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 FOR RESPONDENTS

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QUESTION PRESENTED

The Sarbanes-Oxley Act "protect[s] against retaliation in fraud cases" by prohibiting employers from "discharg[ing] … or in any other manner discriminat[ing] against an employee" "because of" protected activity. 18 U.S.C. § 1514A(a). To establish a SOX whistleblower claim, a plaintiff must show that his protected activity was a "contributing factor" to the adverse employment action he suffered. *Id.* § 1514A(b)(2)(C) (incorporating 49 U.S.C. § 42121(b)). The district court in this case refused to instruct the jury that retaliatory intent was an element of plaintiff's case, and instead instructed the jury that a plaintiff need show only that his protected activity "tended to affect in any way" the employer's decision. The court of appeals held that the absence of a retaliatory intent instruction and the inclusion of the "tended to affect in any way" language constituted legal error.

The question presented in the petition is whether the court of appeals correctly held that a plaintiff must prove retaliatory intent to prevail on a retaliation claim under SOX.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

1. All parties to this proceeding are named in the caption.

2. UBS AG is wholly owned by UBS Group AG, a publicly traded corporation, and no publicly held corporation holds 10 percent or more of UBS Group AG stock. UBS Group AG is a publicly owned corporation and does not have a parent company.

UBS Securities LLC's corporate parents are UBS Americas Holding LLC and UBS Americas Inc. UBS Americas Inc. is wholly owned by UBS Americas Holding LLC. UBS Americas Holding LLC is a wholly owned subsidiary of UBS AG. No publicly held corporation other than UBS AG directly or indirectly owns 10 percent or more of the stock of UBS Securities LLC.

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BRIEF FOR RESPONDENTS

Respondents UBS Securities LLC and UBS AG respectfully submit that the judgment below should be affirmed.

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in the appendix to this brief. App. 1a-25a.

STATEMENT OF THE CASE

It has been black-letter law for decades that a plaintiff in a federal disparate treatment or retaliation case must demonstrate discriminatory intent. Congress and this Court have at times refined the requisite degree of causal nexus between the forbidden consideration and the adverse employment action. But "[t]here is simply no escaping the role intent plays" in proving discrimination. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1742 (2020).

Everyone agrees that the Sarbanes-Oxley Act of 2002 ("SOX") prohibits publicly traded companies from retaliating against employees who have reported certain unlawful conduct. Retaliation is "a form of 'discrimination,'" which means it "is, by definition, an intentional act." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005). Indeed, the statute here makes it unlawful for employers to "discriminate … because of" protected activity. Leaving aside disparate-impact theory, which has no analog in the retaliation context, this Court has consistently construed comparable "discrimination" prohibitions to require proof of intent. As this Court has already explained,

SOX does not prohibit all adverse employment actions—rather, only those taken for "retaliatory reasons." *Lawson v. FMR LLC*, 571 U.S. 429, 442 (2014). The judgment below reflects this settled understanding.

In contravention of both that settled understanding and common sense, however, petitioner urges the Court to eliminate the requirement that a plaintiff alleging retaliation must show that his employer acted with retaliatory intent. Petitioner relies primarily on SOX's burden-allocation framework, incorporated from a different statute, which reduces the degree of causal nexus necessary to prove a "violation" but precludes any "[r]elief" if the employer demonstrates by clear and convincing evidence that the protected activity was not the but-for cause of the adverse action. *See* 49 U.S.C. § 42121(b)(2)(B) (incorporated into SOX by 18 U.S.C. § 1514A(b)(2)(C)). But those burden-allocation provisions address *causation*, not intent, and say nothing about requiring defendants to disprove intent. On the contrary, they confirm that it remains a plaintiff's burden to prove a "violation" of the substantive prohibition against discrimination, which requires a showing of intent.

In lieu of the well-established meaning of the statutory text, petitioner asks the Court to rely on assertions by a handful of members of Congress and a Federal Circuit decision addressing a different statute, the Whistleblower Protection Act of 1989 (the "WPA"), which enhanced civil service protections for federal government employees. But the text of the WPA is materially different from SOX. While SOX prohibits only "discriminat[ion] … because of" protected activity, the WPA does *not* require "discrimination," and Congress *deleted* language requiring a plaintiff to

prove that adverse employment action was taken "as a reprisal for" protected activity. *See* Pub. L. No. 101-12, § 4, 103 Stat. 16, 32. There is no basis for crediting the WPA's legislative history and judicial interpretation over SOX's materially different plain language.

A. Statutory Framework

SOX prohibits publicly traded companies from retaliating against employees who have reported what they reasonably believe to be instances of criminal fraud or securities law violations. Specifically, SOX's anti-retaliation provision directs that no employer 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 act done by the employee" that constitutes protected activity under the statute. 18 U.S.C. § 1514A(a). These claims—allegations of "discharge or other discrimination … in violation of subsection (a)"—must first be filed with the Department of Labor, but after a waiting period the plaintiff may sue in federal court. *Id.* § 1514A(b)(1).

Like SOX, the Dodd-Frank Act provides that "[n]o employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any" act that qualifies as protected activity under that statute. 15 U.S.C. § 78u-6(h)(1)(A). This Court has indicated that a Dodd-Frank retaliation claim requires the plaintiff to demonstrate intent to retaliate. *Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 779 (2018).

SOX also incorporates portions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st

Century ("AIR-21"), Pub. L. No. 106-181, 114 Stat. 61 (2000), codified at 49 U.S.C. § 42121. *See* 18 U.S.C. § 1514A(b)(2)(C). As relevant here, AIR-21 requires employees to prove that their protected activity was a "contributing factor" in the "unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(iii). If an employee proves a violation, the employer may still avoid being ordered to provide "[r]elief" if it demonstrates "by clear and convincing evidence" that it "would have taken the same unfavorable personnel action in the absence of" the protected activity. *Id.* § 42121(b)(2)(B)(iv). AIR-21 thus specifies the degree of causal nexus between the forbidden consideration and the adverse employment action that the plaintiff needs to prove, but permits employers to escape any remedial obligations if they can clearly and convincingly prove a lack of but-for causation.

Designed to protect "aviation employees from retaliation by their employers," AIR-21 consciously employed "language … similar to whistleblower protection laws that cover employees in other industries, such as nuclear energy." S. Rep. No. 105-278, at 22 (1998). The Energy Reorganization Act ("ERA") is the law that "cover[s] employees" in the "nuclear energy" industry. *See* 42 U.S.C. § 5851. Like AIR-21 and SOX, the ERA states that employers may not "discharge any employee or otherwise *discriminate* against any employee" "because the employee" engages in protected activity. *Id.* § 5851(a)(1) (emphasis added).

B. Factual and Procedural Background

1. UBS originally hired petitioner in 2007 as a research strategist supporting its commercial mortgage-

backed securities ("CMBS") business. C.A. J.A.184. In 2009, UBS decided to "reduce its presence" in the CMBS market, and laid petitioner off. C.A. J.A.184-85. In early 2011, UBS rehired petitioner as its only CMBS strategist; his supervisor was Michael Schumacher. J.A.22; C.A. J.A.193. As a strategist, petitioner published research about the CMBS market and met with clients, but did not engage in trading or selling CMBS. J.A.72.

Because petitioner's strategist position did not directly generate revenue, the position was merely "nice to have" and was "by no means necessary" to run a successful CMBS business. J.A.72. "[M]any, many businesses and many, many players in the CMBS space are very successful and they do not have the benefit of research" published by a CMBS strategist. *Id.*

2. UBS experienced major financial difficulties in 2011. As the UBS CEO explained in a 2011 email to all UBS employees, the financial industry was "in the midst of a massive transformation" caused by "a fundamentally changed market environment," "more cautious clients," "debt reduction," and "more stringent regulatory rules and extremely high capital requirements." J.A.159. These market-wide difficulties were compounded by a $2 billion loss on a UBS trading desk in London in 2011. J.A.53.

Because of these extraordinary challenges, UBS senior management was forced to reduce costs through a series of reductions in force, including one in early 2012. J.A.52; Pet. App. 5a. Management determined that 129 positions would be eliminated from the Fixed Income, Currencies, and Commodities ("FICC") division, including seven from FICC Research, petitioner's unit. J.A.169-70.

Lawrence Hatheway, the Global Head of Macro Strategy and Chief Economist for UBS's Investment Bank, learned around January 13, 2012 that he would be required to select the seven positions to eliminate from FICC Research. J.A.95-96, 169-70. One of the positions he selected was the research group's sole CMBS strategist position. J.A.96-97.

It is undisputed that Hatheway, who had no knowledge of any alleged whistleblowing, J.A.104, made the decision to eliminate petitioner's position. *See, e.g.*, J.A.101 (Hatheway testifying that it was his "call"); J.A.47 (Schumacher testifying that he "didn't finally select anyone for termination"). And as the district court ruled, petitioner forfeited any reliance on a cat's-paw theory—i.e., an argument that the allegedly improper motivation of a non-decisionmaker could be imputed to the decisionmaker. *See* J.A.140 (district court refusing "cat's paw instruction" because petitioner's counsel did not timely raise it).

Hatheway decided to eliminate petitioner's position based on his understanding that CMBS "would be a lower priority area for the firm" going forward and his expectation that CMBS was going to face economic headwinds. J.A.96-97. UBS had "decided to pull back" from CMBS "because it was not getting the results that it desired for the money that it was spending." J.A.116. By 2011, UBS was "[c]learly not" planning to emphasize or invest more in the CMBS business, J.A.75, which meant that it did not make sense to retain a CMBS strategist. A "CMBS strategist is very important" "[i]f you're trying to build a top five business." J.A.119. Otherwise, it is merely "nice to have." *Id.* Indeed, petitioner agreed with Hatheway's forecast, writing that CMBS would likely "underperform" going forward and would have a "shrinking

role." C.A. J.A.1469, 1484; *see also* C.A. J.A.1449 ("[I]f you've talked with me at all over the past two months, you'll know I'm bearish."); C.A. J.A.1484 ("[D]uring bouts of risk aversion, CMBS will likely underperform ….").

Growth in UBS's CMBS business "certainly stopped" after May 2011, J.A.73-74, and the business's "[c]urrent situation [wa]s difficult to sustain," J.A.166. Indeed, CMBS headcount at UBS was "roughly flat over 2012" and "significantly smaller" by 2013. J.A.92-93.

3. Hatheway's decision to eliminate petitioner's position met opposition. Hatheway spoke about his decision with Kenneth Cohen, the head of the CMBS business, who was "not happy" about the idea of "eliminating [petitioner's] position." J.A.104.

Similarly, Schumacher (petitioner's immediate boss) "opposed" eliminating petitioner's position. J.A.105. In fact, Schumacher tried to keep both petitioner and Shumin Li (another strategist, whose employment also ultimately was terminated in the reduction in force) at UBS. Schumacher proposed that UBS transfer petitioner to a desk analyst position in the CMBS trading unit. J.A.151. This suggestion was "certainly a vote of confidence" in petitioner. J.A.100.

Ultimately, however, the CMBS business was unable to take petitioner on as a desk analyst. Pet. App. 5a. Schumacher acknowledged that if UBS could not move petitioner to the CMBS trading unit, Hatheway would need to make the "tough call" to eliminate the CMBS strategist position. J.A.151. UBS terminated petitioner's employment in February 2012. Pet. App. 5a.

Petitioner was not the only CMBS strategist on Wall Street laid off around this time; Barclays also terminated a CMBS strategist. J.A.88, 172. When a UBS employee inquired about hiring her at UBS, the head of UBS's CMBS trading desk responded that "[u]nfortunately" there was "no room at the inn." J.A.172. UBS never hired a replacement CMBS strategist. J.A.86-87, 92.

C. Proceedings Below

In 2014, petitioner sued UBS under SOX, claiming that Cohen and a colleague improperly pressured him to skew his research and to publish reports to support their business strategies. Pet. App. 3a, 6a. Petitioner testified that he told Schumacher (but not Hatheway) about this purported pressure from the CMBS trading desk, and alleged that he was terminated because of those complaints. *Id.* at 4a.

At trial, the district court, over UBS's objections, refused to instruct the jury that petitioner must prove that UBS intentionally retaliated against him. Pet. App. 6a. The jury instructions never mentioned intent at all. *Id.* Moreover, again over UBS's objections, the district court articulated petitioner's burden to the jury by directing 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 plaintiff's employment." *Id.* (emphasis added).

On December 21, 2017, the jury returned a verdict in petitioner's favor and an advisory verdict on damages. Pet. App. 7a; *see also* D.C. ECF 250. The district court entered final judgment in petitioner's favor. Pet. App. 7a.

UBS appealed, arguing among other things that the district court erred by not instructing the jury on retaliatory intent and by directing the jury to find for petitioner if his protected activity "tended to affect in any way UBS's decision to terminate" him. C.A. ECF 49 at 31-37.

The Second Circuit "vacate[d] the judgment [below] and remand[ed] for a new trial on liability." Pet. App. 8a. In a unanimous opinion written by Judge Park, the Second Circuit held that "retaliatory intent is an element of a section 1514A claim." *Id.* As the court explained, "[t]he unambiguous, ordinary meaning of section 1514A's statutory language requires retaliatory intent." Pet. App. 9a. Because the statute's text explicitly "prohibits discriminatory actions caused by … whistleblowing," and because "actions are discriminatory when they are based on the employer's conscious disfavor of an employee for whistleblowing," there must be a showing of "retaliatory intent." Pet. App. 10a (brackets and quotation marks omitted). The jury instructions were thus legally erroneous because the "explanation of the contributing factor element fail[ed] to account for the statute's explicit requirement that the employer's conduct be 'discriminat[ory].'" Pet. App. 10a-11a (brackets in original).

The Second Circuit also held that the "contributing factor" instruction given to the jury was "inadequa[te]" in two other ways. Pet. App. 11a n.4. First, by defining "contributing factor" as something that tended to affect "in any way" UBS's decision to terminate petitioner's employment, the instruction improperly permitted the jury to find a violation even if petitioner's "whistleblowing activity" caused him to be "*in-*

sulated from a termination to which he would otherwise have been subjected sooner." *Id.* (emphasis in original). Second, by asking whether his alleged whistleblowing "tended to affect" UBS's decision in any way, the instruction erroneously allowed the jury to "look beyond whether the whistleblowing activity *actually* caused the termination" and instead consider "whether it was *the sort of behavior* that would *tend to affect* a termination decision." *Id.* (emphases in original).

The Second Circuit concluded that the district court's failure to instruct the jury properly was not harmless. *See* Pet. App. 15a-17a. As it recognized, "even though the jury found that [petitioner's] whistleblowing was a contributing factor to his termination," there was no way to determine whether it "would have found that UBS acted with retaliatory intent." Pet. App. 17a. Accordingly, the Second Circuit vacated the judgment and remanded for a new trial. *Id.*

The Second Circuit denied without written opinion petitioner's request for panel rehearing and rehearing en banc. Pet. App. 18a.

SUMMARY OF ARGUMENT

I. The plain language of Section 1514A of the Sarbanes-Oxley Act requires a plaintiff to prove retaliatory intent.

A. SOX prohibits "discriminat[ion] … because of" protected activity. 18 U.S.C. § 1514A(a). This language is not unique to SOX. Interpreting statutes that use that exact formulation or indistinguishable language, this Court has consistently held that a plaintiff must show that his employer *intended* to

treat him differently on account of his protected characteristic or protected activity. This settled understanding is consistent with background principles of tort law, under which intent and causation have different and independently important roles.

B. Nothing about the AIR-21 burden-allocation framework modifies the intent requirement embodied in SOX's substantive prohibition. Under AIR-21 it is plaintiff's burden to prove the "unfavorable personnel action alleged in the complaint," 49 U.S.C. § 42121(b)(2)(B)(iii), which in SOX is the "discharge or other *discrimination … in violation of subsection (a)*" of Section 1514A, 18 U.S.C. § 1514A(b)(1) (emphasis added). The burden-allocation provisions address causation, not intent. The contributing-factor standard is simply "a rule that establishes the causation standard for proving a violation defined elsewhere." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 355 (2013). The employer's affirmative defense similarly concerns causation, not intent.

C. Petitioner cannot satisfy his heavy burden of showing that Congress sub silentio eliminated the intent requirement that is a long-established feature of the statutory language reiterated in SOX. Petitioner attempts to erase discrimination from SOX's text, claiming that retaliatory "discharge" does not require discrimination. But this Court's precedents preclude that interpretation, which also contravenes the clear statutory text: to be actionable, discharge must be a "manner" of discriminating. Unable to avoid the word "discriminate," petitioner next tries to redefine it to excise intent, but that argument founders on decades of this Court's precedents to the contrary. Petitioner's contention that Congress would have used the word "intent" or some form of "motivate" if plaintiffs were

required to prove intent likewise ignores those precedents and the settled understanding that intent is part and parcel of discrimination. Finally, AIR-21's but-for causation defense is not a substitute for intent. But-for causation can be present without intent—and vice versa.

II. The Whistleblower Protection Act of 1989 cannot override the settled understanding that the terms employed in SOX require proof of intent.

A. SOX and the WPA are materially different: unlike SOX, the WPA does not proscribe *discrimination* based on protected activity. If Congress dispensed with intent in the WPA's whistleblower provision, it did so by deleting the phrase "as a reprisal for" and by omitting "discriminat[ion]," not by introducing the "contributing factor" causation standard. Moreover, SOX's burden-allocation framework was taken not from the WPA but from AIR-21, which in turn was modeled on the ERA, which has been understood to require retaliatory intent. It is unsurprising that SOX and the WPA have different elements, as they operate in very different contexts: SOX applies to private-sector companies for whom employment typically is at-will, whereas the WPA applies to federal government employees who enjoy significant civil service protections.

B. The legislative history of the WPA is irrelevant because the language of SOX, a wholly different statute, is clear. In any event, petitioner offers the weakest type of legislative history: statements by individual representatives. Regardless, at best the legislative history indicates that deletion of "as a reprisal for" erased the intent requirement from the previous statutory text.

C. *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), is also unavailing. Far from authoritative, it is a thirty-year-old opinion that interprets the WPA (not SOX), and in fact relies on the deletion of "as a reprisal for" in stating that a plaintiff need not prove intent.

III. No deference is due to the Labor Department's Administrative Review Board ("ARB"). Under any view of *Chevron*, the Labor Department's interpretations of SOX are not entitled to deference because Congress delegated to the SEC, not the Labor Department, the authority "'to make rules carrying the force of law.'" *Lawson v. FMR LLC*, 571 U.S. 429, 476 (2014) (Sotomayor, J., dissenting) (citation omitted). The "muscular scheme of judicial review" of SOX confirms that Congress wanted "federal courts, and not the Secretary of Labor," to resolve any ambiguities. *Id.* at 478. Finally, the Secretary of Labor "has explicitly vested any policymaking authority he may have with respect to § 1514A in the Occupational Safety and Health Administration (OSHA)," not the ARB. *Id.*

None of this is altered by the fact that the AIR-21 burden-allocation framework applies in agency adjudications. SOX's intent requirement is a function of the substantive prohibition of discrimination, not the procedural AIR-21 provisions that are incorporated into SOX by reference. Even if deference were appropriate for some ARB decisions, it would be unwarranted here because the statutory language is clear and the ARB has taken inconsistent positions on the issue without attempting to justify its change in position.

IV. The judgment below should also be affirmed on the alternative ground that the jury instruction on

the "contributing factor" standard was "inadequa[te]" in multiple ways. Pet. App. 11a n.4. Petitioner has failed to challenge those holdings, which are independent bases for affirmance.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE SARBANES-OXLEY ACT REQUIRES A PLAINTIFF TO PROVE RETALIATORY INTENT.

SOX proscribes retaliation—i.e., intentional discrimination on the basis of protected activity. Specifically, SOX prohibits employers from "discharg[ing] … or in any other manner *discriminat[ing]* against an employee in the terms and conditions of employment because of" protected activity. 18 U.S.C. § 1514A(a) (emphasis added). Construing a constellation of federal antidiscrimination and retaliation statutes over many decades, this Court has repeatedly held that Congress's reference to "discriminat[ion] … because of" a protected status or activity requires a plaintiff to prove discriminatory intent. This long-established judicial understanding of SOX's familiar statutory language is entirely consistent with principles of tort law, which inform this Court's interpretation of the discrimination laws. Far from eliminating a plaintiff's obligation to show retaliatory intent, the AIR-21 "contributing factor" standard and employer's but-for-causation defense address *causation*, not intent. There is no evidence that Congress meant to depart from the settled interpretation of "discriminat[ion] … because of" when it enacted SOX; petitioner's arguments to the contrary could make sense only if the word "discriminate" were erased from the statute.

A. "Discrimination ... Because Of" A Protected Status Or Protected Activity Requires Discriminatory Intent.

SOX prohibits "discriminat[ion] … because of" protected activity. 18 U.S.C. § 1514A(a). That formulation is hardly unique. Congress has used it in many anti-discrimination statutes, beginning decades before SOX was enacted. As petitioner himself recognizes, "[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." *George v. McDonough*, 142 S. Ct. 1953, 1959 (2022) (citation and quotation marks omitted). This Court has consistently understood "discriminate … because of" and similar formulations in comparable statutes to require a disparate-treatment plaintiff to show discriminatory intent—and that understanding flows directly from the plain text of these statutes and background principles of tort law. A few examples suffice.

1. Title VII of the Civil Rights Act of 1964 states that "[i]t shall be an unlawful employment practice for an employer … to fail or refuse to hire or to discharge any individual, or otherwise to *discriminate* against any individual … *because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (emphases added). This Court has been clear that under this language, a "plaintiff is required to prove that the defendant had a discriminatory intent or motive." *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 986 (1988); *see also Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 233 (2015) (Alito, J., concurring in the judgment) ("Claims of discrimination under [Title VII] require proof of discriminatory intent."); *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)

("A disparate-treatment plaintiff must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." (citation omitted)); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) ("Proof of discriminatory motive is critical"). *Bostock* is no exception, notwithstanding petitioner's selective quotations. The question, the Court said, always is whether the employer "*intentionally* treats a person worse" because of a protected characteristic. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1740 (2020) (emphasis added). "There is simply no escaping the role intent plays" in proving discrimination. *Id*. at 1742.[1]

Title VII's anti-retaliation provision likewise provides that "[i]t shall be an unlawful employment practice for an employer to *discriminate* against any of his employees … *because* he has opposed any" unlawful employment practice. 42 U.S.C. § 2000e-3(a) (emphases added). Interpreting this provision, the Court has concluded that "Title VII retaliation claims require proof [of the] desire to retaliate." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 352 (2013).

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[1] Petitioner has wisely abandoned his petition-stage argument that the availability of disparate-*impact* liability under some statutes disproves the default rule that "discriminat[ion]" requires a showing of intent. By its very nature, retaliation is a claim of disparate treatment and thus requires intent. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) ("[r]etaliation is, by definition, an intentional act" because the plaintiff "is being subjected to differential treatment"). In any event, Title VII's disparate-impact liability has its origin in 42 U.S.C. § 2000e-2(a)(2), which does not require "discriminat[ion]." *See Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971) (citing 42 U.S.C. § 2000e-2(a)(2)); *Lewis v. City of Chicago*, 560 U.S. 205, 211 (2010) (explaining that *Griggs* relied on subsection (a)(2)).

2. Title VI of the Civil Rights Act of 1964 provides that "[n]o person in the United States shall, *on the ground of* race, color, or national origin, be excluded from participation in, be denied the benefits of, or be *subjected to discrimination* under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d (emphases added). This Court has explained that it is "beyond dispute" that Title VI "prohibits only intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

3. The Age Discrimination in Employment Act of 1967 ("ADEA") states that "[i]t shall be unlawful for an employer" to "fail or refuse to hire or to discharge any individual or otherwise *discriminate* against any individual … *because of* such individual's age." 29 U.S.C. § 623(a)(1) (emphases added). Once again, the Court has interpreted this statutory language to require a showing of discriminatory intent, reiterating that "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (brackets in original; citation omitted); *see also Smith v. City of Jackson*, 544 U.S. 228, 249 (2005) (O'Connor, J., concurring in the judgment) (explaining that the ADEA "plainly requires discriminatory intent").

4. Like SOX, Dodd-Frank prohibits employers from "discharg[ing] … or in any other manner *discriminat[ing]* against" employees "*because of*" protected activity. 15 U.S.C. § 78u-6(h)(1)(A) (emphases added). This Court recently indicated that a plaintiff must establish retaliatory intent under this provision. *See Digit. Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 779 (2018). Dodd-Frank defines "whistleblower" as

someone who reports a suspected securities violation to the SEC, 15 U.S.C. § 78u-6(a)(6), and specifies various types of activities for which such "whistleblowers" are protected: the first clause protects "providing information to the [SEC]," and the third clause covers "making disclosures" to various persons and entities, including but not limited to the SEC, pursuant to certain laws. *Id.* § 78u-6(h)(1)(A)(i), (iii). In holding that an employee must have reported to the SEC to be a protected whistleblower, the Court rejected the contention that this interpretation would "vitiate" the third clause's protections for disclosures to other persons or entities. *Digit. Realty Tr.*, 138 S. Ct. at 779. The Court explained that the third clause retains independent significance because "[t]he employee can recover under the statute without having to demonstrate whether *the retaliation* was *motivated* by the internal report (thus yielding protection under clause (iii)) *or* by the SEC disclosure (thus gaining protection under clause (i))." *Id.* (emphases added). The Court's rationale clearly contemplates that the employer's *retaliatory motive* is a necessary feature of the claim, regardless of *which* type of protected activity was the target of that intent. *Id.*

5. The Court's repeated conclusion that statutes prohibiting discrimination because of a forbidden consideration require proof of intent also squares with background principles of tort law that the discrimination laws draw upon.

Discrimination is an "[i]ntentional tort[]." *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011) (applying the Uniformed Services Employment and Reemployment Rights Act); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998) (explaining that "Title VII borrows from tort law"). And retaliation "is a form of

'discrimination' because the complainant is being subjected to differential treatment." *Jackson*, 544 U.S. at 174. That is why "[t]he requirements for a retaliation claim largely track the requirements for a discrimination claim." *Kaufman v. Perez*, 745 F.3d 521, 531 (D.C. Cir. 2014) (Srinivasan, J., concurring in the judgment).

Retaliation is thus, like discrimination, "by definition" an "intentional act." *Jackson*, 544 U.S. at 173-74. Indeed, it has long been recognized that retaliation is an intentional tort, particularly retaliatory discharge. *Nassar*, 570 U.S. at 346-47 (examining tort law "to define the proper standard of causation for Title VII retaliation claims"); *Pineda v. JTCH Apartments, LLC*, 843 F.3d 1062, 1064 (5th Cir. 2016) (noting that "intentional torts" include "retaliatory discharge"); *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1192 (1st Cir. 1994) ("Retaliatory discharge has been treated as an intentional tort."); *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 112 (7th Cir. 1990) (recognizing that "intentional torts" include "retaliatory discharge").

"[W]hen Congress creates a federal tort[,] it adopts the background of general tort law," *Staub*, 562 U.S. at 417, including—naturally—the requirement that an intentional tort involve intent. For example, a tort claim for "retaliatory discharge" requires the plaintiff to "establish wrongful intent to discharge in violation of public policy." Dan B. Dobbs, et al., *The Law of Torts* § 703 & n.21 (2d ed. 2011) (citation omitted). And in the context of SOX and other federal statutes with similar language, an employer is liable if its "agent intends, for discriminatory reasons, that the adverse action occur." *Staub*, 562 U.S. at 419. That is different from causation, as exhibited—in *Staub*—

by the Court's independent emphasis on evidence that Staub's supervisors "were motivated by hostility toward Staub's military obligations," that their "actions were causal factors" in Staub's termination by another manager, and that the supervisors had the "intent to cause Staub to be terminated." *Id.* at 423.

* * *

When "'judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its … judicial interpretations as well.'" *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006) (ellipsis in original; citation omitted). In SOX, Congress decided to use terminology—"discriminate … because of"—that has long been interpreted by this Court to require a plaintiff to prove intent. That interpretation is strongly supported by traditional tort-law principles that animate the discrimination laws. In fact, this Court has already indicated that a SOX plaintiff must prove that his employer acted with a "retaliatory reason[]." *Lawson v. FMR LLC*, 571 U.S. 429, 442 (2014). Only a clear indication that Congress chose to "disrupt" the settled meaning of that terminology could overcome the strong presumption that discriminatory intent is a required element of a SOX retaliation claim. *Dir. of Revenue of Mo. v. CoBank ACB,* 531 U.S. 316, 324 (2001). No such clear indication exists.

B. AIR-21's Burden-Allocation Framework Does Not Eliminate The Intent Requirement.

Nothing in the AIR-21 burden-allocation framework indicates that Congress chose in SOX to eliminate plaintiffs' obligation to prove intent. Rather, the burden-allocation framework is focused on causation.

1. The first AIR-21 burden-allocation provision at issue sets forth the plaintiff's burden and operates in tandem with SOX's substantive prohibition, which requires intent. It states that a plaintiff cannot establish "that a violation of subsection (a) has occurred" without proving that his protected activity "was a contributing factor in *the unfavorable personnel action alleged in the complaint*." 49 U.S.C. § 42121(b)(2)(B)(iii) (emphasis added). SOX specifies the "unfavorable personnel action" that must be "alleged in the complaint": A "complaint" under the SOX whistleblower statute "alleges discharge or other *discrimination … in violation of subsection (a)*" of Section 1514A. 18 U.S.C. § 1514A(b)(1) (emphasis added). And subsection (a) of Section 1514A, in turn, prohibits "discriminat[ion] … because of" protected activity. Under the statutory framework, therefore, the AIR-21 provision inquires whether protected activity was a "contributing factor" to a *discriminatory* personnel action in "violation" of SOX—and as demonstrated above, "discriminat[ion]" has consistently been understood to require proof of intent.

The second AIR-21 burden-allocation provision allows the employer to avoid remedial obligations even if the plaintiff has demonstrated that a violation occurred. It forbids the court from ordering "[r]elief … 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). That defense is relevant only if the plaintiff has proven a violation—and as explained above, proving a violation means proving discrimination, which requires retaliatory intent.[2]

2. Rather than addressing intent, the AIR-21 provisions allocate the burdens of proving *causation* in a manner similar to Title VII.

The contributing-factor standard for plaintiffs under AIR-21, like the similarly structured motivating-factor standard under Title VII, 42 U.S.C. § 2000e-2(m), "is not itself a substantive bar on discrimination. Rather, it is a rule that establishes the causation standard for proving a violation defined elsewhere." *Nassar*, 570 U.S. at 355. To be sure, the "contributing factor" standard requires less of a causal nexus "than those [causation standards] applied in other anti-discrimination contexts"; "a 'contributing factor' is something less than a substantial or motivating one." *Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir. 2018) (quotation marks and citation omitted). But modifying the standard of *causation* does not address the requirement of *intent*. The question whether the employer possessed discriminatory (i.e., retaliatory) intent is legally and logically distinct from the question of what factors contributed to bringing about the employer's actions, and to what extent. *See supra* 19-20.

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[2] That is how the affirmative defense works for Title VII, too: it comes into play only "[o]n a claim in which an individual proves a violation." 42 U.S.C. § 2000e-5(g)(2)(B).

The employer's defense under AIR-21, like the employers' defense under Title VII, 42 U.S.C. § 2000e-5(g)(2)(B), also hinges on causation. An employer may escape any remedial obligations under the AIR-21 framework if it can "show that it would have taken the same action even if there had never been a protected activity." *Genberg v. Porter*, 882 F.3d 1249, 1259 (10th Cir. 2018). That is, the employer can "invoke lack of but-for causation as an affirmative defense." *Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1017 (2020). Unlike Title VII, a SOX defendant must prove the lack of but-for causation by clear and convincing evidence, but if he does he establishes a complete defense to providing any remedy, whereas the Title VII defendant merely avoids damages and reinstatement liability. *Compare* 49 U.S.C. § 42121(b)(2)(B)(iv) *with* 42 U.S.C. § 2000e-5(g)(2)(B). But for both, the substance of the defense is the same: was the forbidden consideration a but-for cause of the adverse action. Lack of intent is neither necessary nor sufficient to establish the defense.

C. Petitioner's Arguments For Eliminating The Intent Requirement Are Unpersuasive.

As explained above, petitioner faces a heavy burden to establish that Congress chose in SOX to eliminate the intent element for "discrimination" claims. But rather than address the mountain of history and precedent on the meaning of "discriminate … because of," he ignores it, instead launching a series of flank attacks on SOX's requirement that plaintiffs prove intent. All of those arguments are unconvincing.

1. Petitioner argues (at 21, 34-35) that "[t]he word 'discriminate' is not relevant to [his] claim" because he was "'discharge[d],'" whereas the "in any other manner discriminate" language is supposedly a mere "catchall provision" that has no interpretive relevance to "discharge" or the other adverse actions listed in Section 1514A(a).

Petitioner's theory is flatly inconsistent with this Court's interpretation of indistinguishable language in other discrimination statutes. Under SOX, an employer may not "discharge, demote, suspend, threaten, harass, or in *any other manner discriminate* against an employee … because of" protected activity. 18 U.S.C. § 1514A(a) (emphasis added). Title VII similarly makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or *otherwise to discriminate* against any individual … because of such individual's" protected status. 42 U.S.C. § 2000e-2(a)(1) (emphasis added). Similarly, the ADEA makes it unlawful "to fail or refuse to hire or to discharge any individual or *otherwise discriminate* against any individual … because of such individual's age." 29 U.S.C. § 623(a)(1) (emphasis added). Under petitioner's interpretation of this language, then, a Title VII or ADEA plaintiff would not have to prove discriminatory intent if the adverse action he alleges is termination or not being hired—despite volumes of case law denominating firing or refusing to hire an employee in violation of those statutes as "discrimination."

But, of course, petitioner's approach is not the law, as exhaustively shown above. Discriminatory intent is a critical element under Title VII and the ADEA, just as with SOX. In *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the plaintiff

alleged that the "decision to terminate her had been predicated on gender discrimination in violation of Title VII." *Id.* at 251. Similarly, in *Reeves*, the plaintiff alleged "that he had been fired because of his age in violation of the [ADEA]." 530 U.S. at 138. In both cases, this Court emphasized that it was the plaintiff's "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." *Burdine*, 450 U.S. at 253; *Reeves*, 530 U.S. at 143. Petitioner's contrary argument is baseless.

Petitioner's reading also contravenes straightforward statutory interpretation. By its plain terms, the phrase "in any other manner discriminate" necessarily modifies the full list in Section 1514A(a): each entry in the list must be an "other manner" of "discriminat[ing]." As other courts have recognized, "the phrase 'A, B, or any other C' indicates that A is a subset of C." *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1269 (D.C. Cir. 2003) (citation omitted). Petitioner's interpretation of Section 1514A(a) gives no meaning to the word "other." That "flouts the rule that a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Clark v. Rameker*, 573 U.S. 122, 131 (2014) (quotation marks and citation omitted).

Nor is Section 1514A(a) the only reference to a SOX plaintiff's obligation to prove "discrimination." SOX separately confirms that a plaintiff must "allege[] discharge or *other discrimination* by any person in violation of subsection (a)." 18 U.S.C. § 1514A(b)(1) (emphasis added). Again, the word "other" signifies that actionable "discharge" necessarily entails "discrimination." And reading subsection (b)(1) together with subsection (a) reinforces that "discharge, demote,

suspend, threaten, [and] harass" are all modified by "discrimination." Indeed, this Court has already recognized that Section 1514A "enumerate[s]" "prohibited retaliatory measures," including "retaliatory discharges," engaged in "for retaliatory reasons." *Lawson*, 571 U.S. at 441-42.

2. Unable to avoid the word "discriminate," petitioner tries (at 34-37) to neuter the term's meaning, claiming it does not signify that intent is required. But he ignores the unbroken chain of precedents from this Court construing substantively identical statutory uses of "discriminate" to mean that a "disparate-treatment plaintiff must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." *Ricci*, 557 U.S. at 577 (citation omitted). "Discriminate" means the same thing in SOX that it means in Title VII, Title VI, the ADEA, and Dodd-Frank. "The words of [these statutes] are not like mood rings; they do not change their message from one moment to the next." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2216 (2023) (Gorsuch, J., concurring). Indeed, excising intent would "evade[] the ultimate question of discrimination *vel non*." *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983). Petitioner trips upon this problem when attempting to spin his revisionary understanding of discrimination: He concedes (at 35, citation omitted) that discrimination means "to 'make an adverse distinction with regard to'" a forbidden consideration, but fails to

explain how an adverse distinction can be made with regard to protected activity without intent.[3]

3. Petitioner also maintains (at 23-24) that a SOX retaliation claim does not require discriminatory intent because Congress did not include a phrase like "motivating factor" or "intent to retaliate" in Section 1514A. But the same was true of Title VII until 1991, and the same remains true of the other discrimination statutes discussed above, all of which use essentially the same "discriminate … because of" terminology that this Court has consistently interpreted to require intent. Congress's adoption of the same formulation in SOX compels rejection of petitioner's claim that intent need not be proven, and there is no basis for petitioner's assertion that in SOX, unlike numerous other federal employment discrimination statutes, the phrase "discriminate … because of" is insufficient to establish an intent requirement.

Moreover, the insertion of "motivating factor" into Title VII by the Civil Rights Act of 1991 concerned *causation*. That bill codified a "more forgiving standard" of "causation" than but-for causation. *Bostock*, 140 S. Ct. at 1739-40; *Nassar*, 570 U.S. at 355 ("motivating factor" "establishes the causation standard for proving a violation defined elsewhere"). Congress was not imposing a new intent requirement, for intent had

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[3] Petitioner's suggestion (at 36-37) that the Second Circuit required a showing of "hostile feelings about the employee" by using the word "animus" is a red herring. The Second Circuit mentioned "animus" only twice—both in quoting other decisions—and it unambiguously held that what is required is a showing of "retaliatory intent," not hostile feelings toward the employee. Pet. App. 9a. The cases petitioner cites are thus inapposite.

already been part of a claim under 42 U.S.C. § 2000e-2(a)(1) for over a quarter century. Similarly, Congress did not use "motivating factor" language in Title VI, yet it is "beyond dispute … that [Title VI] prohibits only intentional discrimination." *Alexander*, 532 U.S. at 280. The ADEA similarly has no "motivating factor" language, yet intent is required. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 173-74 (2009). So, too, with SOX.[4]

Simply, when Congress in 1991 made a plaintiff's Title VII case easier by reducing the "but for" causation requirement to a "motivating factor" test, it did not simultaneously make a plaintiff's case *harder* by introducing an intent requirement that supposedly never existed before.

4. Congress's inclusion of a specific mens rea requirement in 18 U.S.C. § 1513(e), which criminalizes obstruction of a law enforcement investigation, is equally unavailing. To begin, Section 1513(e) does not include "discriminate … because of" and thus says nothing about the meaning of that term.

Regardless, Congress frequently includes express descriptions of the mens rea required when it enacts criminal statutes, given the heightened need to provide "fair warning" of what conduct will give rise to criminal sanctions. *United States v. Davis*, 139 S. Ct.

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[4] When a discrimination statute uses "because" to connect the forbidden consideration to the adverse action, this Court has interpreted it to require the plaintiff to prove but-for causation. *Gross*, 557 U.S. at 176 (ADEA); *Nassar*, 570 U.S. at 351-52 (Title VII). So, while Congress did not need to specifically mention "intent" because it is built into "discriminate … because of," specification was necessary to require a less onerous causal nexus.

2319, 2323 (2019). For example, the neighboring provisions at 18 U.S.C. § 1513(a), which criminalizes retaliatory murder or attempted murder, and subsection (b), which criminalizes the retaliatory causing of bodily harm, both expressly include the mens rea requirement of "intent to retaliate." Congress simply borrowed the same language when it added subsection (e).

In contrast, federal civil discrimination provisions rarely, if ever, include an explicit mens rea element. *See, e.g.*, 42 U.S.C. § 1981; *id.* § 2000e-2(a)(1) (Title VII); *id.* § 2000d (Title VI); 29 U.S.C. § 623(a)(1) (ADEA). Yet it is "beyond dispute" that those statutes require the plaintiff to prove intent. *Alexander*, 532 U.S. at 280. Having chosen to use familiar phrasing that has repeatedly been held to require intent, Congress had no need to take a belt-and-suspenders approach by explicitly referring to retaliatory intent. Only if it had sought to *eliminate* the intent requirement would clarifying language have been necessary.

Petitioner's strained connection between Section 1514A and Section 1513(e) is further belied by the fact that they were enacted in different titles of SOX (Title VIII, Section 806 and Title XI, Section 1107, respectively). *See* Pub. L. No. 107-204, 116 Stat. 745, 802-03, 810. Indeed, they were drafted as parts of different bills. *See* Corporate and Criminal Fraud Accountability Act of 2002, S. 2010, 107th Cong. § 6 (2002) (adding 18 U.S.C. § 1514A); Corporate Fraud Accountability Act of 2002, H.R. 5118, 107th Cong. § 11 (2002) (adding 18 U.S.C. § 1513(e)). The statutory drafting history thus confirms that comparing these vastly different provisions is a useless exercise.

5. Finally, Petitioner argues (at 24-26) that the employer's but-for-causation defense is the only point at which intent comes into play, suggesting that the defense was designed as a safety-valve to weed out instances where the employer did not act with retaliatory intent. That is incorrect, for several reasons.

First, as noted above, the plain terms of the employer's defense do not address or modify the requirements for proving a violation; rather, the defense merely enables an employer to avoid the imposition of "[r]elief" by proving by clear and convincing evidence that it "would have taken the same unfavorable personnel action in the absence of" protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv). It remains the plaintiff's burden to prove that a "violation of subsection (a)" of Section 1514A occurred, which includes proving retaliatory intent. *See supra* 21-22. The presence of a lack-of-causation defense does not eliminate the plaintiff's responsibility to prove intent.

Consider an example. An employee in a company's accounting department complains to his manager that a particular accounting practice of the company is not compliant with Generally Accepted Accounting Principles, and therefore—he alleges—places the company out of compliance with the securities laws. The company retains independent counsel, investigates, and determines that the accountant is wrong and also that he has made related accounting errors. The accountant is let go, due to his errors: he was bad at his job. His complaint in this circumstance was a "contributing factor" to his termination, but the company acted entirely appropriately. In this total absence of retaliatory intent, the company should not bear the heavy burden of showing by clear and con-

vincing evidence it would have terminated the accountant even if he had not complained. That is why SOX provides that the protected activity must be a contributing factor to a *discriminatory* act, which preserves plaintiff's burden of proving intent.

Second, petitioner's claim that placing the burden of disproving but-for causation on the employer somehow eliminates the plaintiff's obligation to prove discriminatory intent is foreclosed by the settled understanding of Title VII, which was amended in 1991 to require employers to disprove but-for causation to avoid damages and reinstatement in a mixed-motive discrimination case. 42 U.S.C. § 2000e-5(g)(2)(B); *see Comcast*, 140 S. Ct. at 1017. Despite this transfer of the burden of proof on but-for causation to the employer, this Court has continued to affirm that plaintiffs bear the burden of proving discriminatory intent under Title VII. *See Ricci*, 557 U.S. at 577 ("A disparate-treatment plaintiff must establish 'that the defendant had a discriminatory intent or motive' for taking a job-related action." (citation omitted)).

Third, petitioner simply ignores that but-for causation and intent are distinct, and that as shown above, the affirmative defense is about causation, not intent. *See supra* 22-23. By its express terms, the defense prevents "[r]elief" from being "ordered" if there is no but-for causation, separate and apart from any question of retaliatory intent. 49 U.S.C. § 42121(b)(2)(B)(iv). Adjusting the burden on aspects of one element—here, causation—says nothing about the allocation of the burden on the distinct element of intent. The affirmative defense asks whether an employer's "nonretaliatory reasons, by themselves, would have been enough that the employer would have taken the same adverse action in the absence of

the protected activity." *Palmer v. Canadian Nat'l Ry./Ill. Cent. R.R. Co.*, ARB Case No. 16-035, 2016 WL 5868560, at *12 (Sept. 30, 2016) (plurality), reissued https://tinyurl.com/y2rwz2mx (Jan. 4, 2017) (emphasis omitted). That allocation of the burden of proof on but-for causation does not remove the plaintiff's continuing obligation to prove intent.

Petitioner nevertheless claims that an employer's *failure* to prove the defense "completes the proof that the defendant has acted with 'retaliatory intent,'" while "[a]n employer who *lacks* 'retaliatory intent' thus avoids liability" through the affirmative defense. Pet. Br. 6, 25 (emphasis added). That is demonstrably wrong, on both counts: an employer that acted with the darkest of retaliatory intent might nonetheless show it would have fired an employee anyway, whereas an employer that had no improper intent at all might be unable to prove the affirmative defense.

Consider, for example, the only circuit decision to have taken an approach inconsistent with the Second Circuit's here: *Halliburton, Inc. v. Administrative Review Board*, 771 F.3d 254 (5th Cir. 2014) (per curiam). The plaintiff there had complained of accounting improprieties to his employer and to the SEC. *Id.* at 256-57. After receiving a notice from the SEC that the agency had opened an investigation and directing that relevant documents be preserved, the employer "instruct[ed] [employees] to preserve documents relevant to the SEC's investigation, as directed, because 'the SEC has opened an inquiry into the allegations of Mr. Menendez.'" *Id.* at 257. The Fifth Circuit concluded that the plaintiff could state a retaliation claim based on the fact that his employer had disclosed his identity to other employees and his coworkers had treated him differently in response—without any showing

that the employer, in making this disclosure, had a "wrongful motive." *Id.* at 263. On those facts, the but-for-causation defense was unavailable, because absent the protected activity (the complaint) the employer *could not* have taken the same adverse action (disclosing the identity of the complaining employee). *See Menendez v. Halliburton, Inc.*, ARB Case Nos. 09-002 & 09-003, 2013 WL 1282255, at *10 (Mar. 15, 2013) (reasoning that evidence of the employer's lack of retaliatory intent could not "address the issue of whether the [employer] would have disclosed [the employee's] identity in the absence of his protected activity"). The employer thus "failed to prove its affirmative defense" and was held liable despite the absence of any finding (or, apparently, evidence) of "wrongful motive." *Id.*; *Halliburton*, 771 F.3d at 258, 263. Petitioner's claim that intent and but-for causation are coextensive is foreclosed by the very case he urges the Court to endorse.

The *Halliburton* case reflects an aspect of whistleblowing that distinguishes it from the statutory protections associated with race or gender in a way that can make intent particularly relevant. Employers seldom if ever have good reason to act on the basis of an employee's race or gender, but whistleblowing often demands a response—the company must investigate, and on the basis of the investigation and complaint it must often take action, which at times can affect the whistleblower for legitimate, non-retaliatory reasons.

To take another example, consider an employee, Sarah, whose job is to provide uniquely specialized services to one customer of her employer. Sarah discovers fraud and immediately reports it to her managers, who confirm the report, thank Sarah for her diligence, and reward her with a bonus. But when the

employer reports the fraud to the customer, the customer no longer trusts the employer and terminates the relationship. This leaves Sarah without any work, and her position is eliminated. Sarah's report of the fraud was a but-for cause of her termination, which would not have occurred absent her report. But it is equally clear that the employer had no retaliatory intent. Under petitioner's view, the employer would be liable for retaliation, despite the absence of any intent to retaliate. Petitioner thus errs in contending that the but-for causation defense somehow subsumes the issue of retaliatory intent.[5]

That the plaintiff must prove the elements of his substantive claim is unsurprising. What would be surprising is petitioner's contrary interpretation: a statute that imposes a substantive prohibition that requires proof of retaliatory intent, but which then incorporates "a closed universe of rules" addressing a different issue (causation) in order to sub silentio negate the intent element of the substantive prohibition. *See* Pet. Br. 21-22. Petitioner suggests (at 17) that this is permissible because "Section 1514A(a) is directed to employers" whereas the burden-allocation provision is "directed to courts." But that nonsensical distinction cannot justify construing the statute to be

[5] Of course, a jury may sometimes infer intent from the same evidence with which causation is proven. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101-02 (2003) (holding that "direct evidence of discrimination is not required in mixed-motive cases" under Title VII). And under the contributing-factor standard, the required causal nexus is less than for a Title VII claim. *See supra* 22. But in some cases intent will be lacking notwithstanding the existence of but-for caution. That is, in some circumstances intent is the critical element on which liability turns.

at war with itself, with the causation provisions operating to negate a different element of the substantive prohibition. A "statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous." *Clark*, 573 U.S. at 131 (quotation marks and citation omitted). And a paragraph later (still at 17) petitioner concedes the obvious by contradicting his own prior assertion: the burden-allocation provision is "directed to the plaintiff-employee" and "the defendant-employer."

II. THE WPA DOES NOT COMMAND A DIFFERENT RESULT.

Petitioner contends that the Whistleblower Protection Act of 1989 ("WPA") justifies setting aside SOX's plain meaning. But SOX borrows its burden-allocation framework from AIR-21, not the WPA, and the WPA uses different statutory language, imposes different substantive prohibitions, has a different history, and was designed for a different context. In short, the WPA provides no basis to disavow the clear import of SOX's statutory language.

A. The Text And Context Of The WPA And SOX Are Materially Different.

Petitioner (at 3, 26-27) and the Government (at 18, 26) make a variety of claims about the purported close connection between SOX and the WPA. Their claims are inaccurate, and overlook the meaningful differences between those laws' substantive prohibitions.

1. If the WPA does not require proof of intent, that feature is not the result of the WPA's burden-allocation provision—and it has nothing to do with SOX, which uses materially different language.

Unlike SOX, the WPA does not expressly proscribe "discrimination" based on protected activity. Rather, the WPA makes it unlawful for the Government to "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" the employee's protected activity. 5 U.S.C. § 2302(b)(8)-(9).

In fact, the operative provisions of the WPA—paragraphs (b)(8) and (b)(9), which were initially enacted as part of the Civil Service Reform Act of 1978—originally forbade taking or failing to take a personnel action "*as a reprisal for*" protected activity. Pub. L. No. 95-454, § 101, 92 Stat. 1111, 1116 (emphasis added). A "reprisal" is "an action of retaliation." *Reprisal*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1976). Congress's deletion of the "reprisal" requirement in 1989 thus logically could signify a departure from a preexisting intent requirement. Pub. L. No. 101-12, § 4, 103 Stat. 16, 32. "When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995).

What's more, the WPA retained a separate prohibition on "discriminat[ion] … on the basis of" certain protected statuses, but did not include that term in the whistleblower provision. *See* 5 U.S.C. § 2302(b)(1); Pub. L. No. 95-454, § 101, 92 Stat. at 1115 (original enactment of paragraph (b)(1)). It is presumed "that Congress acts intentionally and purposely when it includes particular language in one

section of a statute but omits it in another." *BFP v. Resol. Tr. Corp.*, 511 U.S. 531, 537 (1994) (citation omitted).

The deletion of "reprisal" from the retaliation provision and the failure to require "discrimination" in the WPA may indicate that intent is not required under that statute, but that outcome is not the product of the WPA's burden-allocation provision—and it says nothing about SOX, which *does* expressly require proof of "discriminat[ion]." Congress "deliberately prescribed a distinct statutory scheme applicable only to the federal sector, and in doing so, it eschewed the language used in the private-sector provision." *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020) (quotation marks and citations omitted). The Court "generally ascribe[s] significance to such a decision." *Id.*

2. Petitioner also errs in claiming that the SOX burden-allocation provision was taken directly from the WPA. SOX incorporates the burdens of proof from AIR-21, not the WPA. *See* 18 U.S.C. § 1514A(b)(2)(C); *Lawson*, 571 U.S. at 437. The relevant Senate Report states that SOX incorporates the "procedures and burdens of proof now applicable … *in the aviation industry*," without once mentioning the WPA. S. Rep. No 107-146, at 13 (2002) (emphasis added).

Notably, Congress *has* incorporated the WPA's burden-allocation provision into *other* whistleblower protection statutes. *See* 10 U.S.C. § 4701(c)(6) (Defense Contractor Whistleblower Protection Act) (adopting "[t]he legal burdens of proof specified in section 1221(e) of title 5"); 41 U.S.C. § 4712(c)(6) (National Defense Authorization Act of 2013) (adopting "[t]he legal burdens of proof specified in section

1221(e) of title 5"). That Congress chose to do otherwise in SOX further demonstrates that the WPA was not the chosen model for SOX.

The WPA also was not the direct model for AIR-21's burden-allocation provision, as shown above. *See supra* 4. Congress looked to the ERA, 42 U.S.C. § 5851, not the WPA. *See* S. Rep. No. 105-278, at 22 (1998). The ERA's burden-allocation provision, in turn, was added by the Energy Policy Act of 1992, Pub. L. No. 102-486, § 2902(d), 106 Stat. 2776, 3123-24, which does not refer to the WPA, *see* H.R. Rep. No. 102-474, pt. 8, at 120 (1992). None of the congressional committee reports on the Energy Policy Act (or SOX) even mention the WPA.

Congress also chose to structure the AIR-21 and ERA burden-allocation framework differently from the WPA's. The former sets out the burdens not just for the merits stage, but also the investigative stage, whereas the latter addresses only the merits stage. Moreover, the WPA includes a separate provision mandating that mere temporal proximity plus employer knowledge suffices to establish causation under that statute. 5 U.S.C. § 1221(e)(1). While Congress may have deemed that lenient approach appropriate for federal workers, no such provision was applied to the private sector workforce covered by AIR-21 and the ERA. These differences confirm that Congress did not directly model AIR-21 on the WPA.[6]

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[6] Indeed, in AIR-21 Congress expressly applied the WPA to Federal Aviation Administration employees, but chose not to do the same for private-sector employees. *See* Pub. L. No. 106-181, § 307(a), 114 Stat. at 124; 49 U.S.C. § 40122(g)(2)(A).

3. Such differences, in addition to showing that AIR-21 was not directly modeled on the WPA, also reflect that the WPA and SOX do not "serve the same goal," as petitioner claims (at 27). Petitioner points to the titles of the code sections that provide causes of action under SOX ("Civil action to protect against *retaliation* in fraud cases") and the WPA ("Individual right of action in certain *reprisal* cases") to suggest the goals are the same. 18 U.S.C. § 1514A (emphasis added); 5 U.S.C. § 1221 (emphasis added). But section headings are of limited, if any, probative value in statutory interpretation. *Lawson*, 571 U.S. at 446; *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R. Co.*, 331 U.S. 519, 528-29 (1947). That is particularly true here, since the WPA *deleted* the "reprisal" language from the substantive prohibitions on retaliation that originally appeared in the Civil Service Reform Act of 1978. *See supra* 36.

In truth, SOX and the WPA operate in very different contexts. SOX provides "whistleblower protection for employees of publicly traded companies," 18 U.S.C. § 1514A(a) (capitalization omitted), covering a wide swath of American businesses, while the WPA applies to employees of the federal government. Private-sector employees are presumed to be employed at-will, with limited statutory exceptions. Federal government employees, on the other hand, are generally subject to strict civil service regulations, which in practice make it exceedingly difficult to terminate or demote them. *See, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 385 (1983) ("Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures—administrative

and judicial—by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies."). The WPA operates within that special system of civil service protection. For example, it enables a federal employee claiming retaliation to obtain "a stay of the personnel action involved." 5 U.S.C. § 1221(c)(1). No such provision exists in SOX.

"That Congress would want to hold the Federal Government to a higher standard than state and private employers is not unusual." *Babb*, 140 S. Ct. at 1177. But there is no evidence it eliminated an intent requirement for the wide array of private workplaces covered by SOX. The WPA simply has no bearing on the question presented here.[7]

B. The WPA's Legislative History Is Inapposite And Unedifying.

Even on its own terms, the WPA legislative history cited by petitioner does not support his position.

As an initial matter, where—as here—the "statutory text is unambiguous," legislative history "need

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[7] Petitioner (at 7, 27-28) claims that Congress enacted SOX because it "wanted 'similar protection' to the WPA for corporate whistleblowers," citing a Senate report and a separate statement by a single senator. But that report neither mentions the WPA nor supports the view that SOX was designed to provide precisely the same degree of job protection for employees of private companies. To the contrary, the report expresses an intent to "track" "as closely as possible" the protections previously extended "to *non* civil service employees" like airline workers. S. Rep. No. 107-146, at 30 (emphasis added). As for the senator's statement, that is the least reliable form of legislative history. *NLRB v. SW Gen., Inc.*, 580 U.S. 288, 307 (2017).

not be consulted," much less the legislative history of an entirely different statute. *United States v. Woods*, 571 U.S. 31, 46 n.5 (2013).

And the legislative history petitioner leans on here is of a particularly unreliable sort. Petitioner relies heavily (at 5-6, 19, 30 n.5, 39) on an "Explanatory Statement," which he claims reflects the thoughts and views of "Congress." This "Explanatory Statement" is actually three separate statements: (1) a joint statement by the House sponsors of the WPA of 1989, *see* 135 Cong. Rec. 5032-33 (1989) (Explanatory Statement on S. 20); (2) a joint statement, apparently on behalf of the same House sponsors, about the Whistleblower Protection Act of 1988 (which President Reagan pocket vetoed), *see id.* at 5034-35 (entering into the record 134 Cong. Rec. H9251 (1988) (Joint Explanatory Statement on S. 508)); and (3) a floor statement by Representative Schroeder, one of the House sponsors, *see id.* at 5036-38.[8]

Congress never voted on any of those statements, which at most had the approval of three representatives. As the Court has long recognized, statements by individual representatives "do not have the status of a conference report, or even a report of a single House." *Nat'l Ass'n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 833 n.3 (1983). Indeed, "statements by individual legislators rank among the least illuminating forms of legislative history." *SW Gen.*, 580 U.S. at 307; *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 599 (2004) ("Even

[8] President Reagan pocket-vetoed the 1988 bill because it failed to "ensure that heads of [federal] departments and agencies can manage their personnel effectively." H. Journal, 100th Cong., 2d Sess. 2578 (1988) (Memorandum of Disapproval).

from a sponsor, a single outlying statement cannot stand against a tide of context and history[.]").

Regardless, the legislative history that petitioner and the Government cite is concerned primarily with the degree of causation required. *See* Gov't Br. 4-6. And the conclusion petitioner would have the Court draw from the legislative history—that the WPA eliminated an intent requirement from the Civil Service Reform Act—would flow from the WPA's deletion of the phrase "as a reprisal for" from the statute, and the absence of a "discriminat[ion]" requirement. That reveals nothing about the meaning of statutes, like SOX, that expressly target discrimination.

C. The Pre-SOX Case Law Does Not Justify Elimination Of The Intent Requirement.

Finally, petitioner claims (at 18-19, 29-31) that *Marano v. Department of Justice*, 2 F.3d 1137 (Fed. Cir. 1993), which he says held that a plaintiff need not prove intent, is "the authoritative construction of the 'contributing factor' standard." *Marano* is a thirty-year-old circuit opinion interpreting the WPA, not SOX, and thus provides no support for the claim that intent need not be proven under a statute that—unlike the WPA—proscribes "discriminat[ion] … because of" protected activity. In fact, the *Marano* court reasoned that the mechanism Congress used to remove the intent element for federal government whistleblowers was deletion of the phrase "as a reprisal for." 2 F.3d at 1140.[9]

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[9] Petitioner overreads *Marano* in any event. While the court there gave a lengthy prefatory discourse on the WPA amendments, it stated that "[t]he only issue to be resolved" was

If the Court considers any court of appeals precedent, it should be case law interpreting the ERA, not *Marano*. Opinions applying the ERA both before and after the Energy Policy Act's enactment recognize the requirement that plaintiffs prove intent. *See Kaufman*, 745 F.3d at 533 (Srinivasan, J., concurring in the judgment) (the "central issue" is whether the adverse action "was motivated by discriminatory or retaliatory bias"); *Addis v. Dep't of Lab.*, 575 F.3d 688, 691 (7th Cir. 2009) (employee failed to make her case where "she did not prove any retaliatory intent on [employer's] part"); *Hasan v. Dep't of Lab.*, 400 F.3d 1001, 1006 (7th Cir. 2005) (plaintiff must "demonstrate[] the presence of an improper motive"); *Doyle v. Sec'y of Lab.*, 285 F.3d 243, 252 n.16 (3d Cir. 2002) (plaintiff must "prove that the defendant subjectively intended to discriminate against the plaintiff on account of his engagement in a protected activity" (quotation marks and citation omitted)).

III. THE ADMINISTRATIVE REVIEW BOARD'S POSITION DOES NOT MERIT *CHEVRON* DEFERENCE.

According to petitioner (at 31 n.6) and the Government (at 31-34), the Court should ignore the plain text of SOX because the Department of Labor's ARB has interpreted SOX not to require a showing of "retaliatory intent." The Government even contends that its interpretation of Section 1514A is entitled to deference under *Chevron U.S.A. Inc. v. NRDC*, 467 U.S.

"whether Marano's protected disclosure was a contributing factor to his reassignment," not whether a showing of intent was required. 2 F.3d at 1141. The court explained that the government's argument on appeal was that Marano's "whistleblowing was not the immediate cause-in-fact of his reassignment." *Id.*

837 (1984). Deference in any form is inappropriate here.

The Court has granted certiorari in another case to decide whether *Chevron* should be overturned, and *Chevron* deference is improper here for the reasons explained by the petitioner there. *See Loper Bright Enters., Inc. v. Raimondo*, 45 F.4th 359 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023). In any event, SOX is a particularly poor candidate for deference of any sort to the ARB, for multiple reasons.

1. As Justice Sotomayor has persuasively shown, the Labor Department's interpretations of SOX do not merit *Chevron* deference because Congress in SOX delegated to the SEC, not the Labor Department, the authority "'to make rules carrying the force of law.'" *Lawson*, 571 U.S. at 476 (Sotomayor, J., dissenting) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001)); *see* 15 U.S.C. § 7202(a) ("The [SEC] shall promulgate such rules and regulations, as may be necessary or appropriate in the public interest or for the protection of investors, and in furtherance of [SOX].").[10] Given this arrangement, it makes little sense to suggest that there was "congressional intent" for the ARB to resolve any ambiguities. *City of Arlington v. FCC*, 569 U.S. 290, 296 (2013).

Moreover, SOX's "muscular scheme of judicial review"—which allows a plaintiff to move her case from the Labor Department to federal court after a "conspicuously short amount of time"—"suggests that Congress would have wanted federal courts, and not the Secretary of Labor, to have th[e] power" to resolve

[10] The majority in *Lawson* did "not decide" whether the Labor Department's interpretations of SOX can receive deference. 571 U.S. at 439 n.6.

statutory ambiguities. *Lawson*, 571 U.S. at 478 (Sotomayor, J., dissenting). It is quite possible the federal district courts interpret SOX more often than the ARB does. (The two SOX retaliation cases to reach this Court—*Lawson* and this case—proceeded in federal district court without ever being adjudicated by the Labor Department.) These interpretive responsibilities of the courts and the SEC would bar deference to the ARB even if it did possess interpretive authority, on the principle that "[w]hen a statute is administered by more than one agency, a particular agency's interpretation is not entitled to *Chevron* deference." *Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000).

But in fact, ARB interpretations of SOX are "not 'promulgated in the exercise of'" delegated lawmaking authority, because the Secretary of Labor "has explicitly vested any policymaking authority he may have with respect to § 1514A in the Occupational Safety and Health Administration (OSHA)." *Lawson*, 571 U.S. at 478 (Sotomayor, J., dissenting). As Justice Sotomayor noted, the Secretary of Labor has actually forbidden the ARB from "deviat[ing] from the rules OSHA issues on the Department of Labor's behalf." *Id.*; *see* Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 85 Fed. Reg. 13186, 13187 (Mar. 6, 2020) ("The Board shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions."). Indeed, the ARB is no longer even the final adjudicative authority within the Department; the Secretary is. *See* Gov't Br. 10, 32.

The Government argues that Justice Sotomayor's reasoning should be ignored because this case concerns the interpretation of "statutory burdens of proof applied directly *in an agency adjudication*." Gov't Br. 32. But this case does not involve an agency adjudication, and the intent requirement is a function of SOX's prohibition of discrimination, not its incorporation of AIR-21's causation standard. The Government cites no statutory provision that delegates to the ARB (or even the Secretary of Labor) the authority to make rules carrying the force of law regarding AIR-21's burden-allocation framework.[11]

2. Deference is also inappropriate here because the ARB has taken inconsistent positions without acknowledging or attempting to justify its change of position. The ARB previously concluded that, under SOX, "[t]he ultimate question [is] whether an action was taken due to 'retaliatory motive.'" *Klopfenstein v. PCC Flow Techs. Holdings, Inc.*, ARB Case No. 04-149, 2006 WL 3246904, at *14 (May 31, 2006). It is well settled that "an '[u]nexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice,'" and such an interpretation "receives no

[11] To the extent petitioner (at 31 n.6) contends that deference is owed to a portion of OSHA's regulation governing the investigation of whistleblower complaints, *see* 29 C.F.R. § 1980.104(e)(3), that argument fails for the same reason. In any event, that regulation governs only what a plaintiff needs to show for the Secretary to initiate an investigation. By contrast, the OSHA regulation governing the burden-allocation regime in ALJ merits adjudications, which is the setting analogous to a federal lawsuit, merely repeats the statutory language. *Compare id.* § 1980.109(a)-(b) *with* 49 U.S.C. § 42121(b)(2)(B)(iii)-(iv).

Chevron deference." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (brackets in original; citation omitted).

The Government claims that *Klopfenstein* is limited to its facts because the ARB did not say that Section 1514A "requires proof of a retaliatory motive in other circumstances." Gov't Br. 30 n.7. But the ARB held that the applicable "legal standard" required an inquiry into "whether an action was taken due to 'retaliatory motive.'" *Klopfenstein*, 2006 WL 3246904, at *14. That is inconsistent with the ARB's pronouncements in other cases cited by the Government and petitioner.

3. Finally, deference is unwarranted because the statutory language is clear. *See supra* 14-23. There is no ambiguity on which interpretive deference could be given, and the Government's interpretation is neither "reasonable" nor "persuasive," therefore barring deference under *Chevron* and even under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

IV. THE SECOND CIRCUIT CORRECTLY HELD IN THE ALTERNATIVE THAT THE "CONTRIBUTING FACTOR" INSTRUCTION WAS FATALLY FLAWED.

The Second Circuit's judgment is also correct for the independent reason that the district court erred in instructing the jury that a "contributing factor" is something that "either alone or in combination with other factors tended to affect in any way UBS's decision to terminate [petitioner's] employment." J.A.130.

That instruction was "inadequa[te]" for two reasons entirely separate from the failure to instruct on intent. Pet. App. 11a n.4. First, it would allow a plaintiff to satisfy his burden even if, "by virtue of his

whistleblowing activity, [he] was *insulated* from a termination to which he would otherwise have been subjected sooner." *Id.* Second, the instruction would permit a plaintiff to satisfy his burden even where the protected activity did not "*actually*" have a causal effect on the termination but instead merely "was *the sort of behavior* that would *tend to affect* a termination decision." *Id.*[12]

Based on the evidence presented at trial, these problems were not hypothetical. For example, the former Global Head of Human Resources for UBS's FICC division told the jury that after an employee's submission of a claim of unlawful conduct, UBS would "probably hold off on a termination of the employment until the investigation had been completed." C.A. J.A.612-13. Also, the jury may have believed that petitioner's termination was delayed by the attempt of his immediate supervisor, Michael Schumacher, to find petitioner an alternative position. J.A.151. Petitioner's counsel emphasized that even if Schumacher was attempting "to help [petitioner] by getting him a job as a desk analyst" due to petitioner's protected activity, the "tended to affect in any way" instruction would be satisfied. J.A.110. The jury's verdict, therefore, could

[12] Contrary to petitioner's suggestion (at 14), which was rejected by the Second Circuit, *see* Pet. App. 7a; C.A. ECF 96 at 29-31, there was no need for UBS to reiterate its objections when the district court answered a question from the jury about the contributing-factor instruction. When a court has already ruled on a "purely legal issue[]," counsel need not repeatedly object; that would have been an "empty exercise." *Dupree v. Younger*, 143 S. Ct. 1382, 1390 (2023). Regardless, petitioner did not seek certiorari on issue preservation. *See* Sup. Ct. R. 24.1(a) (merits "brief[s] may not raise additional questions").

have been premised on a belief that petitioner's protected activity temporarily "insulated" him, or was the type of behavior that would tend to insulate him, "from a termination to which he would otherwise have been subjected sooner." Pet. App. 11a n.4 (emphasis omitted).

Petitioner's suggestion that the Second Circuit's concerns are addressed by the but-for-causation defense is incorrect and misses the point. The question is what *the plaintiff must show* to place the burden on defendant, not what the employer must prove once saddled with the onerous clear-and-convincing-evidence standard. Indeed, petitioner and the Government both implicitly concede the flaws in the "tends to affect in any way" instruction by stating that a "contributing factor" "contributes to the production of a result," "has a part in producing an effect," Gov't Br. 20-21 (citations omitted), or "help[s] bring about" the adverse personnel action, Pet. Br. 23. That is different in kind from merely "tending" to affect "in *any* way"; indeed, UBS explicitly pressed the court to instruct the jury in essentially the terms the Government and petitioner now proffer. *See* J.A.107-08, 174-77. But at petitioner's insistence, the district court instead employed the flawed "tends to affect in any way" formulation.

Regardless, petitioner forfeited his right to challenge the Second Circuit's alternative holdings by not seeking review of them in his petition for certiorari. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); Sup. Ct. R. 24.1(a) ("[T]he brief [on the merits] may not raise additional questions or change the substance of the questions already presented in" the petition.). No matter what this Court

decides about intent, the Second Circuit's judgment must be affirmed.[13]

CONCLUSION

This Court should affirm the Second Circuit's judgment.

Respectfully submitted.

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August 8, 2023

[13] If the Court determines it cannot reach the Second Circuit's alternative holdings, it should dismiss the writ of certiorari as improvidently granted. The Court is "not permitted to render an advisory opinion, and if the same judgment would be rendered by the [Second Circuit]" notwithstanding the Court's decision, then the decision would "amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

STATUTORY APPENDIX

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Whistleblower Protection Act of 1989

5 U.S.C. § 1221. Individual right of action in certain reprisal cases

* * *

(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 appli-

cant 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 disclosure 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.

* * *

5 U.S.C. § 2302. Prohibited personnel practices

* * *

(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—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

* * *

(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]

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) refusing to obey an order that would require the individual to violate a law, rule, or regulation;

* * *

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

Dodd-Frank Wall Street Reform and Consumer Protection Act

15 U.S.C. § 78u-6. Securities whistleblower incentives and protection

(a) Definitions

In this section the following definitions shall apply:

* * *

(6) Whistleblower

The term "whistleblower" means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the securities laws to the Commission, in a manner established, by rule or regulation, by the Commission.

* * *

(h) Protection of whistleblowers

(1) Prohibition against retaliation

(A) In general

No employer may discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against, a whistleblower in the terms and conditions of employment because of any lawful act done by the whistleblower—

(i) in providing information to the Commission in accordance with this section;

(ii) in initiating, testifying in, or assisting in any investigation or judicial or

administrative action of the Commission based upon or related to such information; or

(iii) in making disclosures that are required or protected under the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7201 et seq.), this chapter, including section 78j-1(m) of this title, section 1513(e) of Title 18, and any other law, rule, or regulation subject to the jurisdiction of the Commission.

* * *

Sarbanes-Oxley Act of 2002

18 U.S.C. § 1514A. 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 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—

---

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

(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.

* * *

Age Discrimination in Employment Act of 1967

29 U.S.C. § 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

* * *

Title VI of the Civil Rights Act of 1964

42 U.S.C. § 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title VII of the Civil Rights Act of 1964

42 U.S.C. § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

* * *

42 U.S.C. § 2000e-3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

* * *

Energy Reorganization Act

42 U.S.C. § 5851. Employee protection

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)—

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a

proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.

(2) For purposes of this section, the term "employer" includes—

(A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);

(B) an applicant for a license from the Commission or such an agreement State;

(C) a contractor or subcontractor of such a licensee or applicant;

(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344;

(E) a contractor or subcontractor of the Commission;

(F) the Commission; and

(G) the Department of Energy.

(b) Complaint, filing and notification

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the

Secretary shall notify the person named in the complaint of the filing of the complaint, the Commission, and the Department of Energy.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. Upon the conclusion of such hearing and the issuance of a recommended decision that the complaint has merit, the Secretary shall issue a preliminary order providing the relief prescribed in subparagraph (B), but may not order compensatory damages pending a final order. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation,

and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, 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) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

(3)(A) The Secretary shall dismiss a complaint filed under paragraph (1), and shall not conduct the investigation required under paragraph (2), unless the complainant has made a prima facie showing that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(B) Notwithstanding a finding by the Secretary that the complainant has made the showing required by subparagraph (A), no investigation required under paragraph (2) shall be conducted if the employer demonstrates, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of such behavior.

(C) The Secretary may determine that a violation of subsection (a) has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) was a contributing factor in the unfavorable personnel action alleged in the complaint.

(D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

(4) If the Secretary has not issued a final decision within 1 year after the filing of a complaint under paragraph (1), and there is no showing that such delay is due to the bad faith of the person seeking relief under this paragraph, such person may bring 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.

* * *

Wendell H. Ford Aviation Investment and Reform Act for the 21st Century

49 U.S.C. § 42121. 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 subpara-

graph (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) reasonably 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.

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