No. 22-660

In The Supreme Court of the United States

TREVOR MURRAY,

Petitioner,

v.

UBS SECURITIES, LLC AND UBS AG,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE ACADEMY OF RAIL LABOR ATTORNEYS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Founded in 1990, the Academy of Rail Labor Attorneys ("ARLA") is a professional association of attorneys who represent railroad workers in cases brought under the Federal Employers' Liability Act and the Federal Railroad Safety Act ("FRSA"). Through this work, ARLA promotes safe working conditions and standards for railroad employees as well as rail safety for the traveling public and the communities through which trains travel.

ARLA's members and the employees they represent know the issue in this case well. As with claims brought under the Sarbanes-Oxley Act of 2002 ("SOX"), FRSA whistleblower claims are governed by the two-part contributing-factor burden-shifting framework at issue in this case. The Second Circuit's conclusion that whistleblower-employees alleging claims under this framework must prove retaliatory intent is contrary to the plain text of these statutes. The text and purpose of the FRSA—like that of SOX and the more than a dozen other statutes that share the contributing-factor framework—confirm that employees need not prove retaliatory intent.

Given the parallel aims and language of these statutes, the Court's resolution of this case almost certainly will determine intent's role not just in SOX claims, but in FRSA claims, too. ARLA submits this brief, with a focus on how and why Congress adopted the contributing-factor burden-shifting framework to

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[1] This brief was not written in whole or in part by counsel for a party, and no one other than *amicus curiae* or its counsel made a monetary contribution to the preparation or submission of this brief.

govern FRSA whistleblower causes of action, to assist the Court in deciding the question presented.

SUMMARY OF ARGUMENT

The railways pose serious dangers to workers and the public. As the eyes and ears of the rail industry, railroad employees play a critical role in averting these dangers and ensuring public safety. But deeply entrenched railroad policies and practices often silence workers and prevent them from reporting injuries and safety concerns. And when that happens, the consequences can be catastrophic.

Seeking to put an end to the intimidation and retaliation that railroad workers who report hazardous safety conditions regularly experience, Congress incorporated the contributing-factor framework into the FRSA—the whistleblower statute that governs the railroad industry. More than a dozen other federal statutes, including SOX, use the same two-part burden-shifting framework. Under this framework, whistleblower-plaintiffs can prevail if they show that their protected activity was a contributing factor in an adverse action, and if the defendant fails to prove that it would have taken the same adverse action absent the protected activity.

The text, structure, history, and purpose of the FRSA, SOX, and other whistleblower statutes that use the contributing-factor framework show that plaintiffs are not required to prove retaliatory intent as part of their case in chief. The plain language of the statutes makes that clear: Plaintiffs must prove only that their "[protected] behavior…was a contributing factor in the unfavorable personnel action." 49 U.S.C. § 42121(b)(2)(B)(iii). The statutes say nothing about

proving a causal nexus between the action and their employer's state of mind. Judicial decisions, administrative opinions, and legislative history have recognized for decades that omitting a proof-of-motive requirement in statutes employing the contributing-factor standard was no oversight. That was Congress's express intent—a purpose that makes perfect sense given that Congress's overarching aim was protecting the public interest by ensuring that workers could freely report safety and fraud concerns. That's a far different concern than stamping out bias and prejudice.

Like some courts that have decided that railroad employees must prove retaliatory intent under the FRSA, the Second Circuit held that whistleblowers must make the same showing under SOX. In reaching this conclusion, the Second Circuit disregarded the plain text of the statute, focusing exclusively on SOX's general prohibition against retaliation and saying not a single word about the provisions that precisely specify what employees must show to prove a violation of the statute. This acontextual analysis led the court to adopt an extratextual requirement found nowhere in the statute. Employees alleging claims under the contributing-factor framework must prove only that their protected activity was a contributing factor in an adverse action—not that their employer intended to retaliate against them for that activity.

ARGUMENT

I. The FRSA, SOX, and More Than a Dozen Other Statutes Use the Same Two-Part Burden-Shifting Framework for Whistleblower Claims.

This case concerns the proper interpretation of the contributing-factor burden-shifting framework that governs whistleblower actions brought under SOX and more than a dozen other federal statutes.

Some history is necessary to tackle the question before the Court. Congress first adopted the two-part burden-shifting framework at issue in this case in the Whistleblower Protection Act of 1989 ("WPA"). *See* Pub. L. No. 101-12, 103 Stat. 16 (1989) (codified as amended at 5 U.S.C. § 2302). Under the WPA, a civil-service employee must first show that her "protected activity…was a contributing factor" in an adverse "personnel action" taken by her agency employer. *Id.* § 3, sec. 1221(e)(1) (codified as amended at 5 U.S.C. § 1221(e)(1)). If she makes that showing, the burden shifts to the employer to "demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of" the protected activity. *Id.* § 3, sec. 1221(e)(2) (codified as amended at 5 U.S.C. § 1221(e)(2)).

The WPA amended the Civil Service Reform Act of 1978, Pub. L. 95-454, § 101(a), 92 Stat. 1111 (Oct. 13, 1978) ("CSRA"). In the short time that the CSRA had been on the books, courts had interpreted it to require proof of two things from employees who asserted that they had suffered an adverse action after making a protected disclosure: first, that their disclosure was a significant or motivating factor in

their employer's action, and second, that that their employer had taken that action with a retaliatory motive or intent. *See Marano v. Dep't of Justice*, 2 F.3d 1137, 1140–41 & n.3 (Fed. Cir. 1993) (citing cases); S. Rep. No. 100-413, at 13–16 (1988) (discussing cases).

Recognizing that these decisions had "imposed" an "excessively heavy burden" on whistleblowers, Congress adopted the contributing-factor framework in the WPA with the express intent of undoing these features of the existing case law and of redefining what a whistleblower had to prove. *See Marano*, 2 F.3d at 1140 (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on sec. 20)). It did so in two overarching ways.

First, by adopting the contributing-factor standard, Congress substantially reduced the employee's burden to establish causation and permitted her to prevail without showing that her protected activity was a motivating factor, much less a but-for cause, of the adverse action. The new contributing-factor standard was "specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action." *Id.* (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on sec. 20)). Congress also specified the rule that would replace these other causal standards: "[t]he words "a contributing factor"…mean *any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision*." *Id.* (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on sec. 20)).

Second, the contributing-factor framework eliminated any need to show that the employer acted with an improper state of mind. "[T]he word 'contributing' does not place any requirement on the whistleblower…to produce evidence proving retaliatory motive on the part of the official proposing or taking the personnel action." 135 Cong. Rec. 5037 (1989) (remarks of Rep. Pat Schroeder); *see Marano*, 2 F.3d at 1141 ("*Regardless of the official's motives*, personnel actions against employees should quite [simply] not be based on protected activities." (emphasis added; alteration in original) (quoting S. Rep. No. 100-413, at 16 (1988))); S. Rep. No. 100-413, at 15–16 (1988).

Congress has since employed the contributing-factor framework in more than a dozen statutes. Congress used it in 2000 in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, an aviation-safety statute known as "AIR-21." *See* 49 U.S.C. § 42121(b). Two years later, Congress incorporated the AIR-21 provision into SOX. 18 U.S.C. § 1514A(b)(2). More than 10 other statutes—including the FRSA—take the same approach, either by expressly incorporating AIR-21's

standard or by using identical contributing-factor language.[2]

Given the parallel aims and language of the statutes that use the contributing-factor framework, it's common ground that they should be interpreted consistently. *See, e.g.*, Pet. App. at 11a-15a (relying on FRSA case law and holding that because "[t]he relevant statutory language of the SOX and the FRSA is nearly identical," the "articulations of the elements of these claims of these claims must likewise be consistent"); *Lawson v. FMR LLC*, 571 U.S. 429, 434, 457–59 (2014) (reading same term in AIR-21 and SOX "to have similar import" given the "provisions' parallel text and purposes"); *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 263 & n.8 (5th Cir. 2014) (per curiam) (interpreting "'contributing factor' test" in WPA and SOX to mean same thing); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d Cir. 2013) (construing the FRSA and the Energy Reorganization Act "similarly…due to the history surrounding their enactment"); *see also Commc'ns Workers of Am. v. Beck*, 487 U.S. 735, 752–54 (1988)

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[2] *See* National Transit Systems Security Act, 6 U.S.C. § 1142; Consumer Financial Protection Act, 12 U.S.C. § 5567; Criminal Antitrust Anti-Retaliation Act, 15 U.S.C. § 7a-3(b)(2); Consumer Product Safety Improvement Act, 15 U.S.C. § 2087; SOX, 18 U.S.C. § 1514A; Food Safety Modernization Act, 21 U.S.C. § 399d; Taxpayer First Act, 26 U.S.C. § 7623; Patient Protection and Affordable Care Act, 29 U.S.C. § 218c; Anti-Money Laundering Act, 31 U.S.C. § 5323(g)(3)(A); Energy Reorganization Act, 42 U.S.C. § 5851; Seaman's Protection Act, 46 U.S.C. § 2114; FRSA, 49 U.S.C. § 20109; Moving Ahead for Progress in the 21st Century Act, 49 U.S.C. § 30171; Surface Transportation Assistance Act, 49 U.S.C. § 31105; AIR-21, 49 U.S.C. § 42121; Pipeline Safety Improvement Act, 49 U.S.C. § 60129.

(interpreting two provisions from different statutes "in the same manner" "[g]iven the[ir] parallel purpose, structure, and language"); A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 252 (2012) ("Scalia & Garner").

The Court's decision in this case will therefore establish the rules of the road not just for SOX cases, but for the more than a dozen other federal statutes that use the contributing-factor framework.

II. The FRSA's Enactment and Amendments Demonstrate Congress's Aim to Protect the Public Interest by Encouraging Disclosure of Safety and Injury Concerns.

Railroads, railroad workers, and the members of the public they serve are among those sure to be affected by this case. Railroad workers receive whistleblower protection through the FRSA. Like SOX, the FRSA incorporates AIR-21's contributing-factor burden-shifting framework. 49 U.S.C. § 20109(d)(2). The grave dangers that railroads pose to workers and the public alike—dangers exacerbated by a deep-rooted railroad management culture of disciplining and intimidating workers who speak up about safety and injury concerns—motivated Congress to adopt the contributing-factor framework in the FRSA, reducing the showing whistleblowers need to make to prove causation and removing intent from that showing altogether.

Some history again provides necessary context. A pervasive lack of safety has been an enduring problem for our nation's railroads. The railroad business was especially "hazardous at the dawn of the 20th century." *CSX Transp., Inc. v. McBride*, 564 U.S. 685,

691 (2011). "[T]he physical dangers of railroading...resulted in the death or maiming of thousands of workers every year." *Id.* (second alteration in original) (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994)). Astonishingly, railroad workers suffered more than 280,000 casualties "in the year 1908 alone." *Id.*

In light of these extraordinary dangers, for more than a century Congress has taken a keen interest in improving railroad safety. Acquiring accurate and complete information from railroad carriers has been vital to Congress's efforts to tackle the industry's safety problems. To that end, railroads have been subject to accident- and injury-reporting requirements for more than 100 years. *See* Accident Reports Act of 1910, Pub. L. No. 165, 36 Stat. 350 (recodified as amended at 49 U.S.C. §§ 20901–20903).

Building on the Accident Reports Act and other railroad-safety laws passed in the early 20th century, Congress enacted the FRSA in 1970 "to promote safety in all areas of railroad operations and to reduce railroad-related accidents, and to reduce deaths and injuries to persons." Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, § 101, 84 Stat. 971, 971 (codified as amended at 49 U.S.C. § 20101).

Under the FRSA and the Accident Reports Act, railroad carriers must regularly provide the Federal Railroad Administration ("FRA") with information about accidents and injuries, including those affecting railroad employees. *See* 49 U.S.C. § 20901; 49 C.F.R. §§ 225.1–225.41. This information is vital to the FRA's efforts to "develop hazard elimination programs and risk reduction programs that focus on preventing

railroad injuries and accidents." 49 C.F.R. § 225.1. The FRA uses this information to determine how to focus its regulatory efforts and when and where to conduct investigations. *See id.* § 225.31. Reporting-requirement violations can lead to substantial financial penalties. *See id.* § 225.29; 49 U.S.C. §§ 21302, 21304.

Congress amended the FRSA in 1980 after it had become evident that railroads often mistreated workers who spoke out about safety concerns or cooperated with enforcement agencies. *See Consol. Rail Corp. v. United Transp. Union*, 947 F. Supp. 168, 171 (E.D. Pa. 1996) ("After the FRSA's passage,…it came to Congress' attention that railroad workers who complained about safety conditions often suffered harassment, retaliation, and even dismissal."). Congress responded by amending the FRSA to include a whistleblower provision that prohibited railroads from retaliating against employees who reported violations of federal railroad safety laws or took part in proceedings related to the enforcement of these laws. *Id.*; Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, sec. 212(a), 94 Stat. 1811 (codified as amended at 49 U.S.C. § 20109).

Unfortunately, Congress's amendment proved to be ineffective. Deeply entrenched railroad policies and practices limited the new provision's ability to protect employees. Even with the amendment, the industry remained plagued by "substantial underreporting and inaccurate reporting of injury and accident data," as workers continued to forgo reporting safety concerns, including their own on-the-job injuries, due to fear of reprisal and to railroad policies that have a chilling effect. U.S. Gen. Accounting Office, GAO/RCED-89-

109, Railroad Safety: FRA Needs to Correct Deficiencies in Reporting Injuries and Accidents, at 3 (April 1989).

Brazen employer intimidation was responsible for much of the underreporting. As the FRA Administrator explained in 2007 congressional testimony, "harassment and intimidation" are an unpleasant fact of life for railroad workers. *The Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the H. Comm. on Transp. & Infrastructure*, 110th Cong., at 139–40 (Oct. 25, 2007) (Testimony of Joseph H. Boardman) ("2007 Hearing").[3] The harassment and intimidation take a familiar form: workers are disciplined for blowing the whistle on safety violations. *See Pan Am Rys. v. U.S. Dep't of Labor*, 855 F.3d 29, 39 (1st Cir. 2017) ("Pan Am appeared to the ALJ to have a corporate culture more focused on retaliation than on safety: the ALJ found that 99% of injuries at Pan Am that were reportable to the FRA triggered formal charges against the injured employee."). Not surprisingly, then, many railroad employees do not disclose injuries or safety concerns to the railroad "because they wish to avoid potential harassment from management or possible discipline that is sometimes associated with [reporting]." Railroad Accident Reporting, 61 Fed. Reg. 30,940–41 (June 18, 1996).

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[3] *See also* Statement of Joseph H. Boardman, Committee on Transportation and Infrastructure, U.S. House of Representatives, Oct. 25, 2007, https://www.transportation.gov/testimony/impact-railroad-injury-accident-and-discipline-policies-safety-americas-railroads.

But active intimidation was not the only reason for the rampant underreporting. Congress heard that railroads' workplace policies created powerful incentives to underreport safety violations. Policies that are ostensibly meant to address safety problems—for example, tying supervisor compensation to reductions in reported injuries[4]—can "unintentionally inhibit" reporting as well. 2007 Hearing, at 3 (statement of Rep. James R. Oberstar, Comm. Chair); *see Araujo*, 708 F.3d at 159–60 (describing legislative history of 2007 amendments to FRSA and Congressional focus on railroad programs that "*subtly* or overtly intimidate employees from reporting on-the-job injuries" (quoting 2007 Hearing) (emphasis added)). Railroads have also established sweeping and easily violated workplace rules that can be wielded to discourage workers from reporting accidents and injuries—and to punish those who do. *See Smith-Bunge v. Wis. Cent., Ltd.*, 60 F. Supp. 3d 1034, 1041 (D. Minn. 2014) (observing that "[i]f a worker who suffers a subtle injury knows that reporting the injury after 24 hours will result in disciplinary action, including the possibility of an unpaid suspension, his or her incentive to report the injury is chilled").

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[4] *See Araujo*, 708 F.3d at 159 (describing 2007 report of Majority Staff of the House Committee on Transportation & Infrastructure); *see also* Occupational Safety & Health Admin., Employer Safety Incentive and Disincentive Policies and Practices (March 12, 2012), www.osha.gov/laws-regs/standardinterpretations/2012-03-12-0 (listing common employer policies and practices that can discourage employee reports of injuries).

Because the FRSA's 1980 whistleblower amendment failed to protect railroad workers or the public, Congress substantially revised the FRSA's whistleblower provision in 2007. The amendments were meant to "enhance the oversight measures that improve transparency and accountability of the railroad carriers" and "ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers." H.R. Conf. Rep. No. 110-259, at 348 (2007), *reprinted in* 2007 U.S.C.C.A.N. 119, 180–81; *see Pan Am Rys.*, 855 F.3d at 38 ("When Congress amended the FRSA in 2007 to expand anti-retaliation protections and shift enforcement authority from arbitrators to the Department of Labor, it said that it was aiming to address and rectify railroads' history of systematically suppressing employee injury reports through retaliatory harassment and intimidation.").

The FRSA's whistleblower protections now provide that railroad carriers "may not discharge, demote, suspend, reprimand, or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's lawful, good faith" engagement in a protected activity. 49 U.S.C. § 20109(a). The amendments also changed what counts as a protected activity under the statute. Now, employees who notify the railroad of a work-related personal injury, report hazardous safety conditions, or furnish information about accidents that cause injury or property damage are protected from retaliation. *See id.* § 20109(a)-(c) (listing these and other forms of protected activity).

But most significant of all, Congress dramatically altered the substantive legal framework for deciding

FRSA whistleblower claims. As it had done earlier with SOX, Congress specified that FRSA whistleblower actions "shall be governed under the rules and procedures" of AIR-21's two-part contributing-factor burden-shifting framework. *See* 49 U.S.C. 20109(d)(2) & 18 U.S.C. § 1514A(b)(2) (both cross-referencing 49 U.S.C. § 42121(b)).

Congress, courts, and agencies have long recognized that the FRSA's adoption of the contributing-factor framework eliminated the need to prove retaliatory intent as part of an employee's case in chief. *See, e.g.*, *Araujo*, 708 F.3d at 158, 161 & n.7; *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195–96 (9th Cir. 2019); *Petersen v. Union Pac. R.R. Co.*, 2014 WL 6850019, at *2 (A.R.B. Nov. 20, 2014). The statute's "contributing factor" language was meant to enable an employee to prevail on her prima facie case without showing either that the employer acted with an improper state of mind or that her protected conduct was a motivating factor or but-for cause of the employer's adverse action. She simply needed to establish that her protected conduct *contributed* to the employment decision in some way. The ball then moved to the employer's court—via the same-decision defense—to justify the adverse employment action.

But as the Second Circuit did in this case, some courts interpreting the FRSA and analogous whistleblower statutes have ignored the statute's plain language and context and have held that retaliatory intent is an essential component of an FRSA claim. *See, e.g.*, *Tompkins v. Metro-N. Commuter R.R. Co.*, 983 F.3d 74, 82 (2d Cir. 2020); *Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir. 2018); *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791

(8th Cir. 2014); *see also* Pet. App. 14a n.7 (detailing circuit split for FRSA claims on this issue). As explained below, these decisions find no purchase in the FRSA, SOX, or other statutes governed by the contributing-factor framework.

III. The Text, Structure, History, and Purpose of the FRSA and Other Statutes that Use the Contributing-Factor Framework Show that Employees Need Not Prove Retaliatory Intent.

The Second Circuit's need-to-prove-intent rule for SOX and the FRSA is an impermissible extra-textual addition to these statutes. The text, structure, history, and purpose of these and other statutes that use the contributing-factor framework show that employees need not prove retaliatory intent.

Start with the text and structure of these statutes. Because "[c]ontext is a primary determinant of meaning," Scalia & Garner, at 167, "[s]tatutory construction…is a holistic endeavor," *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988). In ascertaining a statute's "plain meaning," courts therefore "must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). Close attention to the language and design of these statutes compels the conclusion that proof of retaliatory intent is not necessary to prevail in whistleblower claims governed by the contributing-factor framework.

The text and structure of SOX and the FRSA are nearly identical. First, they provide that covered employers may not "discharge, demote, suspend,…or

in any other manner discriminate against an employee" because of protected activity. 49 U.S.C. § 20109(a); 18 U.S.C. § 1514A(a). Next, they enumerate the activities that are protected. *See* 49 U.S.C. § 20109(a)(1)-(7) & (b)-(c); 18 U.S.C. § 1514A(a)(1)-(2). Then, they tell courts and agencies how to decide whether these provisions have been violated. *See* 49 U.S.C. § 20109(d)(2); 18 U.S.C. § 1514A(2). They explain that this decision "shall be governed under the rules and procedures" and "the legal burdens of proof set forth in section 42121(b)" of AIR-21. 49 U.S.C. § 20109(d)(2); 18 U.S.C. § 1514A(2). To correctly analyze SOX and other contributing-factor statutes, courts must read their substantive provisions in conjunction with their enforcement provisions. *See Lawson*, 571 U.S. at 440–43 (reading substantive, enforcement, and remedial provisions of § 1514A together to determine meaning of "employee").

Section 42121(b) sets forth two burdens of proof. An employee must first establish four things by a preponderance of the evidence: that (1) he engaged in a protected activity; (2) the employer knew or suspected that he engaged in a protected activity; (3) he suffered an adverse personnel action; and (4) the protected activity was a contributing factor in the personnel action. 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. §§ 1980.104(e)(2), 1982.104(e)(2); Pet. App. 10a. If the employee satisfies these requirements, then the burden shifts to the employer to demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. §§ 1980.104(e)(5), 1982.104(e)(4).

The statutory text of SOX and the FRSA make plain that an employer's state of mind is not part of an employee's case. The statutes specify both the causal standard and causal components of claims arising under these statutes: employees must show only that their "[protected] behavior…was a contributing factor in the unfavorable personnel action." 49 U.S.C. § 42121(b)(2)(B)(iii). The causal connection that employees must establish occupies the space between their *protected conduct* and the adverse action, *not* between the adverse action and their *employer's state of mind*. *Tamosaitis v. URS Inc.*, 781 F.3d 468, 482 (9th Cir. 2015). The FRSA, SOX, and AIR-21 explicitly establish the causal showing that an employee must make, and an employer's retaliatory intent is nowhere to be found.

A text-first approach shines a clear light here. But the history and purpose animating statutes using the contributing-factor framework only make that light brighter. *See Lawson*, 571 U.S. at 447 ("Our textual analysis of § 1514A fits the provision's purpose."). Omitting a proof-of-motive requirement in statutes employing the contributing-factor standard was no oversight. Just the opposite: the standard grew out of Congress's express efforts to *relieve* plaintiffs of the burden of proving illicit motive. With the contributing-factor language that it introduced in the WPA, Congress "specifically intended to overrule," 135 Cong. Rec. 5033 (1989) (Explanatory Statement on sec. 20), decisions that had interpreted the CSRA as requiring plaintiffs to prove that their employer's "motives in taking the retaliatory action were inappropriate," S. Rep. No. 100-413, at 13–15 (1988).

Soon after the WPA was enacted, courts and agencies recognized that the statute's contributing-factor framework enabled plaintiffs to prevail without proving motive or intent. *See, e.g.*, *Marano*, 2 F.3d at 1141; *Russell v. Dep't of Justice*, 76 M.S.P.R. 317, 323 (M.S.P.B. 1997) (citing *Marano*, 2 F.3d at 1141). It was therefore well-established by the time that Congress included the contributing-factor framework in AIR-21 in 2000, and incorporated AIR-21 into SOX in 2002 and the FRSA in 2007, that whistleblower claims analyzed under this framework did not require proof of improper motive or intent. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978). "So, too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Id.* at 581. There is every reason to conclude that Congress was aware that whistleblower claims brought under the contributing-factor framework did not require proof of motive to establish causation when it adopted that framework for SOX, the FRSA, and other related statutes.

It's not difficult to understand why Congress did not make retaliatory intent or animus part of whistleblower claims brought under the FRSA and other statutes that use the contributing-factor framework. The ultimate concern of these statutes is not the mindsets of employers. *Menendez v. Halliburton, Inc.*, 2011 WL 4915750, at *20 (A.R.B.

Sept. 13, 2011) ("The statute is designed to address (and remedy) the effect of retaliation against whistleblowers, not the motivation of the employer."). Congress did not enact the whistleblower provisions of these statutes to protect employees from status-based biases and stereotypes in the workplace, as it did with Title VII and many other employment-discrimination laws.

Take the FRSA as an example. Congress's central concern was making the nation's railroads safer—for railroaders and the public alike.[5] And it understood that it could achieve that goal only if railroad employees felt safe coming forward with information about their injuries and safety concerns.

Congress was acutely aware that railroaders had long been discouraged from blowing the whistle on unsafe practices. Workers often faced intimidation and harassment from superiors who, it could well be said, acted with bad motives. But bad motives were not the only things employees ran up against. Congress knew that many policies, practices, and compensation-incentive structures in the railroad business "*unintentionally* inhibited" reporting as well. 2007 Hearing, at 3 (statement of Rep. James R. Oberstar, Comm. Chair). Seeking to put an end to industry practices that intentionally *and* unintentionally lead to underreporting, it is no surprise that Congress opted for a whistleblower

[5] As recent events confirm, that concern is no less pressing today than it was 100 years ago. *See Mallory v. Norfolk S. Ry. Co.*, No. 21-1168, slip op. at 1 & n.1 (2023) (discussing February 2023 derailment of dozens of train cars carrying hazardous materials in East Palestine, Ohio).

provision that does not require proof of retaliatory intent.[6]

Adding an extra-textual motive or intent requirement would directly frustrate Congress's goal of protecting railroad workers—and ultimately the public. Rail workers usually aren't in the room when their employers respond to their safety disclosures. A rational worker, unsure of his employer's motives and his ability to prove them—and therefore the strength of his legal shield—might well be wise to simply keep his mouth shut. He'd keep his livelihood. But at what cost? With potentially dangerous hazards going unreported, it's the rest of us who'd stand to suffer. These are precisely the incentives and conditions that Congress sought to eradicate by using the contributing-factor framework.

The same logic applies to SOX and the other contributing-factor statutes. Congress reserves the contributing-factor framework for financial, transportation, energy, and other industries that pose significant dangers to the public. *See supra* n.2. These sensitive industries require careful regulation to ensure the safety and well-being both of workers and the public. Because acquiring information about

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[6] Congress incorporated the contributing-factor framework into SOX for similar reasons. "Of particular concern to Congress" in passing SOX "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." *Lawson*, 571 U.S. at 435 (quoting S. Rep. No. 107-146, at 2 (2002) (cleaned up)). That code of silence had its roots in an "incentive system that has been set up that encourages accountants and lawyers who come across fraud in their work to remain silent." *Id.* (quoting S. Rep. No. 107-146, at 20–21 (2002)).

potential fraud and safety violations is necessary to achieve these purposes, and because workers are often the best-positioned to have access to this information, *Lawson*, 571 U.S. at 435, Congress has long understood that these ends can be met only by encouraging workers to disclose this information and by protecting them when they do, *see id.* at 447 ("It is common ground that Congress installed whistleblower protection in the Sarbanes-Oxley Act as one means to ward off another Enron debacle.").

IV. The Second Circuit Ignored the Plain Text of SOX and Other Statutes that Use the Contributing-Factor Framework.

In holding that whistleblowers must prove retaliatory intent under SOX, the Second Circuit ignored the text and context of that statute and others that use the contributing-factor framework. The court arrived at its conclusion based on what it took to be a plain-meaning analysis. *See* Pet. App. 8a–11a. But that analysis was incomplete and founded on several false and unsupported assumptions.

The court focused its textual analysis exclusively on section 1514A's general, substantive provision. Because that provision uses the word "discriminate" and prohibits companies from "discriminat[ing] against" employees "because of" their protected activity, the court reasoned that employees covered by SOX must prove "retaliatory intent [a]s an element of a section 1514A claim." *See id.* 8a–9a (citing 18 U.S.C. § 1514A(a)). Courts that have concluded that railroad employees must prove retaliatory intent under the FRSA have taken the same flawed approach, beginning and ending their analysis with the term

"discriminate" in that statute. *See, e.g.*, *Kuduk*, 768 F.3d at 791; *Armstrong*, 880 F.3d at 382; *Tompkins*, 983 F.3d at 82.

It's not hard to see the flaws in this reasoning. "[S]tatutes must be read as a whole." *Guam v. United States*, 141 S. Ct. 1608, 1613 (2021) (cleaned up). The Second Circuit did not do that. It read SOX with a kind of textual tunnel vision, looking only at section 1514A's general prohibition against retaliation while entirely ignoring the statutory provisions that expressly specify what parties must prove for SOX whistleblower claims. Those provisions make clear that retaliatory intent is not an element of a plaintiff's claim. The plain terms of the statute require proof only that the employee's protected "behavior…was a contributing factor in the unfavorable personnel action." 49 U.S.C. § 42121(b)(2)(B)(iii) (cross-referenced in 18 U.S.C. § 1514A(b)(2)). By adding retaliatory intent to the showing that employees must make, the Second Circuit impermissibly rewrote the statute. *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 774 (2015) ("The problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law…. That is Congress's province.").

That is not the only error in the Second Circuit's analysis. The court's understanding of the term "discriminate" and its belief that proving discrimination necessarily requires showing intent or motive are equally flawed. The court concluded that discrimination, at bottom, flows from a prejudicial mental state. "To 'discriminate,'" the court held, "means to act on the basis of prejudice, which requires a conscious decision to act based on a protected

characteristic or action." Pet. App. 9a (cleaned up). Actions are therefore "discriminatory…when they are based on the employer's conscious disfavor," "motive," or "animus." *Id.* at 10a, 13a–15a.

No doubt much discrimination takes this form. But the concept of discrimination in both law and life is far broader than this. The "normal definition" of "'discrimination' is just "differential treatment." *Babb v. Wilkie*, 140 S. Ct. 1168, 1173 (2020) (quoting *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005)); *see Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1740 (2020).

The law reflects this normal understanding. The lion's share of anti-discrimination law focuses not on intent or mental states, but on outward differences in how people are—or must be—treated. Disparate-impact claims do not require proof of intent; they focus on "the consequences of actions." *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 533 (2015). Neither do harassment or hostile-work-environment claims require proof of a discriminatory mental state. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65–68 (1986) (accepting EEOC's definition of "sexual harassment" as conduct that "has the purpose *or effect* of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" (quoting 29 C.F.R. § 1604.11(a)(3) (emphasis added))). Nor, for that matter, do accommodation claims. The ADA, for instance, "requires preferences in the form of 'reasonable accommodations' that are needed for those with disabilities to obtain the *same* workplace opportunities that those without disabilities

automatically enjoy." *US Airways, Inc. v. Barnett*, 535 U.S. 391, 397 (2002). It's well-established that employers that fail to accommodate disabled employees cannot avoid liability by saying that they did not have an improper motive; that's because the ADA "imposes an affirmative obligation to provide reasonable accommodation to disabled employees." *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 646 n.9 (1st Cir. 2000). "[P]roof of discriminatory intent" is not required for failure-to-accommodate claims. *Withers v. Johnson*, 763 F.3d 998, 1003 (8th Cir. 2014).

The FRSA, SOX, and other statutes that use the contributing-factor framework embrace this normal understanding of discrimination, too. Not only do they prohibit "harassment." *See* 49 U.S.C. § 20109(g); 18 U.S.C. § 1514A(a). They also focus on the end results—"discharge, demot[ion], suspen[sion], threat[s], [and] harass[ment]," 18 U.S.C. § 1514A(a)—of the employer's response to the protected activity. To "discriminate" under these statutes means nothing more than doing these things to employees *because of* that activity. *See* 49 U.S.C. § 20109(g) (providing that "discharge, demot[ion], [and] suspen[sion]" are forms of "discrimination"); 18 U.S.C. § 1514A(a) (same). To "discriminate," in other words, means what it normally does: treating someone who engages in protected activity differently than someone who doesn't. *See* 49 U.S.C. § 42121(b)(2)(B)(iv) (providing that employers may be held liable only if they fail to prove that they would have taken the same action had the protected activity not occurred).

This interpretation fits the structure and purpose of these statutes. Their central aim, again, is to

protect workers and the public in industries where fraud and safety violations can lead to devastating, even lethal results. That distinguishes these statutes from Title VII and other employment laws that are principally concerned with eliminating status-based bias and prejudice from the workplace. Comparing the structure of statutes that use the contributing-factor framework with those that use the motivating-factor framework illustrates the point. When an employee proves that her race or sex was a motivating factor in her employer's decision to fire her, the employer cannot escape liability *even if* it can show that it would have fired her for independent reasons. *See* 42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(B); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 348–49 (2013). That makes perfect sense: any other design would permit employers to get away with discrimination and allow prejudice to continue to infect employers' decisions. The contributing-factor burden-shifting framework is different. Employers have a full defense to liability when they can show that they would have taken the adverse action for reasons unrelated to the protected activity *even when* employees prove that the protected activity was a contributing factor in the adverse action. *See* 49 U.S.C. § 42121(b)(2)(B)(iv). If protecting employees from bias and animus were the goal of whistleblower statutes that use the contributing-factor framework, it would be passing strange for Congress to let employers off the hook when it was proven that their decision was so tainted.

These differences in the text, structure, and purpose of these statutes necessarily lead to different interpretations. "When conducting statutory interpretation, [courts] 'must be careful not to apply

rules applicable under one statute to a different statute without careful and critical examination.'" *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 174 (2009) (quoting *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 393 (2008)). The Second Circuit did not engage in that careful and critical examination here. In concluding that employees must show retaliatory intent—understood variously as "animus," "motive," or conscious disfavor," Pet. App. At 10a, 13a–15a—"because of" whistleblowing, the court found guidance in *Vega v. Hempstead Union Free School District*, 801 F.3d 72 (2d Cir. 2015), a Title VII case involving the motivating-factor standard. After explaining that under this standard "an action is 'because of' a plaintiff's protected characteristic where it was a substantial or motivating factor" in the employer's decision to take the action, *see* Pet. 10a (quoting *Vega*, 801 F.3d at 85 (cleaned up)), the court held that "discriminatory action 'because of' whistleblowing therefore necessarily requires retaliatory intent—*i.e.*, that the employer's adverse actions was *motivated* by the employee's whistleblowing," *id.* (emphasis added).[7]

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[7] The Second Circuit is not alone in improperly reading motive and the motivating-factor standard into SOX and analogous statutes. The court drew support from two FRSA cases that have made the same error. *See* Pet. App. 13a–15a (citing *Tompkins*, 983 F.3d at 82; *Armstrong*, 880 F.3d at 382 ("[W]hile a FRSA plaintiff need not show that retaliation was the *sole* motivating factor in the adverse decision, the statutory text requires a showing that retaliation was *a* motivating factor.")). By reading motive, intent, and the motivating-factor into the FRSA and SOX, these courts effectively read the contributing-factor standard right out of those statutes.

The Second Circuit's reliance on case law interpreting Title VII's motivating-factor standard led it astray. Motive and the motivating-factor standard travel together. *See, e.g.*, *Abercrombie & Fitch Stores, Inc.*, 575 U.S. at 773–74 (interpreting Title VII's motivating-factor standard to involve proof of motive); *see also Staub v. Proctor Hosp.*, 562 U.S. 411, 424 (2011) (Alito, J., concurring in the judgment) (same). But SOX, of course, does not turn on showing that the protected activity was a *motivating factor* in the adverse action. SOX "relaxes" the causation standard for whistleblower claims, *see Abercrombie & Fitch Stores, Inc.*, 575 U.S. at 772–73, and specifies that an employer's action was "because of" whistleblowing when the protected activity was a *contributing factor* in the adverse action, 49 U.S.C. § 42121(b)(2)(B)(iii)—a standard that was "specifically intended to overrule existing case law" requiring "a whistleblower to prove that his protected activity was a 'motivating' factor" or that his employer had "a retaliatory motive," *Marano*, 2 F.3d at 1140–41 (cleaned up). The upshot is straightforward: the contributing-factor standard and a *lack* of motive and intent travel together, too.

CONCLUSION

The Court should reverse the Second Circuit's judgment and hold that employees need not prove retaliatory intent in SOX and other whistleblower actions based on the contributing-factor framework.

Respectfully submitted,

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