No. 22-660

IN THE

Supreme Court of the United States

TREVOR MURRAY,

Petitioner,

v.

UBS SECURITIES, LLC, ET AL.,

Respondents.

On Writ Of Certiorari
To The United States Court of Appeals
For The Second Circuit

BRIEF OF THE AMERICAN ASSOCIATION OF RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Second Circuit correctly held that a plaintiff must prove retaliatory intent to prevail on a retaliation claim under the Sarbanes-Oxley Act.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of American Railroads (AAR)[1] is an incorporated, nonprofit trade association representing the nation's major freight railroads, Amtrak, and some smaller freight railroads and commuter authorities. AAR's members account for the vast majority of the rail industry's line haul mileage, freight revenues, and employment. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, the courts, and administrative agencies. AAR participates as *amicus curiae* to represent the views of its members when a case raises an issue of importance to the railroad industry as a whole.

AAR's members have a strong interest in this case. The Sarbanes-Oxley Act's (SOX) anti-discrimination provision, 18 U.S.C. § 1514A, is, as regards the questions at stake in this case, substantially identical in wording to key parts of the anti-discrimination provision of the Federal Railroad Safety Act (FRSA), 49 U.S.C. § 20109. Both provisions prohibit covered employers from discriminating against employees for engaging in whistleblowing and other protected conduct. And both provisions are governed, at least in part, by the burden-shifting scheme laid out in 49

[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and their counsel made a monetary contribution to the preparation or submission of this brief.

U.S.C. § 42121(b). [2] Indeed, the decision below explicitly relied on circuit precedent construing the FRSA. *See* Pet. App. 11a-13a.

AAR's members regularly face litigation under Section 20109. The requirement of proving retaliatory intent is largely settled in the FRSA context and critical to the railroad industry's ability to enforce safety and other workplace rules. The Administrative Review Board and a chorus of federal courts of appeals have held that it is the employee's burden to establish such intent. A decision for Petitioner here would risk upending that settled interpretation and undermine the very safety objectives that the FRSA was designed to serve.

SUMMARY OF ARGUMENT

Petitioner invites the Court to absolve plaintiffs of proving retaliatory intent in pressing discrimination claims under SOX. A general consensus has repudiated that position in the FRSA context, which involves a nearly identical anti-discrimination and burden-shifting framework. And for good reason: such an approach would effectively immunize employee misconduct, hamstring employers from enforcing legitimate safety and other conduct rules, and clash

[2] In this brief, AAR addresses the issue on which the Court granted certiorari: the appropriate standard to apply to an anti-discrimination statute also governed by the so-called "contributing factor" causation standard. AAR's discussion is thus limited to those sections of the FRSA to which the contributing factor causation standard applies. *Compare* 49 U.S.C. § 20109(a) (referring to discrimination "in whole or in part" and thus suggesting contributing factor standard applies), *with* § 20109(b) (referring to discrimination "for" certain enumerated protected activities).

with the ordinary meaning of "discriminate," uniform anti-discrimination case law, and background principles of tort law. Given the similarities between SOX and the FRSA, those same considerations should inform the Court's interpretation here.

I. The Court need not speculate about the implications of excusing employees from showing retaliatory intent under SOX. The Administrative Review Board (ARB)—which adjudicates claims under both SOX and the FRSA—provided a natural experiment. In 2012, in an FRSA case, it adopted Petitioner's view that an employee need not establish retaliatory intent. The result was to find a "violation" of the statute whenever, in the wake of an employee-submitted injury report (a form of protected activity under the FRSA), a railroad discovered employee misconduct and took disciplinary action. This hampered railroads' abilities to address safety issues and immunized employees from the consequences of workplace misconduct. The courts of appeals widely criticized this result and largely held that the statute's ban on "discrimination" compelled a showing of retaliatory intent. In late 2019, even the ARB came around to this view, repudiating its former precedent. Should this Court rule for Petitioner, the rail industry would likely be forced back into this untenable position.

II. Unsurprisingly, nothing in the language common to the FRSA and Section 1514A compels this unreasonable interpretation. Section 1514A follows the standard structure of employment discrimination statutes, which prohibit employers to "discriminate" in personnel actions "because of" an employee's protected conduct. And it is well established that

statutes with that structure require a showing of intentional discrimination to state a claim. Nor does Section 42121 eliminate the requirement to prove discriminatory intent. Its burden-shifting framework addresses causation, not intent. And in any event, an employee's protected conduct can be a "contributing factor" to an act of intentional discrimination only if it contributes to the employer's motive for acting.

III. Background principles of tort law reinforce this conclusion. Absent contrary textual evidence, such principles dictate that the plaintiff bear the burden of showing each element of his claim—including discriminatory intent—and of showing that the defendant's unlawful conduct was the but-for cause of his injuries. And where, as here, an anti-discrimination statute relaxes the standard for causation, the presumption that the plaintiff must prove intent only strengthens. Anti-discrimination law, like tort law generally, serves two basic purposes, deterrence and compensation of injury. When an employer has intentionally discriminated, its conduct merits deterrence, and it is no longer entitled to a presumption that it did not cause the plaintiff harm. But when there is no showing of intent, loosening the causation standard risks deterring socially beneficial behavior and creating unearned windfalls for plaintiffs. That is precisely what the experience of the FRSA bears out.

ARGUMENT

I. Petitioner's Reading Has Been Tried And Discredited in the Context of the Federal Rail Safety Act

Petitioner's reading of Section 1514A both rejects a requirement to prove intent and establishes a low threshold for proving causation. Any factor which "tends to affect in any way the outcome of the decision" will do. Pet'r Br. 29-30; *accord* U.S. Br. 19-20 (any factor "that affects an agency's decision," "[r]egardless of the official's motives").

Eleven years ago, the ARB adopted precisely this reading for the materially identical anti-discrimination provision of the FRSA. The ARB's interpretation immediately produced adverse consequences, effectively immunizing employees from the consequences of workplace misconduct and undermining the very safety interests the provision is meant to serve. After widespread disapproval from the courts of appeals, the ARB ultimately adopted an intent requirement in 2019. The experience demonstrates why this Court should not venture down the path Petitioner marks out.

1. The FRSA contains an anti-discrimination provision providing employee protections that are substantially the same as those in Section 1514A. 49 U.S.C. § 20109; *see* U.S. Br. 8 n.2. It provides that a covered railroad carrier "may not discharge … or in any other way discriminate against an employee if such discrimination is due, in whole or in part, to the employee's" protected conduct. § 20109(a). As with Section 1514A, actions brought under this section "shall be governed by the legal burdens of proof set

forth in section 42121." § 20109(d)(2)(A)(i). Given the similarities between this framework and SOX, the decision below relied on circuit precedent interpreting Section 20109 to hold that Petitioner needed to prove retaliatory intent. Pet. App. 11a-13a.

The FRSA's anti-discrimination provision is the subject of frequent litigation, often involving workplace injuries. FRSA regulations require railroads to investigate and report accidents resulting in injury or death. *See* 49 C.F.R. pt. 225. To comply with these requirements, railroads generally require employees who are injured on the job to report their injury to the company. *See BNSF R.R. Co. v. U.S. Dep't of Labor*, 816 F.3d 628, 633 (10th Cir. 2016). An employee's compliance with such reporting requirements is itself a form of protected activity under the FRSA. *See* § 20109(a)(4) (protecting reports of "a work-related personal injury" to the "railroad carrier"). Once a railroad receives such a report, it typically investigates the circumstances around the injury "to uncover facts that can prompt corrective action that will reduce the likelihood of a future injury." *Koziara v. BNSF Ry. Co.*, 840 F.3d 873, 878 (7th Cir. 2016). Sometimes the investigation finds that employee's own misconduct—say, violation of a railroad safety rule—led to the injury. *See* Fed. R.R. Admin., *Ten Year Accident/Incident Overview*, https://tinyurl.com/55bjytc5 (last visited Aug. 3, 2023) (select "Generate Report") (noting nearly 7,000 "Human factor caused" accidents in the past decade). In some cases, an investigation turns up evidence of misconduct that did not cause the injury but is misconduct all the same. In either scenario, where the

railroad disciplines the misconduct, litigation under the FRSA often ensues.

2. The seminal ARB decision that adopted Petitioner's preferred interpretation arose out of facts similar to the first scenario. *See In re DeFrancesco*, No. 10-114, 2012 WL 694502 (ARB Feb. 29, 2012). After slipping in snow and falling on his back, DeFrancesco reported the incident to the railroad. *Id.* at *1. The railroad investigated the incident and determined that the fall was the result of "carelessness" and that DeFrancesco had "exhibited a pattern of unsafe behavior that required corrective action." *Id.* After the railroad suspended him for 15 days, DeFrancesco brought a claim under the FRSA. *Id.* at *2. An ALJ dismissed the complaint for failure to prove "retaliatory animus." *Id.* at *3.

The ARB reversed and adopted what came to be known as the "chain of events" or "inextricably intertwined" theory of proof. *Id.* at *4. Under this theory, an employee "is not required to show retaliatory animus (or motivation or intent) to prove that his protected activity contributed to [his employer]'s adverse action." *Id.* at *3. Rather, the employee need only "prove that the reporting of his injury was a *contributing factor* to the [discipline]." *Id.* And a contributing factor is simply "any factor which … tends to affect in any way the outcome of the decision." *Id.* The employer's motivations are irrelevant. So, in DeFrancesco's case, the injury report "was a contributing factor to his suspension" simply because the railroad "would never have reviewed the video of DeFrancesco's fall or his employment records" if he "had not reported his injury." *Id.* at *3-*4. In other words, it was enough

that one thing led to another—that the injury report (the protected activity) led to an investigation, which led to discovery of misconduct, which led to discipline—even if the first link in that chain played no role in the employer's motive for acting.

3. The predictable result of this rule was to allow employees to "immunize themselves against wrongdoing by disclosing it in a protected-activity report." *BNSF*, 816 F.3d at 639; *accord Yowell v. United States Dep't of Lab.*, 993 F.3d 418, 420-21, 423, 427-28 (5th Cir. 2021) (criticizing ALJ's reliance on *DeFrancesco* as allowing "a protected activity" to "shield an employee from the ramifications of workplace misconduct"); *Lemon v. Norfolk S. Ry. Co.*, 958 F.3d 417, 420-21 (6th Cir. 2020) (criticizing the "chain-of-events theory" for "authoriz[ing] employees to engage in banned behavior so long as it occurs during protected conduct").

Any discipline imposed for unsafe behavior that resulted in an injury and injury report effectively meant an employee could prove a "contributing factor"—thus giving rise to liability unless the railroad could establish its affirmative defense "by clear and convincing evidence." 49 U.S.C. § 42121(b)(2)(B)(iii), (iv); *see, e.g.*, *BNSF*, 816 F.3d at 636 (ALJ deemed accident report that led to discovery of a safety violation by the employee a "contributing factor" to discipline for the violation); *Foster v. BNSF Ry. Co.*, 866 F.3d 962, 969 (8th Cir. 2017) (employee raising this theory); *Heim v. BNSF Ry. Co.*, 849 F.3d 723, 727 (8th Cir. 2017) (same); *Koziara*, 840 F.3d at 876 (same). Indeed, because railroad policy typically *requires* employees to file reports after accidents and injuries, reckless employees responsible for the

incidents could count on shifting the burden to their employer wherever *DeFrancesco* reigned.

This result conflicts with a commonsense reading of the burden-shifting provision of Section 42121. An employee who carries his burden of establishing that his protected conduct "was a contributing factor in the unfavorable personnel action alleged" has established "a violation" of the anti-discrimination provision. § 42121(b)(2)(B)(iii). Even where an employer shows that it would have taken the same adverse action absent the protected activity, that employer has still committed a "violation," even if "[r]elief may not be ordered" for it. § 42121(b)(2)(B)(iv); *cf.* 42 U.S.C. § 2000e-5(g)(2)(B) (establishing a similar affirmative defense for employers who have committed "a violation" of Title VII of the Civil Rights Act). Thus, under *DeFrancesco*, a railroad that disciplined an employee *solely* for misconduct—no matter how egregious—committed "a violation" of the FRSA's anti-discrimination provision simply because it learned of the misconduct through an injury report.

This perverse result undermines railroad safety—the very purpose the FRSA's anti-discrimination provision and injury-reporting requirements are meant to serve. "[T]here is nothing sinister … in deeming the submission of an injury report a proper occasion for an employer's conducting an investigation." *Koziara*, 840 F.3d at 878. "An injury report is a normal trigger for an investigation designed to uncover facts that can prompt corrective action that will reduce the likelihood of a future injury." *Id.*; *accord Dakota, Minnesota & E. R.R. Corp. v. U.S. Dep't of Lab.*, 948 F.3d 940, 946 (8th Cir. 2020). But rather than empower those responsible for

improving safety, *DeFrancesco* helped to immunize those who undermined safety from the consequences of workplace misconduct.

Even more perversely, *DeFrancesco* provided cover for employees that refused to timely report accidents or injuries. Railroads generally require employees to report injury-causing incidents at the earliest possible opportunity. But because in many cases railroads learn of an employee's failure to submit a *timely* report only when the employee submits an *untimely* report, *DeFrancesco* ended up penalizing railroads that disciplined employees for failing to take seriously their obligation to timely report incidents. *See, e.g.*, *Yowell*, 993 F.3d at 420-21; *Dakota*, 948 F.3d at 947. In a similar way, employees who lied about the circumstances of their injuries could invoke *DeFrancesco* as well as a shield for their dishonesty. *See, e.g.*, *Lemon*, 958 F.3d at 418-19.

Even discipline for serious misconduct wholly unrelated to the injury found refuge in *DeFrancesco*. In one case, a railroad employee was injured, filed an injury report, and then sued the railroad for causing his injury under the Federal Employers' Liability Act (FELA). Four years later, the railroad learned through discovery in the FELA action that the employee had lied on his employment application and dismissed him on this basis. That the injury report "was a necessary link in a chain of events leading to the adverse activity" was enough: on the ALJ's telling, plaintiff proved his case because the injury led to the injury report, which led to the FELA suit, which led to fact discovery, which led to a discovery of dishonesty, which led to dismissal. *BNSF Ry. Co. v. U.S. Dep't of Lab.*, 867 F.3d 942, 946 (8th Cir. 2017). The court of

appeals sensibly repudiated this decision on appeal, holding the ALJ erred by "ruling that [the railroad]'s motive was irrelevant to the contributing factor inquiry." *Id.* The absurdities *DeFrancesco* produced thus can be traced directly to its rejection of an intent requirement.

4. It is thus unsurprising that *DeFrancesco* quickly became the subject of widespread and forceful disapproval in the courts of appeals. As the Eighth Circuit explained, the "FRSA provides that a rail carrier may not discharge 'or in any other way *discriminate* against' an employee for engaging in protected activity." *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014) (quoting § 20109(a)). "[T]he essence of this intentional tort is 'discriminatory animus.'" *Id.* Thus, "the contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity." *Id.*

Circuits have agreed. Many have expressly held that the employee must establish retaliatory intent. *See Tompkins v. Metro-N. Commuter R.R. Co.*, 983 F.3d 74, 82 (2d Cir. 2020) ("some evidence of retaliatory intent is a necessary component of an FRSA claim"); *Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1213 (10th Cir. 2018) ("employee must produce evidence that unfavorable personnel action was 'motivated by animus'"); *Armstrong v. BNSF Ry. Co.*, 880 F.3d 377, 382 (7th Cir. 2018) ("an employer violates the statute only if the adverse employment action is, at some level, *motivated* by discriminatory animus"). Others have held that "an employee may not rely solely on the fact that a protected activity is what informed the employer of wrongdoing." *Yowell*,

993 F.3d at 427 (5th Cir.); *accord Lemon*, 958 F.3d at 420 (6th Cir.) (rejecting a "chain-of-events theory of causation").[3]

Even the cases some cite[4] as rejecting an intent requirement did not go so far. In *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152 (3d Cir. 2013), the Third Circuit simply held that the employer was not entitled to summary judgment where there was evidence that (i) the employer had all relevant information to charge the employee with a rule violation before the employee's injury report, but only pursued the charge after the report, and (ii) the employer had never before enforced the rule at issue. This is the kind of evidence from which a jury could have inferred retaliatory intent, making the court's factbound decision unremarkable for present purposes. And *Frost v. BNSF Ry. Co.*, 914 F.3d 1189 (9th Cir. 2019), itself recognized that "intent or animus is part of an FRSA plaintiff's case." *Id.* at 1196. Whatever the court meant by further suggesting that a plaintiff could show intent by proving the contributing factor element, it did not purport to overrule its earlier decision in *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451 (9th Cir. 2018), which was unambiguous: "'The contributing factor that an

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[3] Appropriately, none of these decisions even considered extending deference under *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), to *DeFrancesco*. The FRSA gives the Secretary of Transportation, not the ARB or the Department of Labor generally, "the authority … to make rules carrying the force of law," which is a necessary prerequisite for *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 226-27 (2001); *see* 49 U.S.C. § 20103(a); *cf.* Resp. Br. 43-46.

[4] *See* Academy of Rail Labor Attorneys Br. 14.

employee must prove is intentional retaliation prompted by the employee engaging in protected activity.'" *Id.* at 461 (quoting *Kuduk*, 768 F.3d at 791).

5. Even the ARB turned tail in 2019. Expressly disavowing *DeFrancesco*, it held that "[t]he contributing factor that an employee must prove is intentional retaliation prompted by the employee engaging in protected activity." *In re Thorstenson*, Nos. 2018-0059, 2018-0060, 2019 WL 11901996, at *5 (ARB Nov. 25, 2019) (quoting *Kuduk*, 768 F.3d at 791). As a result, it announced, it will "no longer require that ALJs apply the 'inextricably intertwined' or 'chain of events' analysis." *Id.* Applying its new standard, it held that the ALJ erred when ruling that the employee had established a contributing factor merely because "the employer came to learn of the employee's wrongdoing" through his injury report. *Id.* at *6.[5]

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[5] The Ninth Circuit reversed the ARB's decision in *Thorstenson* because it would have been "virtually impossible" for the employee to comply with the rule the railroad claimed he had violated and because the ARB wrongly required the employee to show that his protected activity was "a proximate cause of the adverse action." *Thorstenson v. U.S. Dep't of Lab.*, 831 F. App'x 842, 843-44 (9th Cir. 2020); *Thorstenson v. U.S. Dep't of Lab.*, No. 22-70020, 2023 WL 2523831 (9th Cir. Mar. 15, 2023). The court did not discuss the ARB's holding on intent, and in fact Ninth Circuit precedent recognizes that an FRSA plaintiff must show discriminatory intent. *Rookaird*, 908 F.3d at 461. In subsequent decisions, the ARB has continued to apply *Thorstenson*'s requirement that the "employee must prove [] intentional retaliation." *E.g.*, *In re Corbin*, No. 2020-0023, 2021 WL 2407469, at *3 (ARB May 28, 2021); *In re Klinger*, No. 2019-0013, 2021 WL 1337699, at *4 (ARB Mar. 18, 2021); *In re Yowell*, No. 2019-0039, 2020 WL 3971213, at *4 (ARB Feb. 5, 2020), *aff'd sub nom. Yowell v. United States*, 993 F.3d 418 (5th Cir. 2021).

The United States tries to downplay this about-face, claiming that "the ARB effectively adopted the view that a legal presumption of retaliatory intent will arise if a whistleblower demonstrates that his protected activity was a 'contributing factor' in the adverse action." U.S. Br. 34. In reality, the ARB did the opposite: It held that "an employee must prove [] intentional retaliation" to establish the existence of a "contributing factor." *Thorstenson*, 2019 WL 11901996, at *5. The Board did not deny that the employee's injury report made his employer aware of the misconduct that was the basis for discipline. *Id.* Precisely because retaliatory intent was not presumed, that was not enough to establish a contributing factor. *Id.* at *7; *see also In re Yowell*, No. 2019-0039, 2020 WL 3971213, at *4-*5 (ARB Feb. 5, 2020) (holding that an employee who "was terminated because he did not promptly or immediately report his right knee injury" did not establish a contributing factor).

* * *

"Upon this point a page of history is worth a volume of logic." *N.Y. Tr. Co. v. Eisner*, 256 U.S. 345, 349 (1921). Petitioner's reading has already been tried in the context of the FSRA, and it has proven disastrous. The lack of an intent requirement improperly shielded employees from the consequences of misconduct, undermining the very safety aims of the anti-discrimination provision and the railroads' legitimate interest in enforcing employee-conduct rules. The circuits have largely rejected it, and even the ARB has changed course. This Court should not endorse a reading that experience has so roundly discredited.

II. As an Anti-Discrimination Statute, Section 1514A Requires Proof of Retaliatory Intent

Unsurprisingly, nothing in Section 1514A's text or structure compels the impractical reading Petitioner urges. Section 1514A has the typical structure of an employment discrimination statute. Its catchall phrase makes clear that the provision prohibits only those personnel actions that involve discrimination. And its use of the phrase "because of" in conjunction with "discrimination" indicates that the employee must show that his employer acted with discriminatory intent. Finally, although the burden-shifting provisions of Section 42121 lower the *causation* standard, they do not alter the required showing of *intent*.

1. Section 1514A prohibits only acts of discrimination. Under Section 1514A(a), no covered employer "may discharge, demote, suspend, threaten, harass, *or in any other manner discriminate against* an employee because of" the employee's protected conduct (emphasis added). The word "other," when used to introduce a catchall phrase at the end of a list, means "additional." *Other*, def. 5, *Oxford English Dictionary* (2d ed. 1989). Thus, by "virtue of the word *other[]*," Section 1514A "concerns itself not with every discharge" or unfavorable employment action, but "only with those discharges [or actions] that involve discrimination." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740 (2020).

This also follows from the *ejusdem generis* canon. Because "catchall clauses" are "naturally understood as a summary" of the "specifically enumerated" items of a list, limitations in a catchall clause properly apply

to the enumerated items. *Paroline v. United States*, 572 U.S. 434, 447 (2014) (applying a proximate-cause requirement in a catchall phrase to the enumerated items); *see Fed. Mar. Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) ("Since the summary provision is explicitly limited …, it is reasonable to conclude that Congress intended this limitation to apply to the specifically enumerated categories as well."); *Massachusetts v. EPA*, 549 U.S. 497, 557 (2007) (Scalia, J., dissenting) ("Often [] the examples standing alone are broader than the general category, and must be viewed as limited in light of that category."). *Compare* Pet'r Br. 35 (claiming "no authority for th[is] sort of reverse ejusdem generis reasoning"), *with Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1269 (D.C. Cir. 2003) (recognizing "the 'reverse ejusdem generis' principle …, under which the phrase 'A, B, or any other C' indicates that A is a subset of C").

In addition, Section 1514A closely follows the conventional structure of federal employment discrimination laws. For instance, like Section 1514A, Title VII of the Civil Rights Act prohibits a series of employment actions ("to fail or refuse to hire or to discharge any individual"), followed by a catchall phrase indicating that the previous examples were instances of discrimination ("or otherwise to discriminate against any individual"), "because of such individual's" protected characteristics. 42 U.S.C. § 2000e-2(a)(1). And it is widely understood that Title VII "outlaw[s] discrimination in the workplace," not discrimination *and other non-discriminatory practices*. *Bostock*, 140 S. Ct. at 1737; *see id.* at 1740.

Finally, the rest of Section 1514A unambiguously limits the employment actions prohibited by subsection (a) to acts of discrimination. The right of action for "violation[s] of subsection (a)" is available only to those who allege "discharge or other discrimination." § 1514A(b)(1). Likewise, compensatory damages are limited to the seniority the employee would have had "but for the discrimination" and compensation for special damages "sustained as a result of the discrimination." § 1514A(c)(2)(A), (C).

2. Because Section 1514A prohibits discrimination "because of" protected activity, it applies only to acts of *intentional* discrimination.

To start, the language and structure of Section 1514A(a) are "obviously transplanted" from employment discrimination statutes like Title VII. *George v. McDonough*, 142 S. Ct. 1953, 1959 (2022). As a result, its language must be given the "same meaning" it bears in those statutes. *Id.*

It is well established that statutes prohibiting "discrimination" encompass only intentional discrimination unless "their text refers to the consequences of actions and not just to the mindset of actors." *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 533 (2015). Thus, a statute that simply prohibits discrimination "because of" a protected trait establishes "[d]isparate treatment" liability, *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), under which "the difference in treatment … must be intentional," *Bostock*, 140 S. Ct. at 1740; *accord Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 624 (2007) ("Ledbetter asserted disparate treatment, the central

element of which is discriminatory intent."); *Watson v. Ft. Worth Bank & Tr.*, 487 U.S. 977, 985-86 (1988) ("In such 'disparate treatment' cases, … the plaintiff is required to prove that the defendant had a discriminatory intent or motive."); *Smith v. City of Jackson*, 544 U.S. 228, 249 (2005) (O'Connor, J., concurring in the judgment) ("That provision plainly requires discriminatory intent, for to take an action against an individual '*because of* such individual's age' is to do so 'by reason of' or 'on account of' her age.").

Section 1514A(a) prohibits "discrimination" "because of" an employee's protected conduct. It contains no additional language "focuse[d] on the *effects* of the action on the employee rather than the motivation for the action of the employer." *Inclusive Communities*, 576 U.S. at 533 (internal citation omitted). Thus, it applies only when a covered employer *intentionally* treats an employee worse based on that conduct.[6]

Petitioner and the United States agree. They concede that "'[d]iscriminate' in SOX … means to 'make a difference in treatment.'" Pet'r Br. 35; *see* U.S. Br. 27 (recognizing Section 1514A "prohibit[s] … disparate treatment"). Hence, to find for a plaintiff, the "factfinder" must "conclude" the defendant "has engaged in intentional 'discrimination.'" Pet'r Br. 36.

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[6] This conclusion applies with equal force to the FRSA. Section 20109(a) prohibits "discrimination [] due … to" protected conduct, with no additional language focused on discriminatory effects. § 20109(a). "Due to" is synonymous with "because of." *Due to*, *Webster's Third New International Dictionary* (1961); *Due to*, def. 2, *The New Oxford American Dictionary* (2001).

Despite this concession, Petitioner and the United States attempt to confuse matters by arguing that Section 1514A does not require a showing of "animus" toward the employee to establish liability. Pet'r Br. 35-37; U.S. Br. 26-27. True enough, an employer can engage in intentional discrimination even if it does not act out of feelings of hatred toward the employee. But discriminatory intent—or, for that matter retaliatory intent, which is just the intent to discriminate based on past conduct—can exist without animosity. *Bostock*, 140 S. Ct. at 1743; *see Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991) (an employer's "arguably benign motives" do "not convert a facially discriminatory [action] into a neutral action"). To use one of Petitioner's examples, a school that fires white teachers "to preserve role models for minority schoolchildren" may lack animus, but it still has discriminatory intent. Pet'r Br. 36. Likewise, subjective ill-will is not necessary to establish discrimination under Section 1514A, but retaliatory intent—the intent to treat an employee worse because the employee engaged in protected conduct—is.

3. The burden-shifting provisions of Section 42121 do not eliminate the requirement of showing retaliatory intent. The provisions address proof of causation, not proof of discrimination. And in any event, the phrase "contributing factor" fairly encompasses a showing of intent.

The ARB "may determine that a violation" of Section 1514A(a) "has occurred only if the complainant demonstrates that" his protected conduct "was a contributing factor in the unfavorable personnel action alleged in the complaint."

§ 42121(b)(2)(B)(iii); *see* § 1514A(b)(2)(C). Plainly, this provision does not purport to define the entire showing an employee must make to prevail. To have a viable claim, the plaintiff must be an employee, the employer must be one covered by the statute, and the employer must have taken a covered unfavorable personnel action. Section 42121 does not define the burden of proof for these elements, so they are instead governed by the "ordinary default rule" of proof by the plaintiff by a preponderance of evidence. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 177 (2009).

Section 42121 likewise does not define the burden of proof for discriminatory intent. Section 42121 defines the required link the employee must show between his protected activity and "the unfavorable personnel action"—*i.e.*, causation. 49 U.S.C. § 42121(b)(2)(B)(iii). And it alters that standard from the default of but-for causation to the more relaxed requirement of "contributing factor." *See Comcast Corp. v. Nat'l Ass'n of Afr. Am.-Owned Media*, 140 S. Ct. 1009, 1014 (2020). But altering the causation standard does not affect the employee's burden to establish discriminatory intent. Title VII, for example, provides that a plaintiff need only establish that the employer's discrimination "was a motivating factor for any employment practice." 42 U.S.C. § 2000e-2(m). Still, "the plaintiff is required to prove that the defendant had a discriminatory intent or motive." *Watson*, 487 U.S. at 986; *accord Bostock*, 140 S. Ct. at 1740; *see Univ. of Texas Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 355 (2013) (distinguishing "the causation standard" established by § 2000e-2(m) from the "substantive bar on discrimination … defined elsewhere in Title VII").

In any event, a "contributing factor" in Section 42121 is one that contributes to the employer's motive for acting. A "contributing factor" must contribute to "the unfavorable personnel action alleged in the complaint." § 42121(b)(2)(B)(iii). And a complaint must "allege[] discharge *or other discrimination*." § 1514A(b)(1) (emphasis added). In other words, a contributing factor is one that contributes to an act of intentional discrimination. To meet that standard, the act must be a consideration in the employer's decision to take the unfavorable employment action.[7]

III. Background Tort Principles Confirm Petitioner's Burden to Prove Retaliatory Intent

Background tort principles reinforce that it is the employee's burden in Section 1514A claims to establish retaliatory intent. There is a strong presumption that the plaintiff must prove all elements of his case, including intent. That presumption carries all the more force here, where the standard for causation is relaxed. For if Section 1514A required neither but-for causation nor intentional conduct, it would be entirely unmoored

[7] An employer who lacks retaliatory intent could also win on the affirmative defense in the alternative. *See* § 42121(b)(2)(B)(iv). As Respondent explains, the affirmative defense asks whether "the forbidden consideration [was] a but-for cause of the adverse action." Resp. Br. 23. If there was no "forbidden consideration," then non-forbidden considerations were necessarily the "but-for cause of the adverse action." *See id.*; *see also Koziara*, 840 F.3d at 878-79 (finding in employer's favor on both contributing factor and affirmative defense where there was no evidence that discipline was "retaliatory"); *Thorstenson*, 2019 WL 11901996, at *5-*8 (similar).

from tort law's basic purposes of deterrence and compensation.

1. "[W]hen Congress creates a federal tort it adopts the background of general tort law." *Staub v. Proctor Hosp.*, 562 U.S. 411, 417 (2011). Indeed, this Court regularly relies on common-law tort principles when interpreting antidiscrimination statutes. *See, e.g.*, *Comcast*, 140 S. Ct. at 1014; *Staub*, 562 U.S. at 417; *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440, 447 (2003); *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 542 (1999).

Of central importance is "the ordinary default rule that plaintiffs bear the risk of failing to prove their claims." *Gross*, 557 U.S. at 177. So foundational is this principle that, in a variety of contexts, this Court has simply "assumed without comment that plaintiffs bear the burden of persuasion." *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 57 (2005) (emphasis added).

Anti-discrimination laws are no exception. To be sure, since employers rarely announce their intentions to discriminate openly, such laws often raise difficult questions of proof. And they often guarantee interests of the highest order, such as the "equal opportunity to participate in the workforce without regard to race." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014). Still, these considerations do not displace the default rule. Even "the Title VII plaintiff at all times bears 'the ultimate burden of persuasion,'" including on "the ultimate fact of intentional discrimination." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993). Accordingly, there

is a strong presumption that Section 1514A requires the employee to prove discriminatory intent.

2. Another important tort principle is the presumption of an element of at least but-for causation. "Causation in fact … is a standard requirement of any tort claim." *Nassar*, 570 U.S. at 346. "This includes federal statutory claims of workplace discrimination." *Id.* An "action 'is not regarded as a cause of an event if the particular event would have occurred without it.'" *Id.* at 347. Hence, the "ancient and simple 'but for' common law causation test … supplies the 'default' or 'background' rule against which Congress is normally presumed to have legislated." *Comcast*, 140 S. Ct. at 1014. Indeed, but-for causation has traditionally been "the least rigorous" showing of causation required. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 282 (1989) (Kennedy, J., dissenting). In some contexts, this Court will go further, looking to "common-law principles of *proximate* causation" to flesh out a statutory cause of action. *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 469 (2006) (emphasis added).

In antidiscrimination statutes, however, Congress sometimes departs from the default to require *less* than but-for causation. "In the Civil Rights Act of 1991," for instance, "Congress provided that a Title VII plaintiff who shows that discrimination was even a motivating factor in the defendant's challenged employment decision is entitled to declaratory and injunctive relief." *Comcast*, 140 S. Ct. at 1017; *see* 42 U.S.C. § 2000e-2(m). "A defendant may still invoke lack of but-for causation," but only as a partial "affirmative defense." *Comcast*, 140 S. Ct. at 1017; *see* 42 U.S.C.§ 2000e-5(g)(2)(B).

This departure from the default has been justified by reference to the "two basic purposes" of anti-discrimination laws, and of torts generally: "deter[rence]" and "mak[ing] persons whole for injuries suffered." *Price Waterhouse*, 490 U.S. at 264-65 (O'Connor, J., concurring in the judgment). Where a plaintiff has shown that an employer has engaged in prohibited discrimination, a relaxed causation standard is consistent with both these principles. For one thing, "the deterrent purpose of the statute has clearly been triggered." *Id.* at 265. For another, "as an evidentiary matter," the defendant is no longer "entitled to the same presumption of good faith concerning its employment decisions." *Id.* at 265-66. So the employer can justly be put to the burden of "convinc[ing] the factfinder that, despite the smoke, there is no fire." *Id.* at 266.

Critically, these justifications depend on the premise that the "plaintiff has shown by a preponderance of the evidence" that the employer relied on "an illegitimate criterion." *Id.* at 265. Without such a showing, there is no bad conduct "evil in itself" that merits deterrence. *Id.* And there is no sound basis for presuming the defendant is responsible for any injury the plaintiff may have suffered. If there is no requirement to show discriminatory intent, a cause of action may end up deterring socially beneficial (or at least neutral) conduct, and plaintiffs may obtain windfalls rather than just compensation.

And in fact, that is precisely what the experience of the FRSA shows. *Supra* Part I. The ARB's experiment in abandoning intent penalized railroads for disciplining or replacing employees who posed a

safety threat, and the anti-retaliation statute functioned as a shield for employees guilty of workplace misconduct. Only a requirement that the employee establish intentional discrimination can keep Section 1514A properly grounded in the basic purposes of tort and anti-discrimination law.

That the Whistleblower Protection Act may not require proof of discriminatory intent does not change matters. Unlike Section 1514A, the WPA does not reference "discriminat[ion]." *See* 5 U.S.C. §§ 1221(e)(1), 2302(b)(8), 2302(b)(9)(A)(i), (B), (C). Moreover, as part of the Civil Service Reform Act, the WPA applies to employees of the federal government. Section 1514A, by contrast, covers "employees of publicly traded companies." 18 U.S.C. § 1514A(a). At-will employment is the default rule in the private sector. *Restatement of Employment Law* § 2.01 (2015). But federal civil servants generally may only be removed for cause and subject to an "elaborate, comprehensive scheme" of procedural and substantive protections. *Bush v. Lucas*, 462 U.S. 367, 385 (1983). Thus, "Congress" has decided "to hold the Federal Government to a higher standard than state and private employers," which "is not unusual." *Babb v. Wilkie*, 140 S. Ct. 1168, 1177 (2020).

CONCLUSION

This Court should affirm the judgment of the Second Circuit.

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