 obviate ^[1] 21:5 obviously ^[3] 11:9 16:11 75:11 occasionally ^[1] 58:24 occur ^[1] 33:3 occurred ^[3] 63:15 73:13 97:12 October ^[1] 1:11 offense ^[1] 37:20 offers ^[1] 25:12 Office ^[1] 98:8 often ^[4] 37:4 64:15 65:16 85:9 Okay ^[19] 15:14 19:22,24 20:2,3 22:16,18 27:8 34:9, 14 37:2 47:4 53:6,25 54:8 72:6 84:19 89:11 91:25 old ^[2] 67:12,20 older ^[2] 63:4,20 once ^[3] 12:9 41:12 85:2 one ^[25] 3:20 16:5 18:8 20: 11 31:19 45:7 47:21,25 49: 8 52:1 53:25 61:1 63:2 65: 14 70:22 72:8,12,17 74:7 77:8 89:24,25 93:14 95:6 98:5 ones ^[1] 13:22 only ^[11] 14:9 20:22 33:4, 13 41:7 43:3 54:4 71:20 91:8,13,13 open ^[3] 54:6 55:1 56:1 opening ^[1] 61:13 operates ^[2] 82:12,14 operating ^[1] 95:6 opinion ^[3] 16:11,21 18:7 opportunity ^[1] 56:6 options ^[2] 31:18 46:22 oral ^[6] 1:14 2:2,5 3:7 30:7 58:11 order ^[2] 29:19 70:23 ordinarily ^[1] 94:23 ordinary ^[1] 95:21 original ^[2] 27:16 86:6 other ^[41] 4:17 5:22 6:2 7: 13 8:13 16:11 18:21 24:12, 17,19 35:24 36:10 42:20 43:1 44:9 45:8 46:10,17 54:1 56:2 62:13 64:8 65: 15 67:14 71:23,25 75:16 76:19 77:1,18 78:14,15 79: 14 80:6 83:15 84:20,23 87: 16 93:17 97:2,19 others ^[3] 54:19 59:25 77: 21</p>	<p>PAGE ^[4] 2:2 25:10 44:6 57:17 paragraphs ^[1] 44:21 part ^[25] 11:19 12:8 13:5,16 14:24 15:22 31:12 41:17 43:24 44:14 51:15,16 54:9 63:8 65:22 71:14 72:20 82: 1 84:10 85:9 88:10,15,17 91:14 92:16 particular ^[3] 8:19 57:12 72:1 parties ^[2] 47:2 94:2 partly ^[2] 66:13,14 parts ^[2] 24:23 76:20 passed ^[1] 3:11 path ^[1] 87:19 pattern ^[1] 14:20 paw ^[1] 65:21 pay ^[2] 72:16 82:9 people ^[10] 6:23 35:24 63: 4 72:15 79:15,19 80:12 81: 17 84:23 85:13 performance ^[3] 10:20 84: 22,24 performer ^[2] 52:23 83:6 perhaps ^[1] 29:7 Period ^[8] 19:21,21,22,23, 23 20:1 38:13 75:6 person ^[18] 6:8 11:4 23:11, 12 35:13,14,15 42:4 44:9, 12 52:19,21 56:15,17 67: 11 78:15 84:8 85:17 person's ^[1] 56:13 personal ^[1] 71:6 personnel ^[13] 3:23 4:1 11: 21,23 12:1 43:17,18 44:23 45:2 46:2 53:16 71:4,6 persuasive ^[2] 25:13,15 petition ^[2] 45:21 60:1 Petitioner ^[21] 1:4,19,23 2: 4,8,13 3:8 30:9 36:9 38:3 40:21 45:22 59:9,18 60:1, 7 61:12 67:1 92:25 94:11 96:14 Petitioner's ^[9] 31:15 33: 21 43:9 55:18 61:24 67:2</p>

Official - Subject to Final Review

76:11 79:8 86:3 phrase [3] 58:16,19 59:23 pick [3] 17:25 61:17 84:17 picture [1] 89:18 place [3] 39:7,10 94:7 places [1] 3:20 plain [2] 3:17 4:11 plainly [2] 78:7 82:3 plaintiff [33] 3:21 4:9,15 5:4,17 7:4,6 10:6,8,23 14:23 15:19 19:3 26:18 33:11,25 34:5 44:19 58:17 59:13 67:21 69:11,13 73:17,19 78:4 82:5,7 83:2 88:14 89:13 95:14,19 plaintiff's [6] 28:18 60:3 82:1 85:22 89:4 95:14 plaintiffs [1] 28:6 play [1] 37:13 played [11] 12:24 16:1 31:12 32:12 34:12 41:17 50:21 61:24 89:21 91:17,17 plays [2] 10:4,5 please [4] 3:10 18:4 30:11 58:14 plus [5] 8:17 9:1 40:24,24 41:1 point [15] 9:4 10:11 15:18 22:5 26:10 48:13 54:2,12 65:14 68:1 69:14 78:2 82:19 83:8 84:17 pointed [1] 95:1 points [1] 36:17 poor [2] 52:22 83:5 pose [1] 93:15 position [36] 14:8 15:16 19:2 23:16 24:14 25:14,17 31:14,15 32:4,9 33:21 34:21,21 35:4,9 39:15 41:15 43:8 45:8,21 46:23 54:14 61:25 70:18,18 77:25 79:8,18 80:1 83:7 86:13,17 96:18,18 99:9 positions [1] 8:1 possibility [2] 54:7 55:2 possible [1] 18:8 possibly [1] 68:16 practical [2] 26:13 50:8 practice [1] 60:9 practicing [1] 61:22 precisely [2] 92:15 94:25 preferable [1] 99:10 preferred [2] 97:24 98:5 prejudice [1] 30:14 prerogative [1] 97:9 prerogatives [1] 51:7 present [1] 83:18 presentation [2] 36:11 83:13 presented [2] 64:17 76:13 presumably [2] 9:20 88:10 presumption [3] 10:13 26:5 60:2 pretty [4] 28:23 48:10 85:	18,20 Price [2] 67:12 98:14 prior [4] 32:5 68:12 73:23 84:12 privilege [1] 70:1 privileged [5] 68:21,24 69:5 70:1,7 probably [6] 20:5 28:10 33:14 46:12,16 87:22 problem [3] 32:5 36:15 85:9 problems [2] 21:7 94:8 proceed [1] 94:1 proceedings [1] 20:22 produce [2] 37:13 82:14 producing [5] 31:12 32:14 41:17 50:22 53:12 prohibited [7] 45:6 66:12,13,14 81:1,14,21 prohibition [2] 33:13 49:24 prohibits [2] 73:15 80:18 prolong [1] 87:11 promote [2] 73:10 77:24 promotion [1] 63:2 prong [1] 86:1 proof [10] 3:19,21 5:10 30:18 31:8,8 32:11 35:2 40:17 63:24 proper [4] 20:17 21:1,19 89:23 properly [1] 29:25 propose [1] 49:21 proposed [2] 4:16 97:3 protect [1] 35:20 protected [76] 3:21 4:2,20 7:3,22 8:17 9:4 10:11,17,18 11:2,6,12,19 12:11 17:14 23:22 24:10,25 25:4 27:17 28:16,21 29:1,21 30:24 31:4,8,11 32:11 34:11 35:13,15 36:13 37:13 41:9,17 42:5,6,18 43:25 44:20 45:15 46:3 50:18,20 52:5,10,20,25 53:21,22 59:24 62:6,8,10 67:22 68:10 71:2 74:4,16 79:21 82:23 83:3,20 84:1,21 85:5 89:5,14 90:10 92:4,6 93:9 97:16 98:17 Protection [6] 8:10,23 9:17 27:23 59:19 60:20 prove [26] 3:25 5:2,13 6:1 7:2,20 10:6 12:8 18:10 28:6 33:11 34:5,10 37:15 41:3,3,23,24 48:5 52:16 60:8 68:11 69:2 78:19 81:6 88:14 proven [5] 3:16 5:16 28:4 32:15 33:24 provides [1] 5:7 proving [3] 34:11 42:10 94:21 provision [5] 44:10 59:10,	11 61:11 62:23 proximity [9] 8:18 9:2 10:12 27:17 32:16 40:14 42:1,9,16 public [1] 41:9 publicly [1] 44:13 pure [1] 31:19 purport [1] 59:12 purposefully [1] 77:9 put [9] 7:5 9:19 10:14 36:9 59:9 84:6 85:2,8 92:19 putting [1] 22:15 <hr/> Q QP [1] 50:1 quarrel [1] 80:2 question [35] 3:14,18 6:7 7:1,8 13:3 23:15 24:8 27:3 32:17 33:16 38:2,12 41:4 44:2 49:11,15 54:1 55:15 56:7 64:16,25 66:8,18 71:1 76:13 82:21 84:7 90:10 92:19 93:14,16 94:23 95:18 96:17 questions [7] 4:21 18:21 27:16 54:17 60:5 66:16 97:20 quite [5] 12:14 16:22 53:23 68:16 82:13 <hr/> R railroad [2] 30:19 69:10 raise [1] 18:21 raised [2] 27:3 54:18 raises [1] 13:22 rates [3] 63:2,3,5 rather [2] 13:4 61:5 rating [1] 84:24 ratings [1] 84:23 rea [7] 71:19,22 72:10 74:3,3 77:4 91:22 reached [1] 52:6 React [1] 18:23 reaction [4] 64:9 74:25 87:10 91:6 read [14] 11:23,25 18:7 45:3,4,18 55:6 71:18,21 76:8 77:20 79:12 94:4,7 reading [1] 18:8 reads [1] 33:9 real [3] 37:15 54:25 55:21 realized [1] 69:18 really [6] 25:20 38:8 40:9 42:25 44:17 49:20 reason [24] 15:20 43:3 45:24 49:2 51:14 55:5 56:12 66:12,13,15 73:15 74:21 77:2 80:17 83:21 84:10,21 85:6,25 91:8,13,14 92:13,17 reasonable [2] 9:5,9 reasons [22] 7:14 21:13 22:7 37:7,9 47:17 57:8,10 59:25 63:13,14 68:16 69:6 72:	13,15 73:12 75:17 80:15 89:9 91:8 94:25 98:16 REBUTTAL [3] 2:11 96:11,13 rebutted [1] 26:5 received [1] 86:11 receiving [1] 78:5 recognize [1] 62:12 recognized [5] 58:17 61:22 66:22 81:5 90:2 recognizes [1] 73:21 recorded [1] 9:6 reduced [4] 59:4,7 61:25 76:20 reduction [1] 52:23 reduction-in-force [1] 85:12 reference [1] 61:17 refers [5] 71:2 74:7 78:3,4 79:3 reflect [2] 47:20 58:5 reflected [1] 57:13 regarding [2] 79:3 90:13 regards [1] 74:21 regime [2] 50:13 72:1 regulations [1] 57:25 reinstate [2] 20:21 21:1 reinstatement [1] 82:9 reject [2] 19:7 78:12 rejected [1] 18:12 relate [1] 48:6 related [1] 14:22 relates [3] 77:4 95:7,8 relationship [2] 6:15 96:17 relatively [2] 47:9 60:21 relevant [1] 37:1 relied [1] 21:25 relief [2] 78:3 95:13 relying [1] 59:19 remains [1] 60:25 remand [3] 20:17,22 21:17 remarkable [1] 96:3 Remember [6] 13:9 22:22 28:15 79:6 82:6 93:1 remote [2] 52:5 65:23 removed [1] 59:22 render [1] 12:5 reply [3] 14:6 20:20 25:11 report [5] 3:13 28:25 52:19 82:23 87:16 reported [2] 9:6 28:16 reporting [1] 9:9 reports [1] 14:21 represented [1] 68:23 reprisal [1] 59:24 require [7] 19:17 58:17 73:9 87:4 95:1,19 96:1 required [17] 4:5 16:16 19:14 31:3 35:8 47:22,23 48:4 54:5 62:13 63:16 65:17 73:4,7 82:1 87:5 94:16 requirement [24] 4:14,24 5:9,10,11,14 15:1 17:20,23	19:12 27:10 45:4 59:3,6 60:24 65:13 71:22 72:2,10 73:18 76:4 81:1 91:22 96:21 requires [9] 30:13 31:8,11 32:11 50:18 53:20 66:23 73:9 76:12 requiring [2] 30:18 90:7 requirement [1] 81:15 resides [1] 79:5 resolved [2] 15:17,22 respect [1] 86:4 respectfully [1] 92:21 respond [2] 56:19 60:15 Respondent [1] 33:14 Respondents [4] 1:7,25 2:10 58:12 Respondents' [3] 30:21 39:15 55:7 response [3] 36:7 39:17 70:25 responses [2] 14:16 21:20 responsibilities [1] 35:23 restrict [1] 86:18 result [5] 10:19 14:21 52:14 81:6 82:14 resulted [1] 23:13 retain [1] 68:3 retaliate [6] 18:11 72:19 73:24 75:6 86:25 88:1 retaliating [2] 35:14,17 retaliation [13] 38:6 39:18 47:23 60:4 72:12 73:21 74:5 75:21 76:4 77:5 87:2 91:6 96:4 retaliatory [60] 3:16 4:3,6,10,16 13:8,14 15:1 16:14 19:5,18 26:8 27:11 28:17 30:13 31:9,21,23 35:5,6 36:8,19 39:16,20 44:14 46:24 47:21 49:25 51:14,20 54:5 55:12,14,14 59:16 65:22 67:4,8,10,15 68:7 70:24 73:19 74:8,12 75:19 76:12 77:9 86:2 89:8 92:24 93:2,6 94:5,5,15,22 96:6,21 99:3 reus [1] 76:19 revealed [1] 33:5 revealing [1] 70:1 revelation [1] 70:7 reverse [3] 16:15 19:1 75:9 reversed [1] 32:6 reviewing [1] 28:13 rich [1] 58:19 RIF [1] 52:12 right's [1] 51:7 risk [2] 54:3 55:1 ROBERTS [29] 3:3 10:2 23:6 24:11 25:5 26:20 29:3 30:4 43:10 46:7 47:3 48:18 51:11 53:7 54:23 58:8 69:23 71:9 79:11,13 80:8 90:16,21 92:1 93:10 94:18
--	---	--	---	--

Official - Subject to Final Review

<p>96:8,11 99:11 role [17] 10:4,5 12:24 16:1, 5 32:12,13,19 34:12 37:13 50:22 55:25 61:23 65:24 89:21 91:17,17 root [1] 43:14 route [1] 49:11 routinely [1] 17:18 rule [5] 5:3 7:3 13:21 53:11 57:15 ruled [2] 14:9,14 run [2] 25:25 39:1</p> <hr/> <p style="text-align: center;">S</p> <p>safety [2] 30:19 69:10 same [24] 4:1 5:15 7:20 30:24 37:9 38:2 40:11 45:21 47:6,23 52:6,14,14 56:18 57:4,10 61:7 64:7 66:17 69:3 82:12 84:21,24 94:7 Sara [3] 15:13,15,15 Sarbanes-Oxley [12] 3:11 58:15,22 59:5 60:3,19 61:9,9,14 71:5 73:23 75:20 satisfied [1] 66:1 saying [23] 5:9 14:11 18:13 19:7 26:12 41:25 46:11 47:5 50:11 61:19 63:7,10,11 66:5,11 67:2 70:22 74:14 87:4,13 92:25 96:2 98:18 says [24] 4:12 14:25 16:8,18,21 24:23 26:4 34:25 40:21 51:17 52:20,21 57:23 65:2,3,5 68:22 71:25 77:17 78:13 81:19 83:2,5 87:14 SCALIA [74] 1:24 2:9 58:10,11,13 60:6,16,23 61:21 62:11 63:10 64:6,23 65:16 66:20 67:18 69:22 70:9,14,22 71:10,13,14 72:4,7,21 73:1,4 74:6,12,19,24 75:2,11,15,24 76:6,10 77:16,20 78:10,20 79:19 80:14,21 81:22 82:19 83:23 84:4,9 85:7,20,24 86:23 87:10,18,23 88:6,16,22,24 89:2,19 90:9 91:3,5,15,21 92:21 93:15,25 95:11,23 96:10 scheme [8] 9:12 37:12 40:6 44:20 48:7 50:8 56:1 89:18 schemes [2] 7:20 81:23 Schumacher [4] 86:21,25 87:6,14 scienter [2] 63:16 91:23 score [1] 63:21 screen [1] 83:14 SEC [7] 67:24,24 68:4,20,24 69:4,4 Second [36] 4:4,17 13:10 14:19 15:2,17 16:13,15,16 18:7 19:1 20:15 21:18 22:22 27:9 30:1,12 31:6 34:</p>	<p>22 38:11 47:13 48:2 67:5,9,16 69:16 75:18 79:7 86:1 92:9,11,13,23 94:1 96:25 98:12 second-line [1] 22:19 Secondly [1] 35:9 Section [1] 71:7 SECURITIES [6] 1:6 3:5 9:5,10 44:12,13 see [9] 57:18 65:14 71:16 75:22 76:1,2,4,17 84:23 seem [1] 61:19 seeming [1] 36:15 seems [11] 5:6,10,10 14:13,18 18:20 45:20 56:17 64:24 77:12 98:22 seen [1] 28:18 semantic [2] 25:23 26:9 send [1] 54:10 seniority [1] 78:5 sense [3] 37:22 76:17 92:18 sensible [2] 9:12 92:8 sent [4] 68:2,14,15 86:5 sentence [4] 43:24 45:16 75:7 77:14 sentences [1] 80:10 separate [11] 19:4,18 23:25 34:17 41:7,10 70:20 78:17 82:17 91:5 95:4 separated [3] 55:7 59:16 67:11 separately [3] 4:9 23:17 90:12 separation [2] 69:7 91:18 series [1] 69:9 seriously [1] 49:4 set [2] 31:20 81:8 sets [1] 92:4 setting [1] 97:7 sex [1] 97:13 SG [1] 10:13 SG's [2] 96:18 98:8 shall [3] 3:18 4:13 27:25 sharp [1] 24:13 she's [1] 59:14 shift [6] 10:9,14 35:22 70:24 81:16 95:12 shifted [1] 11:17 shifting [3] 41:13 91:2,20 shifts [4] 3:24 5:21 7:7 50:24 short [1] 94:23 shortly [1] 9:9 shouldn't [1] 11:14 show [45] 3:21 4:9,15 5:5,20 6:2 8:19 10:24 11:3,10 12:18,21 13:21 14:11 15:18,23 16:1 17:20 23:21 24:24 26:8 28:16,17,22 40:13 42:5,6 44:11,20 50:24 58:17 62:18 63:24 64:3,5,7 73:17,19 82:5 83:17 85:4 89:14,21 91:16 99:6</p>	<p>showing [13] 4:5,8,18 10:9 13:14 16:17 17:1 19:17 28:19 68:12 84:1,12,14 shown [7] 10:11 12:10,12 37:19 39:21 82:11 95:15 shows [3] 30:2 82:8 84:19 side [11] 24:13,17 46:11,17 56:3 71:25 79:14 92:19 93:17 97:2,19 sides [1] 54:16 sides' [1] 8:1 similar [3] 60:13,18 62:14 similarly [1] 21:25 simplest [1] 8:9 simply [13] 11:24 17:12 18:19 19:12 31:11 38:5 43:19 49:10,22 67:6 79:15 82:2,16 since [1] 54:14 single [1] 95:12 sits [1] 48:11 six [1] 42:19 slick [1] 83:12 soil [1] 83:14 soil [1] 58:19 solely [1] 61:10 Solicitor [1] 1:20 solved [1] 36:15 solves [1] 48:1 solving [1] 51:3 somebody [3] 35:12 67:3 74:15 someone [2] 5:25 6:3,4,4,14 9:4 17:13 20:10 22:24 28:16 47:25 82:22 someone's [2] 28:25 42:3 sometimes [9] 5:18 38:22,23 64:6 69:16 81:7 85:15,16 89:4 somewhat [1] 87:3 sorry [8] 18:3 45:12 57:2 61:16 84:18 87:11 88:16 90:22 sort [20] 14:12 16:16 17:8,17 19:4,17 24:15 25:2,2 26:13 28:5,13 29:22 64:3,18 65:23 76:19 77:4 95:2,21 SOTOMAYOR [26] 5:23 6:12,19 7:8,10,16 20:11,14 21:6 22:6,14,18 23:3 25:8 26:25 46:8,9,14,18 90:19,20,23 91:4,7,19,25 sought [2] 40:1 92:22 sounds [3] 70:10,10 90:4 SOX [4] 30:12 31:6 96:5 98:25 special [1] 62:23 species [1] 34:1 specifically [1] 78:4 speech [1] 83:12 speeding [3] 23:11,12 24:2 split [1] 67:22</p>	<p>spools [1] 26:14 stage [2] 40:13 70:16 standard [9] 12:13 14:10 28:5 40:2,7 58:22,25 61:6 97:8 Stanford [1] 1:18 start [2] 49:14 96:16 started [2] 33:6 65:4 stated [1] 30:16 STATES [8] 1:1,15,22 2:7 25:12,24 26:4 30:8 States' [2] 25:14,17 statute [40] 3:17 4:12 5:7 7:5 8:19 9:20 11:19 16:24 18:20 38:10 43:15 45:6 49:1 58:23 61:16 71:18 72:20 74:8,11 75:23 76:2,5,8,12,18,20,22 77:8 78:6,25 79:9 81:18 82:12 88:12 92:3,8,9 96:4,4 98:6 statutes [4] 9:21 17:19 71:24 80:25 Staub [4] 63:13 65:20 73:11 97:18 step [34] 4:17 8:4 11:9 14:9,14,19 15:2,17,23 24:5 26:1,1,4,7 28:12 30:1 43:6,7 51:6,19,22,25 67:5,9,16 69:16 79:7 89:1 92:10,11,14,23 93:5 97:4 steps [3] 26:11,18,19 still [13] 6:23 23:5,23 35:25 55:3,15 66:17 67:15 86:8,9 93:2,4 95:12 stipulated [1] 89:4 stop [3] 15:2 39:7 93:21 strong [1] 60:2 struggling [1] 56:10 stuck [1] 85:22 submit [1] 95:16 submitted [2] 99:13,15 subsection [1] 78:2 Subsequently [1] 9:19 substantial [1] 15:25 substantive [4] 5:7,11,14 61:5 substitute [1] 73:17 suddenly [1] 82:15 suffice [1] 9:1 sufficient [3] 16:19 27:25 40:20 suggest [2] 55:8 61:20 suggesting [4] 20:17 93:20 95:5,11 superfluous [3] 12:6 39:24 46:25 supervisor [1] 52:9 supporting [3] 1:22 2:8 30:9 supportive [1] 14:3 Suppose [2] 88:8,9 supposedly [1] 86:11 SUPREME [3] 1:1,14 22:5 surely [1] 50:15</p>	<p>suspend [2] 76:25 77:10 suspended [1] 24:3 suss [1] 65:11</p> <hr/> <p style="text-align: center;">T</p> <p>table [6] 47:11,14,16,18 49:16,19 talked [3] 29:8 38:8 53:15 talks [1] 57:14 target [1] 74:9 temporal [10] 8:18 9:1 10:12 27:17 32:16 40:13 42:1,8,15,16 tended [3] 22:9 86:7,8 tend [2] 84:2 87:7 tends [5] 21:4 22:21 26:24 27:4 97:23 tension [1] 25:18 tent [1] 81:5 tenuous [1] 53:24 term [14] 8:9 9:13,15,21 17:6 21:3,23 22:2,4,9,10 24:22 30:22 80:9 terms [2] 62:20 65:18 terrible [3] 65:4,6,8 test [16] 29:12 53:10 55:4 59:5,8 60:13 61:4,23,25 69:25 70:2 78:19 79:4,4 93:24 94:24 tests [1] 95:6 text [6] 3:17 4:12 8:22 35:10 39:16 53:15 theory [1] 42:3 there's [42] 5:18 6:7 10:13 12:10 13:8,10,13 14:5,25 16:8 17:1,19 19:4,17 21:13 22:7,22 23:23,25 26:5,13 28:24 34:16 36:4 40:5,17 41:1 42:25 45:23 49:10 52:15,16 54:3,4 55:15 61:10 64:8 66:18 69:9,11 76:3 84:13 they'll [1] 84:16 they've [1] 82:9 thinking [1] 11:1 thinks [1] 13:13 third [1] 98:22 THOMAS [10] 4:22 5:6 6:20 25:6 31:13 43:12 60:6,16,22 90:18 Thornburgh [1] 57:22 Thorstenson [1] 32:7 though [8] 9:24 14:3 20:20 39:4,14 63:19 72:9 84:13 thousand [2] 10:22 11:11 threaten [2] 3:14 76:25 three [6] 24:23 31:18 46:22 47:2 73:3 97:14 threshold [1] 66:6 throughout [1] 68:20 Title [20] 5:15 7:18 18:12 30:25,25 42:4 58:5 59:3,5 60:10,14,17,24 62:13 71:23 72:14 77:22 79:3 82:3,</p>
---	---	--	---	--

Official - Subject to Final Review

6 today [3] 18:22 49:20 60:21 together [3] 8:2,5 64:19 took [4] 7:21 14:6 66:11 86:8 toss [1] 17:6 tracked [1] 30:20 traded [1] 44:14 traditionally [1] 71:22 trait [11] 7:3,22 17:14 24:10, 25 25:4 42:5,6 74:4,16 98:17 transplanted [1] 58:18 treat [8] 5:25 17:12 31:3 74:2,15 75:4 78:15 80:12 treated [1] 6:5 treating [6] 37:19 64:13 79:15,19 80:15,16 treatment [4] 30:23 44:3 45:15 63:12 TREVOR [1] 1:3 tricky [1] 9:23 tried [2] 86:12,16 trigger [1] 78:22 true [8] 39:22 42:2,11 50:4, 5 51:21 67:6 79:18 truth [5] 15:3 53:2 83:13 84:7 87:14 truthful [1] 98:16 trying [8] 8:5 18:14 28:10 29:9 56:10 61:18 81:12 88:2 Tuesday [1] 1:11 turn [2] 3:20 31:2 tweaked [1] 40:6 two [24] 14:16 21:20 23:16, 19 25:12,15 27:13 28:3,25 34:17 42:17 52:1,15,16 72:1,22 73:1,2,4 83:10,16 95:5 96:19 99:8 type [3] 5:17 31:19 51:5 types [3] 23:8,20 52:1 typical [1] 53:5 typically [1] 89:20	18,20 34:20 44:17 45:18 49:8 51:16 56:10,21 61:18 64:23 71:16 95:17 understanding [4] 28:12 55:17 92:17 94:24 understood [6] 29:25 36:10 46:10 62:2 77:23 79:1 unfavorable [12] 3:23 4:1 11:21,23 12:1 43:17,18 44:23 45:1 46:1 71:3,6 Unfortunately [1] 72:21 unique [1] 42:10 unit [1] 14:23 UNITED [10] 1:1,15,22 2:7 25:12,14,17,24 26:4 30:8 unlawful [1] 60:9 unsettled [1] 94:13 unusual [3] 58:2 82:13 85:20 up [13] 7:19 11:3 17:25 26:2 31:21 47:5 49:20 51:3 61:17 81:8 83:11 84:17 92:4 useful [1] 50:14 uses [4] 8:24 13:11 95:7,9 using [3] 31:7 87:2 89:25 usual [2] 52:17 82:22	40:2,4 41:23 42:9 48:1 50:6 51:2 52:6,12,14 54:12 60:20 61:10 63:13 65:12 66:3 77:11 79:20 81:15,19, 21 82:12 83:24 84:2 85:10 86:7,9 89:19 90:25 94:5 95:21 97:23,25 ways [2] 18:8 67:19 weeks [2] 42:17 82:24 weigh [1] 53:1 weight [1] 61:11 welcome [2] 4:21 60:5 whatever [3] 55:19 72:9 85:6 whatsoever [2] 10:4,5 Whereupon [1] 99:14 whether [23] 7:12 11:12 13:3 19:19 20:18 23:13,14 25:20 26:3,6 38:12 45:25 47:16 55:11,12 56:14 71:2 76:13 81:20 90:13 92:15 93:6, 7 whistle [1] 74:23 Whistleblower [13] 8:10, 22 9:17 14:21 27:23 35:20, 21,22 59:19 60:20 73:23 75:21 94:13 whistleblowers [2] 3:13 52:11 whistleblowing [17] 13:25 14:4 30:16,19 31:24 33:7 36:2 39:17,21 75:1,3,5 76:2 81:20 86:12,16 90:25 who's [1] 84:7 whole [4] 50:6 71:23 72:17 92:16 widely [2] 61:22 94:9 Wilkie [3] 62:20 63:17,18 will [8] 21:4 39:21 44:5 55:2 56:1 62:18 64:6 84:18 win [3] 26:19 93:2 99:1 wins [4] 11:9 67:12 82:8 84:25 wishing [1] 18:16 within [3] 15:9 42:17 67:23 without [6] 10:9 22:4 68:12 79:9 84:12 96:5 women [2] 18:15 72:16 won [2] 82:9 86:22 wonder [1] 18:5 wondering [2] 25:19 63:23 word [6] 57:19 73:24 75:6 76:23 77:17 78:24 words [6] 5:22 36:10 75:23 83:15 86:8 98:4 work [8] 14:5 29:11 35:10 39:15 56:3 69:18 77:13,14 worker [5] 63:3,3,5,20 65:8 workers [1] 62:24 working [1] 90:5 works [1] 18:20 world [3] 55:10,20 56:12 woven [1] 68:20 WPA [3] 40:3 57:21 59:20	wrapped [1] 93:20 write [3] 16:10,20 77:6 written [2] 77:11 92:3 wrongdoing [1] 52:19 wrongful [1] 84:13
U	V	Y	
UBS [10] 1:6 3:5 4:6,7,11, 15 13:22 17:22 34:21 87:19 UBS's [1] 19:2 ultimate [4] 32:17 41:25 46:5 84:7 ultimately [4] 43:23 44:18 56:3 81:25 unaware [1] 82:2 under [18] 38:10 44:20 60:9,14 62:13,22 69:10 71:7 74:8 77:22 79:9,21 82:3,6 85:22,22 86:1 96:3 underlying [2] 37:6 57:7 underscored [1] 51:18 understand [21] 5:24 9:14 10:1,3 12:15,15 29:9 33:8,	vacate/remand [1] 19:14 valuable [1] 93:22 variation [1] 93:15 various [1] 18:8 verdict [2] 20:21 21:1 version [2] 83:17 85:23 versions [2] 83:10,16 versus [5] 3:5 13:15 24:7, 21 42:18 view [1] 78:13 views [1] 47:2 VII [19] 5:15 7:18 18:13 30:25,25 42:4 58:5 59:3,5 60:10,14,17,24 62:13 71:23 72:14 77:22 79:3 82:3 VII's [1] 82:6 violating [1] 68:9 violation [8] 44:10 61:6,8 79:7,8 82:11 95:16 96:5 virtually [1] 28:4 virtue [1] 38:23	YANG [76] 1:20 2:6 30:6,7, 10 31:13,16 32:22,25 33:2, 12,19,22 34:3,6,8,10,15,23 35:4,16 36:3,4,18,23 37:3, 22 38:1,4,14,20,24 39:5,8, 14 40:11,15,22 41:1,11,14, 20,23 42:20 43:7,22 44:18, 25 45:9,12,23 46:12,16,20 47:8,19 48:17,24 49:9,15, 21 50:3,5,16 51:21,25 53:4, 13,20 54:11 55:23 56:8,22 57:1,4,6 year [1] 28:25 yielded [1] 97:13 younger [1] 63:5 Yowell [1] 32:7	
W	W		
wake [1] 3:12 Walk [1] 88:23 wanted [1] 34:25 wants [3] 39:9 48:21 61:12 Washington [3] 1:10,21, 24 Waterhouse [2] 67:12 98:15 waters [1] 64:18 way [46] 6:5 10:25 11:2 16:10 21:4 22:21 26:14 27:21 28:5,20 29:7 34:10 36:16	wake [1] 3:12 Walk [1] 88:23 wanted [1] 34:25 wants [3] 39:9 48:21 61:12 Washington [3] 1:10,21, 24 Waterhouse [2] 67:12 98:15 waters [1] 64:18 way [46] 6:5 10:25 11:2 16:10 21:4 22:21 26:14 27:21 28:5,20 29:7 34:10 36:16		