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Reimagining Financial Whistleblower Protection: A Proposal for Stronger Protection Under the Sarbanes-Oxley Act

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A PROPOSAL FOR STRONGER PROTECTION UNDER THE SARBANES-OXLEY ACT

INTRODUCTION

Before the early 2000s, Sherron Watkins was just another vice president at Enron, an energy company that dominated the market in the 1990s by trading in commodities like natural gas and electricity.[1] Enron was widely seen as a successful venture, earning "The Most Innovative Company in America" title for six consecutive years.[2] The truth, however, was far more complicated. For four years, Enron engaged in serious accounting fraud, ultimately admitting to the public that it made "more than $1 billion in accounting errors."[3] In essence, Enron, with the help of its accountants at Arthur Anderson, hid its debt in various complex special purpose vehicles—offshore partnerships that were essentially "accounting gimmicks"—to create the impression that Enron was performing far better than it truly was.[4] The creation of these entities was a secret, which meant Enron's purposefully hid its true financial condition from its shareholders and the market.[5]

In August 2001, two months prior to Enron announcing its accounting errors, Watkins sounded the alarm.[6] She sent a letter to Enron chairman Kenneth L. Lay expressing her

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[1] *Time Names Whistleblowers as Persons of Year*, CNN (Dec. 23, 2022, 2:07 AM), https://edition.cnn.com/2002/US/12/23/time.persons.of.year/ [https://perma.cc/Z6XG-2SKR]; Jonathan R. Macey, *Efficient Capital Markets, Corporate Disclosure, and Enron*, 89 CORNELL L. REV. 394, 397–98 (2004).

[2] Macey, *supra* note 1, at 398.

[3] Tom Redburn, *Enron's Collapse: The Week That Was*; *The Enron Debacle Follows a Now Established Format for Scandal*, N.Y. TIMES (Jan. 20, 2002), https://www.nytimes.com/2002/01/20/us/enron-s-collapse-week-that-was-enron-debacle-follows-now-established-format-for.html [https://perma.cc/3AHW-7WFR]; Macey, *supra* note 1, at 422 n.6 (noting Enron's fraudulent conduct began in 1997).

[4] Macey, *supra* note 1, at 396–97, 408.

[5] Troy Segal, *Enron Scandal: The Fall of a Wall Street Darling*, INVESTOPEDIA (Nov. 26, 2021), https://www.investopedia.com/updates/enron-scandal-summary/ [perma.cc/K2UF-2TEM].

[6] Redburn, *supra* note 3.

discomfort with the alleged accounting scandals and with potential conflicts of interest at Arthur Anderson.[7] She warned that the company would soon need to disclose to the public unseemly—and potentially illegal—behavior related to its accounting statements.[8] The letter prompted what would ultimately be a farcical investigation by outside counsel.[9] The investigation, which concluded only two months after Watkins blew the whistle, determined that no further action on the part of the company was necessary.[10] Watkins' efforts to warn of financial wrongdoing were seemingly unsuccessful because just a few days after receiving her letter of concern, Lay "was urging Enron employees in a company Web chat to buy shares."[11]

In December 2001, after revealing its true financial condition, Enron "filed the largest corporate bankruptcy in American history."[12] The consequences were drastic: the company's stock price dropped nearly eighty dollars, and thousands of employees were laid off.[13] Shareholders sued Enron for over $40 billion.[14] Arthur Andersen was eventually forced to shut down its audit department.[15] Ultimately, the Enron scandal became a notorious, textbook example of risky—and illegal—corporate behavior.[16] Few would know better than John Ray III, a restructuring expert often consulted to "manage the fallout from some of the largest corporate failures," including Enron.[17] In a recent bankruptcy court filing related to the collapse of the cryptocurrency exchange FTX, Ray, the newly installed CEO of FTX, used Enron's collapse as *the* prime example of the absolute

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[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Richard A. Oppel Jr. & Andrew Ross Sorkin, *Enron's Collapse: The Overview; Enron Corp. Files Largest U.S. Claim for Bankruptcy*, N.Y. TIMES (Dec. 3, 2001), https://www.nytimes.com/2001/12/03/business/enron-s-collapse-the-overview-enron-corp-files-largest-us-claim-for-bankruptcy.html [perma.cc/9HYD-P9PC].

[13] *What Enron Employees Have Lost: Tens of Thousands Hit by Job Losses, Plummeting Stock*, NPR (Jan. 22, 2002), https://legacy.npr.org/news/specials/enron/employees.html [perma.cc/R5LP-2PJN].

[14] Simon Constable, *How the Enron Scandal Changed American Business Forever*, TIME (Dec. 2, 2021), https://time.com/6125253/enron-scandal-changed-american-business-forever/ [perma.cc/BCK8-63ZQ].

[15] *Id.*

[16] *See* C. William Thomas, *The Rise and Fall of Enron*, J. ACCOUNTANCY (Apr. 1, 2002), https://www.journalofaccountancy.com/issues/2002/apr/theriseandfallofenron.html [perma.cc/F6L5-XEG6] (describing the Enron scandal as "a dream for academics who conduct research and teach" about corporate fraud).

[17] Kalley Huang, *Who Is John J. Ray III, FTX's New Chief Executive?*, N.Y. TIMES (Dec. 13, 2022), https://www.nytimes.com/2022/12/13/technology/john-j-ray-iii-ftx-chief-executive.html [https://perma.cc/AU8T-9ZLY].

worst corporate behavior.[18] The Enron collapse was a striking demonstration of the human costs of risky corporate behavior: the former vice chairman of Enron ultimately died by suicide, and as many as 4,500 former employees were forced to find new jobs.[19] For her part, Sherron Watkins, who blew the whistle only months earlier, left Enron in 2002.[20] She has since written and spoken extensively about her experience in the limelight after coming forward about the scandal.[21]

Whistleblower protection is one of the few issues that has garnered bipartisan support in a polarized Congress.[22] While whistleblowers may fuel controversy, they are often credited with serving the important purpose of maintaining an open and transparent society by reporting "waste, fraud, abuse, corruption, or dangers to public health and safety to someone who is in the position to rectify the wrongdoing."[23] In the past decade, whistleblowers have received no shortage of media attention, with many of the most prominent cases involving government whistleblowers.[24] That may be for good reason:

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[18] Kadhim Shubber et al., *New FTX Chief Says Crypto Group's Lack of Control Worse than Enron*, FIN. TIMES (Nov. 17, 2022), https://www.ft.com/content/7e81ed85-8849-4070-a4e4-450195df08d7 [https://perma.cc/62SB-FARE].

[19] Thomas, *supra* note 16.

[20] David Barboza, *Executive Who Warned Enron of Troubles Is Leaving Company*, N.Y. TIMES (Nov. 15, 2022), https://www.nytimes.com/2002/11/15/business/executive-who-warned-enron-of-troubles-is-leaving-company.html [https://perma.cc/9RM6-FKGU].

[21] *Id.* Sherron Watkins has co-authored a book about her experience as the Enron whistleblower. *See* MIMI SWARTZ & SHERRON WATKINS, POWER FAILURE: THE INSIDE STORY OF THE COLLAPSE OF ENRON (2002).

[22] *See Grassley, Durbin Propose Enhanced FBI Whistleblower Protections*, SEN. CHUCK GRASSLEY (July 28, 2022), https://www.grassley.senate.gov/news/news-releases/grassley-durbin-propose-enhanced-fbi-whistleblower-protections [https://perma.cc/276W-CXMR] (demonstrating ongoing bipartisan support for legislation to protect whistleblowers in new contexts); *What Is a Whistleblower?*, NAT'L WHISTLEBLOWER CTR., https://www.whistleblowers.org/what-is-a-whistleblower/ [https://perma.cc/B49D-EKWA].

[23] *What Is a Whistleblower?*, *supra* note 22; *Whistleblowing*, TRANSPARENCY INT'L, https://www.transparency.org/en/our-priorities/whistleblowing [https://perma.cc/WAA7-ZW5S] (discussing the importance of protecting whistleblowers and outlining some of the unfortunate consequences they face as a result of coming forward).

[24] *See, e.g.*, Glenn Greenwald et al., *Edward Snowden: The Whistleblower Behind the NSA Surveillance Revelations*, GUARDIAN (June 9, 2013), https://www.theguardian.com/world/2013/jun/09/edward-snowden-nsa-whistleblower-surveillance [https://perma.cc/Q39X-AW37]; Patrick Radden Keefe, *The Surreal Case of a C.I.A. Hacker's Revenge*, NEW YORKER (June 6, 2022), https://www.newyorker.com/magazine/2022/06/13/the-surreal-case-of-a-cia-hackers-revenge [https://perma.cc/G4UJ-6VTC]; Devlin Barrett et al., *Whistleblower Claimed that Trump Abused His Office and that White House Officials Tried to Cover It Up*, WASH. POST (Sept. 26, 2019), https://www.washingtonpost.com/national-security/house-intelligence-committee-releases-whistleblowers-complaint-citing-trumps-call-with-ukraines-president/2019/09/26/402052ee-e056-11e9-be96-6adb81821e90_story.html [https://perma.cc/N946-X4T2]; Matthew Russell Lee, *UN Bans Press Reporting on Whistleblowers as BBC Lets Guterres Off Hook by Audio Theft*, INNER CITY PRESS (June

government whistleblowers can reveal unseemly behavior and corruption by our entrusted representatives.[25] But as the Enron fiasco illustrates, whistleblowers play similarly important roles in the private sector, especially in the financial industry.[26] That is because investors have significant money in the markets, and fraudulent conduct, left unexposed, sows confusion and distrust in the financial system.[27]

Members of Congress expressed serious concerns about the fall of Enron.[28] In July 2002, recognizing the importance of both protecting whistleblowers and ensuring confidence in markets, Congress enacted the Sarbanes-Oxley Act (Sarbanes-Oxley).[29] Sarbanes-Oxley was a response to a perceived "corporate code of silence" at large financial institutions like Enron, which stifled the ability of employees to come forward with information about illegal activities at their firms.[30] Congress found that employees who did come forward with complaints frequently faced serious retaliation.[31] Others, like Sherron Watkins, risk being branded as "opportunist[s]" in the national press, speaking out to save themselves from public backlash or potential legal liability.[32] To protect those employees, Sarbanes-Oxley "addressed the issue of private sector whistleblowing by encouraging employees of publicly-

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21, 2022), http://www.innercitypress.com/unleaks6retaliationicp062122.html [https://perma.cc/6WP6-ZLTB].

[25] Yochai Benkler, *A Public Accountability Defense for National Security Leakers and Whistleblowers*, 8 HARV. L. & POL'Y REV. 281, 285 (2014) ("Whistleblowing is seen as a central pillar to address government corruption and failure throughout the world.").

[26] *See* Samantha Osborne, *Dodd-Frank Whistleblower Provision: Determining Who Qualifies as a Whistleblower*, 41 DEL. J. CORP. L. 903, 906 (2017) ("Whistleblowers are central to policing improper corporate acts."); James A. Fanto, *Whistleblowing and the Public Director: Countering Corporate Inner Circles*, 83 OR. L. REV. 435, 438–39 (2004) (discussing the important role of some of the most famous financial whistleblowers, including Cynthia Cooper of WorldCom and James Bingham of Xerox).

[27] *See* Osborne, *supra* note 26, at 907 (noting the adoption of whistleblower protection provisions in the Dodd-Frank Wall Street Reform and Consumer Protection Act, which sought to increase transparency following the 2008 Financial Crisis); Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1779 (2007) ("Whistleblowing is gaining recognition worldwide as an important means of ensuring the transparency and integrity of global markets.").

[28] *See generally Senate Subcommittee Says Enron Board at Fault*, CNN (July 8, 2002, 11:51 AM), https://www.cnn.com/2002/ALLPOLITICS/07/07/senate.enron/index.html [https://perma.cc/FQ2A-T2TL] (explaining the content of a report prepared by a Senate subcommittee after a thorough investigation of Enron's wrongdoing).

[29] Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, and 29 U.S.C.); *see also* Lawson v. FMR LLC, 571 U.S. 429, 432 (2014).

[30] S. Rep. No. 107-146, at 4–5 (2002).

[31] *Id.* at 5–6. For a discussion on the diverging fates of whistleblowers and their corporate executive counterparts, see Fanto, *supra* note 26, at 439 (2004) ("[A] stark contrast exists between the fate of those in [the] corporation's inner circle and the whistleblowers.").

[32] Barboza, *supra* note 20.

traded companies to blow the whistle on fraudulent activity without fear of retaliation in the workplace."[33] Under the relevant provision, Section 1514A, a company may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" for whistleblowing.[34]

Reviews regarding the effectiveness of Section 1514A are mixed. On the one hand, empirical studies demonstrate that Section 1514A "fail[s] to protect the vast majority of employees who file[] Sarbanes-Oxley retaliation claims."[35] Indeed, according to one study, in the three years following the enactment of Sarbanes-Oxley, only 3.6 percent of whistleblowers prevailed on their claims.[36] On the other hand, Sarbanes-Oxley's streamlined and mandated processes for addressing claims has garnered praise, with some arguing that its innovative structure and clearly articulated goal of whistleblower protection give it great potential to offer concrete safeguards to whistleblowers.[37]

Putting aside Sarbanes-Oxley's structural and practical weaknesses, the statute's use of the word "discriminate" is loaded. On the one hand, the Fifth and Ninth Circuit agree that the term appears to demonstrate the broad scope of Sarbanes-Oxley's reach: by including the phrase "or in any other manner discriminate," Congress recognized that corporations and other entities may find new and innovative ways to retaliate against whistleblowers.[38] On the other hand, the Second Circuit interprets the word discriminate to require a showing of retaliatory intent on behalf of the employer.[39] The requirement of a showing of retaliatory intent is now the subject of a split

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[33] Katie Maxwell, *Blowing the Whistle Falls on Deaf Ears: Revamping Texas's Whistleblower Jurisprudence by Applying the Lessons of* Garcetti *and Sarbanes-Oxley*, 43 TEX. TECH L. REV. 647, 658 (2011); *see also* 18 U.S.C. § 1514A(a).

[34] 18 U.S.C. § 1514A(a). Strangely enough, though, while private and public sector whistleblowers perform similar functions, the standards for adjudicating claims of retaliation under the different laws are entirely dissimilar. A litigant's likelihood of success depends heavily on what standard is applied. Thus, whether a whistleblower can recover damages for being fired often hinges almost entirely on whether the litigant is whistleblowing against the government or some other private entity. The lack of uniformity in whistleblower standards has been the subject of significant scholarly criticism. For an overview of the different standards utilized by state and federal courts for different types of whistleblowing claims, see generally Nancy M. Modesitt, *Causation in Whistleblowing Claims*, 50 U. RICH. L. REV. 1193 (2016).

[35] Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 67 (2007).

[36] *Id.*

[37] Maxwell, *supra* note 33, at 659.

[38] 18 U.S.C. § 1514A(a). Courts have routinely interpreted the use of the phrase "in any other manner" as broad. *See, e.g.*, N.L.R.B. v. U.S. Postal Serv., 486 F.3d 683, 687 (10th Cir. 2007) (discussing "broad, 'in any other manner' language").

[39] Murray v. UBS Sec., LLC, 43 F.4th 254, 259–60 (2d Cir. 2022).

among the various US courts of appeals.[40] According to some circuits, retaliatory intent is not a required element of a claim under Section 1514A, the relevant section in Sarbanes-Oxley.[41] Until 2022, no circuit court required a showing of retaliatory intent. However, in *Murray v. UBS Securities*, the Second Circuit broke from this—albeit tenuous—consensus view.[42] Relying on the statute's plain language and other textualist cannons of statutory interpretation, the Second Circuit concluded that a plaintiff must show retaliatory intent to prevail on a Section 1514A claim.[43] On May 1, 2023, the Supreme Court granted certiorari to resolve the circuit split.[44]

Few seem to contest that, should the Supreme Court affirm the Second Circuit's judgment, *Murray* will have drastic consequences for whistleblowers.[45] As the Second Circuit noted, other statutes like the Federal Railroad Safety Act use similar language.[46] On that basis alone, the consequences could be widespread, given the tendency of courts to "interpret identical language in different statutes to have the same meaning."[47] Substantively, an interpretation like that of the Second Circuit makes it much more difficult for whistleblowers to succeed in lawsuits against private entities.[48] Indeed, proving retaliatory

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[40] *Compare* Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 263 (5th Cir. 2014), *and* Coppinger-Martin v. Solis, 627 F.3d 745, 750 (9th Cir. 2010), *with Murray*, 43 F.4th at 259–60.

[41] *See Halliburton*, 771 F.3d at 263 ("We reject Halliburton's argument that the Review Board committed legal error by failing to require proof that the company had a 'wrongful motive.'"); *Coppinger-Martin*, 627 F.3d at 750 (SOX "does not require that the employee conclusively demonstrate the employer's retaliatory motive.").

[42] *Murray*, 43 F.4th at 259–60.

[43] *Id.* at 260.

[44] Khorri Atkinson, *UBS Whistleblower's Retaliation Case Taken Up by Supreme Court*, BLOOMBERG L. (May 1. 2023, 9:41 AM), https://news.bloomberglaw.com/daily-labor-report/ubs-whistleblowers-retaliation-case-taken-up-by-supreme-court.

[45] *See, e.g.*, Gregory Markel et al., *Murray v. UBS: The Second Circuit Creates a Circuit Split on Whistleblower Claim Standard*, JDSUPRA (Aug. 18, 2022), https://www.jdsupra.com/legalnews/murray-v-ubs-the-second-circuit-creates-3799398/ [https://perma.cc/Q9MP-5GRT] (attorneys from Seyfarth Shaw LLP, a large corporate law firm, discussing the potentially "dramatic" effects of the Second Circuit's decision); David Priebe, *Appellate Court Holds Sarbanes-Oxley Whistleblower Retaliation Claim Requires Retaliatory Intent, Setting Up Potential Supreme Court Appeal*, DLA PIPER (Aug. 11, 2022), https://www.dlapiper.com/en/us/insights/publications/2022/08/appellate-court-holds-Sarbanes-oxley-whistleblower-retaliation-claim/ [https://perma.cc/253P-Y9TK] (discussing potential new strategies for corporate defendants facing whistleblowing lawsuits under Sarbanes-Oxley and other whistleblower protection statutes that employ similar language).

[46] *Murray*, 43 F.4th at 260.

[47] *Id.*

[48] Lynne Bernabei & Kristen Sinisi, *2nd Circ. Erred In Requiring Retaliatory Intent in SOX Claim*, LAW360 (Aug. 24, 2022), https://www.law360.com/real-estate-authority/commercial/articles/1522557/2nd-circ-erred-in-requiring-retaliatory-intent-in-sox-claim [https://perma.cc/7EQP-NBV8].

intent is widely considered difficult because employers "will rarely admit retaliatory motives in firing an employee."[49] By requiring a showing of retaliatory intent as an element for a successful whistleblower retaliation claim, the Second Circuit's interpretation unnecessarily risks contravening Congress's precise purpose in including a cause of action for retaliation in Sarbanes-Oxley.[50]

This note discusses the newly formed circuit split on whether retaliatory intent is an element of a whistleblower retaliation claim under Sarbanes-Oxley. This note principally argues that an interpretation like the Second Circuit's threatens to weaken protections for whistleblowers, contravening the precise purpose for which Sarbanes-Oxley was enacted in the first place. Following *Murray*, use of the word "discriminate" has had negative, unintended consequences. Drawing on the Whistleblower Protection Act (WPA),[51] which offers protection to whistleblowers under different circumstances, this note proposes revised language to Sarbanes-Oxley that would fortify whistleblower protections no matter how the Supreme Court resolves the split.

This note will proceed in three Parts. Part I provides background on Sarbanes-Oxley and whistleblower protections in general. This Part emphasizes the importance of whistleblower protection laws in maintaining an efficient and fair marketplace. It describes the specific importance of these protections with respect to financial institutions, drawing on the legislative history of Sarbanes-Oxley and other similar whistleblower protection laws. This Part also briefly discusses the WPA, which ultimately provides support for the proposal discussed in Part III.

Part II discusses the circuit split. It contrasts the analyses of the various circuit courts to consider this issue. Further, it surveys the circuits that have not passed on this question and analyzes how they interpret similar language from other statutes, with the goal of demonstrating that use of the term "discriminate" has resulted in widespread judicial distortion of congressional intent in whistleblower protection statutes. Given the great difficulty of proving retaliatory intent in employment cases, this Part discusses how the Second Circuit's interpretation frustrates one of the core goals of Sarbanes-Oxley: encouraging whistleblowers to come forward.

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[49] Sanjuan v. IBP, Inc., 160 F.3d 1291, 1297 (10th Cir. 1998).

[50] *See* Bernabei & Sinisi, *supra* note 48 (offering a critical view of the Second Circuit's textual analysis and delineating various negative potential consequences of the decision).

[51] 5 U.S.C. § 2302(b)(8)–(9).

Part III discusses the path forward.[52] It offers some considerations on the Supreme Court's impending resolution of the *Murray* case. It will conclude, however, that this is an unpredictable path that may ultimately set whistleblowers back even further. For that reason, this note argues that, regardless of how the Supreme Court decides *Murray*, Congress should improve the statutory language to bring Sarbanes-Oxley's effect in line with its undisputed goal: protecting those who blow the whistle from retaliation. The proposed statutory language will draw from the WPA, which prohibits, in relevant part, retaliation against government employees for "any disclosure of information . . . which the employee or applicant reasonably believes evidences[] (i) a violation of any law, rule, or regulation."[53] Notably, because no proof of discrimination is required, and courts routinely interpret the language as requiring only a showing of causation, this note argues that the WPA can provide Congress with tried and tested guidance on how to clean up other whistleblower provisions like the one in Sarbanes-Oxley. This note dispels any notions that whistleblowing in the federal government context (covered by the WPA)[54] and the financial context (covered by Sarbanes-Oxley and other statutes like the Dodd-Frank Wall Street Reform and Consumer Protection Act)[55] present materially different circumstance that might warrant different language.

I. WHISTLEBLOWERS AND SARBANES-OXLEY

The Federal Government has been involved in protecting whistleblowers since at least the late 1800s.[56] Many early pieces

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[52] Importantly, this note will not serve as a case comment on *Murray*. It will not offer substantive criticism of the Second Circuit's textual analysis beyond noting the potentially dangerous consequences and its inconsistency with the goal of the legislation. For a more targeted criticism of the Second Circuit's interpretive approach and ultimate conclusion, see Bernabei & Sinisi, *supra* note 48.

[53] 5 U.S.C. § 2302(b)(8)(A)(i).

[54] *Id.* § 2302(b)(8)–(9).

[55] Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, and 29 U.S.C.); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 12 and 15 U.S.C., and other titles).

[56] *See* 31 U.S.C. §§ 3729–3733 (1863). Some have traced American commitment to whistleblower protection as far back as the Second Continental Congress in 1778. In 1777, a group of sailors aboard the Warren sent a letter to the Second Continental Congress complaining that their commander, Commodore Esek Hopkins, had tortured British sailors. Hopkins—a member of a powerful family—retaliated, and two of the sailors were jailed. The next year, the appalled Second Continental Congress enacted legislation imposing a duty on "all persons in the service of the United States" to report "misconduct, frauds, or misdemeanors committed by any officers or persons." Stephen M. Kohn, Opinion,

of legislation focused on government whistleblowers.[57] But in the past few decades, Congress recognized that some of the country's biggest scandals—like Enron and the 2008 financial crisis—are connected to abuses within the private sector.[58] These disasters led to legislation like Sarbanes-Oxley and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), which focused on whistleblower protections within private industry.[59]

A. A Brief Overview of Whistleblowers

According to the Federal Government, whistleblowers are "employees, contractors, subcontractors, grantees, subgrantees, and personal services contractors" who "report evidence of wrongdoing."[60] Not only are whistleblowers controversial because they report information their employers do not want made public, but they are also controversial because they can reveal information that even the public may not want to know, especially when it undermines their perception of institutions like the presidency or the military.[61] The False Claims Act, passed during the Civil War, was one of the first major pieces of federal legislation to set the groundwork in the whistleblower space.[62] Congress enacted the False Claims Act because it was concerned about fraud and abuse by "companies supplying the . . . government with deficient goods during the

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The Whistle-Blowers of 1777, N.Y. TIMES (June 12, 2011), https://www.nytimes.com/2011/06/13/opinion/13kohn.html [https://perma.cc/JB8M-TCK5].

[57] *See, e.g.*, 31 U.S.C. §§ 3729–3733; Kohn, *supra* note 56 (discussing protections for "persons in the service *of the United States*") (emphasis added).

[58] *See e.g.*, 18 U.S.C. § 1514A (Sarbanes-Oxley); 15 U.S.C § 78u–6 (Dodd-Frank).

[59] *See* 18 U.S.C. § 1514A; § 78u–6.

[60] *Whistleblower Rights and Protections*, U.S. DEP'T OF JUST., OFF. INSPECTOR GEN., https://oig.justice.gov/hotline/whistleblower-protection [https://perma.cc/4TYB-HHY2]. Depending on the industry, whistleblowers may report wrongful conduct directly to, among others, their employees or to a government agency. *See e.g.*, *id.* (discussing a DOJ hotline for reporting conduct); Dworkin, *supra* note 27, at 1760–61 (2007) (discussing procedures for reporting internally).

[61] *See* Meera Khan, *Whistling in the Wind: Why Federal Whistleblower Protections Fall Short of Their Corporate Governance Goals*, 26 U. MIAMI BUS. L. REV. 57, 84 (2018) (discussing "revere[ence]," but "skepticism" for whistleblowers in the United States). The Edward Snowden saga is a telling example. Only about half of Americans surveyed believed Snowden's exposure of classified documents detailing the federal government's surveillance of US citizens was in "the public interest." A.W. Geiger, *How Americans Have Viewed Government Surveillance and Privacy Since Snowden Leaks*, PEW RSCH. CTR. (June 4, 2018), https://www.pewresearch.org/fact-tank/2018/06/04/how-americans-have-viewed-government-surveillance-and-privacy-since-snowden-leaks/ [https://perma.cc/7DK2-D5SA]. A little more than half of Americans believed the government should prosecute Snowden for disclosing the information. *Id.*

[62] Mary Kreiner Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 192 (2007) (citing 31 U.S.C. §§ 3729–3733).

Civil War."[63] The False Claims Act allowed private citizens to file suit on behalf of the federal government if they became aware of fraudulent conduct by companies providing manufactured products to the United States.[64] The years following the Civil War saw a dramatic increase in the power of business as the country entered the Industrial Revolution.[65] The expansion of large industry and powerful corporations resulted in the increased influence of labor unions, which, consistent with their stated mission of protecting workers, fought for contractual provisions to prohibit retaliation for collective organizing.[66]

The growth of antiretaliation principles increased during the civil rights movement of the 1960s and continued into the 1980s and 1990s, though mostly as a result of changed attitudes about the dignity of protecting people in the workplace and not necessarily from direct union bargaining.[67] These changes coincided with other environmental and civil rights statutes.[68] They also recognized the importance of transparency, thus expanding traditional notions of antiretaliation principles (relating specifically to the formation of labor unions and to strikes) to include protections for whistleblowers.[69]

Today, there is no shortage of statutes designed to protect against retaliation. Such statutes exist in every state, though the extent of protection offered by each differs greatly.[70] The Federal Government has also been active in this field, through legislation like the WPA, which responded to criticism that protections against adverse employment actions were too weak.[71] Laws like Sarbanes-Oxley and Dodd-Frank are two primary examples of important federal legislation that contain protections for whistleblowers.[72] Interestingly enough, though, these two pieces of legislation were each passed in response to a financial crisis—Sarbanes-Oxley as a result of the Enron bankruptcy, and Dodd-Frank in response to the 2008 Financial

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[63] *Id.*

[64] *Id.*

[65] Elizabeth A. Laughlin, *The Rise of American Industrial and Financial Corporations*, 6 GETTYSBURG ECON. REV. 42, 42 (2012).

[66] *See id.* at 48 (discussing the struggles of labor unions that coincided with the growth of big business); Ramirez, *supra* note 62, at 192–93 (listing various legislative achievements resulting from advocacy by labor unions).

[67] *See* Ramirez, *supra* note 62, at 193–94.

[68] *Id.*

[69] *See id.* at 192–94 (discussing progression of antiretaliation ideas from the 1930s through the 1970s).

[70] Khan, *supra* note 61, at 62; Ramirez, *supra* note 62, at 194–95, 195 nn.68–69.

[71] Ramirez, *supra* note 62, at 191, 193–94.

[72] 18 U.S.C. § 1514A (Sarbanes-Oxley); 15 U.S.C § 78u–6 (Dodd-Frank).

Crisis.[73] So, while Congress and the states have enacted serious legislation in this field, they seem, at least in the last twenty years, to be playing a sort of "catch-up" game, engaging in reactive, rather than proactive, lawmaking.

Whistleblowers have garnered significant public attention in the last few years. In 2009, Bradley Birkenfeld, a former UBS banker, brought forth allegations that UBS committed tax fraud by using illegal Swiss bank accounts to avoid paying taxes.[74] As a result, the Swiss government renegotiated its tax treaty with the United States, forcing the Swiss government to provide the United States with names of the owners of nearly five thousand illegal bank accounts.[75] In 2021, Francis Haugen, a former data scientist at Facebook, testified before Congress that the company was aware its platform "harms children, sows division and undermines democracy in pursuit of breakneck growth."[76] Her testimony shored up bipartisan support for stronger regulation of large technology companies.[77] These two examples highlight the importance of whistleblowers in driving structural and political change.

B. The WPA

The WPA—which protects federal employees who blow the whistle on improper or illegal conduct within their place of work—was heralded as ushering in a new, more serious commitment to protecting whistleblowers.[78] It was enacted as part of a series of civil service reforms that were, in part, a response to the corruption plaguing the US government in the wake of the Watergate scandal.[79] It recognized that previous

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[73] *See infra* Section I.C (discussing origins of Sarbanes-Oxley); *Wall Street Reform: The Dodd-Frank Act*, WHITE HOUSE, https://obamawhitehouse.archives.gov/economy/middle-class/dodd-frank-wall-street-reform [https://perma.cc/N3YT-ZRPK] (noting that Dodd-Frank was a response to a "broken financial regulatory system" that caused the 2008 crisis).

[74] *Bradley Birkenfeld: Tax Fraud Whistleblower*, NAT'L WHISTLEBLOWER CTR., https://www.whistleblowers.org/whistleblowers/bradley-birkenfeld/ [https://perma.cc/X9KU-PX87].

[75] *Id.*

[76] Bobby Allyn, *Here Are 4 Key Points from the Facebook Whistleblower's Testimony on Capitol Hill*, NPR (Oct. 5. 2021), https://www.npr.org/2021/10/05/1043377310/facebook-whistleblower-frances-haugen-congress [https://perma.cc/63P8-BP9Z].

[77] *Id.*

[78] Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 ADMIN. L. REV. 531, 533 (1999) ("[U]ntil passage of the Whistleblower Protection Act of 1989 . . . most statutory free speech protections tended to be counterproductive—scandal containment laws that created an increased chilling effect.") (footnote omitted).

[79] *FAQ: Whistleblower Protection Act*, WHISTLEBLOWERS, https://www.whistleblowers.org/faq/whistleblower-protection-act-faq/# [https://perma

whistleblower protection statutes were "long on rhetoric and short on genuine substance."[80] As such, the WPA is credited with "expanding the scope of protection by eliminating prior loopholes, broadening the shield for protected conduct, and expanding the scope of illegal employer conduct."[81] Critically, the WPA applies to *federal* employees, not employees of privately owned companies.[82]

The drafters of the WPA also recognized that, under legislation in effect at the time, many plaintiffs had trouble establishing a prima facie case of retaliation.[83] Recognizing this issue, the WPA took significant steps to reduce the burden on plaintiffs in establishing a prima facie case.[84] For example, previous legislation required a plaintiff to show that an employer took a particular action "in retaliation for" engaging in protected conduct.[85] The WPA changed this language, requiring that a plaintiff demonstrate their employer took a particular action "because of" their engagement in protected conduct.[86] In doing so, the WPA eliminated the requirement of showing invidious intent and relieved plaintiffs of what was previously a heavy burden of proof.[87] The WPA also adopted a "contributing factor" causation standard.[88] Previous statutes required a plaintiff to show that her conduct was a "substantial" or "motivating" factor in an adverse employment action.[89] The WPA eliminated those words, which created difficulty for whistleblowers in establishing a prima facie case of retaliation.[90]

.cc/SU43-D6UW]; Charles S. Clark, *After 40 Years, A Look Back at the Unlikely Passage of Civil Service Reform*, GOV'T EXEC. (July 3, 2018), https://www.govexec.com/management/2018/07/after-40-years-look-back-unlikely-passage-civil-service-reform/149458/ [https://perma.cc/647G-9BHK].

[80] Devine, *supra* note 78, at 533.

[81] *Id.* at 537.

[82] Bruce D. Fong, *Whistleblower Protection and the Office of Special Counsel: The Development of Reprisal Law in the 1980s*, 40 AM. U. L. REV. 1015, 1021 (1991).

[83] Devine, *supra* note 78, at 554–55 ("The most common reason whistleblowers lost under [previous statutes] was their inability to establish a prima facie case.").

[84] *Id.* at 555.

[85] *Id.* at 554 (citing 5 U.S.C. § 2302(b)(8)) (internal quotations omitted).

[86] 5 U.S.C. § 2302(b)(8).

[87] Devine, *supra* note 78, at 554–55; Fong, *supra* note 82, at 1061 ("The change expressed Congress' intent that the statute prohibited actions that are based on protected conduct, regardless of the personal motivation of the responsible officials. If a causal link can be established between the protected conduct and the personnel action, the statute has been violated.").

[88] 5 U.S.C. § 1221(e)(1); *see also* Devine, *supra* note 78, at 555.

[89] Devine, *supra* note 78, at 555.

[90] *Id.*

C. Sarbanes-Oxley

As previewed in the introduction, Sarbanes-Oxley was a response to Enron's collapse.[91] Thus, at the broadest level, in enacting Sarbanes-Oxley, Congress was concerned principally with increasing financial accountability for private corporations.[92] As such, Sarbanes-Oxley mandates an increased role of corporate executives like the CEO and CFO in reviewing and certifying financial reports.[93] It imposes criminal liability on officers who knowingly certify noncompliant financial statements, with fines of up to $1 million or imprisonment up to ten years as potential punishments.[94] Sarbanes-Oxley continues its war against fraud by imposing strict criminal penalties for altering documents used in ongoing investigations and audits.[95] Further, it amends the securities laws to require that audit committees establish procedures for "the confidential, anonymous submission by employees of . . . concerns regarding questionable accounting or auditing matters."[96]

1. Whistleblower Protections

The drafters of Sarbanes-Oxley were concerned that the various state whistleblower protection laws offered insufficient protection and varied too widely between jurisdictions.[97] To better the environment for whistleblowers, Sarbanes-Oxley included federal provisions to cover a broader class of employers across the United States.[98] Sarbanes-Oxley's primary whistleblower protection provision is found in § 806, codified at 18 U.S.C. § 1514A.[99] Under this provision, a company registered with the Securities and Exchange Commission (SEC) may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against" whistleblowers.[100]

In many ways, Sarbanes-Oxley is similar to other whistleblower statutes. For example, it merely requires a reasonable belief on the part of the employee that the

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[91] *See* Dana Brakman Reiser, *Enron.org: Why Sarbanes-Oxley Will Not Ensure Comprehensive Nonprofit Accountability*, 38 U.C. DAVIS L. REV. 205, 243 (2004).

[92] *Id.*

[93] 15 U.S.C. § 7241(a).

[94] 18 U.S.C. § 1350(c)(1).

[95] *Id.* § 1520(a)(2)–(b).

[96] 15 U.S.C. § 78–j1(m)(4)(B).

[97] *See* Valerie Watnick, *Whistleblower Protections Under the Sarbanes-Oxley Act: A Primer and A Critique*, 12 FORDHAM J. CORP. & FIN. L. 831, 841–42 (2007).

[98] *See id.*

[99] Dworkin, *supra* note 27, at 1759–60, 1760 n.13.

[100] 18 U.S.C. § 1514A(a).

information she is providing is correct.[101] However, unlike many other whistleblower statutes, it allows for internal reporting—the whistleblower may provide information to those within the company, as opposed to having to report to an outside agency.[102] Employees may also report inappropriate conduct anonymously, although, importantly, anonymous reporting to the media is not protected.[103] Perhaps most importantly, other provisions of Sarbanes-Oxley require companies to maintain procedures for submitting, receiving, and reviewing whistleblower reports with the hope of creating a streamlined process.[104] These distinctions demonstrate Congress's concern with transparency and evidence lawmakers' intent to go beyond the traditional scope of whistleblower protections in drafting Sarbanes-Oxley.[105]

An even stronger piece of evidence for Congress's broad intentions lies in its use of the phrase "or in any other manner discriminate," which follows a long list of enumerated retaliatory behavior.[106] As a result of this supposedly inclusive language, Sarbanes-Oxley "statutorily encompasses a broader definition of prohibited retaliation than most state whistleblower laws."[107]

2. Protecting Whistleblowers From Retaliation: Law and Procedure

If a whistleblower believes they were retaliated against for reporting misconduct, they are entitled to sue in federal court.[108] They must first, however, pursue an administrative claim before an administrative law judge (ALJ) within the Occupational Safety and Health Administration (OSHA), which is part of the Department of Labor.[109] The ALJ conducts a hearing to assess the viability of the employee's claim.[110]

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[101] Dworkin, *supra* note 27, at 1760 (citing 18 U.S.C. §1514A(1)).

[102] *Id.* There are positive and negative aspects of reporting within a company. On the one hand, some argue that it may allow for internal correction of misunderstandings between the company and the employer. *Id.* On the other hand, however, it may frustrate Sarbanes-Oxley's goal of increasing transparency, because there is more room for a cover-up on behalf of the corporation. *See id.* at 1760, 1769. For a more fulsome discussion on the merits of internal whistleblowers, see Terry Morehead Dworkin & Elletta Sangrey Callahan, *Internal Whistleblowing: Protecting the Interests of the Employee, the Organization, and Society*, 29 AM. BUS. L.J. 267, 277–80 (1991).

[103] Dworkin, *supra* note 27, at 1761.

[104] *Id.* at 1760–61.

[105] *Id.* at 1760.

[106] 18 U.S.C. § 1514A; Dworkin, *supra* note 27, at 1762.

[107] Dworkin, *supra* note 27, at 1762.

[108] *Id.* at 1761–62.

[109] 18 U.S.C. § 1514A(b)(1)(A); *see also* Dworkin, *supra* note 27, at 1761–62.

[110] Watnick, *supra* note 97, at 839.

To succeed on a claim under Section 1514A, the employee must satisfy a four-part, ALJ-created test, showing, by a preponderance of the evidence, that "(1) [they] engaged in protected activity under Sarbanes-Oxley; (2) that the employer was aware of the protected activity; (3) that [they] suffered an adverse employment action; and (4) that the protected activity was likely a contributing factor in the employer's decision to take adverse action."[111] Once the employee establishes the above, the employer is then entitled to show, by clear and convincing evidence, that they undertook the adverse employment action for a legitimate reason.[112] That is, the employer can show that they would have taken the same action regardless of the employee's whistleblowing.[113] This burden shifting feature guarantees companies a meaningful opportunity to rebut an employee's claims and assists ALJs in weeding out frivolous claims.[114] Importantly, the clear and convincing evidence standard placed on the company is more stringent than the preponderance of the evidence standard borne by the claimant-employee.[115] In theory, that should make an employee's likelihood of success stronger.[116] On the other hand, some scholars argue that because employers usually come equipped with reasonable alternative explanations (even if weak) for an employee's termination, the odds of success remain stacked against the employee.[117]

If the employee receives an unfavorable ruling in front of the OSHA ALJ, they are entitled to bring a petition for review in federal district court.[118] Federal courts review findings of the administrative review board in accordance with the standards set out in the Administrative Procedure Act.[119] Litigants petitioning for review of an agency decision face an uphill battle: courts "reverse an agency's decision only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'"[120]

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[111] *Id.* at 839 (collecting cases).

[112] *Id.* at 853–54.

[113] *Id.*

[114] *Id.* at 854–56.

[115] *Id.* at 853–55.

[116] *Id.*

[117] *Id.* at 854. ("Cases where the employer offers what it calls 'clear and convincing evidence' of a legitimate reason for adverse action put the employee in an untenable position."). There are numerous additional critiques of § 1514A's adequacy in promoting whistleblower protections. Issues like arbitration agreements, lack of support from witness testimony, and a demanding standard for what counts as a "protected activity" are some of the hurdles for a plaintiff. *See generally id.*

[118] Lawson v. FMR LLC, 571 U.S. 429, 437 (2014).

[119] Coppinger-Martin v. Solis, 627 F.3d 745, 748 (9th Cir. 2010).

[120] *Id.* (quoting 5 U.S.C. § 706(2)(A)).

If, however, the ALJ does not issue a decision within 180 days of filing, the claimant is entitled to file suit in federal district court and adjudicate the matter there in the first instance.[121]

II. RETALIATORY INTENT: THE CIRCUIT SPLIT

This note focuses on a circuit split over the meaning of the fourth element of a Section 1514A claim: when does protected activity qualify as a "contributing factor" to an employer's decision to take adverse action against an employee? The general idea of the contributing factor test is that "[a] whistleblower need only show that his protected activity had a role in the decision to act adversely toward him."[122] Under other whistleblower protection laws, courts utilized a set of vaguely-defined causation tests, including tests requiring plaintiffs to show their whistleblowing conduct was a "substantial or motivating factor" or a "significant factor" in a personnel decision.[123] Congress found these standards were too onerous.[124] Thus, in general, the contributing factor test is viewed as a more forgiving standard for plaintiffs.[125] Indeed, the "contributing factor" test is easier to satisfy than its civil rights counterpart, the "motivating factor" standard set out in the Civil Rights Act of 1991.[126] Still, parsing the "contributing factor" test has proven difficult, and there is a new circuit split over whether whistleblower-employees must prove that their employer took adverse employment action against them with a retaliatory intent.[127]

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[121] 18 U.S.C. § 1514A(b).

[122] Watnick, *supra* note 97, at 850.

[123] 135 CONG. REC. 5033 (1989) (discussing standards previously used in whistleblower protection legislation); *see also, e.g.*, Bryson v. City of Waycross, No. CV588-017, 1988 WL 428478, at *1 (S.D. Ga. Nov. 1, 1988) ("substantial or motivating factor . . . in the adverse employment actions"), *aff'd sub nom.* Bryson v. City of Waycross, 888 F.2d 1562 (11th Cir. 1989); Twist v. Meese, 661 F. Supp. 231, 232 (D.D.C. 1987), *aff'd*, 854 F.2d 1421 (D.C. Cir. 1988) ("substantial motivating factor underlying the termination"); Starrett v. Special Couns., 792 F.2d 1246, 1253 (4th Cir. 1986) (noting use of "significant factor" test).

[124] 135 CONG. REC. 5033 (1989) (contributing factor test "specifically intended to overrule existing case law," which made success on a whistleblower retaliation too difficult).

[125] Modesitt, *supra* note 34, at 1200 ("The contributing factor standard has been interpreted more favorably to the employee.").

[126] *Id.* at 1200–01 (discussing differences in standards in the civil rights and whistleblower retaliation contexts).

[127] Murray v. UBS Sec., LLC, 43 F.4th 254, 259–60 (2d Cir. 2022).

A. The Fifth and Ninth Circuits Hold Retaliatory Intent is Not an Element of a Section 1514A Claim

The first two circuits to decide whether Section 1514A requires a showing of retaliatory intent explicitly held that it does not.[128] In *Coppinger-Martin v. Solis*, the Court of Appeals for the Ninth Circuit held that Sarbanes-Oxley "does not require that the employee conclusively demonstrate the employer's retaliatory motive."[129] *Coppinger-Martin* concerned a Nordstrom employee who reported to her supervisor what she viewed as vulnerabilities in the company's information systems.[130] Those weaknesses, Coppinger-Martin told her supervisor, "exposed the company to potential SEC violations."[131] Despite a positive set of performance reviews, the company fired Coppinger-Martin approximately three months after her report of the purported vulnerabilities.[132]

An ALJ rejected Coppinger-Martin's Sarbanes-Oxley claims as untimely.[133] In a petition for review of the ALJ's decision, Coppinger-Martin argued that she failed to raise the claim in a timely manner because "she needed additional proof of Nordstrom's motivation in terminating her employment."[134] The Court of Appeals rejected this argument, holding that Coppinger-Martin could have made her prima facie case under Section 1514A without showing retaliatory intent.[135] Coppinger-Martin's allegation that her "protected behavior or conduct was a contributing factor in the unfavorable personnel action" was sufficient to make a prima facie case.[136] Because nothing more was required—and thus her failure to file a timely claim inexcusable—the Ninth Circuit affirmed the ALJ's dismissal of Coppinger-Martin's claim.[137] Although this result was disappointing for Coppinger-Martin, it ultimately created a beneficial precedent for future plaintiffs seeking to prove claims of retaliation against their employers.

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[128] Coppinger-Martin v. Solis, 627 F.3d 745, 750 (9th Cir. 2010); Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 263 (5th Cir. 2014).

[129] *Coppinger-Martin*, 627 F.3d at 750.

[130] *Id.* at 747–48.

[131] *Id.* at 748.

[132] *Id.* at 747–48. Coppinger-Martin, in actuality, continued working for the company well beyond her original firing date; however, many of her job duties were reassigned to other employees. *Id.* at 748.

[133] *Id.*

[134] *Id.* at 750.

[135] *Id.*

[136] *Id.* at 750–51 (quoting 29 C.F.R. § 1980.104(b) (2010)).

[137] *Id.* at 750–52.

The facts of *Halliburton, Inc. v. Administrative Review Board*—a Fifth Circuit case—are similar.[138] Anthony Menendez, an employee in the Finance and Accounting department of Halliburton, reported to supervisors his concern that some of the company's revenue recognition practices deviated from "generally accepted accounting principles."[139] He reported his findings in a memo to his superiors and in a confidential complaint to the SEC.[140] Based on the similarities between the memo and the SEC complaint, supervisors at Halliburton came to believe that it was Menendez who complained to the SEC.[141] Menendez's superior forwarded an email to his team outlining new document retention policies that identified Menendez as the SEC whistleblower.[142] That did not sit well with Menendez's colleagues, who began to ignore him at work and treat him differently than they had before the complaint was filed.[143] Although the SEC did not initiate an enforcement action against the company, Menendez resigned because he believed the practices were unethical and improper.[144]

After an ALJ dismissed his administrative complaint, Menendez filed suit in federal court under Section 1514A, alleging that the disclosure of his name to his colleagues constituted an adverse action under Sarbanes-Oxley's antiretaliation provision.[145] Halliburton countered, rather incredulously, that it was merely "seeking to address [Menendez's] concerns" by proving to him—through the document retention policy email—that his complaints were being taken seriously.[146] Thus, Halliburton argued, it did not act with retaliatory intent, which it contended was necessary for Menendez to succeed.[147] The Fifth Circuit rejected this argument as divorced from both the text and purpose of the statute.[148] A contributing factor, according to the Fifth Circuit, is "*any* factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision."[149] This key phrasing—"*any* factor"—foreclosed Halliburton's argument that Sarbanes-Oxley requires a showing of a "*wrongfully-motivated* causal

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138 Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254 (5th Cir. 2014).
139 *Id.* at 256.
140 *Id.*
141 *Id.* at 256–57.
142 *Id.* at 257.
143 *Id.*
144 *Id.*
145 *Id.* at 257–58.
146 *Id.* at 258.
147 *Id.* at 263.
148 *Id.*
149 *Id.* (quoting Allen v. Admin. Rev. Bd., 514 F.3d 468, 476 n.3 (5th Cir. 2008)).

connection."[150] The court also reasoned that requiring a showing of retaliatory intent would frustrate the general purpose of whistleblower protection statutes, which is to ensure that employers do not take adverse personnel actions against employees in response to their whistleblowing.[151]

B. The Second Circuit Holds a Whistleblower Must Show Retaliatory Intent

Until August 2022, no court required a showing of retaliatory intent in Section 1514A claims.[152] The Second Circuit's decision in *Murray v. UBS Securities*, however, charted a different course.[153] The plaintiff in *Murray* was a commercial mortgaged-backed securities strategist at UBS Securities, LLC.[154] As per SEC regulations, Murray was required to certify that his reports on UBS "products, services[,] and transactions" were "produced independently" and "accurately reflected his own views."[155] Murray alleged that, contrary to these guidelines, two senior UBS employees pressured him to produce inaccurate reports bolstering the company's business strategies.[156] Murray reported his concerns about the purported pressure from his superiors to his direct supervisor on two occasions.[157] Murray's supervisor admonished that it was "important that [he] not alienate [his] internal client" by producing accurate, but ultimately unhelpful reports.[158] Murray alleged that during his annual review, he was again told to "write what the business line wanted."[159] Murray's supervisor then advocated for Murray's removal from his group and branded him "a candidate for termination" if the group declined to move him to an inferior desk analyst position.[160] UBS subsequently fired Murray.[161]

Murray sued UBS for violating Section 1514A.[162] Murray alleged that he was fired in retaliation for blowing the whistle

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150 *Id.*

151 *Id.*

152 Murray v. UBS Sec., LLC, 43 F.4th 254, 261 n.7 (2d Cir. 2022) (identifying a break with the Fifth and Ninth Circuits and noting that no other Circuit has yet addressed the issue).

153 *See id.* at 258–59.

154 *Id.* at 256.

155 *Id.*

156 *Id.*

157 *Id.* at 256–57.

158 *Id.* at 257.

159 *Id.*

160 *Id.*

161 *Id.*

162 *Id.* Interestingly, the case was not adjudicated by an ALJ in the first instance because the Department of Labor failed to issue a final decision as to Murray's

on the alleged pressure he received to tow the business line in his research reports.[163] For its part, UBS maintained that it "implemented a series of reductions in force . . . which resulted in the elimination of Murray's position."[164] At trial, the district court declined UBS's request to include a jury instruction that, to prevail, Murray had to show "proof of UBS's retaliatory intent in taking the adverse employment action."[165] The jury returned a verdict in Murray's favor, and the district court awarded attorney's fees of $1,769,387.52, back pay in the amount of $653,300, and $250,000 in noneconomic damages.[166]

The Second Circuit reversed, holding that a showing of retaliatory intent is required to prevail on a Section 1514A claim.[167] Relying on textualist methods of statutory interpretation—in particular dictionary definitions—the Second Circuit held that the word discriminate means "[t]o act on the basis of prejudice."[168] That definition, the court held, inherently "requires a conscious decision to act based on a protected characteristic or action."[169] Put another way, "discriminatory action [taken] 'because of' whistleblowing therefore necessarily requires retaliatory intent—i.e., that the employer's adverse action was motivated by the employee's whistleblowing."[170] The district court instructed the jury that it was merely required to find Murray's whistleblowing was a contributing factor in his firing: "[f]or a protected activity to be a contributing factor, it must have either alone or in combination with other factors tended to affect in any way UBS's decision to terminate plaintiff's employment."[171] That instruction alone, the Second Circuit held, did not adequately inform the jury of Murray's burden to prove his employer acted with retaliatory intent.[172] As

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administrative complaint within 180 days. First Amended Complaint ¶ 34, Murray v. UBS Sec., LLC, No. 14-cv-927 (S.D.N.Y. Apr. 21, 2014), ECF No. 25; *see also* 18 U.S.C. § 1514A(b)(1)(B).

163 *Murray*, 43 F.4th at 257.

164 *Id.*

165 *Id.* at 258.

166 *Id.*

167 *Id.* at 258–59.

168 *Murray*, 43 F.4th at 259 (alteration in original) (quoting *Discriminate*, WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY (1994)). The court surveyed various other dictionary definitions of the word discriminate. *Id.*

169 *Id.*

170 *Id.*

171 *Id* at 258 (internal quotation marks omitted) (quoting the district court's jury instructions).

172 *Id.* at 262 ("[E]ven though the jury found that Murray's whistleblowing was a contributing factor to his termination, we cannot know whether it would have found that UBS acted with retaliatory intent.").

a result, the Second Circuit voided the jury verdict and forced Murray to return to the district court for a new trial.[173]

The Second Circuit acknowledged its interpretation was at odds with other courts of appeals.[174] According to the Second Circuit, the interpretation by those courts simply glossed over the text's plain meaning.[175] To bolster its textual analysis, the Second Circuit relied heavily on cases interpretating a similar statute, the Federal Railroad Safety Act (FRSA).[176] The Second Circuit has interpreted the whistleblower antiretaliation provision of FRSA—which has "nearly identical language" to Section 1514A—to require a showing of retaliatory intent.[177] The language and structure of both statutes is indeed similar: both contain a nearly identical list of prohibited activities followed by the all-encompassing "or in any other [way/manner] discriminate" language, with Sarbanes-Oxley using "manner" and FRSA employing "way."[178] The statutes diverge only slightly in their lists of prohibited activities, but both include the critical "discriminate" language.[179]

In its survey of how the various courts of appeals interpret Section 1514A, the Second Circuit noted there is also a split among the circuits as to whether FRSA requires a showing of retaliatory intent in a whistleblower retaliation claim.[180] Three Circuits—the Second, Seventh, and Eighth—interpret FRSA to require a showing of retaliatory intent.[181] The Third and Ninth Circuits require no such showing.[182] Thus, across statutes,

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[173] *Id.* at 263.

[174] *Id.* at 261 n.7.

[175] *Id.*

[176] *See id.* at 260–61; 49 U.S.C. § 20109(a).

[177] *Murray*, 43 F.4th at 260–63; *see also* Tompkins v. Metro-N. Commuter R.R. Co., 983 F.3d 74, 82 (2d Cir. 2020) (holding that "some evidence of retaliatory intent is a necessary component of an FRSA claim").

[178] *Compare* 18 U.S.C. § 1514A (employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" for engaging in whistleblowing), *with* 49 U.S.C. § 20109(a) (an employer may not "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" on the basis of whistleblowing).

[179] *Compare* 49 U.S.C. § 20109(a) (an employer may not "*discharge, demote, suspend*, reprimand, *or in any other* way *discriminate against an employee*" on the basis of whistleblowing) (emphasis added to identical language), *with* 18 U.S.C. § 1514A (employer may not "*discharge, demote, suspend*, threaten, harass, *or in any other* manner *discriminate against an employee*" for engaging in whistleblowing) (emphasis added to identical language).

[180] *Murray*, 43 F.4th at 261 n.7.

[181] *Id.* (citing *Tompkins*, 983 F.3d at 82); Armstrong v. BNSF Ry. Co., 880 F.3d 377, 382 (7th Cir. 2018); Kuduk v. BNSF Ry. Co., 768 F.3d 786, 791 (8th Cir. 2014)).

[182] *Id.* (citing Frost v. BNSF Ry. Co., 914 F.3d 1189, 1196 (9th Cir. 2019)); Araujo v. N.J. Transit Rail Operations, Inc., 708 F.3d 152, 158 (3d Cir. 2013).

how to interpret the word "discriminate" is a pervasively divisive issue in the courts of appeals.[183]

III. A PROPOSED SOLUTION: REVISING SECTION 1514A WITH THE WPA IN MIND

The *Halliburton* case discussed in Part II provides a meaningful study on why the retaliatory motive requirement, if adopted throughout the federal courts, would be disastrous. Halliburton's assertion that it merely disclosed the identity of a confidential whistleblower to show that his concerns were being taken seriously would, under the Second Circuit's test, absolve the company of liability under Section 1514A because it did not intend to retaliate.[184] Under that standard, companies could easily fabricate post hoc justifications for taking particular employment actions.[185] It would have been extremely difficult for Menendez to disprove such an assertion, even though it appears implausible on its face.[186] By contrast, the approach adopted by the Fifth Circuit would have permitted Menendez to succeed had he satisfied all other elements of his claim.[187] Thus, it is critical to the protection of whistleblowers that the split be resolved against the Second Circuit. There are two potential paths to resolve the circuit conflict: through the Supreme Court, or through new legislation in Congress. Each is considered in turn, with particular emphasis on the second, which provides a more certain and concrete solution.

A. Supreme Court Review

The Supreme Court granted certiorari in *Murray* in May 2023 and will hear the cases sometime during the October 2023 term, with a decision expected by summer 2024.[188] It is worth noting that the Supreme Court hears only a fraction of the cases it is requested to review.[189] The justices control their docket

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[183] *See Murray*, 43 F.4th at 261 n.7.

[184] *See* Halliburton, Inc. v. Admin. Rev. Bd., 771 F.3d 254, 263 (5th Cir. 2014).

[185] Valerie Watnick, *supra* note 97, at 851.

[186] Sanjuan v. IBP, Inc., 160 F.3d 1291, 1297 (10th Cir. 1998) (noting that it is difficult to prove retaliatory intent because employers rarely make their motives clear).

[187] *Halliburton*, 771 F.3d at 263 (rejecting Halliburton's "argument that the Review Board committed legal error by failing to require proof that the company had a 'wrongful motive'" in sharing his information with his colleagues) (citation omitted).

[188] Atkinson, *supra* note 44.

[189] Hon. John G. Roberts, Jr., *2021 Year-End Report on the Federal Judiciary*, U.S. SUP. CT. (Dec. 31, 2021), https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf [https://perma.cc/CK5N-JHEL] (noting that, in the October 2020 Term, the Court heard arguments in only 73 of the 5,307 cases filed).

almost entirely.[190] One of the criteria they use in determining whether to grant certiorari is whether the lower courts are split on an issue of federal law.[191] Thus while it is not surprising that the Court would take up a case like *Murray*, the Court could have let the issue percolate in the lower courts to see if a consensus emerged.[192] The speed with which the justices acted on a newly created and narrow-ranging circuit split perhaps demonstrates that they see the issue as one on which the lower courts need clarity.[193]

Additionally, the issue has attracted the attention of Senator Charles E. Grassley, a Republican from Iowa and the author of Sarbanes-Oxley's whistleblower protection provision, and Senator Ron Wyden, an Oregon Democrat. They filed an amicus brief urging the Supreme Court to take up Murray's case and to interpret Section 1514A as not requiring a showing of retaliatory intent.[194] They noted that the language Congress used in Sarbanes-Oxley mirrors numerous other statutes, and thus argued that resolving the circuit split would have wide-ranging consequences.[195] A bipartisan showing at the certiorari stage of the case demonstrates that protecting whistleblowers remains an area ripe for legislation.

It is also worth noting that, since the confirmation of John Roberts as Chief Justice, the Supreme Court has been quite receptive to the arguments of corporate parties.[196] Some critics have argued that conservatives on the Supreme Court "have limited the ability of government agencies to regulate corporate acts; and they have made it harder for individuals harmed by corporate acts to have their rights vindicated in court."[197] Indeed, in the October 2020 term, "[whenever] the

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[190] *See* JEFFERY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 32 (discussing the approaches of some of the justices in deciding when to grant certiorari).

[191] *See* SUP. CT. R. 10 (2022).

[192] *See id.*

[193] That is particularly true because the Second Circuit is considered the "Mother Court" of securities cases, and thus its decision is likely to prove persuasive to the circuits who have not yet considered the question. *See* Brief of *Amici Curiae* U.S. Senator Charles E. Grassley, U.S. Senator Ron Wyden, and the Government Accountability Project in Support of Petitioner at 5, Murray v. UBS Securities, LLC, No. 22-660 (U.S. Feb. 17, 2023).

[194] *See id.*

[195] *Id.* at 13

[196] *See* Adam Liptak, *Corporations Find a Friend in the Supreme Court*, N.Y. TIMES (May 4, 2013), https://www.nytimes.com/2013/05/05/business/pro-business-decisions-are-defining-this-supreme-court.html [https://perma.cc/P6KM-94CJ].

[197] SHELDON WHITEHOUSE, AM. CONST. SOC., A RIGHT-WING ROUT: WHAT THE "ROBERTS FIVE" DECISIONS TELL US ABOUT THE INTEGRITY OF TODAY'S SUPREME COURT 8 (2019), https://www.acslaw.org/wp-content/uploads/2019/04/Captured-Court-Whitehouse-IB-Final.pdf [https://perma.cc/ED8Y-G5JL]; *see also id.* (appendix

court heard a case featuring a business on one side and a non-business on the other, it found in favor of the business 83 [percent] of the time."[198] To be sure, this so-called corporate-friendly approach is not absolute.[199] But it may be a factor for Congress to consider when debating when and how to legislate. Moreover, it highlights why relying on the Supreme Court to fix the Second Circuit's interpretation is an unreliable and undesirable path forward for whistleblowers.

B. A Congressional Fix: Revising Sarbanes-Oxley with the WPA in Mind

1. The Proposed Framework

The second—and preferred—path forward is paved with significantly less uncertainty. Regardless of how the Supreme Court resolves the split, Congress should legislate to make its intentions clear. In crafting a solution to the problem created by *Murray*, Congress must take care to ensure that some of the actual and realized benefits of Sarbanes-Oxley remain. Thus, Congress should undertake a two-step process to bring judicial interpretations of Sarbanes-Oxley in line with Congress's original purpose. First, Congress should eliminate the statute's list of prohibited activities, including the word "discriminate." Second, following the example of the WPA, Congress should amend Sarbanes-Oxley to employ a "reasonable person" standard in defining the "contributing factor" element of a Section 1514A claim.

For step one, Congress should remove the laundry list of prohibited activities, which states that an employer may not "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee" on the basis of whistleblowing.[200] Although Congress may have intended this language to be broad, the Second Circuit's narrow construction of the word "discriminate" shows that the broad language is, at least in some cases, not achieving its goal of encompassing a wider range of behavior.[201] The WPA, by contrast, employs even broader

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categorizing cases in which the Supreme Court's conservatives have "protect[ed] corporations from liability").

[198] Felix Salmon, *The Most Pro-Business Supreme Court Ever*, AXIOS (Aug. 4, 2022), https://www.axios.com/2022/08/04/supreme-court-john-roberts-business [https://perma.cc/QBM2-4WUZ].

[199] *Id.* (noting that in the October 2020 term the Court ruled against corporate interests 17 percent of the time).

[200] 18 U.S.C. § 1514A(a).

[201] *See supra* Section II.B.

language: under that act, an employer may not "take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of" protected whistleblower activity.[202] The focus on taking *any* personnel action, rather than exclusively discriminatory action, offers broader protection to whistleblowers and avoids thorny issues of statutory interpretation.

Second, Sarbanes-Oxley should take after the WPA and explicitly employ a "reasonable person" standard in defining the "contributing factor" element. Both the WPA and Sarbanes-Oxley provide that a plaintiff may show causation by satisfying the contributing factor test.[203] Sarbanes-Oxley achieves this result somewhat obtusely, by noting that Section 1514A claims—including questions regarding burdens of proof—should be adjudicated according to 49 U.S.C. § 42121(b)(i), which explicitly requires proof that the employer's behavior "was a contributing factor in the unfavorable personnel action alleged in the complaint."[204] However, where Sarbanes-Oxley is unclear as to what constitutes a contributing factor, the WPA is not.[205] Rather than rely on piecemeal, court created tests, the WPA instructs courts that an:

> [E]mployee may demonstrate that the disclosure [of relevant, protected information] or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that . . . the official taking the action knew of the disclosure . . . and the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure . . . was a contributing factor in the personnel action.[206]

By explicitly employing a "reasonable person" standard in defining the "contributing factor" element and permitting use of circumstantial evidence, Congress would make clear to courts that proving retaliatory intent is not necessary.[207] Indeed, several courts already recognize this language does not require

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[202] 5 U.S.C. § 2302(b)(8).

[203] *See id.*; 49 U.S.C. § 42121(b)(2)(B)(i) (cross-referenced in 18 U.S.C. §1514A) and 5 U.S.C. § 1221(e)(1).

[204] 18 U.S.C. §1514A(b)(2); 49 U.S.C. § 42121(b)(i). The statute's use of a cross-referencing scheme here is rather confusing and provides another reason why codifying the contributing factor language within Section 1514A itself would provide greater clarity to courts. *See* Coyomani-Cielo v. Holder, 758 F.3d 908, 912 (7th Cir. 2014). (lamenting the "strange and confusing" use of cross-references).

[205] *Compare* 49 U.S.C. § 42121(b)(2)(B)(i) (providing contributing factor language used in Sarbanes-Oxley and other statutes, but no definition of the term), *with* 5 U.S.C. § 1221(e)(1) (explicitly defining how the contributing factor test may be satisfied under the WPA).

[206] 5 U.S.C. § 1221(e)(1).

[207] *See id.*; Marano v. Dep't of Just., 2 F.3d 1137, 1141 (Fed. Cir. 1993).

a plaintiff to show retaliatory motive.[208] Even the defendants in *Murray* pointed to the contrast in the two statutes' language to argue that Sarbanes-Oxley was *different* than the WPA because it does *not* require a showing of retaliatory intent.[209]

2. Potential Objections

To be clear, this note does not argue that the WPA should replace Sarbanes-Oxley wholesale. One of the most widely praised aspects of Sarbanes-Oxley is that it contains unique structures that mandate covered entities comply with certain restrictions to protect whistleblowers.[210] Those provisions should remain. The specific language of Section 1514A, however, would benefit from elimination of the word "discriminate," from which the Second Circuit—and other courts in the context of different statutes—have inferred the requirement of retaliatory intent.[211]

Although this note maintains that congressional attempts to foster whistleblowing are laudable, there is always the potential for frivolous claims from the poor performer.[212] Legislation should not place companies in a position where they "cannot take legitimate adverse employment action against counterfeit whistleblowers who pose an obstacle to achieving their missions."[213] This note's proposal, however, offers adequate protection for corporations regulated by Sarbanes-Oxley. Companies have ample opportunities to show, by clear and convincing evidence, that they "would have taken the same personnel action in the absence of such disclosure."[214]

On the one hand, the "clear and convincing evidence" standard is undoubtedly a tough one.[215] But it is also one that should be easy to meet if the employer did, in fact, have a

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[208] *Id.* ("[A] whistleblower *need not* demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action.") (emphasis in original).

[209] *See* Brief for Defendants-Appellant-Cross-Appellees at 33, Murray v. UBS Sec. LLC, No. 20-4202 (2d. Cir. Apr. 5, 2021), ECF No. 49 ("The fundamental differences between the WPA and SOX demonstrate that the district court's reliance on the *Marano* terminology to instruct the jury was inappropriate.").

[210] 15 U.S.C. § 78j–1(m)(4) (requiring that audit committees develop procedures for reporting of "the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters").

[211] *See supra* Section II.B.

[212] Nathan A. Adams IV, *Distinguishing Chicken Little from Bona Fide Whistleblowers*, 83 FLA. BAR J. 100, 100 (2009).

[213] *Id.*

[214] 5 U.S.C. § 1221(e)(2).

[215] *See* Cooper v. Oklahoma, 517 U.S. 348, 366 (1996) (describing clear and convincing evidence as an "especially high standard of proof").

legitimate reason for terminating the employee. After all, the company is in a better position to explain its decision than anyone else, either by producing performance reviews or putting forth witnesses and evidence attesting to an employee's poor performance.[216] Thus, employers are in a substantially better position to defend themselves than plaintiffs, who must piece together various data points to create a cohesive story showing they were fired for whistleblowing.[217] This is especially true when the company is adhering, as it must, to other Sarbanes-Oxley whistleblower regulations, which require that companies be made aware of whistleblower complaints early through mandated reporting and recordkeeping obligations.[218] Thus, with this notice, the company is left with sufficient time to conduct an investigation and scour its records to determine whether it had a legitimate reason for taking the adverse action.

Another potential objection to importing language from the WPA is that it deals with the government as an employer, rather than the privately owned and operated entities regulated by Sarbanes-Oxley. The government whistleblowing context, however, is not meaningfully different from the private sector, and the activities that each act protects is compelling evidence of this similarity. The WPA protects individuals who report, among other things, "gross mismanagement, a gross waste of funds, [and] an abuse of authority" within a governmental agency.[219] It was precisely this conduct that Sarbanes-Oxley attempted to regulate in the wake of the Enron scandal: mismanagement and abuse of authority to cover up financial crimes.[220] So while the procedures for whistleblowing may differ, it makes good sense that the actual standards for protections of both government and private employees should be the same.[221]

Additionally, even assuming the Supreme Court resolves the circuit split in Murray's favor (thus not requiring a showing of retaliatory intent), this statutory solution provides stronger and more concrete protections for whistleblowers. Critically, no matter how the Court rules, Sarbanes-Oxley will still be limited

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[216] *See* Fanto, *supra* note 26, at 445–46 (discussing how a "group" or "inner circle" of top executives and advisors often have significantly more information about a corporation's activities than individual employees).

[217] *See id.*

[218] *See* 15 U.S.C. § 78j–1(m)(4).

[219] 5 U.S.C. § 2302(b)(8)(A)(ii).

[220] Lawson v. FMR LLC, 571 U.S. 429, 433–34 (2014) (surveying the purposes of Sarbanes-Oxley and its relationship to the Enron scandal).

[221] *See* Devine, *supra* note 78, at 545–46 (discussing procedures for the WPA); *supra* Section I.C.3.

to the "laundry list" of activities delineated in the statute.[222] This language provides courts who are hostile to whistleblower protections ample breathing room to undertake a close reading of the prohibited activities and interpret them narrowly. By contrast, the broader language of the WPA makes it more difficult for companies to argue that their actions fall outside the scope of the statute. A statutory solution expanding the scope of covered activities, then, is the surest way to create the strongest protections for whistleblowers.

Lastly, as this note has previously discussed, whistleblower protection is a field where congress has routinely asserted itself with bi-partisan force. The Grassley Brief demonstrates that members of both parties remain interested in protecting whistleblowers. Thus, while partisan gridlock can also make statutory solutions seem unviable, if history is indication, there is ample opportunity and appetite to achieve meaningful change for whistleblowers.

3. Additional Suggestions

Additionally, any revision of Section 1514A would benefit from the inclusion of a broad construction provision. In such provisions, Congress indicates—in the text of the statute itself—that it intends for a particular provision to be interpreted broadly, with the goal of maximizing its effectiveness as it relates to the goals of the statute.[223] Congress is aware of the potential of these provisions. For example, in 2012, US House Representative Lynn Woosley introduced the Private Sector Whistleblower Protection Streamlining Act of 2012.[224] That legislation—which did not ultimately pass Congress—included a provision entitled "Broad Construction," which read: "It is the sense of Congress that the provisions of this section . . . should be construed broadly to maximize this Act's remedial objectives."[225] Such a provision would by no means allow a court to contort a statute's text to fit any particular case it thinks *should* be covered by the legislation.[226] But it would allow courts to adopt an interpretation of Sarbanes-Oxley that is based on

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[222] 18 U.S.C. § 1514A(a).

[223] H.R. 6409, 112th Cong. (2012).

[224] *Id.*

[225] *Id.*

[226] *See* Yates v. United States, 574 U.S. 528, 555 (2015) (Kagan, J., dissenting) (quoting Davis v. Michigan Dep't of Treasury, 489 U.S. 803, 809 (1989)) ("[W]e interpret particular words 'in their context and with a view to their place in the overall statutory scheme.'"). By adding this meaningful context to the statute, Congress would give courts less wiggle room to deviate from congressional intent. *See id.*

Congress' clearly established intent, rather than murky legislative history.[227]

Lastly, Congress must act prospectively, rather than retrospectively, in this field. The Supreme Court has, in recent years, been critical of attempts to push a policy agenda through the courts.[228] Thus, rather than wait for a potential Supreme Court decision that could be harmful to whistleblowers, Congress should act proactively.[229] Legislation like Sarbanes-Oxley often follows disaster.[230] Congress should not wait for further catastrophe in the whistleblower context. The cycle of a congressional failure to act leading to catastrophe and an ultimate rush to legislate is all too familiar.[231] Given the bipartisan appeal of many whistleblower protection laws, this is an area where it is not difficult to imagine proactive, forward-looking legislation.[232] Congress should use that bipartisan energy in a positive way and revise Sarbanes-Oxley.

CONCLUSION

The whistleblower protections of the Sarbanes-Oxley Act are championed as "the single most effective measure possible to prevent recurrences of the Enron debacle and similar threats to the nation's financial markets."[233] By injecting the requirement of retaliatory intent into Section 1514A, the Second Circuit unnecessarily impeded the ability of whistleblowers to succeed on retaliation claims, in direct contradiction of Congress's goals. Regardless of how the Supreme Court interprets the statute's current language, Congress should act to make its purposes clear and ensure the public has access to the information it deserves. It should adopt the more forgiving language of the

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[227] *See* Bank One Chicago, N.A. v. Midwest Bank & Tr. Co., 516 U.S. 264, 283 (1996) (Scalia, J., concurring in part) ("The text's the thing. We should therefore ignore drafting history without discussing it, instead of after discussing it.").

[228] *See, e.g.*, Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1822 (2020) (Kavanaugh, J., dissenting) ("Under the Constitution's separation of powers, the responsibility to amend [the antidiscrimination laws to include protections for LGBTQ+ individuals] belongs to Congress and the President in the legislative process, not to this Court."); Arellano v. McDonough, 143 S. Ct. 543, 552 (2023) ("[T]he nature of the subject matter cannot overcome text.").

[229] *See supra* Section III.A (discussing the Roberts Court's probusiness attitude).

[230] *See supra* Section I.C.1.

[231] *See* Nikhilesh De, *FTX's Failure Is Sparking a Massive Regulatory Response*, COINDESK (Nov. 15, 2022), https://www.coindesk.com/policy/2022/11/14/ftxs-failure-is-sparking-a-massive-regulatory-response/ [https://perma.cc/Q4K3-D8RE].

[232] *See* Stephen M. Kohn, *A Bipartisan Whistleblower Bill Targets Wildlife Crime*, REUTERS (July 19, 2022, 12:50 PM), https://www.reuters.com/legal/legalindustry/bipartisan-whistleblower-bill-targets-wildlife-crime-2022-07-19/ [https://perma.cc/SMK4-KFHB].

[233] 148 Cong. Rec., S7418-21 (July 16, 2012).

WPA in defining what a contributing factor is, and it should make clear its intention that the language be interpreted as broadly as possible to protect the greatest amount of conduct. With no change, congressional purpose would be frustrated, and the public would be left to conduct their affairs in the dark.

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