No._____

In the
Supreme Court of the United States

FREDERICK B. WRIGHT,

Petitioner,

v.

ADMINISTRATIVE REVIEW BOARD,
UNITED STATES DEPARTMENT OF LABOR,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an employer's professed motivating factor in taking adverse action against a whistleblower employee under the Safe Drinking Water Act and the Federal Water Pollution Control Act should override a whistleblower employee's reasonable belief that he has been subject to an adverse action because of protected activity. The lower courts' subordination of the role of the employee's reasonable belief in favor of an employer's ability to justify an adverse action is especially troubling when the very purpose of these whistleblower protections is to encourage employees to make difficult choices by putting their careers on the line for the sake of safety.

PARTIES TO THE PROCEEDING

Petitioner, Frederick Wright ("Wright"), was the appellant in the court below. Respondent, Administrative Review Board ("ARB"), United States Department of Labor ("DOL"), was the appellee in the court below.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Wright respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The ARB's Final Decision and Orders dated January 12, 2018 and May 22, 2019 are reproduced in the accompanying Appendix ("App.") at pages 15-19 and 50-61. The Fifth Circuit's November 13, 2020 opinion affirming the ARB's Final Decision and Order is reproduced in the Appendix at pages 1-14. The Fifth Circuit's January 22, 2021 order denying the petition for panel rehearing is reproduced in the Appendix at pages 85-86.

JURISDICTION

The opinion and order for which review is sought was entered by the Fifth Circuit on November 13, 2020. (App. at 1-14). The order denying the petition for rehearing was entered on January 22, 2021. (App. at 85-86). Petitioner timely invokes this Court's jurisdiction under 28 U.S.C Section 1254(1) and Order List: 589 U.S. dated March 19, 2020, extending the filing deadline to 150 days from the order denying the petition for rehearing.

STATUTORY PROVISIONS AT ISSUE

The employee protection ("whistleblower") provision of the Safe Drinking Water Act ("SDWA"), 33 U.S.C. 1367(a), provides, in relevant part, that "no person shall fire, or in any other way discriminate against, or cause to be fired or

discriminated against, any employee . . . by reason of the fact that such employee. . . has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter. Similarly, Section 507 of the Federal Water Pollution Control Act ("FWPCA"), 42 U.S.C. 300j-9(i) states, in relevant part, that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . has (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State . . . or (C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter."

Pursuant to 29 C.F.R. § 24.109(b)(2), "[i]n cases arising under the six environmental statutes listed in § 24.100(a) [which includes the SDWA and the FWPCA], a determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint. If the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint, relief may not be ordered if the respondent demonstrates by

a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity."

STATEMENT OF THE CASE

On July 19, 2013, Petitioner Wright filed a complaint against his former employer, the Railroad Commission of Texas ("Railroad Commission"), with the U.S. Department of Labor, Occupational Safety and Health Administration ("OSHA") claiming violations under the SDWA and FWPCA whistleblower protection provisions, and their implementing regulation at 29 C.F.R. § 24.109(b)(2). The gravamen of the complaint was for retaliation and discrimination against Wright by terminating him because he raised concerns about oil and gas operators not being required to comply with rules regulating drilling wells to protect sources of underground drinking water.

Wright's complaint was heard by the DOL's Administrative Law Judge ("ALJ"), who was criticized twice by the ARB for issuing faulty opinions. The first time, the ARB criticized the ALJ's May 19, 2016 Decision and Order Dismissing Complaint (App. at 62-84) for failing to assess whether Wright had a reasonable belief that he raised environmental or public health and safety concerns governed by or in furtherance of the relevant acts. (App. at 56, 59). The matter was remanded for the specific purpose of reanalyzing that issue in light of causation. (App. at 59).

The second time, the ARB again criticized the ALJ's November 15, 2018 Decision and Order on Remand (App. at 20-49) for the same reason (i.e. failing to

analyze whether Wright lacked a reasonable belief that he was raising environmental concerns in his complaints, his complaints were not objectively reasonable, or both). (App. at 16). Nevertheless, the ARB allowed the ALJ's dismissal to stand, concluding that the crucial piece of the puzzle (i.e. whether Wright had a reasonable belief that he raised environmental or public health and safety concerns governed by or in furtherance of the relevant acts) was irrelevant, notwithstanding the requirements of 29 C.F.R. § 24.109(b)(2). In so doing, the ARB essentially did away with any analysis of the employee's conduct (including his reasonable belief that his activities were protected), and made the focus solely upon causation, finding the lack of analysis by the ALJ sufficient to uphold the ALJ's finding that Wright failed to prove that protected activity caused or was a motivating factor in the adverse action. In essence, the ARB took the position that an employee's reasonable, good faith belief is never relevant if the employer can find some reason to justify the adverse action anyway.

The Fifth Circuit had jurisdiction to hear this matter pursuant to 33 U.S.C. §§ 1367(b) and 1369(b)(1), and FRAP 15, which authorize any person adversely affected by a final decision of the Secretary of Labor to file a petition for review in the circuit court. On November 13, 2020, the Fifth Circuit affirmed the May 22, 2019 Final Decision and Order of the ARB. Notably, the Fifth Circuit likewise avoided the issue of the ALJ's failure to examine whether Wright had a subjective belief he engaged in protected activity by simply affirming the employer's pretextual reasons for terminating Wright (his purported "behavioral issues"). (App. at 9). Again, the

employee's belief was rendered an afterthought in the analysis. Wright's petition for rehearing *en banc* was summarily denied on January 22, 2021. (App. at 85-86).

This case presents an opportunity for this Court to examine the propensity in the lower courts of allowing an employer's pretextual basis for imposing adverse action against a whistleblowing employee to trump the employee's reasonable belief that he raised environmental or public health and safety concerns governed by or in furtherance of the relevant acts. This is especially important when the ARB has specifically cautioned that the line between insubordination and whistleblowing may be thin or even nonexistent. *Kenneway v. Matlack, Inc.*, No. 1988-STA-020 at 3 (Sec'y June 15, 1989).

REASONS FOR GRANTING THE PETITION

THIS PETITION SHOULD BE GRANTED BECAUSE AN EMPLOYEE'S REASONABLE BELIEF AS TO WHETHER HE IS ENGAGING IN PROTECTED ACTIVITY AS A WHISTLEBLOWER SHOULD BE AFFORDED THE SAME WEIGHT AS AN EMPLOYER'S ABILITY TO CLAIM THAT THE PROTECTED ACTIVITY WAS NOT A MOTIVATING FACTOR IN THE ADVERSE ACTION AGAINST THE EMPLOYEE

This court has long recognized the importance of whistleblower protection in the transportation industry. See, e.g. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 258 (1987) (plurality opinion) (holding that employees in the transportation industry are often best able to detect safety violations, but cannot be expected to assist federal safety regulators if doing so puts their livelihood in jeopardy). That is the exact situation Petitioner Wright faces here, as he seeks this Court's assistance in

reviewing the lower courts' unfettered trampling of an employee's protected activity under whistleblower statutes.

1. This Court's Guidance is Needed to Prevent an Employer's Motivating Factor in Taking Adverse Action Against a Whistleblower From Overriding the Equally Important Element of an Employee Presenting a Reasonable Belief that He Has Been Subject to an Adverse Action Because of Protected Activity

Petitioner Wright submitted a complaint for hostile work environment to the Railroad Commission, alleging that his managers and colleagues did not understand the state and federal rules they were charged with enforcing and often disregarded them. (App. at 4). Wright also advocated for the use of an older version of a compliance review form, contending that it would better inform the public about wells, thereby improving the enforcement of federal and state safe drinking water laws. *Id*. In fact, it was close to the time of his termination that an operator submitted the newer (and unsafe) version of the form to the Railroad Commission, when Wright took the reasonable, good faith position that the prior form offered a more specific level of accuracy necessary to properly apply safe drinking water laws, and insisted upon its use. (App. at 3, 52). That exchange led to Wright's manager questioning him, and culminated in a disagreement over the propriety of the form; all in the name of safe water protection. *Id*. Wright was terminated following this interaction.

The FWPCA protects activity undertaken with a reasonable, good-faith basis, even if it is incorrect. *Stone & Webster Engineering Corp. v. Herman*, 115 F. 3d 1568, 1575 (11th Cir. 1997); *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.

2d 474, 478–79 (3d Cir.1993) (retaliatory discharge under § 507(a) of the FWPCA). The elements of an FWPCA retaliation claim are that (1) the employee engaged in protected activity, (2) the employee suffered an adverse action, and (3) the protected activity was a motivating factor in the adverse action. *Kaufman v. Perez*, 745 F. 3d 521, 527 (D.C. Cir. 2014).

The employee has the burden to show "by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint." 29 C.F.R. § 24.109(b)(2). A motivating factor is "a substantial factor." *Mt. Healthy City School District v. Doyle*, 429 U.S. 274, 286 (1977). "If the [employee] has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint," the burden shifts to the employer. 29 C.F.R. § 24.109(b)(2). "[R]elief may not be ordered if the [employer] demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity." *Mt. Healthy* at 287. The employer must therefore separate its legitimate rationale from its prohibited rationale in order to prove its decision would have been the same absent the employee's protected activity. *DeKalb Cty. v. U.S. Dep't of Lab.*, 812 F. 3d 1015, 1020–23 (11th Cir. 2016).

In *Staub v. Proctor Hospital*, 562 U.S. 411, 417 (2011) this Court explained the difficulty in construing the phrase "motivating factor" in a similar context, and ultimately distinguished between "a motivating factor" and a "causal factor" by explaining that only the former would require "unlawful animus on the part of the

[decisionmaker]." *Id.* at 418. Nonetheless, lower courts have held that even where there is evidence of a "dual motive" -where reasons other than retaliation may also account for the employee's discharge- the employer has the burden of proving by a preponderance of the evidence that it would have terminated the employee even if the employee had not engaged in the protected conduct. See *Passaic Valley*, supra, at 481; *Simon v. Simmons Foods, Inc.*, 49 F. 3d 386, 388–91 (8th Cir. 1995).

Congress intended for employers to take whistleblower allegations seriously. See *Stone & Webster* at 1572 (noting that the tough standards for employers are not by accident). See also *Addis v. Dep't of Labor*, 575 F. 3d 688, 691 (7th Cir. 2009) (explaining that "a 'contributing factor' is something less than a substantial or motivating one" as is required in typical employment discrimination actions); *Armstrong v. BNSF Ry. Co.*, 880 F. 3d 377, 381–83 (7th Cir. 2018). While whistleblower cases focus on the employer's reason for justifying an adverse action in the face of protected activity, they rarely focus upon the employee's reasonable, good faith belief that the conduct was protected. In fact, here, the ARB twice identified that the ALJ failed to make any such findings, yet ultimately decided that this failure was not relevant to Wright's claim. (App. at 16). Indeed, the ARB stated unequivocally in its January 12, 2018 Order that the ALJ had already decided whether the protected activity was a motivating factor in Wright's termination and was prepared to affirm the opinion solely on that basis. (App. at 60). The ARB nonetheless found a remand necessary because "the analysis is incomplete without recognition of the scope and nature of the protected activity." *Id.* In other words, the

ALJ simply had to fill in the blanks of the opinion because the employer's position had already been accepted. The remand was therefore nothing more than "lip service."

Yet, how could the ALJ's failure to make that finding regarding the nature and scope of the protected activity not be relevant, when the very purpose of the statute is to encourage employees to make difficult choices by putting their careers on the line for the sake of safety? As an engineer specialist, Wright's primary duty was to work with oil and gas operators to ensure compliance with state and federal rules, statutes, and regulations. (App. at 2). Taking the unpopular position- even at the risk of being deemed "difficult to work with" (App. at 3)- should have not only been tolerated, but welcomed. Indeed, as the ARB has recognized, "intemperate language, impulsive behavior, and even alleged insubordination are often associated with protected activity." *Kenneway*, supra at 3. Simply put, Wright was doing his job and his employer chose to terminate him because of it.[1]

[1] Ironically, the ARB acknowledged the foregone conclusion of Wright's fate, noting that "we do not prejudge the outcome of this case," when that is exactly what it did by choosing to ignore blatant shortcomings in the ALJ's opinion and blessing it anyway. (App. at 16, 60). Certainly whistleblower employees such as Wright deserve better.

2. The Temporal Proximity Between the Protected Activity and the Adverse Action Against Wright Made the Proper Consideration of Wright's Reasonable Belief Crucial to the Analysis

Temporal proximity between the employee's engagement in a protected activity and the unfavorable personnel action can be circumstantial evidence that the protected activity can be a contributing factor to the adverse employment action. See *Kewley v. Dep't of Health and Human Servs*., 153 F. 3d 1357, 1362 (Fed.Cir.1998) (noting that, under the Whistleblower Protection Act, the circumstantial evidence of knowledge of the protected disclosure and a reasonable relationship between the time of the protected disclosure and the time of the personnel action will establish, prima facie, that the disclosure was a contributing factor to the personnel action). Indeed, direct evidence is not required. See *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (noting, in the context of Title VII employment discrimination cases, that "[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence"). See also *Marano v. Dep't of Justice*, 2 F. 3d 1137, 1141 (Fed. Cir. 1993) (noting, in a case under the Whistleblower Protection Act, that an employee "need not demonstrate the existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action"); *Araujo v. New Jersey Transit Rail Operations, Inc.*, 708 F. 3d 152, 157–63 (3d Cir. 2013). Here, the ARB even acknowledged that temporal proximity may support an inference of retaliation. (App. at 60). The ARB's neutering of Wright's

reasonable, good faith belief that his conduct constituted protected activity was all the more egregious in light of the timing of the Railroad Commission's adverse action.

CONCLUSION

Petitioner respectfully requests that this court grant this petition and offer meaningful guidance to lower courts that have relaxed the ability of employers to defend themselves against whistleblower actions at the expense of the protection that Congress intended to bestow upon whistleblowing employees.

Respectfully submitted,

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