

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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TREVOR MURRAY, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 22-660  
 )  
 ) UBS SECURITIES, LLC, ET AL., )  
 )  
 ) Respondents. )  
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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 -- I'm a bit  
24 confused by that answer. I understand the  
25 meaning of "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 did the --

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 -- what do  
25 you think "contributing factor" means? Because



1 I think both sides' positions have difficulty  
2 hanging together completely because of the  
3 interaction of "contributing factor" and, as you  
4 call it, step 2. At least for me, that's the --  
5 I'm 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 -- 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 contributing factor.  
20 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 -- 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 step. 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 Sarah.

14 JUSTICE BARRETT: Okay. Yeah.

15 MS. ANAND: Sarah, the Sarah 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 -- 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, but one of which possible  
9 reading is, in addition to an intent to  
10 discriminate, you have to prove a further intent  
11 or a motive to retaliate.

12 And we've rejected that in the Title  
13 VII context many times, saying you may have the  
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 -- course would be  
18 to remand for consideration of whether the jury  
19 was 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 factors."

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 I -- 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 -- I'm not sure my  
17 friend on the other side has an example --  
18 having 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 -- you're  
13 saying there's no practical difference, but the  
14 sort of analytic way that the argument spools  
15 out is 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 -- 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: But 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 make clear that discrimination does not  
2 turn on such motive or animus. All that's  
3 required is the decision to treat differently be  
4 made because of the protected activity.

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

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

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

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

25 And I think that goes to the



1 hypothetical, Justice Barrett, that you were  
2 asking about.

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

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

19           JUSTICE ALITO: In the  
20 decisionmaking --

21           MR. YANG: In the --

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

24           MR. YANG: -- in the decision.

25           JUSTICE ALITO: So that -- that --

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

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

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

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

18          MR. YANG: I --

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

21          MR. YANG: Mm-hmm.

22          JUSTICE ALITO: -- that no  
23 discriminatory intent need be proven by the  
24 employee plaintiff. But what you just said a  
25 minute ago was that some species of

1 discriminatory intent --

2 MR. YANG: Mm-hmm.

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

5 MR. YANG: Right.

6 JUSTICE ALITO: Right?

7 MR. YANG: Yes, but --

8 JUSTICE ALITO: Okay.

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

13 JUSTICE ALITO: Yeah. Okay.

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

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

22 MR. YANG: Well, like --

23 JUSTICE ALITO: They said that they  
24 wanted an instruction that says there has to be  
25 discriminatory intent. And you just admitted

1 that there must be some proof of discriminatory  
2 intent.

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

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

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

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

24 That good-hearted employer is still  
25 discriminating on the basis of the

1       whistleblowing.  So there --

2                   JUSTICE JACKSON:  Mr. -- Mr. Yang, can  
3       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 affirmative 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 the -- 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 in -- 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  
6 is 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 -- I think it's more  
10 the -- I think it's more the latter. It's the  
11 --

12 JUSTICE ALITO: It's the latter?

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

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

25 MR. YANG: Hmm. I think there's some

1 daylight between us, and I think the reason is  
2 is that we think that when you ask whether it  
3 was a contributing factor in the unfavorable  
4 personnel action, the thing that has to be a  
5 contributing factor has to be the protected  
6 behavior itself, not some chain of events that  
7 gets to the ultimate outcome.

8 JUSTICE ALITO: Thank you.

9 CHIEF JUSTICE ROBERTS: Justice  
10 Sotomayor?

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

14 MR. YANG: I think that's probably --  
15 I think that's --

16 JUSTICE SOTOMAYOR: If that's how you  
17 --

18 MR. YANG: -- probably best addressed  
19 to the other side then because I --

20 JUSTICE SOTOMAYOR: All right. They  
21 can await it.

22 MR. YANG: -- I -- I -- I think this  
23 case is a little confusing. I -- I do think  
24 that if you take a look at the three options --  
25 chain of causation, our position, and then

1 retaliatory intent, which, again, is -- makes  
2 the contributing factor inquiry superfluous -- I  
3 think that helps to clarify, and you could ask  
4 the parties what their views are on those three.

5 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

21 MR. YANG: Well, I think maybe my  
22 exchange with Justice Alito may reflect that. I  
23 mean, it's one thing to say that retaliatory  
24 intent's not required because, you know,  
25 retaliation is not required, is not the same,



1 you know, you don't have to take this act to  
2 injure someone else. That's one thing.

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

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

18 JUSTICE KAGAN: Have this conversation  
19 all over again?

20 MR. YANG: Maybe.

21 CHIEF JUSTICE ROBERTS: Justice  
22 Gorsuch?

23 JUSTICE GORSUCH: I don't think  
24 anybody wants to have this conversation all over  
25 again.

1 (Laughter.)

2 MR. YANG: I certainly don't.

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

13 MR. YANG: Well, the danger, I think,  
14 is simply that there's no -- you're not going to  
15 err in -- in going that route. The question is  
16 what you're leaving --

17 JUSTICE GORSUCH: Well, that's good.  
18 That's a good day. That's a good start.

19 MR. YANG: Well, the -- the question  
20 is what you're leaving on the table, right,  
21 because --

22 JUSTICE GORSUCH: What -- yeah. What  
23 -- what is it that we're leaving on the table  
24 that you think we really need to clean up today?

25 MR. YANG: The -- what you propose, I

1 believe, is simply interpreting 1514A(a).  
2 Like, let's ignore the burden-shifting and just  
3 look at what this prohibition means, right, and  
4 it doesn't mean retaliatory intent.

5 JUSTICE GORSUCH: That was the QP on  
6 which we granted the case.

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

8 JUSTICE GORSUCH: That -- that's true,  
9 right?

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

17 JUSTICE GORSUCH: Well -- well, what  
18 do you want me to say about the burden-shifting  
19 regime that's going to be intelligent and useful  
20 and surely correct?

21 MR. YANG: Well, I think what you  
22 could say is that the contributing factor  
23 requires that the protected behavior, not  
24 intent, right, because it's a means of inferring  
25 intent, the protected behavior was a

1 contributing factor, which means it played a  
2 role in -- in -- in producing the decision,  
3 right, and that that's all that you need to  
4 show, and then it -- you -- the burden shifts to  
5 the -- the employer to -- to make out its  
6 affirmative defense.

7 I think that would go a long way in  
8 solving some of the issues that come up. You  
9 could also, if you want to, say that's not a  
10 chain-of-causation type of -- of inquiry, but,  
11 you know, again, I don't want to step on the --  
12 the Court's prerogatives about how it writes its  
13 opinion.

14 JUSTICE GORSUCH: No, no, I appreciate  
15 that. Thank you very much.

16 CHIEF JUSTICE ROBERTS: Justice  
17 Kavanaugh?

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

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

3                   JUSTICE KAVANAUGH: Or is that not  
4 right?

5                   MR. YANG: No, no, no. Step 2 can --  
6 can address two -- types of circumstances. One,  
7 the employer can say: Look, taking our decision  
8 as a given, like, we would -- like, if you look  
9 at the decision, the contributing -- the  
10 protected activity was so remote, like, we would  
11 have reached the decision the same way.

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

20                   So there's two things -- and -- and  
21 the employer can prove that too. So there's two  
22 --

23                   JUSTICE KAVANAUGH: But the usual case  
24 -- correct me if I'm wrong -- is going to be  
25 where the person made a report of wrongdoing,

1 protected activity, and the employer says -- and  
2 the person gets fired, and the employer says:  
3 We fired them because they were a poor  
4 performer, because we're doing a reduction in  
5 force, because they were embezzling, and not  
6 because of the protected activity. And then the  
7 jury has to weigh is the employer telling the  
8 truth or not, which is exactly what the closing  
9 arguments in this case were?

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

12 JUSTICE KAVANAUGH: Okay.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Barrett?

15 JUSTICE BARRETT: How does your  
16 articulation of the contributing factor test  
17 rule out the chain of causation? You said have  
18 some effect in producing the decision?

19 MR. YANG: Yeah. And I think -- I  
20 think you actually have to say -- look also at  
21 the text and say, when -- when Congress talked  
22 about a contributing factor in the personnel  
23 action, they're talking about the decision to  
24 take that action.

25 JUSTICE BARRETT: Right.

1           MR. YANG: And that requires that they  
2 actually consider the protected behavior, not  
3 something that was caused by the protected  
4 behavior in a long chain that could be quite  
5 tenuous.

6           JUSTICE BARRETT: Okay. And just one  
7 other question that goes to Justice Gorsuch's  
8 point about how much we need to decide.

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

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

1                   And so I -- you know, again, I would  
2                   leave the Court to decide what's -- what's best  
3                   to do in this case.

4                   CHIEF JUSTICE ROBERTS: Justice  
5                   Jackson?

6                   JUSTICE JACKSON: So isn't the real  
7                   risk of not going farther that it leaves open  
8                   the possibility that courts will think there is  
9                   still something more to do than the  
10                  burden-shifting test?

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

23                  And my understanding is your argument  
24                  and Petitioner's argument is no, that the  
25                  burden-shifting takes care of whatever intent,



1 discriminatory intent, exists in this world, and  
2 so it would be a real benefit to make that  
3 clear, I think.

4 MR. YANG: I think the Court could  
5 definitely conclude that. I think, if the Court  
6 doesn't address the role of the burden-shifting  
7 scheme, you likely will leave open for  
8 litigation a cogent argument made by the other  
9 side which ultimately doesn't work because I  
10 think --

11 JUSTICE JACKSON: Well, let me -- let  
12 me also give you the opportunity to answer that  
13 question directly --

14 MR. YANG: Yeah. Yeah.

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

25 So can you respond? You -- you've

1 said a couple times they're different, and maybe  
2 you can help us understand why that's the case.

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

5 JUSTICE JACKSON: Oh, they're --  
6 they're not different.

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

8 JUSTICE JACKSON: I'm sorry, they're  
9 not different. Yes.

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

11 JUSTICE JACKSON: Yes.

12 MR. YANG: And I -- you know, I --  
13 again, it's the intent underlying a decision are  
14 the reasons for the decision, and when you ask  
15 what caused the decision to be made, it is the  
16 same thing because the decisionmaker's reasons  
17 are what caused the decision to be made.

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

1 the case.

2           When the -- the WPA language was  
3 adopted, Attorney General -- Thornburgh said,  
4 look, this "contributing factor" language says  
5 you have to contribute to the decision. And  
6 when the -- the MSPB's regulations were issued,  
7 they say it has to affect the decision.

8           So this is an unusual context where  
9 intent and causation don't have a meaningful  
10 difference. And I think, frankly, the Court's  
11 decisions in the Title VII context reflect that  
12 too.

13           JUSTICE JACKSON: Thank you.

14           CHIEF JUSTICE ROBERTS: Thank you,  
15 counsel.

16           Mr. Scalia.

17           ORAL ARGUMENT OF EUGENE SCALIA

18           ON BEHALF OF THE RESPONDENTS

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

21           In Sarbanes-Oxley, Congress employed a  
22 phrase, "discriminate because of," that has long  
23 been recognized to require a plaintiff to show  
24 discriminatory intent. It is this transplanted  
25 phrase with its rich soil that decides this

1 case.

2 Congress also incorporated in  
3 Sarbanes-Oxley the contributing-factor standard  
4 of the AIR21 statute to address a distinct issue  
5 that this Court and Congress occasionally  
6 grapple with, and that is the causation standard  
7 in a discrimination case.

8 But just as Congress did not eliminate  
9 an intent requirement in Title VII when it  
10 adopted the reduced motivating factor causation  
11 test in Title VII, so in Sarbanes-Oxley it did  
12 not eliminate an intent requirement by  
13 incorporating the reduced contributing-factor  
14 causation test of AIR21.

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

24 Finally, Petitioner and the government  
25 err in relying on the Whistleblower Protection

1 Act, or the WPA. That law lacks the  
2 "discriminate because of" language which frames  
3 this case, and, indeed, Congress removed the  
4 phrase that the action had to be taken as a  
5 reprisal for protected activity.

6 For these reasons and others,  
7 Petition -- Petitioner cannot overcome the  
8 strong presumption that discriminatory intent is  
9 plaintiff's burden in a Sarbanes-Oxley  
10 retaliation case.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Mr. Scalia, the  
13 Petitioner indicated earlier that you could use  
14 a motivating factor to prove -- demonstrate  
15 an -- an unlawful employment practice under  
16 Title VII.

17 And contributing, I think her analogy  
18 was that the contributing factor here -- the --  
19 the contributing-factor test here is similar to  
20 the motivating factor under Title VII.

21 How would you respond to that?

22 MR. SCALIA: Justice Thomas, I agree  
23 that the Title VII framework is a framework very  
24 similar to the framework that we have with  
25 Sarbanes-Oxley in AIR21, a much closer analogy,

1 by the way, than the Whistleblower Protection  
2 Act, which we heard relatively about today.

3 JUSTICE THOMAS: Mm-hmm.

4 MR. SCALIA: But, as I said, there was  
5 a -- intent requirement to Title VII before  
6 motivating factor was added, and there remains  
7 one now, and it does not arise from motivating  
8 factor.

9 What this Court said in Nassar is that  
10 the motivating factor test does not add a  
11 substantive bar. Rather, it defines the  
12 causation standard for a violation defined  
13 elsewhere. Same thing here.

14 The violation is described in  
15 Sarbanes-Oxley. Sarbanes-Oxley looks over to  
16 AIR21 solely for causation. There's no way that  
17 that AIR21 provision could carry the weight  
18 Petitioner wants to give it. As I mentioned in  
19 my opening, it leaves out elements of a  
20 Sarbanes-Oxley case.

21 JUSTICE JACKSON: Where -- where in  
22 the statute does it say causation? I'm sorry,  
23 you say it looks over to pick up or reference  
24 causation, and I guess I'm trying to understand  
25 why you're saying that, because it doesn't seem

1 to suggest or say that that's what it's doing.

2 MR. SCALIA: Justice Jackson, I think  
3 it's widely recognized by the practicing bar  
4 that this is a test of the causal role that's  
5 played. I believe that is the -- Petitioner's  
6 position as well, but it's a reduced causal test  
7 just as this Court --

8 JUSTICE JACKSON: Understood. But  
9 how -- how is that different than intent? Tell  
10 me -- tell me what is different about a  
11 determination that the adverse action was caused  
12 by the protected activity and that the employer  
13 -- you know, the -- the adverse action -- that  
14 the protected activity was a contributing factor  
15 or was intended because of the -- because of the  
16 protected activity?

17 MR. SCALIA: Justice Jackson, this  
18 Court's cases recognize that the discriminatory  
19 intent required under Title VII and other  
20 similar laws and causation are actually  
21 importantly distinct.

22 Now I would concede there are times  
23 when the evidence used to establish causation  
24 will also be evidence used to show intent as  
25 well, but take, for example, this Court's

1 decision in Babb v. Wilkie a few terms ago.

2 This Court held that there could be  
3 discriminatory intent and liability for it under  
4 a special provision of the age discrimination  
5 law applicable to federal workers with no  
6 causation.

7 The Court gave an example of a manager  
8 that has to make a promotion decision, rates one  
9 worker a 90, rates another worker an 85, and  
10 then, because he doesn't like older people,  
11 rates the younger worker down to an 80.

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

16 MR. SCALIA: No, we are not saying  
17 that animus is necessary. But we are saying  
18 that differential treatment for intentional  
19 reasons. The way this Court defined it in Staub  
20 was to intend for discriminatory reasons that  
21 the adverse action occurred. This Court called  
22 that the scienter that's required.

23 So, in the Wilkie -- in the Babb v.  
24 Wilkie case, this Court said there was  
25 discriminatory intent, even though there wasn't



1 causation, because the older worker already had  
2 a lower score.

3 JUSTICE BARRETT: So is that what you  
4 would contemplate -- I'm just wondering what  
5 kind of proof you would use to show intent that  
6 would be different than the causation  
7 burden-shifting framework.

8 You would say that the employee has to  
9 show that the employer harbored some sort of  
10 discriminatory intent with what evidence? Like,  
11 how do you show it?

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

21 There often is additional evidence of  
22 intent. And let me -- again, a question that's  
23 been presented here is, how much would we  
24 disturb the waters if we were to sort of glom  
25 together causation and intent? My answer is

1 immensely.

2 Take this Court's --

3 JUSTICE KAGAN: Well, I -- I -- I  
4 don't understand that, Mr. Scalia, because  
5 everything that you just said, that seems to me  
6 exactly the question that the burden-shifting  
7 mechanism is all about.

8 The employee comes in and says -- and  
9 says all of those things, I made a complaint and  
10 then terrible things started happening to me.

11 And the employer says, no, not at all,  
12 I mean, that -- the -- these terrible things had  
13 nothing to do with the complaint. It was  
14 because you were a terrible worker or because  
15 you embezzled money.

16 So all of that is exactly what the  
17 burden-shifting -- mechanism is designed to suss  
18 out, and that's exactly the way you just  
19 explained what your intent requirement is. So,  
20 at that point, I guess I just don't see what one  
21 is doing differently from the other.

22 MR. SCALIA: And, again, there often  
23 can be overlap in the actual evidence required,  
24 but in terms of the impact for the case, it's  
25 very important.

1           Take, again, the Staub case. This was  
2 the "cat's paw" case. You -- you had  
3 retaliatory intent on the part of the immediate  
4 managers. It had some sort of remote causal  
5 role, but this Court very carefully looked both  
6 at intent and at causation as each -- as  
7 elements that had to be satisfied. That is  
8 fundamental to discrimination law.

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

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

22           So those questions would have to be  
23 answered, but -- but it's still the exact same  
24 question. There's no here's where we have  
25 intent and here's where we have causation.

1           MR. SCALIA: Your Honor, where I begin  
2 is that the "discriminate because of" language  
3 is long -- language this Court has recognized  
4 from time immemorial requires discriminatory  
5 intent, an intent element, and then causation  
6 must be established too.

7           The Petitioner has argued -- she  
8 began, Petitioner's counsel, by saying that this  
9 was -- how to handle claims that somebody acted  
10 with retaliatory intent. Her argument is that  
11 gets determined at the second step. But that's  
12 simply not true.

13           She has admitted in her brief that  
14 retaliatory intent actually doesn't necessarily  
15 get discerned at the second step because an  
16 employer that did have retaliatory intent but  
17 nonetheless would have separated the person  
18 anyway wins. That's the old Price Waterhouse  
19 case.

20           On the other hand, an employer that  
21 lacked retaliatory intent can still lose at that  
22 second step. So, Justice Kagan --

23           JUSTICE KAVANAUGH: How?

24           MR. SCALIA: Many, many different  
25 ways. First of all, the Halliburton case is a

1 Fifth Circuit case, an old Fifth Circuit case,  
2 that Plaintiff cited as establishing the circuit  
3 split here. The protected activity there was  
4 the employee complained within the company. He  
5 then complained to the SEC. The SEC told the  
6 general counsel, we're going to be conducting an  
7 investigation, at which point the general  
8 counsel, as a general counsel does, sent out a  
9 notice to employees to retain documents.

10 What he said was the SEC is  
11 investigating Mr. Menendez's allegations. This  
12 is the employee. Mr. Menendez said: That hold  
13 notice was retaliatory action because it made my  
14 colleagues angry that I had said they were  
15 violating the law. And so that was the  
16 protected activity.

17 If that employer is forced to prove  
18 without any prior showing of intent that it  
19 would have let that employ -- that it would have  
20 sent out the hold notice anyway, that's  
21 impossible. It sent out the hold notice for  
22 what were quite possibly very good-faith reasons  
23 because the complaint was made.

24 Or another example, these things  
25 happen: An employee, lawyer at a company,

1 complains to the SEC, and woven throughout his  
2 complaint is privileged, confidential  
3 information. The employer says: I do not want  
4 to be represented by a lawyer who discloses my  
5 privileged information to the SEC. I'm going to  
6 have to let you go.

7           Those things -- that employer is not  
8 going to be able to prove that he would have  
9 done the same thing absent the complaint to the  
10 SEC, because it was the complaint to the SEC  
11 that disclosed privileged information, which for  
12 innocent, good-faith, non-retaliatory reasons  
13 led to the separation.

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

21           And those cases were being forced to  
22 go to the -- the second step. Employers  
23 sometimes weren't able to meet it. And the  
24 courts eventually realized this doesn't work,  
25 this chain of causation, and they introduced an

1 intent element to discipline it.

2 Now --

3 JUSTICE BARRETT: But, Mr. Scalia --

4 CHIEF JUSTICE ROBERTS: Counsel, it --

5 JUSTICE BARRETT: -- why wouldn't the  
6 government's test -- in your example about the  
7 revealing privilege -- privileged information,  
8 why wouldn't the government's test take care of  
9 that? Because the government said: No, chain  
10 of causation isn't enough; it has be a  
11 contributing factor to the decision. And,  
12 there, the decision, you know, the contributing  
13 factor, was the revelation of privileged  
14 material, not the complaint itself.

15 MR. SCALIA: Justice Barrett, that  
16 sounds like intent to me. That sounds like  
17 you're getting inside the heads of the  
18 decisionmakers --

19 JUSTICE BARRETT: But at the burden --

20 MR. SCALIA: -- and asking --

21 JUSTICE BARRETT: But at the  
22 burden-shifting stage, right, not independently?  
23 So is it -- I mean, maybe I'm just confused  
24 about your position. I thought your position  
25 was that there was an independent element of

1 intent that was separate and apart from the  
2 burden-shifting framework? Is that right?

3 MR. SCALIA: I'm saying that one thing  
4 that needs to be established in order for the  
5 burden to shift is that there was retaliatory  
6 intent. The -- and in response to, Justice  
7 Alito, I believe, a question you were asking,  
8 AIR21 refers to whether the protected activity  
9 was a contributing factor to the unfavorable  
10 personnel action alleged in the complaint.

11 If you go to Sarbanes-Oxley, the  
12 disfavored personal -- personnel action alleged  
13 in the complaint is, under Section 1, taken with  
14 discrimination.

15 CHIEF JUSTICE ROBERTS: Counsel, is --

16 MR. SCALIA: So the contributing  
17 factor has to be contributing to an action that  
18 has that discriminatory intent --

19 JUSTICE GORSUCH: Mr. Scalia --

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

21 JUSTICE GORSUCH: -- if I -- let me --  
22 let me see if I understand it, and -- and tell  
23 me where I'm going wrong.

24 As -- as you read the statute, there  
25 has to be mens rea and causation, causation



1 established through this burden-shifting  
2 mechanism only, and you read that because  
3 "discriminate because of" has traditionally had  
4 a mens rea requirement in it and Title VII and a  
5 whole bunch of other statutes.

6 The other side says, in this  
7 particular new, novel regime, those two are  
8 collapsed into the causation requirement.

9 So far so good?

10 MR. SCALIA: I think that's  
11 accurate --

12 JUSTICE GORSUCH: Okay.

13 MR. SCALIA: -- Justice Gorsuch.

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

24 Can we agree on that much, that the  
25 further intent to retaliate or motive is not

1 part of the statute?

2 MR. SCALIA: Unfortunately, no. I  
3 think the two --

4 JUSTICE GORSUCH: No? No? Oh, we  
5 were so close.

6 (Laughter.)

7 MR. SCALIA: Two intents are --

8 JUSTICE GORSUCH: We had two out of  
9 three.

10 MR. SCALIA: Two -- two intents are  
11 required, Justice Gorsuch. First, to take the  
12 action. Now that's the -- the base level of  
13 intent, that's required even in a disparate  
14 impact case, right? Even in disparate impact,  
15 which we say doesn't require intent, requires  
16 intent not to hire the employee, not to promote  
17 the employee.

18 What Staub said is there needs to be  
19 intent for discriminatory reasons that the  
20 adverse action occurred. So there needs to be  
21 intent to take the action but to do it for a  
22 reason the law prohibits.

23 And, Justice Gorsuch, I think to  
24 substitute the -- the plaintiff needs to show  
25 discriminatory intent for a requirement that the

1 plaintiff show retaliatory intent would just  
2 engender confusion in a -- what everybody  
3 recognizes to be a retaliation case.

4 In -- in Lawson, which was this  
5 Court's prior Sarbanes-Oxley whistleblower  
6 decision, the word "retaliate" was used 50  
7 times. So --

8 JUSTICE GORSUCH: Yeah, but if I -- if  
9 I intend to treat you differently -- that's my  
10 mens rea, your -- your -- your mens rea --  
11 because of a protected trait, why isn't that  
12 retaliation?

13 MR. SCALIA: And the best instruction  
14 to elicit that is one which refers to  
15 retaliatory intent under a statute which is  
16 intended to target --

17 JUSTICE GORSUCH: Why wouldn't a  
18 statute --

19 MR. SCALIA: -- retaliatory intent.

20 JUSTICE GORSUCH: Why wouldn't -- why  
21 wouldn't an instruction saying, if you intend to  
22 treat somebody differently because of a  
23 protected trait, you are liable? What would --  
24 what issue would you have with an instruction  
25 like that?

1 MR. SCALIA: I -- I think the  
2 instruction needs to make clear that it was  
3 intended to do it for a reason that the law  
4 regards as improper because --

5 JUSTICE GORSUCH: Because -- here in  
6 -- yeah --

7 MR. SCALIA: -- here, because an  
8 adverse reaction to --

9 JUSTICE GORSUCH: To whistleblowing.

10 MR. SCALIA: -- to -- to the  
11 whistleblowing.

12 JUSTICE GORSUCH: I intend to treat  
13 you differently because of your whistleblowing  
14 activity, period. No word -- "retaliate"  
15 doesn't appear in that sentence. What's wrong  
16 with that -- what's wrong with that instruction?  
17 How would you reverse me if I gave that  
18 instruction?

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

21 JUSTICE GORSUCH: No, I -- I -- right.  
22 Right. Right.

23 MR. SCALIA: We can talk about the  
24 other flaws in the instructions that were given  
25 here that we think are independent reasons to

1 affirm the Second Circuit. But, again, if  
2 you're instructing a jury about retaliatory  
3 intent in a case that's involving Sarbanes-Oxley  
4 whistleblower retaliation --

5 JUSTICE GORSUCH: I just don't see  
6 those words in this statute.

7 MR. SCALIA: -- I think it becomes a  
8 little bit confusing for a jury.

9 JUSTICE GORSUCH: I see discrimination  
10 in this statute, and I see whistleblowing  
11 activity, and I know there's a causation  
12 requirement, but I don't see the retaliation in  
13 this statute.

14 MR. SCALIA: Yeah.

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

18 MR. SCALIA: And, as I said,  
19 Petitioner's counsel began by describing this as  
20 a statute that requires retaliatory intent. The  
21 question presented is whether it's established  
22 that the --

23 JUSTICE JACKSON: But, counsel, can I  
24 just ask you --

25 MR. SCALIA: I'm sorry.

1                   JUSTICE JACKSON: I agree with Justice  
2                   Gorsuch in the sense that I don't see certain  
3                   things in the statute, but I was curious in your  
4                   briefing as to why you left out the other sort  
5                   of actus reus parts of the statute. You --  
6                   you've reduced it all down to "discriminate  
7                   because of," which you say is the heart of the  
8                   statute.

9                   But, before the word "discriminate,"  
10                  we have the company may not or no company may  
11                  "discharge, demote, suspend, threaten, harass,  
12                  or in any other manner discriminate."

13                  And the reason why I think that might  
14                  be important is that if you are right that there  
15                  is some sort of mens rea that relates to  
16                  retaliation, I guess I at least would have  
17                  thought that Congress would write this  
18                  differently, right? That you would have a  
19                  statute that would say one may not, comma, you  
20                  know, purposefully or with retaliatory intent  
21                  harass, demote, suspend, et cetera. But that's  
22                  not the way this is written.

23                  So it seems like "discriminate" is not  
24                  necessarily doing the work that give -- in light  
25                  of the entire sentence, doing the work that you

1 want it to do.

2 MR. SCALIA: Your -- Your Honor, the  
3 -- the word "discriminate" does appear. It says  
4 "or in any other manner discriminate," which --

5 JUSTICE JACKSON: Yes.

6 MR. SCALIA: -- has been read to mean  
7 that the others are forms of discrimination.  
8 But this Court, under Title VII, certainly has  
9 understood that "discharge" is modified by  
10 "discriminate"; "fail to promote," modified by  
11 "discriminate." Our position, it modifies all.

12 But, if you need more, Justice  
13 Jackson, I would point you to subsection (c),  
14 which refers to the relief that's available, and  
15 that refers specifically to the plaintiff  
16 receiving the seniority he would have had in the  
17 absence of the discrimination. This statute  
18 plainly does contemplate that --

19 JUSTICE JACKSON: But -- but it -- but  
20 it could --

21 MR. SCALIA: -- all those foregoing  
22 acts are discriminatory.

23 JUSTICE JACKSON: But you reject the  
24 view that when it says "discriminate or in any  
25 other manner discriminate," that just means any

1 other manner treat the person differently and is  
2 not necessarily carrying with it the kind of  
3 separate intent to discriminate, and to the  
4 extent it is there, it's in the burden-shifting  
5 test as to how you prove that intent?

6 MR. SCALIA: We believe that  
7 "discriminate" as used in this context does  
8 again modify all the actions that would trigger  
9 liability, and that needs to be an intent to  
10 discriminate. That is how the word  
11 "discriminate" in the statute has been  
12 understood.

13 Again, I take you to Nassar. This  
14 Court's decision regarding Title VII refers to  
15 the motivating -- factor test as a test of  
16 causation. Intent resides elsewhere.

17 Also, remember that the finding after  
18 the second step is actually of a violation. The  
19 Petitioner's position is that a violation can be  
20 found under this statute without ever having  
21 established the improper intent.

22 CHIEF JUSTICE ROBERTS: Counsel --

23 JUSTICE ALITO: Could you read --

24 CHIEF JUSTICE ROBERTS: -- both of  
25 your -- the counsel on the other side said that



1 discrimination is simply treating people  
2 differently.

3 I gather it's the essence of your  
4 position that that's not true?

5 MR. SCALIA: It's treating people  
6 differently in a way that is harmful to a  
7 protected individual and, additionally, under  
8 this Court's cases for decades, which, of  
9 course, were established law when this law was  
10 enacted, it -- it needs to be intentional  
11 discrimination.

12 So that's our position, that we don't  
13 quarrel generally with their description of  
14 discriminate itself, but we add this Court has  
15 been crystal-clear that that discrimination  
16 needs to be intentional. Otherwise, again,  
17 we're back at -- at disparate impact among other  
18 things.

19 CHIEF JUSTICE ROBERTS: Well,  
20 "intentional" -- there must be more to that term  
21 if you think that those sentences from your  
22 adversaries are -- are wrong because you can  
23 intentionally treat people differently, but you  
24 think that's not necessarily discrimination?

25 MR. SCALIA: It's intentionally for

1 discriminatory reasons treating them  
2 differently. So you are intentionally treating  
3 them differently but for a reason the law  
4 prohibits. That, I believe, is just ingrained  
5 --

6 JUSTICE KAVANAUGH: Can I --

7 JUSTICE KAGAN: So I -- I -- I --

8 MR. SCALIA: -- in the "discriminate  
9 against because of" language. Excuse me.

10 JUSTICE KAGAN: -- I think that  
11 basically is ingrained in all of our  
12 discrimination statutes. They all have some  
13 requirement that a prohibited factor came into a  
14 decision and that it was there in your head when  
15 you made the decision.

16 But what all of our decisions have  
17 recognized is the tent -- intent is a very  
18 difficult thing to prove, and, as a result of  
19 that, what Congress has done, and sometimes this  
20 Court has done it, has set up burden-shifting  
21 mechanisms. You do this first. Then we'll give  
22 you a chance to do that.

23 They're all -- those burden-shifting  
24 mechanisms are geared to trying to figure out  
25 what was in his head when he made the decision.

1 Was the prohibited consideration in his head in  
2 the requisite way? But, because that's hard to  
3 say directly, we'll shift burdens and tell  
4 different people to do different things.

5 And that's exactly what this statute  
6 does and says that's the way you figure out  
7 whether the whistleblowing activity was in his  
8 head in the prohibited way.

9 MR. SCALIA: Your Honor, I agree with  
10 much of that, that these burden-shifting schemes  
11 have been developed to get at both causation but  
12 also intent. But, ultimately, both also are  
13 required as part of the plaintiff's case.

14 I'm simply unaware of any decision  
15 under Title VII on which this was plainly framed  
16 where intent was not also something that the  
17 plaintiff had to show.

18 And, remember, under Title VII's  
19 motivating factor, again, the plaintiff who  
20 shows that wins. Now they may not get  
21 reinstatement or back pay, but they've won.  
22 They get attorneys' fees and -- and -- and --  
23 and they have shown a violation.

24 This statute operates the same way.  
25 It's quite unusual to think that those -- that

1 burden-shifting operates to produce that result  
2 with causation suddenly just becoming combined  
3 with intent and not simply asking the jury to  
4 make a separate finding --

5 JUSTICE KAVANAUGH: Could I --

6 MR. SCALIA: -- on that point.

7 JUSTICE KAVANAUGH: -- could I ask a  
8 question then about how the case -- this case  
9 and usual cases develop? Someone engages in  
10 protected activity or a report of misconduct and  
11 then a few weeks later, a few months later, is  
12 fired.

13 Then the case goes to the litigation  
14 and the jury, and the plaintiff says: I was  
15 fired because I engaged in the protected  
16 activity. The employer, as here, comes in and  
17 says: No, we fired you because you were a poor  
18 performer or because we had money issues and  
19 needed to eliminate the position.

20 Then, at that point and in this case,  
21 in the closing arguments, you know, your counsel  
22 said you're going to hear two different versions  
23 of -- of events. And then the -- Murray's  
24 counsel got up and said, you just heard a  
25 speech. It was a slick presentation for sure,

1 but it was not the truth. It's a smoke screen.

2 In other words, the jury had to decide  
3 between two different versions of events, which  
4 the burden was on you to show that your version  
5 was correct, but you were able to present to the  
6 jury this idea that no, we didn't do it, we  
7 didn't intend to do it because of the protected  
8 activity. We did it for another reason, right?

9 Didn't that defense get to the jury?

10 MR. SCALIA: Yes, it -- it did, Your  
11 Honor, although the way, of course, these  
12 instructions functioned, first of all, they got  
13 there by just showing that the protected  
14 activity tended to affect in any way --

15 JUSTICE KAVANAUGH: Well, there was --

16 MR. SCALIA: -- the -- the decision.

17 JUSTICE KAVANAUGH: -- a follow-up  
18 instruction on that. But put that aside. The  
19 ultimate question was who's telling the truth  
20 about why this person, Murray, was fired.

21 MR. SCALIA: And -- and, Justice  
22 Kavanaugh, that's another part of the reason why  
23 the innocent employer, if forced to make that  
24 defense without a prior intent showing, may lose  
25 even though there's no wrongful intent, because

1 the -- showing by clear and convincing evidence

2 --

3 JUSTICE KAVANAUGH: But they'll  
4 have -- to pick up on Justice Kagan's point, I'm  
5 sorry to interrupt, but the -- the employer will  
6 have the information that shows, okay, we fired  
7 10 other employees as well who hadn't engaged in  
8 the protected activity for the same reason.

9 Or here's our list of performance  
10 ratings and, see, we fired these other people  
11 who had the same performance rating. That's how  
12 the employer wins these cases, but they -- the  
13 employer has the information.

14 Once you put that in, then the jury,  
15 as was went on in the closing arguments here,  
16 has to figure out is that enough to show that  
17 the protected activity wasn't the -- you know,  
18 whatever the -- the reason.

19 MR. SCALIA: Justice Kavanaugh,  
20 ideally, you have that evidence and you put it  
21 in. But part of the problem is that often you  
22 may not, and you may not have it in a way that's  
23 clear and convincing.

24 In a reduction-in-force case, for  
25 example, by definition, you're letting go people

1 that you thought were doing just fine.  
2 Sometimes you're making fine distinctions.  
3 That's -- or sometimes you don't have  
4 comparators. The person engaged in misconduct  
5 that's pretty --

6 JUSTICE KAVANAUGH: Yeah, I agree.

7 MR. SCALIA: -- pretty unusual.

8 JUSTICE KAVANAUGH: You're -- you're  
9 stuck there under the -- under plaintiff's  
10 version. I agree with that.

11 MR. SCALIA: And -- and, Justice  
12 Kavanaugh, that's another reason why the  
13 innocent employer loses under the second prong  
14 even when there is no retaliatory intent, which  
15 is where Petitioner's counsel began.

16 And then, with respect to the  
17 instruction, what the judge did was first sent  
18 the jury back to her original instruction about  
19 "tend to affect in any way." And although she  
20 used words that took "tend" out, she still --  
21 still said "affect any way." And there was  
22 evidence here that the employee's direct  
23 manager, who had supposedly received the  
24 whistleblowing complaint, actually tried to find  
25 him another position.

1                   So the jury could have used that to  
2 say, yeah, I guess it kind of had an effect  
3 because he heard the whistleblowing and tried to  
4 find another position.

5                   If there had been an restrict --  
6 intent -- instruction --

7                   JUSTICE KAVANAUGH: Well, if the jury  
8 believed Schumacher -- I think that's the name  
9 -- you would have won, right?

10                  MR. SCALIA: Well, but if the jury had  
11 been told that it had to have been found that  
12 Schumacher had an intent to retaliate or an  
13 intent to discriminate, although, again, I  
14 think, in a retaliation case, using intent to  
15 discriminate might be somewhat confusing, would  
16 require explanation. We're not saying animus.

17                  If the jury had been required to find  
18 that too about Mr. Schumacher, not just that it  
19 tended to affect or even affected but that there  
20 was an intent --

21                  JUSTICE KAVANAUGH: You don't think --

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

23                  JUSTICE KAVANAUGH: Sorry to prolong  
24 it, but you don't think the jury instructions  
25 allowed the jury to get at that by saying is



1 Schumacher telling the truth when, says, I'm  
2 firing -- or you're being fired for something  
3 other than the report? You don't think the jury  
4 -- that was before the jury?

5 MR. SCALIA: I think that the jury was  
6 given too easy a path to find against UBS in a  
7 case that was --

8 JUSTICE KAVANAUGH: Because of the  
9 burden flip probably?

10 MR. SCALIA: Because of the burden  
11 flip and because a basic element of a  
12 discrimination case, intent to discriminate,  
13 intent to retaliate, was taken out.

14 And for a jury trying to find  
15 agreement four days before Christmas, as was the  
16 case here, those things make a difference.

17 JUSTICE JACKSON: Mr. --

18 MR. SCALIA: That element should not  
19 have been --

20 JUSTICE ALITO: Suppose you were --  
21 suppose you were drafting jury instructions.  
22 Part of the instructions presumably would  
23 involve the burden-shifting features of the  
24 statute.

25 What, if anything, would you instruct

1 a jury that the plaintiff has to prove before  
2 you get to that part of the instructions?

3 MR. SCALIA: I'm -- I'm sorry, Justice  
4 Alito. Before I get to the burden-shift part of  
5 the instruction?

6 JUSTICE ALITO: Exactly what do you  
7 think should be -- should the -- the jury be  
8 instructed?

9 MR. SCALIA: I think the --

10 JUSTICE ALITO: Walk us through that.

11 MR. SCALIA: -- the -- the jury should  
12 be instructed --

13 JUSTICE ALITO: What's the first step?

14 MR. SCALIA: The jury should be  
15 instructed to find the elements in the  
16 Plaintiff's case. Sometimes they're stipulated,  
17 but that would include that there was protected  
18 activity. That would include the contributing  
19 factor. That would also include that there was  
20 an intent to take the action for retaliatory  
21 reasons. And then it would -- then there are  
22 cases that now do this because the --

23 JUSTICE ALITO: Okay. You would --  
24 before you get to anything about the  
25 burden-shifting, the jury -- the plaintiff would

1 have to show that the protected activity was,  
2 what, a but-for cause, a motivating cause, some  
3 cause? What would -- what would you do -- what  
4 would you ask the jury to decide before this  
5 burden-shifting scheme entered the picture?

6 MR. SCALIA: Justice Alito, the way  
7 that is typically done, should be done, is to  
8 show that it played some role in furthering, in  
9 bringing about the adverse action. That's a  
10 proper, I think, description of contributing  
11 factor. It's not the one that was given. It's  
12 one the government has now begun using but had  
13 not been used with the jury. But not  
14 motivating. It's recognized that contributing  
15 is a lower level than motivating.

16 JUSTICE ALITO: But that sounds like  
17 you're -- you're working your argument about  
18 discriminatory intent into the burden-shifting  
19 framework, not requiring something outside the  
20 burden-shifting framework.

21 MR. SCALIA: It is outside. This is a  
22 question about the impact of the protected  
23 activity. Did it contribute, did it further the  
24 decision that was made? Separately is the  
25 instruction to be given regarding whether there

1 was an intent to take this discriminatory  
2 action.

3 CHIEF JUSTICE ROBERTS: Thank you,  
4 counsel.

5 Justice Thomas, anything further?  
6 Justice Sotomayor?

7 JUSTICE SOTOMAYOR: Give me the --

8 CHIEF JUSTICE ROBERTS: Justice Kagan  
9 -- oh, I'm sorry.

10 JUSTICE SOTOMAYOR: Give me the  
11 instruction. Intent to do what? Intent to have  
12 the whistleblowing contribute in some way to the  
13 firing? Because I -- but why isn't that the  
14 burden shifting already?

15 MR. SCALIA: An intent to --

16 JUSTICE SOTOMAYOR: To do what?

17 MR. SCALIA: -- separate the employee  
18 in reaction -- in retaliation for or --

19 JUSTICE SOTOMAYOR: But that wasn't  
20 the only reason. They have multiple reasons.  
21 So don't you have to tell the jury it has to be  
22 -- you're right back in the circle. You're  
23 right back in the circle because you can't get  
24 out of contributing factor because it doesn't  
25 have to be the only reason or it only has to be

1 a part reason.

2 MR. SCALIA: That -- that's correct,  
3 Your Honor. It has to show that there -- that  
4 intent played a role, that it played a role in  
5 the separation decision, but it does not --

6 JUSTICE SOTOMAYOR: So how is that  
7 different than the burden shifting?

8 MR. SCALIA: Because it's a  
9 requirement of the intent, the mens rea, what  
10 this Court called the scienter, that's basic to  
11 discrimination claims.

12 JUSTICE SOTOMAYOR: Okay.

13 CHIEF JUSTICE ROBERTS: Justice Kagan?

14 JUSTICE KAGAN: I mean, Congress could  
15 definitely have written a statute like that that  
16 sets up here's the protected activity, there was  
17 a contributing factor, and there was -- the  
18 employer intended for the protected activity to  
19 be a contributing factor.

20 That's a sensible statute. But, if  
21 that were the statute, you don't need the second  
22 step of the burden-shifting analysis. You've  
23 already done everything that the second step of  
24 the burden-shifting analysis does.

25 The reason why you have the second

1 step of the burden-shifting analysis is  
2 precisely to make that determination of whether  
3 the employer actually acted in part or in whole  
4 for that reason, understanding that the employer  
5 has the information, and so it makes sense to  
6 put that question on the employer's side of who  
7 has the burden to do what.

8 MR. SCALIA: But, respectfully,  
9 Justice Kagan, as I've sought to explain, the  
10 second step does not discern the employer's  
11 retaliatory motive or the absence of it. The  
12 Petitioner is saying that's where it's  
13 determined. But, remember, the employer that  
14 has a retaliatory motive can still win there.  
15 And, as I've explained, the employer that lacks  
16 it can still lose.

17 So that's not the step at which it's  
18 ascertained whether there is retaliatory intent.  
19 What's ascertained there is whether this action  
20 would have been taken even in the absence of the  
21 protected activity, including that intent.

22 CHIEF JUSTICE ROBERTS: Justice  
23 Gorsuch?

24 Justice Kavanaugh?

25 Justice Barrett?

1                   JUSTICE BARRETT: One question,  
2 Mr. Scalia. I want to pose a variation of the  
3 question that Justice Gorsuch asked your friends  
4 on the other side. If we disagreed with you  
5 that intent was an independent element and we  
6 think intent, as Justice Kagan was just  
7 suggesting, is wrapped into the burden-shifting  
8 framework, would you like us to just stop there,  
9 or do you think it would be valuable to say  
10 something more about the contributing factor in  
11 the burden-shifting test?

12                   MR. SCALIA: Certainly, we think the  
13 Court should proceed to address the second  
14 issue. That has been briefed by the parties.  
15 It was integral to the court's decision below.  
16 If you read where it -- it said that there had  
17 to be retaliatory intent -- by the way,  
18 retaliatory intent, it did not say there had to  
19 be animus. If you read that, immediately in the  
20 same place, it explained the problems with the  
21 instruction that was being given. That is a  
22 widely used instruction that the government has  
23 backed away from here. So has Petitioner.

24                   I think you are leaving an enormous  
25 amount unsettled in whistleblower law if you do

1 not address that and you do not address also the  
2 discriminatory or retaliatory intent that is  
3 required to be established.

4 JUSTICE BARRETT: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Jackson?

7 JUSTICE JACKSON: And would we also  
8 cover how you would go about proving the  
9 retaliatory intent? And I just ask -- and this  
10 is just a short question -- which is ordinarily  
11 my understanding is that a burden-shifting test  
12 is used precisely because of the reasons that  
13 Justice Kagan pointed out, that we don't require  
14 sort of direct evidence of what is in -- in the  
15 head of an employer.

16 So, if this is a separate element, are  
17 you suggesting that we have two burden-shifting  
18 tests operating in this environment, one that  
19 relates to causation and uses the contributing  
20 factor and another that relates to intent and I  
21 guess uses motivating or but-for or because or  
22 something?

23 MR. SCALIA: No. We are suggesting  
24 just a single burden shift still, which is, as  
25 we've explained, a defense to relief. But the



1 plaintiff's burden, when the plaintiff is done  
2 with this case, it's been shown to be a  
3 violation. And we submit it would be --

4 JUSTICE JACKSON: No, I understand,  
5 but I guess my question is just you would  
6 require the plaintiff to bring direct evidence  
7 of this intent? It couldn't do it during the --  
8 sort of the ordinary way that it's done in  
9 discriminatory -- in discrimination cases?

10 MR. SCALIA: Not at all, Justice  
11 Jackson. There would need to be a finding of  
12 intent, but that can be inferred from  
13 circumstantial evidence. We would not require  
14 direct evidence. We're merely saying that it  
15 would be so remarkable under a discrimination  
16 statute or a retaliation statute to find a  
17 violation, as SOX does, without even finding  
18 that there was retaliatory intent.

19 JUSTICE JACKSON: Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22 MR. SCALIA: Thank you.

23 CHIEF JUSTICE ROBERTS: Rebuttal,  
24 Ms. Anand?

25

1 REBUTTAL ARGUMENT OF EASHA ANAND  
2 ON BEHALF OF THE PETITIONER

3 MS. ANAND: Thank you, Your Honor.

4 I want to start by addressing Justice  
5 Kagan's question about the relationship between  
6 our position and the SG's position.

7 So we agree on two key things. First,  
8 "contributing factor" cannot include an animus  
9 requirement, and it cannot include retaliatory  
10 intent to the extent that means something more  
11 than the JA 180 language of "affects the  
12 decision."

13 Second, the burden-shifting framework  
14 is how you capture discrimination. And I don't  
15 think I heard my friend on the other side give  
16 you an example of why Justice Gorsuch's proposed  
17 instruction, which is step 2 of the  
18 burden-shifting framework, doesn't adequately  
19 capture -- doesn't adequately exclude innocent  
20 employers, setting aside the  
21 clear-and-convincing-evidence standard, which,  
22 of course, was Congress's prerogative.

23 And this Court has already held that's  
24 what discrimination mean, right? That's --  
25 that's Bostock. Discrimination has occurred if

1 changing the employee's sex would have yielded a  
2 different choice. That's Abercrombie. Three  
3 elements for discriminate, adverse action,  
4 because of protected activity. So you're not --  
5 you're not breaking any new ground here. And  
6 I'm happy to explain Staub and Halliburton that  
7 my friend on the other side cited if there are  
8 questions about those.

9 To the extent this Court is inclined  
10 to decide between the JA 130 formulation, which  
11 is "tends to affect in any way," which is our  
12 preferred formulation, or the JA 180 "affects  
13 the decision in any way," and, again, I don't  
14 think you need to do that because both  
15 instructions were in this case, but to the  
16 extent this Court is inclined to choose between  
17 them, I'd like to say a few words on why I think  
18 the JA 130 formulation is the preferred one.

19 So, first, the statute notably doesn't  
20 say "contributing factor in the decision." And  
21 that's notable because, as the SG's Office  
22 explained, Mt. Healthy does use the "in the  
23 decision" formulation, so it's notable that  
24 Congress chose not to use that.

25 Second, this would collapse the

1 difference between contributing and motivating  
2 factor, right? So motivating factor, Price  
3 Waterhouse. If we ask the decisionmaker to list  
4 the reasons and they were truthful, the  
5 protected trait would be on that list. That's  
6 basically saying it's a contributing factor in  
7 the decision. And Congress chose to use  
8 "contributing factor" and not "motivating  
9 factor" in this context.

10 And, third, Marano seems to have  
11 defined this authoritatively a generation ago.  
12 Congress was well aware of that definition when  
13 it incorporated it into SOX.

14 So, again, for us to win, you just  
15 have to say no animus and contributing factor  
16 and no retaliatory intent to the extent it means  
17 more than "affects the decision," and  
18 burden-shifting framework is all you need to  
19 show to get at discrimination.

20 If you want to go further and choose  
21 between these two instructions, I've given you  
22 my position on why the JA 130 formulation is  
23 preferable.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1                   The case is submitted.  
2                   (Whereupon, at 11:32 a.m., the case  
3 was submitted.)  
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