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 *AMICUS CURIAE* AIRLINES FOR AMERICA IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*[1]

Airlines for America ("A4A") is the nation's oldest and largest airline trade association, representing both passenger and cargo airlines. Together, as of June 2023, A4A's member carriers and their wholly owned subsidiaries directly employ more than 90% of the airline industry's 746,000 full-time equivalent workers. A4A member airlines and their marketing partners account for more than 90% of U.S. airline passenger and cargo traffic. Commercial aviation, moreover, drives 5% of U.S. gross domestic product and helps support more than 10 million U.S. jobs.

In the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, commonly called "AIR-21," Pub. L. No. 106-181, 114 Stat. 61 (2000), Congress prohibited air carriers, including A4A's members, from retaliating against their employees because of the employees' safety-related whistleblowing. AIR-21's burden-shifting procedures for antiretaliation claims have been explicitly incorporated into numerous other statutes, including the Sarbanes-Oxley Act of 2002 ("SOX"), 18 U.S.C. § 1514A(b)(2), the statute directly at issue here. The Court's decision in this case will thus turn in part on its interpretation of AIR-21, and accordingly will have a significant impact on A4A's members. A4A has a strong interest in ensuring that AIR-21 is properly construed, and that the Second Circuit's decision re-

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[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

quiring a retaliation plaintiff to prove all the elements of a claim for retaliation, including retaliatory intent, is affirmed.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question presented in this case is whether a SOX retaliation plaintiff must prove retaliatory intent. That question all but answers itself. Retaliation is an intentional tort, so naturally it requires intent. This question, however, takes on special significance for A4A and its members because of how Congress reached that answer. While Congress prohibited retaliation in SOX, it expressly borrowed the burdens of proof from AIR-21, the antiretaliation statute applicable to the aviation industry. A4A thus writes separately to demonstrate that a showing of retaliatory intent is required under AIR-21, and to emphasize the significant practical consequences for aviation of a contrary rule.

This Court has warned repeatedly that lax standards for pleading and proving retaliation claims risk inundating agencies and courts with weak or even frivolous claims, leaving them unable to weed out meritless cases at earlier stages of investigation or litigation because a complainant's initial showing is so low. Such standards likewise burden employers who, even if ultimately vindicated by a full-blown investigation or trial, must expend resources to defend against a multitude of claims. Permissive standards also stifle employer decisionmaking, causing employers to think twice before undertaking adverse personnel actions even when entirely warranted, for fear of litigation and liability.

These concerns apply with particular force to AIR-21 retaliation claims. The causation standard for such claims is low: the employee need only show that protected activity was a "contributing factor" in the adverse personnel action. And that already-low standard has been made even lower by Department of Labor ("DOL") regulations advising that a complainant's initial burden is "[n]ormally" met "if the complaint shows that the adverse personnel action took place shortly after the protected activity," 29 C.F.R. § 1797.104(b)(2), even where there is no objective reason to doubt the *bona fides* of the adverse personnel action. This minimal showing triggers an onerous burden for airline employers, requiring them to prove by clear and convincing evidence that they would have taken the same personnel action regardless of the employee's protected activity. If the airline cannot make that showing, DOL "shall" investigate the complaint. 49 U.S.C. § 42121(b)(2)(A).

This scheme already presents many of the risks that this Court has warned about before. Meritless claims can proceed to investigation and result in liability merely by virtue of an accident of timing. And it imposes significant costs on employers, both in terms of responding to an employee's complaint and because the threat of investigation and liability interferes with *bona fide* disciplinary actions.

Petitioner proposes to exacerbate these risks by diluting the plaintiff's case even further. He contends that, to prove retaliation under AIR-21, a plaintiff need not prove the element of intent.

But a careful reading of AIR-21 shows that this is not what Congress intended. In 49 U.S.C.

§ 42121(a), Congress prohibited aviation employers from discharging or otherwise discriminating against an employee because of the employee's protected whistleblowing activity. This is familiar language with a familiar meaning. It means that the "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) (quotations omitted).

Section 42121(a)'s prohibition on intentional discrimination is incorporated into Section 42121(b)'s rules, procedures, and burdens of proof. Under Section 42121(b)(1), an AIR-21 retaliation plaintiff's complaint must allege "a violation of subsection (a)." Under Section 42121(b)(2)(B)(iii), an AIR-21 retaliation plaintiff must prove the violation "alleged in the complaint." And under Section 42121(b)(3), the Secretary of Labor may order relief for the AIR-21 retaliation plaintiff only if the Secretary "determines that a violation of Section 42121(a) has occurred." Section 42121(b) thus follows the traditional rule that the plaintiff must allege and then prove the elements of a claim.

Petitioner justifies a contrary conclusion by focusing exclusively on one provision of AIR-21—and then reading that provision incorrectly. In his (and the government's) view, Section 42121(b)(2)(B)(iii) "defines the whistleblower's affirmative case." Gov't Br. 16; *see* Pet. Br. 2, 22-23. And because that provision does not expressly require intent or incorporate Section 42121(a) in so many words, petitioner contends that retaliatory intent is not an element of an AIR-21 retaliation claim.

Petitioner is wrong. By requiring the plaintiff to prove the complaint's allegations, Section 42121(b)(2)(B)(iii) confirms that an AIR-21 retaliation plaintiff must prove discrimination, including retaliatory intent, and thus conforms to the traditional rule that the plaintiff must allege and then prove his entitlement to relief. It is also true, as petitioner observes, that Section 42121(b)(2)(B)(iii) requires only a modest nexus between the employee's protected activity and the adverse personnel action. But by clarifying the causation element of a retaliation claim under Section 42121(a), Section 42121(b)(2)(B)(iii) does not eliminate all other elements of the offense. If anything, it reflects Congress's desire to keep these elements intact, including the element of intent. The decision below should be affirmed.

ARGUMENT

I. PERMISSIVE STANDARDS FOR RETALIATION CLAIMS DRAIN AGENCY, JUDICIAL, AND EMPLOYER RESOURCES

A. The "proper interpretation and implementation" of an antiretaliation provision has "central importance to the fair and responsible allocation of resources in the judicial and litigation systems." *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 358 (2013). While whistleblower claims (and therefore antiretaliation provisions) serve an important function, this Court repeatedly has emphasized that permissive standards enable "the filing of frivolous claims, which … siphon resources from efforts by employers, administrative agencies, and courts" to combat actual retaliation. *Id.*; *see also, e.g.*, *Egbert v.*

Boule, 142 S. Ct. 1793, 1807 (2022) (even a "frivolous retaliation claim threatens to set off broad-ranging discovery in which there is often no clear end to the relevant evidence" (internal quotation marks omitted)); *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1953 (2018) (permissive causation standards "create[] a risk that the courts will be flooded with dubious retaliatory arrest suits").

These consequences are felt acutely by employers, both within the confines of litigation and without. Within litigation, permissive standards "make it far more difficult to dismiss dubious claims at the summary judgment stage," *Nassar*, 570 U.S. at 358, requiring employers and courts to expend resources litigating weak or even frivolous claims. More important, however, are the consequences outside litigation. As *Nassar* explained, an employee "who knows that he or she is about to be fired for poor performance" could "forestall that lawful action" by filing an "unfounded" discrimination charge so that, "when the unrelated employment action comes, the employee could allege that it is retaliation" for filing the discrimination charge. *Id.* By the same token, an employer who knows that an employee has recently filed a complaint will think twice about taking an adverse personnel action—and may not take it at all—even if it is entirely warranted.

B. The Court made these observations in *Nassar* when the choice was between "but-for" causation and a more lenient "motivating factor" causation test. *Id.* at 348 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion)); *id.* (citing *Hopkins*, 490 U.S. at 259 (White, J., concurring in the judgment)). In AIR-21, the causation stand-

ard is even lower, so the *Nassar* Court's concerns apply with even greater force.

Under AIR-21, to proceed to an agency investigation, aviation employees need only show that their protected activity was a "contributing factor" in their employer's adverse personnel action, 49 U.S.C. § 42121(b)(2)(B)(iii), and the Department of Labor has declared that "[n]ormally," a complainant's initial burden "is satisfied … if the complaint shows that the adverse personnel action took place shortly after the protected activity." 29 C.F.R. § 1797.104(b)(2). In DOL's view, in other words, airline employees can satisfy their initial retaliation burden simply by showing they were subjected to an adverse personnel action close in time to engaging in protected activity.

AIR-21 also imposes greater legal burdens on employers than the scheme in *Nassar*. Whereas in Title VII claims, the employer must show by a preponderance of the evidence that it would have made the same decision absent the impermissible motive, *Hopkins*, 490 U.S. at 253, AIR-21 requires employers to make this showing by clear and convincing evidence. Under DOL regulations, moreover, the employer must make this showing within just 20 days of receiving the complaint to forestall an investigation. 29 C.F.R. §§ 1979.104(c)-(d). Suffice it to say, clear and convincing evidence is "a high standard of proof," *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 557 (2014), and 20 days is a very short time to marshal the evidence required to attempt to meet it, *see* 29 C.F.R. § 1979.104(c).

These high burdens seriously impair employers' ability to take legitimate action against any employee without first ruling out, in every instance, the possibility that the employee may have engaged in protected activity at some point in the past. Take, for example, a mechanic with a record of performing aircraft maintenance inadequately, but who recently filed a complaint covered by AIR-21. By firing that mechanic, the airline potentially exposes itself to having to defend that basic personnel decision by clear and convincing evidence. That burden, and the risk of investigation, would cause the airline to hesitate before taking action or may prevent it from taking action at all.

Yet petitioner proposes to reduce AIR-21's requirements even further. In his view (like the Department of Labor's), an AIR-21 plaintiff need not even make a showing of retaliatory intent. Blessing that rule would *a fortiori* give rise to the concerns that troubled the *Nassar* Court when choosing between two higher causation standards. Under petitioner's rule, employees anticipating an adverse personnel action based on poor job performance could forestall that lawful result just by filing a complaint. So even if the mechanic had not recently filed a complaint, if he came to suspect he might soon be terminated—say, after a poor performance review, he could file one that day. Or even if he does not suspect discipline, he could get out ahead of potential future discipline by filing complaints on a regular basis, which would not be particularly remarkable in such a highly-regulated industry.

Such gamesmanship can easily lead to a favorable result for the employee. Even where an adverse

personnel action has "nothing to do with" protected conduct, "savvy employers know that it might cost them well into the six figures to defend against a … retaliation suit—even where the suit ultimately proves to be without merit." Jessica K. Fink, *Protected By Association? The Supreme Court's Incomplete Approach To Defining The Scope Of The Third-Party Retaliation Doctrine*, 63 Hastings L.J. 521, 545 (2012). Savvy employees, for their part, know that employers are often willing to pay "to avoid the aggravation, costs, and losses of time, resources, and productivity that inevitably arise in defending" retaliation allegations. David Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. Pa. J. Lab. & Emp. L. 73, 82 (1999). This combination not only burdens the agency by incentivizing "baseless" retaliation charges, but drains employer resources—and permits favorable outcomes for complainants—in the process. *Id.*

Moreover, even absent employee efforts to game the system, and although the agency's investigation may ultimately vindicate nonretaliatory employers, "the lessened causation standard" makes it "far more difficult to dismiss dubious claims" without expending significant agency resources to investigate and significant employer resources to defend. *Nassar*, 570 U.S. at 358-59.

C. These concerns are of particular weight for A4A's members. "Excessive discrimination claims bind employers by forcing them to divert their resources, thereby reducing their efficiency." Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of*

Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims, 61 Alb. L. Rev. 627, 659 (1997). In the aviation context, those concerns implicate travel for more than 90% of U.S. airline passenger and cargo traffic, totaling 5% of U.S. gross domestic product. The cost and effort required to defend against meritless claims, whether before or during an investigation or on agency or judicial review, drains airline resources, detracts from airlines' ability to transport passengers and cargo, and chills their willingness to take legitimate personnel actions against employees whose performance jeopardizes the passenger experience as well as airline operations overall. As explained next, that is not what Congress intended when it enacted AIR-21.

II. AN AIR-21 RETALIATION CLAIM REQUIRES PROOF OF RETALIATORY INTENT

Petitioner's argument that an AIR-21 retaliation plaintiff need not establish retaliatory intent conflicts with the statute's text and structure. Section 42121(a) prohibits discrimination because of protected activity, i.e., retaliation. The statutory language has a well-established meaning, which requires intent. Contrary to petitioner's argument, Section 42121(b) does not signal a departure from the settled meaning of Section 42121(a). To the contrary, it effectuates the well-established meaning of Section 42121(a) by requiring the complainant to plead and prove, and the Secretary of Labor ultimately to find, "a violation of subsection (a)," i.e., that the airline employer has engaged in intentional discrimination

on account of the employee's protected activity. 49 U.S.C. §§ 42121(b)(1)-(3).

A. Section 42121(a) Prohibits Discrimination Because Of Protected Activity, Which Requires Retaliatory Intent

There is no serious dispute that if Section 42121(a) establishes the standard for liability under AIR-21, a showing of retaliatory intent would be required to prove a retaliation claim. Like SOX, AIR-21 prohibits employers from "discharg[ing]" or "otherwise discriminat[ing] against an employee … because the employee" engaged in protected activity. 49 U.S.C. § 42121(a); *see* 18 U.S.C. § 1514A(a) (listing additional adverse personnel actions). This is a classic formulation of retaliation, *see* Retaliation, Black's Law Dictionary (11th ed. 2019) (defining employment retaliation as "[a]n adverse employment action taken because an employee has engaged in a legally protected activity"), a point reinforced in SOX, where Congress described the statutory prohibition as one "against retaliation," Pub. L. No. 107-204 § 806, 116 Stat. 745, 802 (2002); *see also, e.g.*, *Dubin v. United States*, 143 S. Ct. 1557, 1567 (2023).

Retaliation is an intentional tort. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005). In determining whether intent is a required element, the Court must "start from the premise that when Congress creates a federal tort it adopts the background of general tort law." *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011); *see also Comcast Corp. v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020); *Nassar*, 570 U.S. at

347. As the name suggests, intentional torts require proof of intent, which here means that the employer or its "agent intends, for discriminatory reasons, that the adverse action occur." *Staub*, 562 U.S. at 419; *see* Resp. Br. 18-20.

This Court has consistently described retaliation claims as requiring proof of retaliatory intent. In *Crawford-El v. Britton*, 523 U.S. 574 (1998), for example, this Court identified retaliation as among "the wide array of different federal law claims for which … motive is a necessary element." *Id.* at 585. In *Hartman v. Moore*, 547 U.S. 250 (2006), this Court explained that "any … plaintiff charging … retaliatory action … must prove the elements of retaliatory animus as the cause of the injury." *Id.* at 260. Likewise, in *Wilkie v. Robbins*, 551 U.S. 537 (2007), the Court described "the standard retaliation case" as asking "whether the officials' later action against the plaintiff was taken … for the purpose of punishing for the exercise of a constitutional right (that is, retaliation, probably motivated by spite)." *Id.* at 558 n.10.

There is no basis to conclude that Congress deviated from this settled principle in AIR-21. Just the opposite. Like AIR-21, many antidiscrimination laws prohibit employers from taking adverse action or otherwise discriminating because of an employee's membership in a protected group or protected conduct. *See, e.g.*, 42 U.S.C. §§ 2000e-2(a)(1), 2000e-3(a) (Title VII); 42 U.S.C. § 2000d (Title VI); 42 U.S.C. § 12112(a) (ADA); 38 U.S.C. §§ 4316(a), 4316(b)(1)(B) (USERRA); 29 U.S.C. § 623(a)(1) (ADEA); 15 U.S.C. § 78u-6(h)(1)(A) (Dodd-Frank); *see also* Resp. Br. 15-18. This language has a well-established meaning.

In the employment context, to discriminate because of something means "that the defendant had a discriminatory intent or motive for taking a job-related action." *Ricci*, 557 U.S. at 577 (quotations omitted); *see* Resp. Br. 14-20. This is no less true when it comes to retaliation. *Nassar*, 570 U.S. at 352 (retaliation under Title VII "require[s] proof that the desire to retaliate was the but-for cause of the challenged employment action"); *Jackson*, 544 U.S. at 168 (retaliation is discrimination on the basis of sex where "it is an intentional response to … an allegation of sex discrimination").

Thus, if Section 42121(a) provides the standard for liability under AIR-21, retaliatory intent is required.

B. Section 42121(b) Confirms That A Retaliation Plaintiff Must Prove The Elements Of Retaliation Under Section 42121(a)

The text and structure of Section 42121(b) confirm that Section 42121(a), with its prohibition on intentional discrimination because of an employee's protected activity, sets the standard for a retaliation claim under AIR-21. From start to finish, Section 42121(b) implements Section 42121(a) and incorporates it into AIR-21's rules, procedures, and burdens of proof. A complainant must allege a "violation of subsection (a)," 49 U.S.C. § 42121(b)(1), and must prove the violation "alleged" in the complaint, *id.* § 42121(b)(2)(B)(iii). And ultimately, the Secretary of Labor can award final relief to the employee only if he "determines that a violation of subsection (a) has occurred." *Id.* § 42121(b)(3)(B). It is standard

fare that a plaintiff must prove what he alleges and prove his entitlement to relief and, as its plain text makes clear, AIR-21 is no exception.

Petitioner's argument is that Section 42121(b)(2)(B)—and Section 42121(b)(2)(B)(iii) in particular—fixes the elements of an AIR-21 retaliation claim, and because that Section does not expressly mention intent, it must not be an element of the plaintiff's case. Although petitioner is wrong in multiple respects, his cardinal sin is reading Section 42121(b)(2)(B) "in isolation." *Dubin*, 143 S. Ct. at 1566 (quotations omitted). When AIR-21 is read "as a whole," *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991), it is evident that the statute's prohibition on retaliation requires the plaintiff to prove retaliatory intent.

1. Start with Section 42121(b)(1), which petitioner ignores. That provision governs pleading: an AIR-21 retaliation plaintiff must allege "a violation of subsection (a)." 49 U.S.C. § 42121(b)(1). Typically, a plaintiff must prove what he alleges. The "[n]ormal" rule in litigation is that "the essential elements of a claim remain constant through the life of a lawsuit," and that "the plaintiff must plausibly allege at the outset of a lawsuit … what the plaintiff must prove in the trial at its end." *Comcast*, 140 S. Ct. at 1014. Applying that rule to Section 42121(b)(1) means that a plaintiff must eventually prove a violation of Section 42121(a), which indisputably requires a showing of intent. *Supra* Part II.A.

2. Section 42121(b)(2) confirms the "[n]ormal" rule's application—an AIR-21 plaintiff must prove

the violation he alleges. Specifically, Section 42121(b)(2)(B)(iii) provides that "[t]he Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that" 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). The "unfavorable personnel action alleged in the complaint," of course, is a "violation of subsection (a)," *id.* § 42121(b)(1), which prohibits intentional discrimination because of the employee's protected activity, *supra* Part II.A.

True enough, Section 42121(b)(2)(B)(iii) does not track Section 42121(a) in every particular. Section 42121(a), standing on its own, would require "but-for" causation, which is the established meaning of the phrase "because of" (or, in AIR-21, "because the"). *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768, 772-73 (2015). But Congress is free to "relax[]" the causation element, *see id.* (discussing 42 U.S.C. § 2000e-2(m)), which is exactly what it did in Section 42121(b)(2)(B)(iii) by specifying that the complainant need only prove that his protected activity was a "contributing factor" in the airline employer's unfavorable personnel action. That Congress modified one element in Section 42121(a) does not demonstrate its intent to negate another. To the contrary, the fact that Congress modified only the causation element but left all others undisturbed confirms that those other elements

apply fully to an AIR-21 retaliation claim, including retaliatory intent.[2]

3. Section 42121(b)(3), another provision of AIR-21 ignored by petitioner, confirms the point. That provision directs the Secretary of Labor to award relief "[i]f" the Secretary "determines that a violation of subsection (a) has occurred." 49 U.S.C. § 42121(b)(3). Another standard rule in litigation is that the plaintiff must prove his entitlement to relief. *See Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009); *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005). Here, this means that the plaintiff must prove exactly what he alleged—i.e., inten-

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[2] Petitioner may contend that Section 42121(b)(2)(B)(iii) can be read as not actually requiring the plaintiff to prove the complaint's allegation of an unlawful personnel action, but only that protected activity contributed to the unlawful personnel action alleged in the complaint. This interpretation, while unlikely, would not help petitioner in any event. That is because the phrase "only if" in Section 42121(b)(2)(B)(iii) "describes a necessary condition, not a sufficient condition." *Twp. of Tinicum v. U.S. Dep't of Transp.*, 582 F.3d 482, 488 (3d Cir. 2009) (citing *California v. Hodari D.*, 499 U.S. 621, 627-28 (1991)); *see also Jennings v. Rodriguez*, 138 S. Ct. 830, 846-47 (2018). So even if Section 42121(b)(2)(B)(iii) did not directly require the plaintiff to prove the unlawful personnel action alleged in the complaint, it would not follow that the plaintiff is relieved of that burden altogether—i.e., the elements required by Section 42121(b)(2)(B)(iii) would be necessary, but not sufficient, to establish the plaintiff's entitlement to relief. *See* 49 U.S.C. § 42121(b)(2)(B)(iv) (prohibiting relief based on employer's showing). Indeed, everyone agrees that the plaintiff must prove an unlawful personnel action, *see* Gov't Br. 16, whether via Section 42121(b)(2)(B)(iii) or by operation of the traditional rule that the plaintiff must prove what he alleges. *See* 49 U.S.C. § 42121(b)(3) (Secretary "shall order" relief "[i]f" he finds a violation of Section 42121(a)).

tional discrimination because of protected activity in violation of Section 42121(a). *Cf. Watson v. Ft. Worth Bank & Tr.*, 487 U.S. 977, 986 (1988) (quotations omitted) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.").

4. Ultimately, petitioner recognizes (as he must) that retaliatory intent is required for an AIR-21 retaliation claim, but he asserts that Congress deviated from the traditional structure of litigation through a different sub-sub-sub-subsection of AIR-21: Section 42121(b)(2)(B)(iv). That provision, he suggests, "place[s] the burden" to disprove retaliatory intent on the defendant-employer. Pet. Br. 25-26; *id.* at i (question presented is whether the "employer bear[s] the burden of proving a lack of 'retaliatory intent'"). But Section 42121(b)(2)(B)(iv) is addressed to causation, not intent.

Section 42121(b)(2)(B)(iv) mandates that the Secretary of Labor may not order relief "if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of" the employee's protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv). This provision "shift[s] the burden of persuasion to the employer to establish the absence of but-for cause." *Burrage v. United States*, 571 U.S. 204, 213 n.4 (2014); *see also Comcast*, 140 S. Ct. at 1017 (requiring the defendant to prove "that it would have made the same decision even if it had not taken the" protected trait or activity into account "[i]n essence" takes "the burden of proving but-for causation from the plaintiff and hand[s] it to the de-

fendant as an affirmative defense"). But causation is not the same as intent. *See Staub*, 562 U.S. at 418-22 (distinguishing causation and intent); *Hartman*, 547 U.S. at 260 (same); Resp. Br. 21-23. And intent does not follow ineluctably from causation, especially when the causation standard is watered down, as in AIR-21.

Indeed, it is easy to envision scenarios in which the employer fails to negate but-for causation by clear and convincing evidence even though retaliatory intent was lacking. For instance, imagine an employee who misses an important client meeting to file a protected safety-related complaint. If the employer disciplines the employee for missing work, it would not be able to make the showing in Section 42121(b)(2)(B)(iv), even if the employer did not know the reason for the employee's absence and thus could not have harbored retaliatory intent. Or take the circumstances in *Staub*. A direct supervisor's report might play a causal role in an adverse personnel action, but the employer would not be liable if that supervisor acted without forbidden intent. *Staub*, 562 U.S. at 422. Retaliatory intent is plainly required, but a fact-finder (be it a jury or an agency) will not invariably find it merely by rejecting the employer's argument that it would have taken the same unfavorable personnel action regardless of the employee's protected conduct.

5. Finally, petitioner's heavy reliance on the Whistleblower Protection Act (WPA) is misplaced. On its own, Congress' prior enactment of a *different* statute with *different* language would say very little about Congress' intent to deviate from the traditional structure of litigation in AIR-21. *See* Resp. Br. 35-

42. But petitioner's argument is especially weak here because Congress affirmatively chose not to follow the WPA model here despite every opportunity to do so. For instance, instead of drafting an entirely new statutory scheme in AIR-21, Congress could have incorporated the WPA, as it has in several statutes. *See* Resp. Br. 37-38; *see* 10 U.S.C. § 4701(c)(6); 12 U.S.C. § 1831j(f). In fact, in AIR-21 itself, Congress extended the WPA's protections to Federal Aviation Administration employees, *see* Pub. L. No. 106-181 § 307; 49 U.S.C. § 40122(g)(2)(A); *see also* S. Rep. No. 105-278, at 21 (1998); Gov't Br. 18 n.5, but chose to implement a different scheme for private employers. That could only have been "deliberate." *Nassar*, 570 U.S. at 353. Where "Congress has simultaneously chosen to amend one statute in one way and a second statute in another way"—or here, amend one statute and create another—that choice normally implies "differences in meaning." *Comcast*, 140 S. Ct. at 1018. Nor is there anything "unusual" about that choice. Congress often chooses to "hold the Federal Government to a higher standard than … private employers." *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020).

Thus, while Congress may have borrowed the "contributing factor" language from the WPA, that is the extent of the similarity. In fact, Congress borrowed the structure of AIR-21's private-employer whistleblower provisions from "other industries, such as nuclear energy." S. Rep. No. 105-278, at 22 (1998). The Energy Reorganization Act ("ERA"), has the same structure as the provisions at issue here, 42 U.S.C. § 5851, and has been (correctly) interpreted to require a showing of retaliatory intent. *See*

Kaufman v. Perez, 745 F.3d 521, 532-33 (D.C. Cir. 2014) (Srinivasan, J., concurring in the judgment); *see also Addis v. Dep't of Lab.*, 575 F.3d 688, 691-93 (7th Cir. 2009); *Ind. Mich. Power Co. v. U.S. Dep't of Lab.*, 278 F. App'x 597, 604 (6th Cir. 2008); *Jones v. U.S. Dep't of Lab.*, 148 F. App'x 490, 499 (6th Cir. 2005); *Hasan v. U.S. Dep't of Lab.*, 400 F.3d 1001, 1005-06 (7th Cir. 2005); *Doyle v. U.S. Sec'y of Lab.*, 285 F.3d 243, 250 (3d Cir. 2002); *Carroll v. U.S. Dep't of Lab.*, 78 F.3d 352, 356 (8th Cir. 1996). So too for the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109, which like SOX explicitly adopts AIR-21's burden-allocation scheme. *Id.* § 20109(d)(2)(A)(i); *see, e.g.*, *Tompkins v. Metro-N. Commuter R.R. Co.*, 983 F.3d 74, 82 (2d Cir. 2020); *Dakota, Minn. & E. R.R. Corp. v. U.S. Dep't of Lab. Admin. Rev. Bd.*, 948 F.3d 940, 945 (8th Cir. 2020); *Neylon v. BNSF Ry. Co.*, 968 F.3d 724, 728-29 (8th Cir. 2020); *Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir. 2018); *Blackorby v. BNSF Ry. Co.*, 849 F.3d 716, 722 (8th Cir. 2017); *Heim v. BNSF Ry. Co.*, 849 F.3d 723, 727 (8th Cir. 2017); *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 792 (8th Cir. 2014).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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