No. 22-660

In the Supreme Court of the United States

TREVOR MURRAY, PETITIONER

v.

UBS SECURITIES, LLC, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether a whistleblower must establish that his employer acted with "retaliatory intent" in order to carry his burden of proof under the burden-shifting framework in 18 U.S.C. 1514A(b).

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INTEREST OF THE UNITED STATES

This case concerns whether an employee challenging his termination after reporting potential securities-law violations must establish that his employer acted with "retaliatory intent" to establish a claim under 18 U.S.C. 1514A's whistleblower provision. The United States has a substantial interest in that question because the Department of Labor (DOL) enforces Section 1514A through agency adjudication, 18 U.S.C. 1514A(b), and because the Securities and Exchange Commission (SEC) has an interest in the protection of persons who report potential violations of the federal securities laws and regulations that the SEC enforces.

STATEMENT

1. Section 1514A of Title 18 of the United States Code, which Congress enacted in the Sarbanes-Oxley

Act of 2002, Pub. L. No. 107-204, § 806(a), 116 Stat. 802, makes it unlawful for certain employers to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of [specified whistleblowing activity]." 18 U.S.C. 1514A(a).

The administrative adjudication of an employee's Section 1514A claim is conducted by DOL and governed by the rules and procedures specified in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21), Pub. L. No. 106-181, § 519(a), 114 Stat. 145 (enacting 49 U.S.C. 42121 (2000)). See 18 U.S.C. 1514A(b)(2)(A). Section 42121(b) provides that DOL may find that a violation of Section 1514A(a) has occurred if an employee shows that his "[protected] behavior * * * was a contributing factor in the unfavorable personnel action," 49 U.S.C. 42121(b)(2)(B)(iii), but may not order relief if the employer demonstrates by "clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of that behavior," 49 U.S.C. 42121(b)(2)(B)(iv).

Section 42121(b)'s burden-shifting language is drawn from statutory text that Congress had previously enacted to govern the adjudication of federal-employee whistleblower claims in the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, § 3(a)(13), 103 Stat. 30 (enacting 5 U.S.C. 1221(e)(1) and (2) (Supp. I 1989)). That WPA language, in turn, modified the burden-shifting framework that was originally formulated in *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977), for deciding an employee's First Amendment retaliation claim and that had then been extended to federal-employee whistleblower claims. The evolution of that burden-shifting

language from *Mt. Healthy* to the WPA and its subsequent application in Section 42121(b) and then in Section 1514A, at issue here, informs the question presented in this case.

a. *Mt. Healthy* established a burden-shifting framework for establishing liability when an employee's "protected [First Amendment] conduct played a 'substantial part' in [his employer's] actual decision not to renew" his employment. 429 U.S. at 285. The Court rejected a "rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in [the adverse employment] decision," because such a rule "could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing," "even if the same decision would have been reached had the [protected conduct] not occurred." *Ibid.* The Court instead "formulate[d] a test of causation," *id.* at 286, under which an employee-plaintiff bears the "burden" of showing that his "constitutionally protected * * * conduct was a 'substantial factor'—or, to put in other words, that it was a 'motivating factor' in the [defendant's] decision not to rehire him." *Id.* at 287 (footnote omitted). If the plaintiff carries that burden of showing the "decision" was "taint[ed]" by an impermissible consideration, the defendant may nevertheless avoid liability by "show[ing] by a preponderance of the evidence that it would have reached the same [personnel] decision * * * even in the absence of the protected conduct." *Ibid.*

One year later, Congress enacted the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, with provisions prohibiting a federal agency from taking or failing to take a personnel action "as a reprisal" for a federal employee's whistleblowing activity, 5 U.S.C. 2302(b)(8)

(1988), or exercise of appeal rights, 5 U.S.C. 2302(b)(9) (1988). Soon thereafter, the Merit Systems Protection Board (MSPB) determined that an employee asserting a CSRA reprisal claim had to show "retaliatory motive" —which "in almost all situations [would need to] be inferred from circumstantial evidence"—by proving that "retaliation for the [protected activity] is a significant factor in the challenged personnel action." *In re Frazier*, 1 M.S.P.B. 159, 186, 188 (1979), aff'd, 672 F.2d 150 (D.C. Cir. 1982).

The MSPB utilized *Mt. Healthy*'s burden-shifting framework to adjudicate those claims, requiring a federal employee to first prove that "retaliation was a significant factor in the [adverse] action." *Gerlach* v. *FTC*, 8 M.S.P.B. 599, 604-605 & nn.7, 13 (1981) (discussing "retaliatory motive" and "intent"); see *Warren* v. *Department of the Army*, 804 F.2d 654, 657-658 (Fed. Cir. 1986). Like *Mt. Healthy*, the MSPB described that standard as whether retaliation was a "'substantial' or 'motivating' factor" in the agency action. *Gerlach*, 8 M.S.P.B. at 604. If the employee carried that burden, the agency could defeat liability by "prov[ing] by a preponderance of the evidence" that it "would have" taken the same action "absent the protected conduct." *Spadaro* v. *U.S. Dep't of Interior*, 18 M.S.P.R. 462, 465 (1983).

b. In 1989, Congress enacted 5 U.S.C. 1221(e) as part of the WPA to codify a modified burden-shifting framework for federal-employee whistleblower claims. Both Houses of Congress had "unanimously approved" the WPA's predecessor bill (S. 508, 100th Cong.) in late 1988, 135 Cong. Rec. 564 (1989) (Sen. Levin), with text for Section 1221(e) that directed the MSPB to order corrective action if the whistleblower "has demonstrated that a [protected] disclosure * * * was a factor in [an

adverse] personnel action" and the employing agency failed to show "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 134 Cong. Rec. 29,540 (1988) (bill text). The "a factor" standard in that bill and the clear-and-convincing-evidence burden on the employing agency to avoid liability were designed to "codify the test set out by * * * *Mt. Healthy*," with modifications that would (a) "supersede[]" the then-existing "substantial, motivating or predominant factor" requirement, and (b) impose a "higher standard of proof" for the employing agency's "defense." *Id.* at 27,854 (joint explanatory statement). President Reagan pocket vetoed that bill, but in 1989 the same bill was reintroduced without change (as S. 20). 135 Cong. Rec. at 564; S. 20, 101st Cong. § 3(a) (Jan. 25, 1989) (Section 1221(e)).

"[T]he Mount Healthy test * * * was a major point of negotiation" between the bill's sponsors and the Administration. 135 Cong. Rec. at 5036. The negotiations led to an amendment clarifying the bill's *Mt. Healthy* provision by "insert[ing] 'contributing' before 'factor,'" but leaving the agency's clear-and-convincing-evidence defense unchanged. *Id.* at 4641 (amendment text); see *id.* at 4509 (Sen. Levin), 5033 (explanatory statement), 5037 (Rep. Schroeder). Attorney General Thornburgh memorialized the agreement by letter, explaining that, under the text of the bill's modified "Mt. Healthy test," "[a] 'contributing factor' need not be 'substantial'" and that the test merely imposed on an employee the "burden * * * to prove that the whistleblowing contributed in some way to the agency's decision." *Id.* at 4511, 5033-5034 (letter); see *id.* at 4509, 5033, 5037. The bill's primary sponsors also emphasized that the "'contributing factor'" language was "specifically intended to overrule

existing case law" requiring "a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action," *id.* at 4509, 5033; see *id.* at 4513, and that, "importantly, the addition of the word 'contributing' does not place any requirement on the whistleblower * * * to produce evidence proving retaliatory motive," *id.* at 5037 (Rep. Schroeder).

Congress thereafter enacted the WPA with that "contributing factor" language. Accordingly, when a federal employee alleges that an agency took or failed to take a "personnel action * * * because of [his protected disclosure]," 5 U.S.C. 2302(b)(8), Section 1221(e) provides that the "[MSPB] shall order such corrective action as the Board considers appropriate if the employee * * * has demonstrated that a [protected] disclosure * * * was a contributing factor in the personnel action." WPA § 3(a)(13), 103 Stat. 30 (Section 1221(e)(1)). But no corrective action may be ordered "if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." *Ibid.* (Section 1221(e)(2)).

In 1990, the MSPB implemented the WPA with regulations defining "[*c*]*ontributing factor* [to] mean[] any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure." 5 C.F.R. 1209.4(c) (1991) (now 5 C.F.R. 1209.4(d)). The Federal Circuit held soon thereafter that, under 5 U.S.C. 1221(e)(1), a whistleblower must establish "only that his protected disclosure played a role in, or was 'a contributing factor' to, the personnel action," and that that test is satisfied where "'any' weight [is] given to the protected disclosure." *Marano* v. *Department of Justice*,

2 F.3d 1137, 1140 (1993) (citation omitted). The Federal Circuit further held that "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." *Id.* at 1141.

c. After enacting the WPA, Congress enacted multiple similar whistleblower statutes—including AIR-21 in 2000—to protect private-sector employees. Congress directed DOL to adjudicate those whistleblower claims by using the same "contributing factor" and clear-and-convincing-evidence standards as in the WPA. See 49 U.S.C. 42121(b)(2)(B).[1]

d. In 2002, Congress enacted the Sarbanes-Oxley Act "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Lawson* v. *FMR LLC*, 571 U.S. 429, 432 (2014). "Of particular concern to Congress was abundant evidence that Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a 'corporate code of silence'" that "'discouraged employees from reporting fraudulent behavior.'" *Id.* at 435 (citation and brackets omitted). Congress ac-

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[1] See also, *e.g.*, Motor Vehicle and Highway Safety Improvement Act of 2012, Pub. L. No. 112-141, Div. C, Tit. I, § 31307(a), 126 Stat. 766-769 (enacting 49 U.S.C. 30171(b)); FDA Food Safety Modernization Act, Pub. L. No. 111-353, § 402, 124 Stat. 3968-3971 (amending the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301 *et seq.*, by adding 21 U.S.C. 399d(b) in 2011); Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 219(a), 122 Stat. 3063-3065 (enacting 15 U.S.C. 2087(b)); Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902(d), 106 Stat. 3123-3124 (amending Energy Reorganization Act of 1974, 42 U.S.C. 5801 *et seq.*, by adding 42 U.S.C. 5851(b)(3)).

cordingly enacted a "whistleblower regime"—codified at 18 U.S.C. 1514A—to advance the "far-reaching objective" of disrupting that "'code of silence'" by protecting those who "report[] corporate misconduct." *Digital Realty Trust, Inc.* v. *Somers*, 138 S. Ct. 767, 773, 778 (2018) (citation and brackets omitted). Section 1514A provides that no publicly traded company, or any officer, employee, contractor, subcontractor, or agent of such company, "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of any lawful [whistleblowing activity] done by the employee" concerning conduct that the employee reasonably believes violates certain federal fraud statutes or an SEC rule or regulation. 18 U.S.C. 1514A(a).

i. "Congress designed [Section] 1514A to 'track . . . as closely as possible' the protections afforded by [49 U.S.C.] 42121," which had been enacted two years earlier in AIR-21. *Lawson*, 571 U.S. at 457 (citation omitted). A whistleblower alleging an adverse employment action in violation of Section 1514A(a) must therefore file an administrative complaint with the Secretary of Labor that, with one exception not relevant here, "shall be governed under the rules and procedures set forth in [S]ection 42121(b)." 18 U.S.C. 1514A(b)(1)(A) and (2)(A).[2]

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[2] Congress has similarly incorporated Section 42121's adjudicatory framework into other private-sector whistleblower provisions. See, *e.g.*, Anti-Money Laundering Act of 2020, Pub. L. No. 116-283, Div. F, § 6314, 134 Stat. 4601-4602 (enacting 31 U.S.C. 5323(g)(3)); Criminal Antitrust Anti-Retaliation Act of 2019, Pub. L. No. 116-257, § 2, 134 Stat. 1148-1149 (enacting 15 U.S.C. 7a-3(b)); Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, §§ 1521, 1536, 121 Stat. 446, 465-466 (amending 49 U.S.C. 20109(c)(2) (now (d)(2)) and 31105(b)).

First, under Section 42121(b), DOL's Occupational Safety and Health Administration (OSHA), which enforces private-sector whistleblower statutes, must dismiss a complaint without "conduct[ing] an investigation" if the complainant fails to make a "prima facie showing" that protected activity was a "contributing factor" in the unfavorable treatment or the employer establishes its "clear and convincing evidence" defense. 49 U.S.C. 42121(b)(2)(B)(i) and (ii); see 29 C.F.R. 1980.104(e)(1) and (4).

Second, if OSHA conducts an investigation, it must notify the parties of its findings and—if it finds "reasonable cause to believe that the complaint has merit"—it must issue those findings with "a preliminary order" providing relief. 49 U.S.C. 42121(b)(2)(A); see 29 C.F.R. 1980.105(a). Section 42121(b) provides that "[t]he Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any [protected whistleblowing] behavior * * * was a contributing factor in the unfavorable personnel action." 49 U.S.C. 42121(b)(2)(B)(iii). But relief "may not be ordered * * * if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. 42121(b)(2)(B)(iv).[3]

If no party timely requests a hearing, the preliminary order is "deemed a final order that is not subject to judicial review." 49 U.S.C. 42121(b)(2)(A). Otherwise, an administrative law judge (ALJ) must expedi-

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[3] DOL would dismiss a complaint without determining whether a violation has occurred if the employee is shown to have filed outside the 180-day statute of limitations, 18 U.S.C. 1514A(b)(2)(D), or if a settlement is reached before DOL's final order, 49 U.S.C. 42121(b)(3)(A).

tiously conduct an "on the record" hearing, *ibid.*, and issue an order, 49 U.S.C. 42121(b)(3)(A); see 29 C.F.R. 1980.107. The ALJ must apply the "contributing factor" burden-shifting framework previously discussed. 29 C.F.R. 1980.109(a) and (b). The ALJ's decision is subject to review by DOL's Administrative Review Board (ARB) and (since 2020) "discretionary review by the Secretary." 29 C.F.R. 1980.110(a) and (e). The final agency decision is then subject to review in a court of appeals. 49 U.S.C 42121(b)(4); 29 C.F.R. 1980.112(a).

ii. Under Section 1514A, if a final agency decision is not issued within 180 days after the complaint is filed, the complainant generally may bring a district court action "for de novo review." 18 U.S.C. 1514A(b)(1)(B); 29 C.F.R. 1980.114(a). That action is likewise "governed by the legal burdens of proof set forth in [S]ection 42121(b)." 18 U.S.C. 1514A(b)(2)(C); see 29 C.F.R. 1980.114(b).[4]

2. In 2011, respondent UBS Securities (respondent) hired petitioner for respondent's commercial mortgage-backed securities (CMBS) business as a research strategist responsible for reporting on CMBS markets to current and future customers. Pet. App. 2a-3a. Petitioner was required by SEC regulations to certify that his reports were produced independently and accurately reflected his own views. *Id.* at 3a & n.1.

Petitioner contends that two leaders of respondent's CMBS trading desk gave him negative feedback about his reports to customers and "pressured him to skew his

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[4] Section 42121(b) authorizes an administrative action with judicial review in a court of appeals but, unlike Section 1514A(b)(1)(B), does not provide for a freestanding district court action. See 49 U.S.C. 42121(b)(1)-(4).

research and to publish reports to support their business strategies." Pet. App. 3a-4a. In December 2011 and January 2012, petitioner reported that conduct to his direct supervisor, Michael Schumacher, asserting it was unethical and illegal. *Id.* at 4a. When petitioner informed Schumacher that the situation with the trading desk was "bad and getting worse," Schumacher responded that petitioner should just "write what the business line wanted." *Id.* at 4a-5a (citations omitted). Shortly after that exchange, Schumacher emailed his own supervisor and recommended that petitioner be fired. *Id.* at 5a. Schumacher recommended in the alternative that if "'the CMBS team want[s] to keep a presence in analysis, they c[ould] move [petitioner] onto the [trading] desk' as a desk analyst." *Ibid.* (citation omitted). The trading desk declined to accept a transfer of petitioner and, in February 2012, respondent fired him. *Ibid.*

3. In August 2012, petitioner filed a complaint with OSHA alleging that his termination violated Section 1514A. 2/24/2015 D. Ct. Op. 5. In February 2014, after waiting the requisite 180-day period, petitioner filed this Section 1514A action in district court. *Id.* at 5-6.

As relevant here, at trial, the district court instructed the jury that petitioner must establish four elements to prove his Section 1514A claim: (1) "[petitioner] engaged in activity protected [by Section 1514A]"; (2) "[respondent] knew that [petitioner] engaged in the protected activity"; (3) "[petitioner] suffered an adverse employment action—here, the termination of his employment"; and (4) "[petitioner's] protected activity was a contributing factor in the termination of his employment." C.A. App. 3050; see J.A. 126-127.

The district court further instructed that, "[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 [petitioner's] employment." C.A. App. 3053; see J.A. 130. Later, while deliberating, the jury submitted a note asking about the tended-to-affect instruction. J.A. 179 (Exhibit 4-3). The court's written answer, after referring the jury to the relevant pages of the court's original instructions addressing the contributing-factor element, clarified that what the jury "should consider" is "did anyone with th[e] knowledge of [petitioner's] protected activity, because of the protected activity, affect in any way the decision to terminate [petitioner's] employment." J.A. 180.

The jury found that petitioner established his Section 1514A claim and that respondent failed to "prove[], by clear and convincing evidence, that it would have terminated [petitioner's] employment * * * even if he had not engaged in protected activity." C.A. App. 3065 (verdict form); see Trial Tr. 2441-2443. The district court awarded petitioner approximately $900,000 in damages plus $1.77 million in attorney's fees and costs. Pet. App. 7a.

4. The court of appeals vacated and remanded for a new trial. Pet. App. 1a-17a.

The court of appeals first found—as respondents had acknowledged, Resps. C.A. Br. 12—that the jury instructions correctly identified the four elements of a Section 1514A claim. Pet. App. 10a; see *id.* at 6a. But the court agreed with respondents' argument that the district court's elaboration of the "contributing factor element" was erroneous because it "fail[ed] to account for the statute's explicit requirement that the employer's

conduct be 'discriminatory.'" *Id.* at 10a-11a (brackets omitted). The court stated that "[t]o 'discriminate' means 'to act on the basis of prejudice,' which requires a conscious decision to act based on a protected characteristic or action"—here, a "conscious disfavor of an employee for whistleblowing." *Id.* at 9a-10a (citation and brackets omitted). Based on that account, the court held that "to prevail on the 'contributing factor' element of a [Section 1514A] antiretaliation claim, a whistleblower-employee must prove that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent." *Id.* at 11a.

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the "contributing factor" test applicable to Section 1514A claims requires proof of retaliatory intent.

A. The adjudication of a whistleblower claim under Section 1514A is governed by a statutory burden-of-proof provision that requires a complainant to demonstrate that his "[protected] behavior * * * was a contributing factor in the unfavorable personnel action," 49 U.S.C. 42121(b)(2)(B)(iii). See 18 U.S.C. 1514A(b)(2)(A) and (C). A complainant need not prove that the employer harbored retaliatory intent to carry that burden.

1. Congress enacted the term "contributing factor" in Section 42121(b)(2)(B) as a term of art. Congress first adopted that distinctive text in 1989 in the WPA to govern the adjudication of federal-employee whistleblower claims. And when Congress transplanted the same term into the private-sector whistleblower provisions of Section 42121 (in 2000) and Section 1514A (in 2002), it was well established that the "contributing factor" test did not require proof of retaliatory intent. Congress accordingly adopted that understanding.

2. That established meaning of "contributing factor" reflects the most natural reading of the term. A "factor" is something that contributes to the production of a result. And the adjective "contributing" likewise describes something that has a part in producing an effect. A "contributing factor" therefore is most naturally read broadly to include something that plays a role in producing a result. Moreover, under the "contributing factor" test, the complainant must show that his protected "*behavior*" was a "contributing factor." 49 U.S.C. 42121(b)(2)(B)(iii) (emphasis added). If Congress had intended to require a complainant also to demonstrate that reprisal, retaliation, or retaliatory intent by the employer was a contributing factor, it would have enacted text to that effect.

3. Indeed, when Congress first enacted the "contributing factor" test in the WPA for whistleblower claims, it was expressly designed not to impose a requirement to prove retaliatory intent. Before the WPA, the leading decision in this context required that a federal employee prove "retaliatory motive" and therefore show that "retaliation for the [protected activity was] a significant factor in the challenged personnel action." Congress specifically rejected that approach by requiring a complainant to demonstrate only that his "[protected] behavior"—not retaliation—was a "contributing factor"—not a significant one—in the personnel action. That approach reflects a legislative judgment that whistleblowing should never be a factor that contributes in any way to, and thereby taints, an adverse personnel action in this context.

B. Neither the court of appeals nor respondents appear to dispute that the "contributing factor" standard does not require proof of retaliatory intent in the WPA

context. They instead conclude that the same "contributing factor" standard should be given a different meaning under Section 1514A because Section 1514A(a) uses the term "discriminate." Pet. App. 9a-11a. That is wrong.

1. The term "discriminate" simply means to treat differently. It does not require that an employer act because of malevolent motive or prejudice. Congress here used "discriminate" in a catchall phrase that extends Section 1514A's prohibition beyond the types of differential treatments specifically listed and to capture all forms of adverse treatment in the terms and conditions of private-sector employment. That catchall phrase does not speak to an employer's intent.

2. Even if Section 1515A(*a*) were read to prohibit only unfavorable personnel action motivated by retaliatory intent, the burden-shifting provisions incorporated into Section 1514A(*b*) would be properly understood to impose a legal presumption of retaliatory intent where the complainant has demonstrated that the employer had knowledge of the protected activity and that activity was a "contributing factor" in the personnel action.

C. The foregoing analysis reflects the best interpretation of the statutory text and context. And DOL's ARB has long interpreted Section 1514A not to require proof of retaliatory intent. That reasonable interpretation, made in a formal agency adjudication, is entitled to *Chevron* deference because the Secretary of Labor has delegated her adjudicatory authority to the ARB and the ARB's interpretation of the statutory burdens of proof that apply directly in agency adjudication falls squarely within its authority.

ARGUMENT

SECTION 1514A DOES NOT REQUIRE A WHISTLEBLOWER TO PROVE THAT HIS EMPLOYER ACTED WITH "RETALIATORY INTENT"

Section 1514A whistleblower claims are governed by Section 42121(b)'s burden-of-proof provisions, which establish a two-step burden-shifting process for adjudicating those claims. See 18 U.S.C. 1514A(b)(2)(A) and (C); pp. 9-10 & n.4, *supra*. Under the first step, which defines the whistleblower's affirmative case, the whistleblower must "demonstrate[] that any [of his protected] behavior * * * was a contributing factor in the unfavorable personnel action." 49 U.S.C. 42121(b)(2)(B)(iii). As this case comes to the Court, the parties (and the court of appeals) have agreed with the jury instructions that, to establish an affirmative case under Section 1514A, a whistleblower must prove four elements by a preponderance of the evidence: "(1) [the whistleblower] engaged in protected activity; (2) the employer knew that he engaged in the protected activity; (3) he suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action." Pet. App. 10a (citation and brackets omitted); see *id.* at 6a; Resps. C.A. Br. 12; Resps. C.A. Reply Br. 15; Pet. C.A. Br. 16, 19-20, 39-40. The question in this case is whether the court of appeals erred in holding that the "'contributing factor' element" requires proof that "the employer took the adverse employment action against the whistleblower-employee with retaliatory intent," Pet. App. 11a, such as where the employer acted out of prejudice, animus, or comparable hostile or culpable intent. See *id.* at 9a-10a, 13a-14a; Br. in Opp. 15, 18-19. That holding was erroneous.

Section 42121(b)(2)(B)'s burden-shifting text and the origin of the "contributing factor" test in the WPA make clear that "contributing factor" is a term of art in the whistleblowing context that simply requires a showing that the whistleblower's *protected behavior*—not retaliatory intent of the employer—was a factor that contributed in some way to the unfavorable action. The complainant's proof that the employer had knowledge of his protected activity, and that the protected activity was a contributing factor in the adverse treatment, constitute a sufficient showing of the employer's state of mind and prohibited response to that activity.

A. Section 1514A's "Contributing Factor" Test Does Not Require Proof Of "Retaliatory Intent"

The term "contributing factor," which was first enacted in the WPA and was then incorporated in Section 42121(b)(2)(B)(iii), is a term of art that has long been interpreted under the WPA not to require proof that the employer harbored retaliatory intent. That interpretation reflects the most natural understanding of the statutory text. And the drafting history of Congress's enactment of the WPA in 1989 further confirms that it is the correct understanding of the statutory text.

1. "Contributing factor" is a term of art that has long been interpreted not to require a showing of retaliatory intent

a. It is well settled that "[w]here Congress employs a term of art 'obviously transplanted from another legal source,"' such as prior legislation, "it 'brings the old soil with it.'" *George* v. *McDonough*, 142 S. Ct. 1953, 1959 (2022) (quoting *Taggart* v. *Lorenzen*, 139 S. Ct. 1795, 1801 (2019)); see *Stokeling* v. *United States*, 139 S. Ct. 544, 551 (2019). That principle applies with particular

force here, where "Congress used an unusual term"—contributing factor—that had a well-established "history in this very context." *George*, 142 S. Ct. at 1959. Congress enacted Section 42121 (and Section 1514A) with "no new 'definition' or other provision indicating any departure from the 'same meaning'" of that term that had developed under the WPA. *Ibid.* (citation omitted). As a result, Section 42121(b)(2)(B) "'codified and adopted the [interpretation of "contributing factor" that] had developed under' [the WPA]." *Ibid.* (citation and brackets omitted); see *United States* v. *Castleman*, 572 U.S. 157, 174 (2014) (Scalia, J., concurring in part and concurring in the judgment) (explaining that the interpretive presumption that a term "means the same thing each time it is used" applies "'when Congress uses the same language in two statutes having similar purposes'") (citation omitted).

That conclusion flows not only from Section 42121(b)'s use of the WPA's distinctive "contributing factor" formulation, but also from the balance of Section 42121(b)'s burden-shifting framework, which further incorporates the WPA's distinctive formulation of an employer's defense. 49 U.S.C. 42121(b)(2)(B); see 5 U.S.C. 1221(e).[5]

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[5] Indeed, in the same law (AIR-21) that enacted Section 42121, Congress amended earlier 1995 reform legislation for the Federal Aviation Administration (FAA)—which had inadvertently barred FAA employees from filing whistleblower claims under 5 U.S.C. 1221—by reextending civil-service "whistleblower protection[s]" to FAA employees, including "the provisions for * * * enforcement as provided in chapter 12 of title 5." 49 U.S.C. 40122(g)(2)(A); H.R. Rep. No. 167, 106th Cong., 2d Sess. Pt. 1, at 33, 35-36 (1999) (bill text); see *id.* at 118; S. Rep. No. 278, 105th Cong., 2d Sess. 21, 44-45, 78 (1998). Congress thus reapplied the WPA's contributing-factor burden-shifting framework in 5 U.S.C. 1221(e) to those federal whistleblower claims and simultaneously enacted Section 42121's text

b. When Congress enacted Section 42121 in 2000 (and then Section 1514A in 2002), it was already established under the WPA that a whistleblower need not prove retaliatory intent to carry his burden of showing that protected activity was a "contributing factor" in an adverse personnel action.

Since 1990, the WPA's implementing regulations have defined "[*c*]*ontributing factor*" to mean "any disclosure that affects an agency's decision" to take the challenged adverse action. 5 C.F.R. 1209.4(c) (1991) (now 5 C.F.R. 1209.4(d)). In 1993, the Federal Circuit—which from its creation in 1982 has had primary jurisdiction to review MSPB decisions on Section 1221 whistleblower claims, 5 U.S.C. 1221(h)(2), 7703(b)(1) (2006)—determined that, under the WPA's "'contributing factor' test" in Section 1221(e), a whistleblower carries his burden of proof by showing that "his protected disclosure played a role in * * * the personnel action." *Marano* v. *Department of Justice*, 2 F.3d 1137, 1140. That occurs if "'any' weight [is] given to the protected disclosure, either alone or even in combination with other factors." *Ibid.* And the Federal Circuit made clear that although "evidence of a retaliatory motive would [be sufficient] to establish" a whistleblower's claim, "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." *Id.* at 1141. The court explained that that statutory standard reflects a legislative judgment that—"[r]egardless of the

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with the same contributing-factor and clear-and-convincing-evidence tests for private-sector whistleblower claims. AIR-21 §§ 307(a), 519(a), 114 Stat. 124, 146-147 (enacting 49 U.S.C. 40122(g)(2)(A) and 42121(b)(2)(B)).

official's motives"—"personnel actions against employees should quite simply not be based on protected [whistleblowing] activities." *Ibid.* (citation and brackets omitted).

Thus, well before the 2000 enactment of Section 42121 and the 2002 enactment of Section 1514A, it was clear that "retaliatory animus" or "'motive'" is not a "requirement in the [WPA]" because a federal-employee whistleblower need not establish such intent to show that a "'disclosure was a contributing factor to [a] personnel action.'" *Kewley* v. *HHS*, 153 F.3d 1357, 1362 (Fed. Cir. 1998) (quoting *Marano*, 2 F.3d at 1141); see, *e.g.*, *Caddell* v. *DOJ*, 61 M.S.P.R. 670, 681 (1994); see also *Carr* v. *SSA*, 185 F.3d 1318, 1323-1325 (Fed. Cir. 1999) (explaining that questions of retaliatory motive are considered as part of employer's defense). And when Congress transplanted the same "contributing factor" test to define the elements of a private-sector whistleblower's claim under Section 42121 (and, later, under Section 1514A), Congress "adop[ted] the cluster of ideas that were attached" to that term of art, *George*, 142 S. Ct. at 1963 (citation omitted), including that a complainant need not prove retaliatory intent.

2. The term "contributing factor" is most naturally read not to require a showing of retaliatory intent

Beyond the incorporation of the settled understanding under the WPA, the statutory text in Section 42121(b)(2)(B)(iii) demonstrates that proof of retaliatory intent is not required. That text simply requires proof that protected activity was a "contributing factor" in the employer's action.

The word "factor" describes "something * * * that contributes to the production of a result." *Webster's Third New International Dictionary* 813 (1986) (*Web-*

ster's Third); accord *Webster's New International Dictionary* 908 (2d ed. 1951) (*Webster's Second*) ("One of the elements, circumstances, or influences that contribute to produce a result."). The adjective "contributing" similarly describes something that "has a part in producing an effect." *Webster's Third* 496; cf. *Webster's Second* 580 (defining verb "contribute" to mean "to have a share in any act or effect"). A "contributing factor" is therefore most naturally understood broadly to include something that plays a role in producing a result.

That understanding is reinforced by the manner in which the term is used in 49 U.S.C. 42121(b)(2)(B)(iii). That provision requires that "[protected] behavior" was a "contributing factor" (*ibid.*), *i.e.*, the *whistleblowing* itself must have had some role—"a part"—in "producing" the unfavorable personnel action. *Webster's Third* 496.

That text does not suggest that a whistleblower bears the burden of proving that some "retaliatory intent" of the employer played a role in the decision. If Congress had intended to require that showing, it would have enacted text requiring a whistleblower to demonstrate that "reprisal," "retaliation," "retaliatory intent," or some other textual description of such a motive *of the employer*—rather than the protected activity *of the employee*—"was a contributing factor in the unfavorable personnel action," 49 U.S.C. 42121(b)(2)(B)(iii). In fact, Congress has enacted similar language in one unique civil-service context by providing that a federal employee whose principal job function is to investigate and disclose wrongdoing may invoke the CSRA's whistleblower protections but must "demonstrate[] that an employee [with supervisory authority]" took an adverse "personnel action with respect to the [complainant] *in*

reprisal for the disclosure." 5 U.S.C. 2302(f)(2) (emphasis added).

By eschewing such language for Section 1514A, Congress afforded broader protection, requiring only that the plaintiff demonstrate that "[*protected*] *behavior* was a contributing factor." 49 U.S.C. 42121(b)(2)(B)(iii) (emphasis added). And while showing that the employer acted with retaliatory animus in response to whistleblowing activity is one way of showing that protected activity played a role in producing the adverse action, it has long been settled under the WPA—from which Section 42121(b), and thus Section 1514A, was drawn—that it is neither the only way nor a necessary means of satisfying the "contributing factor" test. See *Marano*, 2 F.3d at 1141.

3. The drafting history surrounding Congress's enactment of the "contributing factor" test confirms that it does not require a showing of retaliatory intent

When Congress first enacted the "contributing factor" test in 1989, it was specifically designed not to impose a requirement to prove retaliatory intent. Prior to the WPA, the leading decision relevant to whistleblower claims held that a federal employee did have to prove "retaliatory motive" (often "inferred from circumstantial evidence") and that "the appropriate test" required the employee to prove that "*retaliation for the* [*protected activity*] *is a significant factor in the challenged personnel action*." *In re Frazier*, 1 M.S.P.B. 159, 186, 188 (1979) (emphasis added), aff'd, 672 F.2d 150 (D.C. Cir. 1982); see p. 4, *supra*; S. Rep. No. 413, 100th Cong., 2d Sess. 11, 13, 16 (1988) (explaining that *Frazier* established the "elements" of an employee's case and required proof that "retaliation was a 'significant' factor in the agency's actions"). In 1989, Congress rejected

that approach by enacting the WPA, which lowered the employee's burden of proof to require only that he "demonstrate[] that a [protected] disclosure"—not retaliation for the disclosure—"was a contributing factor"—not a significant factor—"in the personnel action." 5 U.S.C. 1221(e)(1).

That deliberate textual choice reflects the judgment that "[w]histleblowing should never be a factor that contributes in any way to an adverse personnel action"; and, if it does, the "action [i]s tainted" and gives rise to liability unless (in the second half of the burden-shifting process) the employer can "demonstrate, by clear and convincing evidence, that it would have taken the same action even in the absence of the whistleblowing." 135 Cong. Rec. at 4509 (Sen. Levin); *id.* at 5033 (explanatory statement); see pp. 4-6, *supra* (describing WPA's drafting history). Thus, as the bill manager in the House of Representatives emphasized, one of the "[m]ost important[]" features of the contributing-factor standard is that it "does not place any requirement on the whistleblower * * * to produce evidence proving retaliatory motive." 135 Cong. Rec. at 5037 (Rep. Schroeder). And when Congress later enacted Section 1514A, it incorporated the WPA's provisions for "government employees" who "report[] wrongdoing" through Section 42121 because "similar protection" was needed to protect private-sector employees "who blow the whistle on fraud and protect investors." S. Rep. No. 146, 107th Cong., 2d Sess. 10, 13 & n.12, 30 (2002).

B. Section 1514A(a) Does Not Alter The Burden-Shifting Framework For Adjudicating Whistleblower Claims Under The "Contributing Factor" Test

Neither the court of appeals nor respondents appear to dispute that the "contributing factor" standard in the

WPA context does not require proof of retaliatory intent. See Br. in Opp. 10-11; Resps. C.A. Br. 33-34 & n.1 (arguing that WPA's "contributing factor" test is different). Instead, the court held (as respondents argued) that the same "contributing factor" text that is incorporated in Section 1514A(*b*) to define the whistleblower's burden of proof should be given a different meaning than under the WPA, because Section 1514A(*a*) uses the term "discriminate." The court (like respondents) read the statute to require—as part of "the 'contributing factor' element of a [Section 1514A] claim"—"pro[of] that the employer took the adverse employment action against the whistleblower-employee with retaliatory intent." Pet. App. 9a, 11a; see Br. in Opp. 2, 10-11, 15-16, 18-19; Resps. C.A. Reply Br. 12-13, 15-16 (arguing that the "'contributing factor' prong requires a plaintiff to show that the employer's decision was *motivated*, at least in part, *by a desire to retaliate* against the plaintiff for engaging in protected activity") (citation omitted); Resps. C.A. Br. 15-19. That holding is wrong.

1. Section 1514A(a) does not require proof of retaliatory intent

The court of appeals significantly overread Section 1514A(a)'s use of the term "discriminate." And in doing so, the court failed to properly interpret that language in light of Section 1514A(b)(2)(C), which specifies the whistleblower's burden of proof and thereby specifies the elements of a Section 1514A claim.

a. The court of appeals concluded that Section 1514A(a) "unambiguous[ly]" requires proof of "retaliatory intent" because it uses the term "'discriminate'" (Pet. App. 9a-10a) when providing that it is unlawful to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee * * *

because of" protected conduct, 18 U.S.C. 1514A(a). The court reached that conclusion based on its view that "discriminate" means "'to act on the basis of prejudice'" and requires proof of "the employer's conscious disfavor of an employee for whistleblowing." Pet. App. 9a-10a (quoting *Webster's II New Riverside University Dictionary* 385 (1994)) (brackets omitted). That is incorrect.

As a textual matter, the word "discriminate" typically means "[t]o make a difference in treatment or favor (of one as compared with others)." *Bostock* v. *Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020) (quoting *Webster's Second* 745 (1954) and stating that the term in 1964 meant "roughly what it means today"). This Court has therefore emphasized that the "normal definition" of "discrimination" is simply "differential treatment," *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1173 (2020) (quoting *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005)), and, for that reason, "the term 'discriminate against' refers to distinctions or differences in treatment that injure protected individuals," *Burlington N. & Santa Fe Ry.* v. *White*, 548 U.S. 53, 59 (2006) (Title VII retaliation); see *Bostock*, 140 S. Ct. at 1740 (treatment "worse" than that given to others "similarly situated"). That is what the word "discriminate" in Section 1514A(a) means. And a prohibition against such different treatment "does not depend on why the employer discriminates" or the presence of "malevolent motive." *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991); see, *e.g.*, *Bostock*, 140 S. Ct. at 1743 (discussing cases imposing Title VII disparate-treatment liability even though the employer "tended to favor hiring women" or sought to treat categories of men and women "equal[ly]" without "animosity" against women).

Section 1514A(a) identifies a short list of specific types of acts constituting forbidden differential treatment "because of" protected whistleblowing: "discharge, demot[ion], suspen[sion], threat[s], [and] harass[ment]." 18 U.S.C. 1514A(a). By then including a catchall phrase making it unlawful to "in any other manner discriminate against an employee in the terms and conditions of employment," *ibid.*, Congress simply extended Section 1514A's prohibition to the full range of adverse "difference[s] in treatment," *Bostock*, 140 S. Ct. at 1740, beyond those actions specifically mentioned. Unlike the federal agency context at issue in the WPA, where Congress has continued over time to refine a long list of the types of federal-agency "personnel action[s]" that are prohibited if taken "because of" protected whistleblowing, 5 U.S.C. 2302(b)(8); see 5 U.S.C. 2302(a)(2) (list), Congress instead employed capacious language in the catchall phrase in Section 1514A(a) to capture all forms of adverse treatment in the terms and conditions of private-sector employment because of whistleblowing.

That phrase describing the range of prohibited adverse treatments does not speak to the employer's intent, much less require proof of animus or retaliatory intent. To the contrary, as explained above, the relevant text is drawn directly from the WPA, which Congress enacted to *reject* prior decisions requiring proof of retaliatory intent. See pp. 17-23, *supra*. The court of appeals failed to consider that critical context informing the proper interpretation of Section 1514A(a).

b. Respondents contend (Br. in Opp. 16) that it makes no sense "[t]o speak of *retaliation* without *intent*" and that, "[b]y definition, retaliation is disparate treatment on account of protected activity." But although the title of Section 1514A describes the provision as affording

protection against "retaliation," see also *Lawson* v. *FMR LLC*, 571 U.S. 429, 433-434, 437, 441-444 (2014), the operative statutory text does not contain the word "retaliation." Nor does it use the term "intentional retaliation." The settled elements of the complainant's burden of proof under the WPA, and Sections 42121 and 1514A, require proof only that the employer had *knowledge* of the employee's protected activity, and that the protected activity was a contributing factor in the employer's action. See p. 16, *supra*.

Animus or hostility to the employee' protected activity may often be one of the reasons that the employer fired the employee or otherwise subjected him to adverse treatment. But it does not follow that Section 1514A's broad prohibition against disparate treatment because of protected activity is limited *only* to actions taken with that sort of retaliatory intent, or that a complainant must carry what would often be the different burden of actually proving that the employer acted with that intent.

Respondents' observation that "[i]ntentional torts . . . generally require that the actor *intend the consequences of an act*," Br. in Opp. 16 (quoting *Staub* v. *Proctor Hosp.*, 562 U.S. 411, 417 (2011)), is similarly misplaced. That principle is relevant where (as in *Staub*) a plaintiff relies on a statute that prohibits certain employment actions taken with discriminatory intent to hold an employer liable for an action taken by a second-level supervisor who lacked any discriminatory "animus" but who based her decision on a report by a first-line supervisor who acted with such animus. 562 U.S. at 417-418. *Staub* teaches that an employer may be held liable under those circumstances if, *inter alia*, "the *adverse action* [there, termination] is the *intended*

consequence of [the first-line supervisor's] discriminatory conduct," even though the first-line supervisor's conduct (an unfavorable report) is not itself unlawful. *Id.* at 419, 422 (emphases added). But there is no question here that respondent intended to terminate petitioner. The question in this case—which *Staub*'s intentional-tort discussion does not inform—is whether the jury, which found that petitioner's protected activity was a "contributing factor" in his termination, also had to find that respondent acted at least in part with retaliatory intent.

2. Section 1514A's burden-shifting framework in any event would impose a legal presumption of retaliatory intent when the "contributing factor" test is met

If Section 1514A(a) were nevertheless read to prohibit an unfavorable personnel action only if it is motivated by retaliatory intent in the sense respondents apparently mean—*i.e.*, prejudice or animus—then the burden-shifting provisions under Section 1514A(b) would properly be understood to impose a legal presumption of retaliatory intent where a whistleblower has demonstrated that protected activity of which the employer had knowledge was a "contributing factor" in the personnel action.

The parties—like the court of appeals—correctly agree that, under 49 U.S.C. 42121(b)(2)(B)(iii), there are four "elements" of a Section 1514A claim: (1) protected behavior (whistleblowing), (2) the employer's knowledge of that behavior; (3) an unfavorable personnel action; and (4) proof that the protected activity was a "contributing factor" in that action. Pet. App. 10a; see p. 16, *supra* (citing briefs). And as explained above, the "contributing factor" test does not require proof of retaliatory intent.

It follows that, even if Section 1514A(a) were interpreted to prohibit only unfavorable personnel actions motivated by "retaliatory intent" in the sense respondents apparently mean, the *adjudicatory process* that Congress prescribed for alleged Section 1514A(a) violations would still not require actual proof of such intent. Rather, that process would in effect require courts and agencies adjudicating such claims "to presume retaliatory intent from the facts and circumstances," 135 Cong. Rec. at 5037 (Rep. Schroder), where the employer had knowledge of the employee's protected conduct and that conduct was a contributing factor in the adverse treatment. Such a legal presumption would reflect the judgment that "it is unrealistic to expect the whistleblower * * * to demonstrate improper motive," *ibid.*, and that the most appropriate way to limit employer liability in this context is to require that the employer demonstrate, by "clear and convincing evidence," that it "would have taken the same unfavorable personnel action in the absence of [the protected] behavior," 49 U.S.C. 42121(b)(2)(B)(iv).

C. The Secretary's Interpretation Of Section 1514A Is Entitled To Deference

The conclusion that Section 1514A does not require proof of retaliatory intent reflects the best interpretation of the statutory text and context. And in any event, DOL's reasonable adjudicatory interpretation of Section 1514A is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984).[6]

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[6] This Court has granted certiorari in *Loper Bright Enterprises* v. *Raimondo*, No. 22-451 (May 1, 2023), to consider whether to "overrule *Chevron*" or limit its application in certain cases involving statutory "silence." The Court's resolution of that question should

1. In adjudicating whistleblower claims under Section 1514A, the ARB has long held that "[n]othing in Section [1514A] requires a showing of retaliatory intent." *Menendez* v. *Halliburton, Inc.*, Nos. 09-2, 09-3, 2011 WL 4915750, at *20 (ARB Sept. 13, 2011). Focusing on Section 1514A's burden-shifting framework for adjudication, the ARB "adopted the definition of 'contributing factor' stated [by the Federal Circuit] in *Marano*" in the WPA context in 1993 and applied it to the same "contributing factor" burden-shifting language governing Section 1514A claims. *Id.* at *20 n.173. The ARB likewise adopted *Marano*'s conclusion that a "whistleblower need not demonstrate the existence of a retaliatory motive," *ibid.* (quoting *Marano*, 2 F.3d at 1141), and therefore determined that, under Section 1514A, "[p]roof of 'retaliatory motive' is not necessary" to establish that "protected activity was a contributing factor to * * * adverse actions," *id.* at *18, *20. The Fifth Circuit upheld that interpretation on review of a subsequent decision in the same case, reasoning that Section 1514A "contains the same 'contributing factor' test" as the WPA's whistleblower provisions and that *Marano* had decades earlier construed that "contributing factor" test as not requiring any proof of "'retaliatory motive.'" *Halliburton, Inc.* v. *ARB*, 771 F.3d 254, 263 & n.8 (2014) (per curiam) (citation omitted).[7]

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not affect the outcome here: This case does not involve the sort of statutory silence that the petitioner in *Loper Bright* contends is present in that case, and DOL's interpretation is in any event the best reading of Section 1514A.

[7] In the court of appeals, respondents cited (Resps. C.A. Reply Br. 20) *Klopfenstein* v. *PCC Flow Technologies Holdings, Inc.*, No. 04-149, 2006 WL 3246904 (May 31, 2006), for the proposition that the ARB has taken inconsistent positions because it previously interpreted Section 1514A to require a whistleblower to prove a retal-

2. The ARB's interpretation of Section 1514A is entitled to *Chevron* deference. Congress has directed DOL to enforce Section 1514A through its adjudication of whistleblower complaints. 18 U.S.C. 1514A(b). That direction necessarily includes authority to "speak with the force of law" in a "formal adjudication." *United States* v. *Mead Corp.*, 533 U.S. 218, 229-230 & n.12 (2001). As a result, to the extent the statutory text is ambiguous, the ARB's reasonable interpretation, rendered "in the context of formal adjudication," is "entitled to deference." *SEC* v. *Zandford*, 535 U.S. 813, 819-820 (2002).

This Court in *Lawson* emphasized the "lead role played by DOL in administering whistleblower statutes" but did not decide what weight should be given to an ARB interpretation of Section 1514A. *Lawson*, 571 U.S. at 439 n.6. Three Justices in dissent concluded that the ARB was not the correct governmental component entitled to *Chevron* deference on the interpretive issue there, given that Congress generally delegated to the SEC (not DOL) authority to promulgate rules and regulations implementing the Sarbanes-Oxley Act; DOL's Secretary has delegated "any policymaking authority [she] may have" to OSHA, not the ARB; and Section

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iatory motive. But respondents misread that decision. In *Klopfenstein*, the complainant's factual theory was that his "protected activity was a contributing factor because [a company official] had discriminatory animus against [him] based on [his whistleblowing]." *Id.* at *6; see *id.* at *13-*14. The ARB observed that the "ultimate question whether an action was taken due to 'retaliatory motive is a legal conclusion.'" *Id.* at *14 (citation omitted). But the ARB did not hold that Section 1514A requires proof of a retaliatory motive in other circumstances—including those where the complainant can establish that his protected activity was a contributing factor based on other evidence.

1514A in certain contexts allows district courts to adjudicate Section 1514A actions "*de novo*." *Id.* at 476-478 (Sotomayor, J., dissenting). This case, however, involves a different Section 1514A question concerning the interpretation of statutory burdens of proof applied directly *in an agency adjudication* that falls squarely under the ARB's authority.

Congress has directed that DOL adjudicate Section 1514A complaints using the "rules and procedures set forth in [S]ection 42121(b)," 18 U.S.C. 1514A(b)(2)(A), that apply the "contributing factor" test at issue in this case. See p. 9, *supra*. In the absence of the Secretary's discretionary review and any pertinent regulations, the ARB is the final DOL authority on the interpretation of that adjudicatory test. See 29 C.F.R. 1980.110(c)-(e). And while district courts may also adjudicate certain whistleblower claims if the agency has not issued a decision within 180 days, 18 U.S.C. 1514A(b)(1)(B), Congress directed those courts to apply "the legal burdens of proof set forth in [S]ection 42121(b)" that by their terms apply only in the administrative proceedings. 18 U.S.C. 1514A(b)(2)(C); see pp. 9-10 & n.4, *supra*. Deference to the ARB's interpretation is therefore warranted.

3. The ARB's interpretation of Section 1514A is consistent with the ARB's longstanding interpretation of analogous contributing-factor language in non-Section 1514A statutes. And any surface tension reflected by the ARB's current position in the railroad-safety whistleblower context does not reflect a significant substantive difference and does not alter the deference owed to the ARB's position that a plaintiff need not prove retaliatory animus or intent.

Until November 2019, in non-Section 1514A whistleblower contexts governed by the same type of statutory "contributing factor" burden-shifting framework, the ARB had consistently and "repeatedly held" that, under the "'contributing factor'" test, "an employee need not prove retaliatory animus, or motivation or intent, to prove that his protected activity contributed to the adverse employment action." *Rathburn* v. *Belt Ry.*, No. 16-36, 2017 WL 6572154, at *5 & n.42 (Dec. 8, 2017) (claim under 49 U.S.C. 20109(d); citing decisions); accord, *e.g.*, *Beatty* v. *Celadon Trucking Servs.*, Nos. 15-85, 15-86, 2017 WL 6572143, at *6 (ARB Dec. 8, 2017) (claim under 49 U.S.C. 31105(b)). Even after the Eighth Circuit disagreed with that interpretation in *Kuduk* v. *BNSF Ry.*, 768 F.3d 786 (2014), the ARB adhered to its longstanding interpretation. *E.g.*, *Brough* v. *BNSF Ry.*, No. 2016-89, 2019 WL 3293916, at *6 (June 12, 2019), aff'd, Nos. 19-71983, 20-70655, 2021 WL 5905721, at *1 (9th Cir. Dec. 14, 2021).

In November 2019, shortly after oral argument in the Eighth Circuit on a petition for review of an ARB decision that had criticized the Eighth Circuit's position, see *Riley* v. *Dakota, Minn. & E. R.R.*, Nos. 16-10, 16-52, 2018 WL 6978216, at *4 & n.3 (July 6, 2018), rev'd, 948 F.3d 940, 945-947 (8th Cir. 2020), the ARB articulated a different approach in the context of a railroad-safety whistleblower claim under 49 U.S.C. 20109(d). *Thorstenson* v. *BNSF Ry.*, Nos. 2018-59, 2018-60, 2019 WL 7042958, at *5-*6 (Nov. 25, 2019) (per curiam). The ARB nominally adopted the Eighth Circuit's position that an employee must prove "intentional retaliation prompted by [protected whistleblowing]." *Id.* at *5 (quoting *Kuduk*, 768 F.3d at 791). But that acquiescence was limited, because the ARB ruled that a

whistleblower "need not prove a retaliatory motive beyond showing that the employee's *protected activity* was a *contributing factor* in the adverse action." *Ibid.* (emphases added); accord *Yowell* v. *Fort Worth & W. R.R.*, No. 2019-39, 2020 WL 3971213, at *4 (ARB Feb. 5, 2020) (per curiam) (Section 20109(d) claim), aff'd, 993 F.3d 418 (5th Cir. 2021).

In so ruling, the ARB effectively adopted the view that a legal presumption of retaliatory intent will arise if a whistleblower demonstrates that his protected activity was a "contributing factor" in the adverse action. See pp. 28-29, *supra* (discussing legal presumption). As a result, any tension between the ARB's Section 1514A precedent and those recent railroad-safety-whistleblower decisions is minimal because the ARB's limited acquiescence in the face of appellate precedent has not fundamentally altered its adjudicatory approach. The ARB's decisions ultimately require proof only that a whistleblower's protected activity was a "contributing factor" in the adverse action. That interpretation is reasonable, and it is entitled to deference.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

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JULY 2023

APPENDIX

TABLE OF CONTENTS

1. 5 U.S.C. 1221 provides in pertinent part:

Individual right of action in certain reprisal cases

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), seek corrective action from the Merit Systems Protection Board.

(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

(c)(1) Any employee, former employee, or applicant for employment seeking corrective action under subsection (a) may request that the Board order a stay of the personnel action involved.

(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines that such a stay would be appropriate.

(3)(A) The Board shall allow any agency which would be subject to a stay under this subsection to comment to the Board on such stay request.

(B) Except as provided in subparagraph (C), a stay granted under this subsection shall remain in effect for such period as the Board determines to be appropriate.

(C) The Board may modify or dissolve a stay under this subsection at any time, if the Board determines that such a modification or dissolution is appropriate.

* * * * *

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure or protected activity; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if, after a finding that a protected disclo-

sure was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

* * * * *

(g)(1)(A) If the Board orders corrective action under this section, such corrective action may include—

(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(ii) back pay and related benefits, medical costs incurred, travel expenses, any other reasonable and foreseeable consequential damages, and compensatory damages (including interest, reasonable expert witness fees, and costs).

(B) Corrective action shall include attorney's fees and costs as provided for under paragraphs (2) and (3).

(2) If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred.

(3) If an employee, former emloyee,[1] or applicant for employment is the prevailing party in an appeal

[1] So in original. Probably should be "employee,".

from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred, regardless of the basis of the decision.

(4) Any corrective action ordered under this section to correct a prohibited personnel practice may include fees, costs, or damages reasonably incurred due to an agency investigation of the employee, if such investigation was commenced, expanded, or extended in retaliation for the disclosure or protected activity that formed the basis of the corrective action.

(h)(1) An employee, former employee, or applicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

* * * * *

2. 5 U.S.C. 2302 provides in pertinent part:

Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section—

(A) "personnel action" means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title or under title 38;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

(x) a decision to order psychiatric testing or examination;

(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and

(xii) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

* * * * *

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

* * * * *

(8) 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—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial

and specific danger to public health or safety; or

(C) any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information described in subparagraph (B) that is—

(i) not classified; or

(ii) if classified—

(I) has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. 3003)); and

(II) does not reveal intelligence sources and methods.[1]

* * * * *

This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), (i) any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted by substantial evidence, and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a

[1] So in original. The period probably should be a semicolon.

gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.

* * * * *

(f)(1) A disclosure shall not be excluded from subsection (b)(8) because—

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

(B) the disclosure revealed information that had been previously disclosed;

(C) of the employee's or applicant's motive for making the disclosure;

(D) the disclosure was not made in writing;

(E) the disclosure was made while the employee was off duty;

(F) the disclosure was made before the date on which the individual was appointed or applied for appointment to a position; or

(G) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the principal job func-

tion of whom is to regularly investigate and disclose wrongdoing (referred to in this paragraph as the "disclosing employee"), the disclosure shall not be excluded from subsection (b)(8) if the disclosing employee demonstrates that an employee who has the authority to take, direct other individuals to take, recommend, or approve any personnel action with respect to the disclosing employee took, failed to take, or threatened to take or fail to take a personnel action with respect to the disclosing employee in reprisal for the disclosure made by the disclosing employee.

3. 18 U.S.C. 1514A provides in pertinent part:

Civil action to protect against retaliation in fraud cases

(a) WHISTLEBLOWER PROTECTION FOR EMPLOYEES OF PUBLICLY TRADED COMPANIES.—No company with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)) including any subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company, or nationally recognized statistical rating organization (as defined in section 3(a) of the Securities Exchange Act of 1934 (15 U.S.C. 78c),[1] or any officer, employee, contractor, subcontractor, or agent of such company or nationally recognized statistical rating organization, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against

[1] So in original. Another closing parenthesis probably should precede the comma.

an employee in the terms and conditions of employment because of any lawful act done by the employee—

(1) to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by—

(A) a Federal regulatory or law enforcement agency;

(B) any Member of Congress or any committee of Congress; or

(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation of section 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

(b) ENFORCEMENT ACTION.—

(1) IN GENERAL.—A person who alleges discharge or other discrimination by any person in violation of subsection (a) may seek relief under subsection (c), by—

(A) filing a complaint with the Secretary of Labor; or

(B) if the Secretary has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

(2) PROCEDURE.—

(A) IN GENERAL.—An action under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to the person named in the complaint and to the employer.

(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

(D) STATUTE OF LIMITATIONS.—An action under paragraph (1) shall be commenced not later than 180 days after the date on which the violation occurs, or after the date on which the employee became aware of the violation.

(E) JURY TRIAL.—A party to an action brought under paragraph (1)(B) shall be entitled to trial by jury.

(c) REMEDIES.—

(1) IN GENERAL.—An employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.

(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

(A) reinstatement with the same seniority status that the employee would have had, but for the discrimination;

(B) the amount of back pay, with interest; and

(C) compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.

* * * * *

4. 49 U.S.C. 42121 (2018 & Supp. III 2021) provides:

Protection of employees providing air safety information

(a) PROHIBITED DISCRIMINATION.—A holder of a certificate under section 44704 or 44705 of this title, or a contractor, subcontractor, or supplier of such holder, may not discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged

violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to aviation safety under this subtitle or any other law of the United States;

(2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to aviation safety under this subtitle or any other law of the United States;

(3) testified or is about to testify in such a proceeding; or

(4) assisted or participated or is about to assist or participate in such a proceeding.

(b) DEPARTMENT OF LABOR COMPLAINT PROCEDURE.—

(1) FILING AND NOTIFICATION.—A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 90 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary of Labor shall notify, in writing, the person named in the complaint and the Administrator of the Federal Aviation Administration of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

(2) INVESTIGATION; PRELIMINARY ORDER.—

(A) IN GENERAL.—Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the person named in the complaint an opportunity to submit to the Secretary of Labor a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary of Labor shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary of Labor concludes that there is a reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Such hearings shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

(B) REQUIREMENTS.—

(i) REQUIRED SHOWING BY COMPLAINANT.—The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(ii) SHOWING BY EMPLOYER.—Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(iii) CRITERIA FOR DETERMINATION BY SECRETARY.—The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(iv) PROHIBITION.—Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

(3) FINAL ORDER.—

(A) DEADLINE FOR ISSUANCE; SETTLEMENT AGREEMENTS.—Not later than 120 days after the date of conclusion of a hearing under paragraph (2), the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary of Labor, the complainant, and the person alleged to have committed the violation.

(B) REMEDY.—If, in response to a complaint filed under paragraph (1), the Secretary of Labor determines that a violation of subsection (a) has occurred, the Secretary of Labor shall order the person who committed such violation to—

(i) take affirmative action to abate the violation;

(ii) reinstate the complainant to his or her former position together with the compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

(iii) provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary of Labor, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reason-

ably incurred, as determined by the Secretary of Labor, by the complainant for, or in connection with, the bringing the complaint upon which the order was issued.

(C) FRIVOLOUS COMPLAINTS.—If the Secretary of Labor finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary of Labor may award to the prevailing employer a reasonable attorney's fee not exceeding $1,000.

(4) REVIEW.—

(A) APPEAL TO COURT OF APPEALS.—Any person adversely affected or aggrieved by an order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary of Labor. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

(B) LIMITATION ON COLLATERAL ATTACK.—An order of the Secretary of Labor with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

(5) ENFORCEMENT OF ORDER BY SECRETARY OF LABOR.—Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary of Labor may file a civil action in the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

(6) ENFORCEMENT OF ORDER BY PARTIES.—

(A) COMMENCEMENT OF ACTION.—A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

(B) ATTORNEY FEES.—The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorney and expert witness fees) to any party whenever the court determines such award is appropriate.

(c) MANDAMUS.—Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

(d) NONAPPLICABILITY TO DELIBERATE VIOLATIONS.—Subsection (a) shall not apply with respect to an employee of a holder of a certificate issued under section

44704 or 44705, or a contractor or subcontractor thereof, who, acting without direction from such certificate-holder, contractor, or subcontractor (or such person's agent), deliberately causes a violation of any requirement relating to aviation safety under this subtitle or any other law of the United States.

(e) CONTRACTOR DEFINED.—In this section, the term "contractor" means—

(1) a person that performs safety-sensitive functions by contract for an air carrier or commercial operator; or

(2) a person that performs safety-sensitive functions related to the design or production of an aircraft, aircraft engine, propeller, appliance, or component thereof by contract for a holder of a certificate issued under section 44704.