No. 22-660

In the Supreme Court of the United States

TREVOR MURRAY, PETITIONER

v.

UBS SECURITIES LLC; UBS AG

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

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America is the world's largest business federation.[1] It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in

[1] Pursuant to Rule 37.6, the Chamber affirms that no counsel for a party authored this brief in whole or in part; no such counsel or a party made a monetary contribution to fund its preparation or submission; and no person other than the Chamber, its members, or its counsel made such a monetary contribution.

every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in important matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files briefs as amicus curiae in cases that, like this one, raise issues of concern to the Nation's business community.

This case presents an important question affecting the Chamber's members: namely, whether an employee alleging a violation of the anti-retaliation provision of the Sarbanes-Oxley Act of 2002, 18 U.S.C. 1514A, must prove that his employer acted with retaliatory intent when taking the challenged adverse personnel action against him. Many of the Chamber's members face lawsuits under Section 1514A, and they have a strong interest both in the faithful interpretation of that provision according to its text and in the dismissal of retaliation claims that fall outside the statute's scope. Meritless claims and expanding litigation costs have a direct impact on the viability, growth, and survival of businesses nationwide.

In the decision below, the court of appeals correctly interpreted Section 1514A to require proof of retaliatory intent. That requirement is crucial to ensuring that liability is imposed only on employers that truly intend to discriminate against an employee for engaging in conduct protected by the statute. Absent an intent requirement, an employer could be liable under Section 1514A any time there is a minimal causal relationship between the protected activity and the adverse personnel action, even if the employer was not subjectively motivated by the employee's decision to engage in protected activity. Such a regime would significantly interfere with an employer's ability to manage its employees and would negatively affect the Nation's business community. The Chamber thus has a significant interest in this case.

SUMMARY OF ARGUMENT

This case presents the question whether, in a private action for retaliation under 18 U.S.C. 1514A, an employee must prove that his employer acted with retaliatory intent when taking the challenged adverse personnel action against him. As respondents explain, the answer to that question is yes. This brief demonstrates why that is so as a matter of statutory interpretation and why petitioner's contrary interpretation would have significant adverse effects for employers.

A. The text of Section 1514A demonstrates that retaliatory intent is an element of a plaintiff's prima facie case. As an initial matter, Section 1514A(a) prohibits a covered employer from "discriminat[ing]" against an employee because an employee engaged in protected activity. Because to "discriminate" against a person is to act on the basis of class or category, the concept of discrimination inherently encompasses intent by the discriminating party. This Court's precedents interpreting similarly worded statutory prohibitions on disparate treatment in employment reflect that principle: a disparate-treatment plaintiff must show that his employer acted with a discriminatory intent or motive, which requires a showing that the employer was actually motivated by the employee's protected characteristic when taking the relevant adverse personnel decision. Section 1514A should likewise be interpreted to require a showing that the employer acted with retaliatory intent.

The nature of Section 1514A as an anti-retaliation statute—signified by the provision's title and the operative statutory text—also confirms that proof of retaliatory intent is required. At common law, courts have recognized an action for wrongful or retaliatory discharge, which is an intentional tort. When Congress creates a federal statutory tort, the Court presumes that Congress intends to

adopt the background of general tort law. It is black-letter tort law that a plaintiff alleging an intentional tort must show that the defendant acted with culpable intent. And under Section 1514A, the culpable intent that an employee must show is that his employer was actually motivated by the employee's decision to engage in protected activity.

Section 1514A also requires proof of causation, but that is a distinct element of an employee's claim. Proof of causation does not equate to proof of intent; there are circumstances under which an employee's protected trait or activity constitutes a but-for cause of an adverse personnel action, but the employer was nevertheless not motivated by that trait or activity (such as when the employer is not aware of it). Section 1514A thus requires proof of *both* intent and causation.

B. Petitioner, supported by the government, focuses his argument on Section 1514A(b)'s incorporation of the burden-of-proof provisions of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (known as AIR-21). In their view, because those burden-of-proof provisions do not mention retaliatory intent, such intent cannot be an element of an employee's claim under Section 1514A. That argument fails, however, because it conflates the elements of a claim with the burdens of proof governing those elements.

AIR-21's burden-of-proof provisions concern only the causation element of an employee's claims; they serve to deviate from the default rule that would require the plaintiff to prove but-for causation by a preponderance of the evidence. But Section 1514A(b)'s incorporation of those provisions does not mean that causation is the *only* element of a Section 1514A claim. To the contrary, the statutory text indicates that Section 1514A(a) is the provision that sets out the elements of a claim for retaliation, with

Section 1514A(b) merely altering the burden of proof on the element of causation. Petitioner's contrary textual arguments are unpersuasive: they conflate the elements of a claim with the burdens of proof and the element of causation with the element of intent.

Petitioner, again supported by the government, separately argues that Congress must not have intended to make retaliatory intent an element of a claim under Section 1514A, because Section 1514A incorporates AIR-21's burden-of-proof provisions; AIR-21's burden-of-proof provisions are supposedly modeled on the Whistleblower Protection Act of 1989 (WPA); and the Federal Circuit and Department of Labor have previously interpreted the WPA not to require proof of retaliatory intent. That argument lacks merit, and there are two principal reasons why.

First, petitioner overlooks important textual differences between AIR-21 and the WPA; AIR-21's burden-of-proof provisions are not intended to establish the exclusive elements of a claim under that statute, even if the relevant provision of the WPA can be interpreted as having that effect.

Second, Section 1514A does not actually incorporate the WPA. It simply incorporates the "burdens of proof" set forth in AIR-21, and it is a stretch to think that Congress intended to import the WPA's elements into Section 1514A in such a roundabout way.

Petitioner is thus incorrect that Section 1514A(b)'s incorporation of AIR-21's burden-of-proof provisions shows that retaliatory intent is not an element of an employee's case for retaliation. Section 1514A(a) sets forth the elements of the cause of action, and Section 1514A(b) shifts the burden of proof on just one of those elements.

C. Petitioner and the government's interpretation of Section 1514A would interfere with the ability of companies to manage their employees. There are circumstances in which an employee's protected activity would constitute a but-for cause of any personnel action, but the employer would be entirely justified in taking the action. For example, in the course of investigating a whistleblower report, an employer may discover wrongdoing by the employee who filed the report. Absent the report, the wrongdoing might have gone unnoticed, but any subsequent adverse personnel action taken on the basis of the wrongdoing would not have been motivated by the protected activity. The problem is particularly acute with compliance employees, whose job is to report when they believe their employers may be violating federal law.

Regardless of the situation, petitioner's interpretation of Section 1514A would penalize employers for taking personnel actions that are in no way motivated by the employee's decision to engage in protected conduct. That is not what an anti-retaliation statute is supposed to do, and it should not be interpreted in that way.

ARGUMENT

A PLAINTIFF MUST PROVE RETALIATORY INTENT TO PREVAIL IN A CIVIL ACTION UNDER 18 U.S.C. 1514A

Section 1514A(a) of Title 18 of the United States Code makes it unlawful for any publicly traded company to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of," among other things, an employee's reporting of his employer's potential violation of certain federal laws. After exhausting administrative remedies, an employee may file a civil action against his employer for a violation of that prohibition. See 18 U.S.C. 1514A(b)(1).

Section 1514A(b) provides that a civil action under 1514A "shall be governed by the legal burdens of proof set forth in [49 U.S.C.] 42121(b)," the anti-retaliation provision for certain non-governmental aviation employees in AIR-21. 18 U.S.C. 1514A(b)(2)(C). Section 42121(b) first states, in relevant part, that an employer can be liable "only if the complainant demonstrates that [the protected activity] was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. 42121 (b)(2)(B)(iii). Section 42121(b) then provides that "[r]elief may not be ordered" against an employer "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).

Section 1514A(a)'s text and broader context demonstrate that, in a civil action alleging retaliation for protected activity, the employee must prove that his employer acted with retaliatory intent when taking an adverse personnel action against him. Nothing in Section 1514A(b)'s incorporation of AIR-21's burden-of-proof provisions, which concern only the element of causation, eliminates the need to prove retaliatory intent under Section 1514A(a). The contrary interpretation urged by petitioner is incorrect and would have significant adverse effects on the ability of businesses to manage their employees.

A. The Text Of Section 1514A Demonstrates That Retaliatory Intent Is An Element Of A Plaintiff's Claim

In statutory-interpretation cases, this Court "proceed[s] from the understanding that unless otherwise defined, statutory terms are generally interpreted in accordance with their ordinary meaning." *Sebelius* v. *Cloer*,

569 U.S. 369, 376 (2013) (internal quotation marks, citation, and alteration omitted). Here, the text leaves no doubt that a plaintiff must prove retaliatory intent in a civil action for retaliation under Section 1514A.

1. Section 1514A(a) makes it unlawful for employers to take several specifically enumerated personnel actions ("discharge, demote, suspend, threaten, harass") or "in any other manner discriminate against" an employee because the employee engaged in protected activity. 18 U.S.C. 1514A(a). Congress's use of the word "discriminate" at the end of the list of enumerated personnel actions in Section 1514A(a) illustrates that Congress intended only to prohibit conduct that is "discriminat[ory]" in nature. As courts have recognized, the "most logical reading of [a] statute" with a list of specifically enumerated items followed by a more general term is often that "the general term reflects back on the more specific" items, such that "the phrase 'A, B, or any other C' indicates that A is a subset of C." *Dong* v. *Smithsonian Institute*, 125 F.3d 877, 879-880 (D.C. Cir. 1997) (citation omitted); see *United States* v. *Delgado*, 4 F.3d 780, 786 (9th Cir. 1993); Jay Wexler, *Fun with Reverse 'Ejusdem Generis*,' 105 Minn. L. Rev. 1, 18-26 (2020). That principle is consistent with the "commonsense canon of *noscitur a sociis*[,] which counsels that a word is given more precise content by the neighboring words with which it is associated." *United States* v. *Williams*, 553 U.S. 285, 294 (2008).[2]

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[2] Cf. *Massachusetts* v. *EPA*, 549 U.S. 497, 557 (2007) (Scalia, J., dissenting) (employing similar reasoning to explain why "[t]he phrase 'any American automobile, including any truck or minivan,' would not naturally be construed to encompass a foreign-manufactured [truck or] minivan" (citation omitted)).

The statutory text thus makes clear that Congress intended only to prohibit employment actions that are "discriminat[ory]" in nature in Section 1514A. To discriminate is "[t]o make distinctions on the basis of class or category without regard to individual merit," *American Heritage Dictionary of the English Language* 516 (5th ed. 2011), or "[t]o make an adverse distinction with regard to," 4 *Oxford English Dictionary* 758 (2d ed. 1989). See also *Webster's Third New International Dictionary* 648 (2002) (defining "discriminate" as "to make a difference in treatment or favor on a class or categorical basis in disregard of individual merit"). As the court of appeals thus correctly recognized, to discriminate "requires a conscious decision to act based on a protected characteristic or action." Pet. App. 9a.

This Court's precedents interpreting Title VII confirm that understanding. Title VII contains similar language to Section 1514A, making it unlawful for an employer to "fail or refuse to hire or to discharge any individual, or to otherwise *discriminate* against any individual * * * because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1) (emphasis added). This Court has held that Title VII's language signifies a prohibition on disparate treatment, and "[a] disparate-treatment plaintiff must establish that the defendant had a discriminatory intent or motive for taking a job-related action." *Ricci* v. *DeStefano*, 557 U.S. 557, 577 (2009) (internal quotation marks and citation omitted). "Unless it is proved that an employer intended to disfavor the plaintiff because of his membership in a protected class, a disparate-treatment claim fails" under Title VII. *Watson* v. *Fort Worth Bank & Trust*, 487 U.S. 977, 1002 (1988) (Brennan, J., concurring in part and concurring in the judgment); accord *id.* at 986 (majority opinion).

This Court's precedents interpreting the Age Discrimination in Employment Act of 1967 (ADEA) are to the same effect. The ADEA similarly makes it 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) (emphasis added). This Court has held that, in a civil action under that provision, the plaintiff has "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff." *Reeves* v. *Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 143 (2000) (citation omitted).

As this Court has observed on numerous occasions, the element of intent concerns a defendant's state of mind. See, *e.g.*, *Halo Electronics, Inc.* v. *Pulse Electronics, Inc.*, 579 U.S. 93, 105 (2016). In a case involving intentional discrimination, therefore, "liability depends on whether the protected trait * * * actually motivated the [defendant's] decision." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 610 (1993). The same is true under Section 1514A: the plaintiff must prove that the protected activity actually motivated the adverse personnel action in order to prevail on a claim for retaliation.

2. The nature of Section 1514A as an anti-retaliation statute also demonstrates that proof of culpable intent is required. Section 1514A is titled, "Civil action to protect against *retaliation* in fraud cases." 18 U.S.C. 1514A (emphasis added). As this Court has noted, "the title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." *Dubin* v. *United States*, 143 S. Ct. 1557, 1567 (2023) (internal quotation marks and citations omitted). While a title cannot "override the plain words of a statute," statutory terms that are "elastic"—like the word "discriminate"—"must be construed in light of the terms surrounding

them," including "the title Congress chose." *Ibid.* (internal quotation marks, citations, and alterations omitted); see Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806(a), 116 Stat. 802 (listing the title of Section 1514A as part of the enacted legislation). This Court has also previously relied on the title of a provision in the Sarbanes-Oxley Act when interpreting the provision. See *Yates* v. *United States* 574 U.S. 528, 539-540 (2015) (plurality opinion); *id.* at 552 (Alito, J., concurring in the judgment).

Beyond the title, the operative statutory text shows that Section 1514A is an anti-retaliation statute. Section 1514A prohibits an employer from taking an adverse personnel action against an employee in response to the employee's decision to engage in protected activity. Although the text does not use the word, the statute thus makes it unlawful for an employer to "retaliate" against the employee, in the sense of "inflict[ing]" an employment-related injury "in return" for the employer's protected activity. *Webster's Third New International Dictionary of the English Language* 1938 (2002) (defining "retaliate"). The substance of Section 1514A thus confirms what the title expressly states: Section 1514A is an anti-retaliation statute.

That fact matters because, at common law, impermissible retaliation by an employer against an employee constitutes an intentional tort. In particular, courts have recognized the tort of wrongful discharge, which an employer commits by terminating an at-will employee for, among other things, "blowing the whistle on the employer's illegal conduct." 3 Dan B. Dobbs et al., *The Law of Torts* § 703, at 776 (2d ed. 2011) (Dobbs). Courts often refer to the tort of wrongful discharge as the tort of "retaliatory discharge." *Ibid.*; see, *e.g.*, *Rehfield* v. *Diocese of Joliet*, 182 N.E.3d 123, 132 (Ill. 2021); *Shovelin* v. *Central New Mexico Electric Cooperative, Inc.*, 850 P.2d 996, 1006

(N.M. 1993). And courts have made clear that wrongful or retaliatory discharge is an intentional tort. See, *e.g.*, *Jasper* v. *H. Nizam, Inc.*, 764 N.W.2d 751, 769 (Iowa 2009); *Adams* v. *George W. Cochran & Co.*, 597 A.2d 28, 32 (D.C. 1991); *Worley* v. *Providence Physician Services Co.*, 307 P.3d 759, 763 (Wash. Ct. App. 2013).

By prohibiting retaliation by an employer against an employee who engages in protected activity, Section 1514A thus creates a federal intentional tort. And "when Congress creates a federal tort," this Court "start[s] from the premise" that Congress intended to "adopt[] the background of general tort law." *Staub* v. *Proctor Hospital*, 562 U.S. 411, 417 (2011). It is black-letter tort law that an intentional tort must involve "an intent on the part of the defendant to engage in conduct the law regards as wrongful." 1 Dobbs § 2, at 4. Here, the conduct prohibited by statute is discrimination, see pp. 8-9, *supra*, which inherently requires proof that an employer's adverse personnel decision was "actually motivated" by the employee's protected activity or characteristic. *Hazen Paper*, 507 U.S. at 610. The nature of Section 1514A as an anti-retaliation statute thus further demonstrates that a plaintiff must prove retaliatory intent.

3. Section 1514A additionally requires an employee to prove causation, because the statute imposes liability only when an employer takes an adverse personnel action "because of" the employee's protected activity. See *University of Texas Southwest Medical Center* v. *Nassar*, 570 U.S. 338, 350-352 (2013). But causation is distinct from intent, and proof of the former does not equate to proof of the latter.

This Court's decision in *General Building Contractors Association* v. *Pennsylvania*, 458 U.S. 375 (1982), is illustrative. There, the plaintiffs were individuals from racial

minorities who sought work as engineers for several construction companies that had agreed to hire engineers exclusively through a union hiring hall. *Id.* at 378-380. The union, however, had engaged in intentionally discriminatory practices that prevented minority individuals from gaining access to the hiring hall and limited them to low-paying jobs if they did gain access. *Id.* at 380-381. The plaintiffs filed suit against the construction companies and others under Title VII and 42 U.S.C. 1981. *Id.* at 380.

This Court held that the companies could not be held liable for intentional discrimination. See *General Building Contractors Association*, 458 U.S. at 391-397. After concluding that the doctrine of *respondeat superior* did not apply, see *id.* at 393-395, the Court held that the companies could not otherwise be held liable, because they "neither knew nor had reason to know of the [u]nion's discriminatory practices." *Id.* at 383; see *id.* at 396-397. Even though the plaintiffs' race was clearly a causal factor in their inability to obtain satisfactory engineering jobs at the construction companies, the companies could not be held liable without intent to discriminate. See *id.* at 396-397.

Under Section 1514A, too, situations can arise where the employee's protected activity is a cause of an adverse personnel action but the employer lacks retaliatory intent. For example, an employer's investigation of wrongdoing reported by an employee may reveal significant wrongdoing by the employee. If the employer terminated the employee based on the wrongful conduct, the employee's protected activity may well constitute a but-for cause of the termination—after all, the employer may not have discovered the employee's wrongdoing without investigating the employee's report. But the termination would not have actually been motivated by the protected activity; the employer's motive for terminating the employee

would have been the employee's wrongdoing. It is thus clear that proof of causation alone does not demonstrate culpability; proof of improper intent is also required.

To be sure, this Court has said that, in some circumstances, an employer can "discriminat[e]" against an employee merely by engaging in "differential treatment," *Babb* v. *Wilkie*, 140 S. Ct. 1168, 1173 (2020) (citation omitted), even in the absence of any "malevolent motive," *Automobile Workers* v. *Johnson Controls*, 499 U.S. 187, 199 (1991). See Pet. Br. 36-37; U.S. Br. 24-26. But even when an employer acts without *animus* toward the employee, the employer may still be impermissibly *motivated* by the employee's protected trait or activity. For example, in *Johnson Controls*, *supra*, the employer dissuaded female employees with childbearing capacity from working in positions that involved lead exposure, out of concern for "the risk of harm to any fetus carried by a female employee." *Id.* at 190. In that circumstance, the employer lacked animus toward its female employees, but its conduct was still motivated by the sex of their female employees (and thus their ability to bear children). Even where an employer lacks animus, therefore, motive still matters, and proof of causation alone does not suffice.

Accordingly, Section 1514A requires an employee to prove that his employer acted with wrongful intent, separate and apart from the element of causation. That means a plaintiff must show that his employer was motivated by the employee's protected activity when taking the adverse personnel action. Absent such a showing, an employee's claim for retaliation fails as a matter of law.

B. Section 1514A's Incorporation Of AIR-21's Burden-Of-Proof Provisions Does Not Eliminate The Requirement For A Plaintiff To Prove Retaliatory Intent

Petitioner, supported by the government, argues (Pet. Br. 20-33; U.S. Br. 17-23) that Section 1514A(b)'s incorporation of AIR-21's burden-of-proof provisions demonstrates that retaliatory intent is not an element of an employee's case for retaliation under Section 1514A. They are incorrect.

1. The premise underlying petitioner's argument is that retaliatory intent cannot be an element of a claim under Section 1514A because AIR-21's burden-of-proof provisions do not mention retaliatory intent. See Br. 23-24. That premise is flawed because it improperly conflates burdens of proof with the elements of a claim.

As this Court has explained, the elements of a claim are the "constituent parts" of the claim that a plaintiff must prove to the jury. *Mathis* v. *United States*, 579 U.S. 500, 504 (2016) (citation omitted). By contrast, burdens of proof concern "[a] party's burden to prove a disputed assertion or charge" and determine "which of two contending litigants loses when there is no evidence on a question or when the answer is simply too difficult to find." *Black's Law Dictionary* 244 (11th ed. 2019). The elements thus tell the parties *what* must be proved, and the burdens of proof tell the parties *who* must do the proving and *what degree* of proof is required.

According to its plain text, Section 1514A(b)(2)(C) incorporates the "legal burdens of proof" set forth in Section 42121(b) of AIR-21. But those burdens concern only one element of an employee's claim: causation. Under AIR-21, the employee must create an inference of but-for causation by showing that the relevant protected activity was a "contributing factor" to the alleged adverse person-

nel action. 49 U.S.C. 42121(b)(2)(B)(i), (iii). If the employee meets that burden, the employer can avoid remedial action by proving, by clear and convincing evidence, that it "would have taken the same unfavorable personnel action in the absence of that behavior"—that is, by disproving the existence of but-for causation. 49 U.S.C. 42121(b)(2)(B)(iv); see *Nassar*, 570 U.S. at 360.

AIR-21's burden-of-proof provisions thus alter the burdens of proof on the element of causation in an action for retaliation. In the absence of those provisions, AIR-21 would not expressly assign the burden of proof on causation to one party, and a court would apply the "ordinary default rule" that "the party seeking relief"—under AIR-21, the employee—bears the burden of persuasion "regarding the essential aspects of [his] claims." *Schaffer* v. *Weast*, 546 U.S. 49, 56, 57, 58 (2005). An AIR-21 plaintiff would thus have the burden of proving but-for causation by a preponderance of the evidence. See *Grogan* v. *Garner*, 498 U.S. 279, 286 (1991).

There can be no dispute that causation is an element of a claim under Section 1514A. See p. 12, *supra*. And by incorporating AIR-21's burden-of-proof provisions, Section 1514A(b) lowers the employee's burden to prove causation by requiring only a showing that the protected activity was a "contributing factor" in the alleged adverse employment action. See 18 U.S.C. 1514A(b)(2)(C); 49 U.S.C. 42121(b)(2)(B)(iii).

That does not mean, however, that causation is the *only* element of a claim under Section 1514A. Indeed, that would be an illogical outcome. For example, a company cannot be liable under Section 1514A unless the company (or its parent) has publicly traded securities. See 18 U.S.C. 1514A(a). A plaintiff obviously must prove that fact in order to state a claim for liability, but it is plainly separate from Section 1514A(b)'s incorporation of AIR-

21's burden-of-proof provisions. Instead, that element is set forth in Section 1514A(a).

An employee must also prove that he engaged in protected activity. While AIR-21's burden-of-proof provisions refer to "behavior described in paragraphs (1) through (4) of subsection (a)" of Section 42121, it is subsection (a) that sets forth the particular requirements for proving that protected activity occurred. See 49 U.S.C. 42121(a), (b)(2)(B)(iii). And as applied to Section 1514A, those references make little sense, because Section 1514A(a) consists only of paragraphs (1) and (2). AIR-21's burden-of-proof provisions thus do not create the requirement for an employee to prove that he engaged in protected activity under Section 1514A; Section 1514A(a) does so.

So considered, it is clear that Section 1514A(b)'s incorporation of AIR-21's burden-of-proof provisions does not establish the elements of a Section 1514A claim. Instead, Section 1514A(a) establishes the elements, and the incorporation of AIR-21's burden-of-proof provisions merely changes the default allocation of the burden of proof on the element of causation. Petitioner is thus incorrect that retaliatory intent cannot be an element of a claim under Section 1514A simply because AIR-21's burden-of-proof provisions do not mention retaliatory intent.

2. Because petitioner and the government misunderstand the relationship between Section 1514A(a) and Section 1514A(b)'s incorporation of AIR-21's burden-of-proof provisions, many of their arguments are beside the point. For example, it does not matter whether the plain meaning of the phrase "contributing factor" does or does not impose an intent requirement. See Pet. Br. 22-24; U.S. Br. 20-23. As just explained, it is Section 1514A(a) that imposes the intent requirement; Section 1514A(b) merely alters the burden of proof on the element of causation. To

the extent that petitioner and the government's arguments do concern the interaction of Section 1514A(a) and (b), however, their arguments lack merit.

a. Petitioner contends (Br. 22-23) that Congress's use of the phrase "shall be governed" in Section 1514A(b) when incorporating AIR-21's burden-of-proof provisions shows that Section 1514A(a) cannot establish the elements of a claim under Section 1514A. In petitioner's view, the phrase "shall be governed" connotes exclusivity. But that argument again conflates elements with burdens of proof: AIR-21 sets forth the burdens of proof, not the elements of a claim under Section 1514A.

Petitioner's argument fails on its own terms in any event, because the precedents on which petitioner relies do not show that Congress's use of the phrase "shall be governed" eliminates requirements imposed by different provisions of the same statute. In *Weinberger* v. *Catholic Action of Hawaii/Peace Education Project*, 454 U.S. 139 (1981), the statute at issue did not contain the phrase "shall be governed"; petitioner is merely relying on the language in this Court's opinion, which addressed a judicial gloss on a statute, not a discrete requirement imposed by the same statute. See *id.* at 143-144. And in *Cornelius* v. *Nutt*, 472 U.S. 648 (1985), the Court held only that, where Congress provides that a proceeding "shall be governed" by a particular rule, the tribunal cannot apply a conflicting rule. See *id.* at 660-662; see 5 U.S.C. 7121(e)(2). But as already explained, see pp. 12-14, a requirement under Section 1514A(a) to show retaliatory intent does not conflict with Section 1514A(b)'s incorporation of AIR-21's burden-of-proof provisions.

b. Petitioner also argues that "any consideration" of retaliatory intent "is left to the second step of the burden-shifting framework"—namely, the requirement for the defendant to disprove causation by clear and convincing

evidence under AIR-21. Br. 24. In petitioner's view, a finding that the defendant would have taken the same employment action in the absence of the protected activity "completes the proof that the defendant has acted with retaliatory intent." Br. 25 (internal quotation marks omitted).

Petitioner thereby conflates causation with retaliatory intent. AIR-21's burden-of-proof provisions concern but-for causation. But again, the presence of but-for causation does not prove the presence of retaliatory intent. Accordingly, petitioner is simply incorrect that the employer's ability to disprove but-for causation encompasses the element of retaliatory intent. The two elements are substantively distinct.

c. Both plaintiffs and the government also argue (Pet. Br. 26-32; U.S. Br. 17-20) that retaliatory intent cannot be an element of an employee's case under Section 1514A because such intent is not an element of an employee's case under the Whistleblower Protection Act of 1989 (WPA), which protects civil-service employees from retaliation. The argument goes as follows: Congress first enacted a version of AIR-21's burden-of-proof provisions when it enacted the WPA; the Federal Circuit (which has exclusive jurisdiction over WPA claims) and the Department of Labor have interpreted the WPA not to require proof of retaliatory intent; Section 1514A's burdens of proof are "obviously transplanted" from the WPA, Pet. Br. 26; thus, Congress must have intended not to require a showing of retaliatory intent under Section 1514A. That elaborate argument is unpersuasive.

i. As respondents correctly explain (Br. 4, 38), petitioner's argument incorrectly assumes that Congress modeled AIR-21's burden-of-proof provision on the WPA's. But the WPA "was not the direct model for" that

provision; instead, "Congress looked to the [Energy Reorganization Act]." *Id.* at 38; see 42 U.S.C. 5851.

Even if Congress did consider the WPA when acting AIR-21, however, there are key textual differences between Section 1514A and AIR-21, on the one hand, and the WPA, on the other, showing that the former statutes would not necessarily incorporate all of the legal rules governing complaints under the latter. For one thing, the WPA does not prohibit "discriminat[ion]" by the employer against the employee, as do Section 1514A and AIR-21. 18 U.S.C. 1514A(a); 49 U.S.C. 42121(a); see 5 U.S.C. 1221(e). Accordingly, while the WPA may "require[] only a showing of causation in fact," that does not preclude whistleblower statutes that refer to "discrimination" from requiring a showing of retaliatory intent. *Armstrong* v. *BNSF Railway Co.*, 880 F.3d 377, 382 n.1 (7th Cir. 2018); accord *Kuduk* v. *BNSF Railway Co.*, 768 F.3d 786, 791 n.4 (8th Cir. 2014).

In addition, the WPA states that the Administrative Review Board "shall" order relief "*if* the employee * * * has demonstrated that a disclosure or protected activity * * * was a contributing factor in the [relevant] personnel action." 5 U.S.C. 1221(e)(1) (emphasis added). By contrast, AIR-21 states that the Secretary of Labor "may" find a violation "*only if* the complainant demonstrates that any [protected] behavior * * * was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. 42121(b)(2)(B)(iii) (emphasis added).

"The distinction between 'if' and 'only if'" is "not a mere quibble over vocabulary." *Carver* v. *Lehman*, 558 F.3d 869, 876 n.12 (9th Cir. 2009). "The word 'if' describes a sufficient condition," meaning that proof of the required showing under the WPA "guarantee[s]" the employee re-

lief. *Township of Tinicum* v. *Department of Transportation*, 582 F.3d 482, 489 (3d Cir. 2009); see *California* v. *Hodari D.*, 499 U.S. 621, 628 (1991). "The phrase 'only if,'" however, "describes a necessary condition," meaning that the "contributing factor" showing under AIR-21 is required but "does not guarantee" relief. *Tinicum*, 582 F.3d at 488. The language of AIR-21—which is the language incorporated by reference in Section 1514A—thus cannot be read to create the exclusive requirement for imposing liability, even if the language of the WPA is more susceptible to such a reading.

ii. Even setting aside textual differences, the premise that Congress must have intended to incorporate the legal rules governing the WPA directly into Section 1514A is tenuous. Although petitioner and the government assiduously avoid acknowledging as much, Section 1514A does not actually incorporate the WPA; instead, it incorporates AIR-21's burden-of-proof provisions, which petitioner and the government believe employ the same legal rules as the WPA because of similarities between the statutes. Petitioner and the government's argument thus requires two separate inferential leaps: first, that Congress intended AIR-21 to borrow the legal elements of liability from the WPA; and second, that Congress then intended to incorporate the WPA's legal elements into Section 1514A through AIR-21.

As already noted, see pp. 20-21, the first inferential leap is not warranted in light of AIR-21's history and the textual differences between AIR-21 and the WPA. But the second inferential leap is equally dubious. Even if some members of Congress saw a general connection between whistleblowing protections for government employees and Section 1514A, there is no basis to infer that the entire Congress that enacted the Sarbanes-Oxley Act intended to incorporate all of the WPA's elements into

Section 1514A. Indeed, if anything, the legislative history of Section 1514A suggests that Congress focused specifically on AIR-21—and not the WPA—simply because AIR-21 applied to "non civil service employees." S. Rep. No. 146, 107th Cong., 2d Sess. 30 (2002).

It is thus wrong to assume that Congress must have intended to incorporate the WPA's elements of liability into Section 1514A merely by incorporating the "burdens of proof" set forth in AIR-21—and thus that retaliatory intent cannot be an element of a claim under Section 1514A merely because lower courts and agencies have interpreted the WPA not to impose such a requirement. Section 1514A does not incorporate the WPA, and it separately establishes that an employee must also prove retaliatory intent in order to prevail in an action under that provision.

C. The Contrary Interpretation Of Section 1514A Would Interfere With The Employer-Employee Relationship

Petitioner's interpretation of Section 1514A would have adverse effects on the Nation's business community. It would chill covered businesses from taking necessary personnel actions concerning employees who engage in protected activity, even when such action is not motivated by the employee's decision to engage in protected activity.

As explained above, see pp. 13-14, an employer may discover wrongdoing by an employee in the course of investigating a report filed by the employee which constitutes protected activity under Section 1514A. In that situation, the protected activity may well be a but-for cause of any adverse personnel action, because the employer may not have discovered the wrongdoing absent the employee's protected activity. Under those circumstances, a defendant may not be able to avoid liability by showing that it "would have taken the same unfavorable personnel

action in the absence of [the protected] behavior." 49 U.S.C. 42121(b)(2)(B)(iv). But there is no good reason to impose liability in that circumstance, because any action taken by the employer would not have been motivated by the employee's protected activity. Under petitioner's approach, however, an employer could be liable for terminating the employee, despite the wrongdoing. The result is that the employer would feel obligated to retain the employee, out of fear of significant liability.

Petitioner's approach would also seriously interfere with an employer's ability to manage compliance personnel. For example, publicly traded companies often hire compliance officers to ensure that the company complies with SEC regulations and other federal laws. A compliance officer may incorrectly report that his employer's conduct violates SEC regulations—either unintentionally or intentionally. Yet under petitioner's approach, the employer would likely be hesitant to reprimand the officer, because the officer's reporting would be a but-for cause of the reprimand. While the company may be able to argue that the employee's belief that a violation occurred was not "reasonable," 18 U.S.C. 1514A(a)(1), it would be difficult for an employer to make that assessment ex ante, given that the inquiry has both objective and subjective components. See *Rhinehimer* v. *U.S. Bancorp Investments, Inc.*, 787 F.3d 797, 811 (6th Cir. 2015); *Nielsen* v. *AECOM Technology Corp.*, 762 F.3d 214, 221 (2d Cir. 2014); *Lockheed Martin Corp.* v. *Administrative Review Board*, 717 F.3d 1121, 1132 (10th Cir. 2013).

At bottom, whatever other situations may arise, petitioner's interpretation will result in innocent employers being saddled with liability. The elements of causation and intent are distinct, and without the element of intent, an employer can be penalized even when the employee's

protected activity did not actually motivate the adverse personnel action. That result makes little sense.

Nor will the enforcement of the intent requirement prevent meritorious claims from prevailing merely because the employee initially lacks information about his employer's motive. Cf. Pet. Br. 6 (citing 135 Cong. Rec. 5033 (1989)). At the pleading stage, "[m]alice, intent, knowledge, and other conditions of [the employer's] mind may be alleged generally," Fed. R. Civ. P. 9(b), allowing a plaintiff to survive a motion to dismiss by alleging facts that give rise to a plausible inference of intent, see, *e.g.*, *Ashcroft* v. *Iqbal*, 556 U.S. 662, 686-687 (2009). And once the employee proceeds past any motion to dismiss, the employee will have access to the full panoply of discovery mechanisms, including document discovery and depositions. See Fed. R. Civ. P. 30-36.

If an employee is unable to prove discriminatory intent after full discovery, then there is no reasonable basis for penalizing an employer for retaliation. A decision in favor of respondents thus would strike a fair balance between the need for employees to be free from retaliation and the need for employers to have the ability to take nondiscriminatory personnel actions where appropriate. The Court should thus follow the plain text of Section 1514A, which requires proof of retaliatory intent by an employee alleging that his employer took adverse action against him because he engaged in protected activity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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AUGUST 2023