No. 14-1585

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CHARLES T. LEE,

Plaintiff-Appellant,

v.

NORFOLK SOUTHERN RAILWAY CO.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of North Carolina

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

RACHEL GOLDBERG
Senior Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

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Pursuant to Federal Rule of Appellate Procedure 29(a), the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiff-Appellant. For the reasons set forth below, the district court erred in concluding that an employee's pursuit of a statutory claim under 42 U.S.C. 1981 for racial discrimination is an election of remedies under the Federal Railroad Safety Act's ("FRSA") election of remedies provision, 49 U.S.C. 20109(f), that bars the

employee from subsequently seeking relief under FRSA's whistleblower protection provision.

STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY TO FILE

The Secretary has a strong interest in the interpretation of the whistleblower provision of FRSA, 49 U.S.C. 20109, because he administers and enforces the statute, and adjudicates FRSA whistleblower complaints brought by employees of railroad carriers. *See* 49 U.S.C. 20109(d). Norfolk Southern Railway Company ("Norfolk Southern") contends that FRSA's election of remedies provision bars a railroad employee from pursuing a FRSA whistleblower complaint if he already pursued a statutory claim for racial discrimination. This case is the first in which a court of appeals will directly address whether FRSA's election of remedies provision applies to statutory employment discrimination claims unrelated to whistleblowing such as a race-discrimination claim under 42 U.S.C. 1981.[1]

[1] Two circuit courts of appeals, numerous district courts, and the Secretary have all addressed the related issue of whether FRSA's election of remedies provision bars an employee from pursuing a FRSA whistleblower complaint if the employee has previously pursued of arbitration related to the same adverse action under the employee's collective bargaining agreement ("CBA"). They all concluded that an arbitration to enforce rights under a CBA is not an election of remedies under section 20109(f). *See Grimes v. BNSF Ry.*, 746 F.3d 184 (5th Cir. 2014) (per curiam); *Reed v. Norfolk S. Ry.*, 740 F.3d 420 (7th Cir. 2014); *Koger v. Norfolk S. Ry.*, No. 1:13-12030, 2014 WL 2778793 (S.D.W. Va. June 19, 2014); *Pfeifer v. Union Pac. R.R.*, No. 12-cv-2485, 2014 WL 2573326 (D. Kan. June 9, 2014); *Ray v. Union Pac. R.R.*, 971 F. Supp. 2d 869 (S.D. Iowa 2013); *Ratledge v. Norfolk S. Ry.*, No. 1:12-cv-402, 2013 WL 3872793 (E.D. Tenn. July 25, 2013); *Kruse v.*

STATEMENT OF THE ISSUE

Whether 49 U.S.C. 20109(f) precludes an employee from pursuing a FRSA whistleblower cause of action when the employee has already filed a federal statutory cause of action under 42 U.S.C. 1981 for racial discrimination in employment.

STATEMENT OF THE CASE

A. FRSA and Background Regarding FRSA's Election of Remedies Provision

In 1970, Congress enacted FRSA to promote safety in railroad operations. *See* 49 U.S.C. 20101 *et seq.* After FRSA's passage, Congress noted that railroad employees "who complained about safety conditions often suffered harassment, retaliation, and even dismissal." *Consol. Rail Corp. v. United Transp. Union*, 947 F. Supp. 168, 171 (E.D. Pa. 1996) (citing Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, 94 Stat. 1811, *reprinted in* 1980

Norfolk S. Ry., ARB Case Nos. 12-81 & 12-106, 2014 WL 860729 (Admin. Review Bd. Jan. 28, 2014), *petition for review docketed Norfolk S. Ry. v. Perez*, No. 14-3274 (6th Cir. March 28, 2014); *Mercier v. Union Pac. R.R.* and *Koger v. Norfolk S. Ry.*, ARB Case Nos. 09-121, 09-101, 2011 WL 4889278 (Admin. Review Bd. Sept. 29, 2011) (ARB consolidated cases for review) ("*Mercier*"); *cf. Battenfield v. BNSF Ry.*, No. 12-cv-213, 2013 WL 1309439 (N.D. Okla. Mar. 26, 2013) (examining section 20109(f) and permitting plaintiff to add FRSA retaliation claim to his lawsuit alleging a violation of the Federal Employers' Liability Act despite having challenged his termination under his CBA); *Norfolk S. Ry. v. Solis*, 915 F. Supp. 2d 32, 43-45 (D.D.C. 2013) (concluding that court did not have jurisdiction to review the Administrative Review Board's ("ARB") *Mercier* decision because the ARB's statutory interpretation was, at a minimum, a colorable interpretation of FRSA's election of remedies provision).

U.S.C.C.A.N. 3830, 3832). To protect these employees, Congress amended FRSA in 1980 to prohibit railroads from retaliating against employees who provided information about violations of federal railroad safety laws or refused to work under hazardous conditions. *See* Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, 94 Stat. 1811 (amended 2007). FRSA required that retaliation complaints be resolved following the procedures for resolution of CBA disputes under the Railway Labor Act ("RLA"), 45 U.S.C. 151 *et seq.* *See* Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, sec. 212(c)(1); *see also Rayner v. Smirl*, 873 F.2d 60, 64 (4th Cir. 1989).[2] The 1980 amendments also included an election of remedies provision, which stated:

> Whenever an employee of a railroad is afforded protection under this section and under any other provision of law in connection with the same allegedly unlawful act of an employer, if such employee seeks protection he must elect either to seek relief pursuant to this section or pursuant to such other provision of law.

[2] The RLA mandates that disputes requiring the application or interpretation of a CBA must first be handled according to the internal grievance procedures specified in the CBA. *See Union Pac. R.R. v. Bhd. of Locomotive Eng'rs & Trainmen*, 558 U.S. 67, 72-73 (2009) (citing 45 U.S.C. 153 First (i)). If the employee or the railroad seeks review of the railroad's decision on the employee's grievance, the RLA requires that the appealing party do so through arbitration before the National Railroad Adjustment Board or a Public Law Board established by the railroad and union. *See* 45 U.S.C. 153 First (i).

Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, sec. 212(d).[3]

In 2007, Congress again amended FRSA to bolster the protections of employees. First, the amendments expanded the protected acts of employees. *See* Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, § 1521, sec. 20109(a)(4), 121 Stat. 266, 444 (codified at 49 U.S.C. 20109(a)(4)). Second, Congress eliminated the requirement of resolving FRSA complaints through the RLA's dispute-resolution procedures and instead transferred authority to investigate and adjudicate these complaints to the Secretary. *See id.* at § 1521, sec. 20109(c)(1), 121 Stat. 446 (codified at 49 U.S.C. 20109(d)(1)). Third, Congress retained the election of remedies provision without modification, but added two new provisions that specified that nothing in section 20109 of FRSA preempted or diminished other rights of employees and that the rights provided by FRSA could not be waived. *See id.* at § 1521, sec. 20109(e), (f), (g), 121 Stat. 447 (codified at 49 U.S.C. 20109(f), (g), (h)). Thus, FRSA now states:

> (f) ELECTION OF REMEDIES.—An employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier.

[3] In 1994, FRSA's whistleblower provision was re-designated from 45 U.S.C. 411 to 49 U.S.C 20109, and the language in the election of remedies provision was modified slightly (to its current form), but this modification was not intended as a substantive change. *See* Pub. L. No. 103-272, 108 Stat. 867 (1994).

> (g) NO PREEMPTION.—Nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law.
>
> (h) RIGHTS RETAINED BY EMPLOYEE.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement. The rights and remedies in this section may not be waived by any agreement, policy, form, or condition of employment.

49 U.S.C. 20109(f), (g), (h).[4] The 2007 amendments aimed to "enhance[] administrative and civil remedies for employees" and "ensure that employees can report their concerns without the fear of possible retaliation or discrimination from employers." H.R. Conf. Rep. No. 110-259, at 348 (2007), *reprinted in* 2007 U.S.C.C.A.N. 119, 180-81, 2007 WL 2162339.

To pursue a FRSA whistleblower complaint, an employee must file a complaint with the Occupational Safety and Health Administration ("OSHA"), which investigates the complaint and issues findings and a preliminary order. *See* 49 U.S.C. 20109(d)(1), (2)*;* 29 C.F.R. 1982.103-.105; Secretary's Order No. 1-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912-01, 2012 WL 194561 (Jan. 25, 2012) (delegating authority to OSHA to conduct investigations under FRSA). Either the employee or the railroad may object to OSHA's findings and preliminary order and

[4] Before the 2007 amendments, FRSA's whistleblower protection provision preempted state law claims for retaliatory discharge. *See, e.g.*, *Rayner*, 873 F.2d at 65.

seek a hearing before a Department of Labor Administrative Law Judge ("ALJ"). *See* 49 U.S.C. 20109(d)(2)(A), *incorporating the procedures in* 49 U.S.C. 42121(b)(2)(A); 29 C.F.R. 1982.106(a). Either party may seek review of an ALJ decision by the ARB, which issues the Secretary's final order on a FRSA complaint. *See* 29 C.F.R. 1982.110(a); Secretary's Order No. 02-2012 (Oct. 19, 2012), 77 Fed. Reg. 69378-01, 2012 WL 5561513 (Nov. 16, 2012). Final orders of the Secretary are reviewable only in the U.S. courts of appeals under the standards in the Administrative Procedure Act. *See* 49 U.S.C. 20109(d)(4); 29 C.F.R. 1982.112(a), (b).

In addition, 49 U.S.C. 20109(d)(3), which provided the district court's jurisdiction for Lee's FRSA claim, allows an employee to bring his FRSA whistleblower complaint in U.S. district court "if the Secretary of Labor has not issued a final decision within 210 days after the filing of the complaint and if the delay is not due to the bad faith of the employee."

B. Factual Background and Procedural Posture of This Case

Lee works for Norfolk Southern as a carman; his duties include inspecting and tagging for repair railroad cars and locomotives. *See* App. 612-14. On September 21, 2011, Lee filed a lawsuit in the District Court for the Western District of North Carolina under 42 U.S.C. 1981 asserting an action for employment discrimination based upon race ("First Lawsuit"). *See* App. 615; *Lee*

v. Norfolk S. Ry., 912 F. Supp. 2d 375 (W.D.N.C. 2012).[5] Lee alleged that Norfolk Southern discriminated against him based on his race in his pay, opportunities for training and promotion, seniority, and imposing a six-month suspension for drinking alcohol while on duty. *See* 912 F. Supp. 2d at 377, 379. On November 14, 2011, while Lee's First Lawsuit was pending, Lee filed a FRSA whistleblower retaliation complaint with OSHA. *See* App. 615.

On December 12, 2012, the district court in Lee's First Lawsuit granted summary judgment to Norfolk Southern and dismissed the case. *See* 912 F. Supp. 2d at 375. The district court concluded that Lee's section 1981 claims relating to pay rates, training, promotions, seniority, and the six-month suspension for drinking alcohol while on duty were preempted by the RLA because they required interpreting Lee's CBA. *See id.* at 380.[6] The court further concluded that Lee's

[5] Section 1981 makes it unlawful to deny to a person the right to make and enforce contracts and the right to enjoy the full and equal benefit of all laws based on the person's race. *See* 42 U.S.C. 1981.

[6] The RLA provides the exclusive procedure for resolving any dispute requiring the application or interpretation of a CBA and therefore preempts other causes of action that require applying or interpreting the CBA. *See Andrews v. Louisville & Nashville R.R.*, 406 U.S. 320, 324 (1972) (the RLA preempted state law wrongful discharge claim that required applying or interpreting a CBA). By contrast, claims that are independent of a CBA and that do not require the interpretation or application of a CBA are not preempted by the RLA and may be brought in other forums. *See, e.g., Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 257-59, 266 (1994) (claims under state law did not require interpretation of the CBA, and therefore were not preempted by the RLA); *Norman v. Mo. Pac. R.R.*, 414 F.2d 73, 82-83 (8th Cir. 1969) (racial discrimination claim under Title VII was not

section 1981 claims of racial discrimination based on harassment by co-workers and supervisors failed because while a reasonable jury could find Lee was harassed by supervisors and coworkers because of his race, Lee had not presented sufficient evidence to hold Norfolk Southern vicariously liable for the harassment. *See id.* at 383-87 (applying defense under *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), and granting summary judgment to Norfolk Southern).

In his FRSA action then pending with OSHA, Lee exercised his right to file a de novo action in district court pursuant to 49 U.S.C. 20109(d)(3) by filing his FRSA complaint in this action on January 8, 2013. *See* App. 9-14. In his FRSA complaint, Lee claims that Norfolk Southern retaliated against him for excessive tagging of railroad cars as needing repair. *See* App. 614-15. The retaliatory acts that Lee complained of were denial of proper pay, failure to provide training, and the six-month suspension for drinking alcohol while on duty. *See* App. 615, 623.

C. The District Court's Decision

On May 20, 2014, the district court in this action granted Norfolk Southern's motion for summary judgment, concluding that Lee's First Lawsuit for racial discrimination under 42 U.S.C. 1981 was an election of remedies under section 20109(f) that barred Lee's subsequent FRSA whistleblower action. The court noted that FRSA's election of remedies provision contains four elements: (1) an

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preempted by the RLA because the RLA is not set up to remedy racial discrimination in employment practices).

employee; (2) may not seek protection; (3) under FRSA and another provision of law; (4) for the same allegedly unlawful act of the railroad carrier. *See* App. 623. The court commented that the first, second, and fourth elements were not disputed and the case therefore turned on the question of whether Lee's First Lawsuit constituted an action under "another provision of law." *See* App. 623.[7]

While the court acknowledged the case law treating an employee's pursuit of an arbitration to redress CBA violations as outside the scope of FRSA's election of remedies provision, the court concluded that these cases are "completely inapplicable here" because Lee did not seek redress through an arbitration under his CBA. App. 630 (citing *Ray*, 971 F. Supp. 2d 869; *Reed v. Norfolk S. Ry.*, No. 12-cv-873, 2013 WL 1791694 (N.D. Ill. April 26, 2013);[8] *Ratledge*, 2013 WL 3872793; *Mercier*, 2011 WL 4889278). Instead, Lee filed the First Lawsuit, seeking protection under section 1981 for racial discrimination, which the court concluded was "another provision of law." *See* App. 630.

The court rejected Lee's argument that the election of remedies provision should be construed narrowly. *See* App. 630-32. Lee had argued, relying on

[7] This is an inaccurate statement of Lee's position before the district court. Lee explicitly argued that his racial discrimination claim was not based on the same unlawful act as his FRSA whistleblower claim and continues to pursue that argument on appeal. *See* App. 554; Appellant's Br. 47-48.

[8] The district court below cited the district court decision in *Reed* rather than the Seventh Circuit's *Reed* decision, which was issued on January 14, 2014.

Ratledge, that the term "another" in the election of remedies provision implies that the precluded action must be similar in kind to section 20109 and a claim under section 1981 is not similar in kind. *See* App. 630-31. The court concluded that *Ratledge* did not support Lee's narrow interpretation of the provision because, by interpreting the statutory language to require that the other provision of law and FRSA's whistleblower provision be "similar in kind," *Ratledge* meant that the provisions of law must be similar in the type of remedies they provided. According to the court, *Ratledge* distinguished between legal remedies and contractual CBA remedies as not similar in kind. *See* App. 631-32. Because Lee's section 1981 claim and his FRSA claim both provided legal remedies as opposed to contractual remedies, the court concluded, *Ratledge* was inapplicable. *See* App. 632. Lee had also argued that section 20109 and section 1981 were not similar in kind because they addressed different wrongs. The court rejected that argument, reasoning that such an interpretation would render 20109(f) null because "every cause of action necessarily targets a different wrong." App. 632.

Lastly, the court rejected Lee's argument that applying the election of remedies in this case would violate paragraphs (g) and (h), which expressly preserved Lee's right to bring a section 1981 claim without barring him from also seeking redress under FRSA . *See* App. 633-35. The court concluded that Lee had pursued his anti-discrimination rights in the First Lawsuit, and therefore his rights

under section 1981 had not been diminished. *See* App. 633. The effect of section 20109(f) in conjunction with paragraphs (g) and (h) was, according to the court, merely to direct an employee to bring a FRSA claim first. *See* App. 633. In the district court's view, paragraphs (g) and (h) preserve an employee's right to pursue another statutory discrimination claim by permitting him to pursue such claim after he pursues a FRSA whistleblower claim. *See* App. 626-27, 633.

SUMMARY OF ARGUMENT

An employee does not "seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier" within the meaning of section 20109(f) when the employee seeks protection under a statute prohibiting racial discrimination in employment and later seeks protection against retaliation for whistleblowing protected under FRSA. Section 20109(f) requires that the other provision of law under which an employee seeks protection be a statute that provides substantive whistleblower protections similar to those provided by FRSA's whistleblower provision.

An employee who seeks protection under FRSA is seeking protection from retaliation for having engaged in whistleblowing related to railroad safety or security. Properly read in context, an employee who seeks protection under another provision of law for the same allegedly unlawful act is an employee who seeks protection under another statute from retaliation for having engaged in the

same conduct, *i.e.*, blowing the whistle on the same railroad safety or security concerns that FRSA protects.

The text of section 20109 provides multiple indicators that this narrow reading of the provision is the correct one. First, reading section 20109(f) as a whole, the provision requires similarity between FRSA and the other provision under which the employee seeks protection. This similarity requirement is reinforced by section 20109(f)'s reference to "the same allegedly unlawful act," which by contrast to other subsections of section 20109 refers not just to an adverse action (such as a suspension or discharge) but also to the alleged reason for the action, *i.e.*, retaliation for whistleblowing related to safety or security. The title of section 20109(f) ("Election of remedies"), sections 20109(g) and (h), which indicate Congress' intent not to diminish the rights of railroad employee's under other anti-discrimination statutes, and the legislative history and context of section 20109 further confirm that this reading is correct.

Section 1981 does not provide whistleblower protection comparable to that provided by FRSA. Section 1981 protects against racial discrimination in contracts and the application of all laws; the unlawful act it protects against is racial discrimination. An employee seeking protection for racial discrimination under section 1981 is not "seek[ing] protection" under "another provision of law" for the "same allegedly unlawful act" within the meaning of section 20109(f).

Thus, a railroad employee who brings a claim for race discrimination under section 1981 can also subsequently bring a claim under FRSA that the railroad retaliated against him for blowing the whistle on railroad safety violations.

ARGUMENT

A. An Employee Does Not "Seek Protection Under . . . Another Provision of Law for the Same Allegedly Unlawful Act of the Railroad Carrier" When He Pursues a Race Discrimination Claim.

Section 20109(f) requires that the other "provision of law" under which an employee "seek[s] protection" be a statute that provides substantive protections comparable to those provided by FRSA. *See Reed v. Norfolk S. Ry.*, 740 F.3d 420, 424-25 (7th Cir. 2014). The election of remedies provision states that "an employee may not seek protection under both this section and another provision of law for the same allegedly unlawful act of the railroad carrier." 49 U.S.C. 20109(f). Seeking protection under "this section" (*i.e.*, 49 U.S.C. 20109) means bringing a claim based on FRSA's substantive whistleblower protections. *See Reed*, 740 F.3d at 424-25. Therefore, as the Seventh Circuit concluded, "[t]o seek protection under another provision of law must mean something similar: to bring a claim founded on a comparable substantive protection." *Id.* at 425 (emphasis added). For example, a claim of retaliation for reporting safety concerns or workplace injuries under the Occupational Safety and Health Act ("OSH Act"), 29

U.S.C. 660(c), would be a claim founded on a comparable substantive protection. *See Reed*, 740 F.3d at 425.

As the Seventh Circuit explained, and as other courts have agreed, a contrary interpretation shears the words in the election of remedies provision from their context. *See id*. at 424-25; *Ratledge v. Norfolk S. Ry.*, No. 1:12-cv-402, 2013 WL 3872793, at *12 (E.D. Tenn. July 25, 2013) (the language "another provision of law" in FRSA's election of remedies provision indicates that the other provision of law "should be similar in kind to § 20109"); *see also Ray v. Union Pac. R.R.*, 971 F. Supp. 2d 869, 880-81 (S.D. Iowa 2013) (finding *Ratledge*'s statutory analysis compelling).[9] "The election-of-remedies provision only bars railroad employees from seeking duplicative relief under overlapping antiretaliation or whistleblower statutes[.]" *Reed*, 740 F.2d at 426 (emphasis added). Thus, to preclude a FRSA whistleblower action under the election of remedies provision, the other provision

[9] The district court below erred in concluding that *Ratledge*'s interpretation of the phrase "another provision of law" supported the conclusion that Lee's section 1981 racial discrimination claim was an election of remedies. *See* App. 632-32. While *Ratledge* interpreted paragraph (f)'s language as requiring that the other provision of law be similar in kind to section 20109 and concluded that contractual rights are not similar in kind to FRSA's substantive rights, *see* 2013 WL 3872793 at *12, nothing in the *Ratledge* decision can be read to conclude that a statute that provides any type of substantive right is similar in kind to FRSA.

of law under which an employee seeks protection must provide protection for whistleblowing activity similar to that covered by FRSA.[10]

The requirement that the election of remedies provision applies only to actions in which an employee seeks protection for "the same allegedly unlawful act" further shows that FRSA's election of remedies provision is meant to bar a cause of action under FRSA by an employee who has already pursued a cause of action under another statute that protects against unlawful acts of retaliation for safety- or security-related whistleblowing. An adverse action by a railroad against an employee is not, on its own, an unlawful act under FRSA's whistleblower provision. An adverse action is unlawful under FRSA only if it is, at least in part, in retaliation for the employee having engaged in a safety- or security-related whistleblower activity. FRSA's statutory language distinguishes between an adverse action and an "allegedly unlawful act." FRSA makes it unlawful to "discharge, demote, suspend, reprimand, or in any other way discriminate against an employee" only if such action is due, in whole or in part, to having engaged in

[10] The election of remedies provision is not rendered null by this interpretation; it applies to other whistleblower protection statutes, such as the OSH Act, the National Transit Systems Security Act, 6 U.S.C. 1142, and state whistleblower protection statutes that provide protection against retaliation for the same types of safety- or security-related whistleblowing addressed in FRSA.

activities protected by the Act. 49 U.S.C. 20109(a), (b).[11] Because FRSA's election of remedies provision applies only when an employee seeks protection for the same allegedly unlawful act that gives rise to the FRSA whistleblower cause of action, the unlawful act for which an employee seeks protection under another provision of law within the meaning of section 20109(f) must similarly be a retaliatory adverse action taken against the employee, at least in part, because of the employee's protected whistleblower activity.

While section 1981 is a statute and therefore is a provision of law as a general matter, an employee who files a section 1981 claim is not "seek[ing] protection under . . . another provision of law for the same allegedly unlawful act of the railroad carrier" within the meaning of section 20109(f). Section 1981's protection against racial discrimination in employment does not provide substantive protection comparable to that provided by FRSA, which protects

[11] The distinction between an adverse action and an unlawful act is further illustrated by FRSA's distinct use of the terms "unfavorable personnel action" (*i.e.*, adverse action) and "violation" (*i.e.*, unlawful act). Under the burdens of proof applicable to retaliation claims under FRSA, which incorporates the rules, procedures, and burdens of proof from 49 U.S.C. 42121, "[t]he Secretary may determine that a violation . . . has occurred only if" the employee demonstrates that protected conduct "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. 42121(b)(2)(B)(iii) (emphases added). The Secretary 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 that behavior." 49 U.S.C. 42121(b)(2)(B)(iv) (emphasis added). As this language demonstrates, proof that an adverse action occurred is only one of several elements that an employee must show to establish that the adverse action is an unlawful act under FRSA.

against the retaliatory treatment of an employee due to the employee having raised a safety or security concern. The unlawful act for which an employee seeks protection under section 1981 is the employer's discriminatory treatment of the employee based on the employee's race.

Just as an adverse action is not, on its own, unlawful under FRSA, an adverse action is not, on its own, unlawful under section 1981. An adverse action is just one of several elements that an employee must show to establish that the action was unlawful under section 1981. *See Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 133 & n.7 (4th Cir. 2002) (section 1981, which has the same elements as Title VII discrimination claims, requires an employee to show that he is a member of a protected class, he was qualified for his job and his job performance was satisfactory, some adverse action was taken against him, and other employees who are not members of the protected class were treated differently). Thus, the unlawful act of racial discrimination in employment is a different unlawful act from the unlawful act of retaliation for having engaged in a safety- or security-related whistleblowing activity.

Section 20109(f)'s language does not support the conclusion that the election of remedies provision applies to all potential statutory claims, including very disparate types of claims, arising out of the adverse action that gives rise to a FRSA whistleblower claim. If Congress had meant the election of remedies

provision to bar employees from challenging an adverse action based on different types of statutory claims, Congress would not have used the language "same allegedly unlawful act." Congress could have barred employees from seeking protection under FRSA and another statute for "the same act," "the same unfavorable personnel action," or "the same discharge, demotion, suspension, reprimand, or any other discrimination." It did not. Congress chose to bar an employee from "seek[ing] protection under both this section and another provision of law for the same allegedly unlawful act. . . ." 49 U.S.C. 20109(f) (emphasis added).

The district court below viewed the "same allegedly unlawful act" as Norfolk Southern's six-month suspension of Lee. *See* App. 623; *see also Sereda v. Burlington N. Santa Fe R.R.*, No. 4:03-cv-10431, 2005 WL 5892133, at *4 (S.D. Iowa Mar. 17, 2005) (stating that FRSA's election of remedies provision (under the pre-2007 version of the statute) "is addressed not to the character or motivation of the employer's allegedly unlawful act, but to the act itself," such as a discharge).[12] However, interpreting "the same allegedly unlawful act" as merely

[12] *Sereda*'s statement regarding the scope of FRSA's election of remedies provision was incorrect. Like the current version of FRSA's whistleblower protection provision, the pre-2007 version distinguished between an adverse action taken against an employee and a violation of the statute by making clear that a violation "involves" a discharge, suspension or other action but also requires a showing that the adverse action was in retaliation for safety-related protected activity. *See* 49 U.S.C. 20109(c) (2005), *amended by* Implementing

the adverse action, as the district court did, reads the term "unlawful" out of the statute.

The title of section 20109(f), "Election of remedies," further confirms that the section is narrow and does not bar pursuit of a FRSA cause of action by an employee who has also sued for racial discrimination. No other provision of the United States Code, save 6 U.S.C. 1142(e), which was passed in 2007 along with the amendments to FRSA and modeled on section 20109(f), contains the precise title and wording of section 20109(f). However, the term "election of remedies" is commonly understood as "[a] claimant's act of choosing between two or more concurrent but inconsistent remedies on a single set of facts." Black's Law Dictionary (9th Ed. 2009); *see, e.g.*, *Artis v. Norfolk & W. Ry.*, 204 F.3d 141, 143 (4th Cir. 2000) ("The doctrine of election of remedies refers to situations where an individual pursues remedies that are legally or factually inconsistent.") (internal quotation marks omitted); 25 Am. Jur. 2d, Election of Remedies § 3 ("Where

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Recommendations of the 9/11 Commission Act of 2007 ("If the violation is a form of discrimination that does not involve discharge, suspension, or another action affecting pay, and no other remedy is available under this subsection, the Board, division, delegate, or other board of adjustment may award the employee reasonable damages, including punitive damages, of not more than $20,000.") (emphasis added). Also notably, *Sereda* addressed FRSA's election of remedies provision only in dicta. The court in *Sereda* held, consistent with this Court's decision in *Rayner* and other case law interpreting the pre-2007 statute, that FRSA preempted plaintiff's state common law wrongful discharge claims. *See* 2005 WL 5892133, at *3-4. The court noted in dicta that its conclusion was not undermined by FRSA's election of remedies provision. *See id.* at *4.

remedies sought by the plaintiff are inconsistent or repugnant, the plaintiff may be required to elect which remedy to pursue.”). That a railroad could be found liable for terminating an employee for race discrimination but not liable for retaliation based on safety whistleblowing, or vice versa, are not inconsistent with each other. By contrast, opposite findings on whether an employee was terminated for engaging in the same whistleblowing under FRSA and a comparable whistleblower protection statute could be inconsistent.[13]

B. Paragraphs (g) and (h) Support a Narrow Interpretation of Paragraph (f)’s Election of Remedies Provision.

Interpreting paragraph (f) narrowly to apply only to comparable whistleblower protection statutes is consistent with paragraphs (g) and (h).

[13] While a finding in a race discrimination case that a railroad discharged an employee for a legitimate reason might seem inconsistent with the possibility of a finding that the employee was discharged for protected whistleblowing, “election of remedies” is not the proper legal doctrine for resolving such an inconsistency. In proper circumstances, other doctrines, such as collateral estoppel might apply to resolve this inconsistency. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 (4th Cir. 2006) (collateral estoppel may apply where the issue is identical to one previously litigated, the issue was actually determined in the prior proceeding, the issue’s determination was “a critical and necessary part of the decision in the prior proceeding,” the prior judgment is final and valid, and the party against whom collateral estoppel is asserted “had a full and fair opportunity to litigate the issue in the previous forum”) (internal quotation marks omitted); *Grimes*, 746 F.3d at 188-90 (in an employee’s FRSA whistleblower case, collateral estoppel did not apply to CBA arbitration’s finding of fact that employee had been dishonest in reporting his work-related injury, where the railroad conducted the investigation and terminated the employee, the arbitrators only reviewed the record from that closed investigation, and the arbitration proceeding did not afford the employee basic procedural protections of a judicial forum).

Paragraphs (g) and (h), which were added to the statute in 2007, state in bold terms that "nothing in this section preempts or diminishes any other safeguards against discrimination, demotion, discharge, suspension, threats, harassment, reprimand, retaliation, or any other manner of discrimination provided by Federal or State law" and "nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law or under any collective bargaining agreement." 49 U.S.C. 20109(g) and (h). These sections indicate a strong congressional intent that other federal or state statutory safeguards against discrimination, which paragraph (g) references explicitly, not be burdened or reduced.

Accordingly, the district court read 20109(f) too broadly. It accepted the proposition that reading section 20109(f) to prohibit an employee from bringing a FRSA cause of action if he has brought suit under another employment statute does not "diminish" any employee rights or remedies because an employee always remains free to bring a FRSA claim or another claim, but must bring the FRSA claim first. *See* App. 632-33. However, as the Seventh Circuit recognized in *Reed,* while forcing a choice of claims "may not literally be a diminution of either remedy. . . it is a fine distinction" that "sits uneasily" with paragraphs (g) and (h)'s "broad language." 740

F.3d at 426. Conversely, interpreting section 20109(f) to bar employees only from "seeking duplicative relief under overlapping antiretaliation or whistleblower statutes[,]" reasoned the Seventh Circuit, "fits snugly" with paragraphs (g) and (h)'s prohibition against diminishing an employee's rights under federal law. *Id.* (emphasis added).[14]

C. The History of FRSA's Election of Remedies Provision and Its Underlying Purpose Support a Narrow Reading of Section 20109(f).

The history of FRSA's election of remedies provision further supports the conclusion that Congress did not intend employees to have to choose between pursing a FRSA retaliation cause of action and a statutory employment discrimination claim based on race. Section 20109(f) originally stated:

> Whenever an employee of a railroad is afforded protection under this section and under any other provision of law in connection with the

[14] This is true even if, as the district court found, section 20109(f) directs only that a FRSA cause of action be brought first. *See* App. 626-27, 633. Both FRSA and many statutory protections aimed at preventing discrimination based on factors other than whistleblowing require claims to be exhausted informally before an administrative agency whose investigation and conciliation procedures are intended to be accessible to an employee without the assistance of an attorney. *See* 29 C.F.R. 1982.103-.104 (describing the complaint filing and investigation procedures for FRSA claims); *see also e.g.*, 29 C.F.R. 1601.8, .12, .15 (describing the complaint filing procedures for claims under Title VII and Americans with Disabilities Act); Br. for Sec'y of Labor as *Amicus Curiae* in Support of Plaintiff-Appellee at 17-19, *Jones v. Southpeak Interactive Corp.*, No. 13-2399 (4th Cir. June 27, 2014) (discussing the informality of the OSHA process for whistleblower complaints under the very similar procedures in the Sarbanes Oxley Act of 2002, 18 U.S.C. 1514A). Navigating the sequencing requirements of the district court's reading of 49 U.S.C. 20109(f) is an extreme burden for pro se employees, and may diminish employee rights against discrimination as a practical matter.

> same allegedly unlawful act of an employer, if such employee seeks protection he must elect either to seek relief pursuant to this section or pursuant to such other provision of law.

Federal Railroad Safety Authorization Act of 1980, Pub. L. No. 96-423, § 10, sec. 212(d), 94 Stat. 1811, 1815 (amended 2007). Analyzing this language and the fact that no substantive changes were intended when the language was modified to its current form in 1994, the *Reed* court noted that "the original phrasing emphasizes that one can only seek protection under a provision of law that itself affords protection for retaliatory acts." 740 F.3d at 425 (first emphasis in original; second emphasis added). Because section 1981 does not afford protection for whistleblower retaliation, an employee seeking protection under section 1981 for racial discrimination in his employment is not seeking protection for the same unlawful act that he is seeking protection for in his FRSA whistleblower complaint.[15]

The legislative history also shows that the election of remedies provision was aimed at preventing employees from seeking protection under other statutes that provided similar substantive protections as FRSA's whistleblower provision.

[15] An employee can seek protection under section 1981 for retaliation for complaining about racial discrimination. However, while the Secretary does not believe that a claim for retaliation under section 1981 would implicate section 20109(f)'s election requirement, Lee's section 1981 claim did not implicate retaliation at all, and therefore even more clearly falls outside of section 20109(f)'s election requirement.

The House Representative who managed the 1980 bill, which included the election of remedies provision, stated:

> We also agreed to a provision clarifying the relationship between the remedy provided here and a possible separate remedy under [the OSH Act]. Certain railroad employees, such as employees working in shops, could qualify for both the new remedy provided in this legislation, or an existing remedy under [the OSH Act]. It is our intention that pursuit of one remedy should bar the other, so as to avoid resort to two separate remedies, which would only result in unneeded litigation and inconsistent results.

126 Cong. Rec. 26,532 (1980) (statement of Rep. James Florio). Section 11(c) of the OSH Act protects employees against retaliation for filing a complaint, instituting a proceeding, testifying, or exercising rights provided by the statute related to safety and health in the workplace. *See* 29 U.S.C. 660(c).

Thus, the election of remedies provision was originally conceived as preventing pursuit of remedies under other whistleblower protection statutes that provided protections similar to the protections in FRSA. The election of remedies provision was designed to prevent pursuit of multiple causes of action arising out of the unlawful act of retaliation for engaging in protected whistleblowing activities regarding safety and health. As the Seventh Circuit noted, Congressman Florio's statement was "firmly rooted to the 'existing remedy' under the [OSH] Act." *Reed*, 740 F.3d at 425 n.4.[16] The election of remedies provision was

[16] The Secretary believes that it is significant that, while the protection of railroad employees against race discrimination under Title VII and other statutes was well

directed at preventing employees from filing whistleblower retaliation causes of action under a different statutory scheme covering the same protected activity.

The legislative history and context of FRSA do not suggest that Congress intended the election of remedies provision to preclude a railroad whistleblower from pursuing a remedy for retaliation based on his or her safety complaints and any other statutory claim that arises out of the same adverse action, including a race discrimination claim. The purpose of FRSA has always been "to promote safety in every area of rail operations." 49 U.S.C. 20101. This Court indicated in *Rayner* that, "[a]s with all safety legislation, [FRSA's whistleblower provision] should be broadly construed to effectuate the congressional purpose." 873 F.2d at 63. "FRSA was meant to protect railroad employees who are harassed, discriminated against or discharged by their employers for reporting safety violations" and to ensure that "[s]uch 'retaliatory actions by employers [were] not to be tolerated in the workplace.'" *Id.* at 64 (quoting *See* H.R. Rep. No. 96–1025, *reprinted in* 1980 U.S.C.C.A.N. 3830, 3832, 3840, 1980 WL 13014).

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established in 1980 when FRSA's whistleblower provision was enacted, *see, e.g., Norman*, 414 F.2d at 82-83 (recognizing that Title VII's protections against race discrimination apply to railroad employees), Congressman Florio's statement singled out section 11(c) of the OSH Act's protection against retaliation for safety and health whistleblowing as the intended target of the election of remedies provision. The OSH Act, which has no private right of action and is enforced only by the Secretary of Labor, is certainly less well-known than other employment statutes such as Title VII.

In short, by enacting FRSA's whistleblower protections, Congress intended that "[r]ailroad employees would no longer 'be forced to choose between their lives and their livelihoods.'" *Id.* (quoting 1980 U.S.C.C.A.N. at 3832). This backdrop of sweeping protection for safety whistleblowing weighs against reading FRSA's election of remedies provision to preclude a FRSA claim if the employee has also pursued statutory claims unrelated to retaliation for reporting safety concerns.

Interpreting FRSA's election of remedies provision to prohibit an employee from bringing a FRSA action if the employee previously pursued an action under section 1981 or another federal statute unrelated to safety whistleblowing fits even less comfortably with the 2007 amendments to FRSA, which were designed to increase protection to railroad employees who report safety concerns. *See Ratledge*, 2013 WL 3872793, at *15 (citing H.R. Rep. No. 110-259). Such an interpretation could force employees to choose between seeking protection under the discrimination statute or under FRSA. This could result in fewer FRSA actions and potentially insulate rail carriers from being held accountable for retaliatory conduct, which would be contrary to Congress' stated intention. *Cf. id.* at *15 (explaining that forcing employees to choose between pursuing arbitration under a CBA and a FRSA claim is contrary to the express purpose of the 2007 amendments to FRSA).

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Respectfully Submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

WILLIAM C. LESSER
Deputy Associate Solicitor

MEGAN E. GUENTHER
Counsel for Whistleblower Programs

s/ Rachel Goldberg
RACHEL GOLDBERG
Senior Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5555

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface, using Microsoft Word 2010 utilizing Times New Roman, in 14-point font in text and 14-point font in footnotes.

s/ Rachel Goldberg
RACHEL GOLDBERG
Attorney

CERTIFICATE OF SERVICE

I certify that the brief for the Secretary of Labor was served electronically through this Court's CM/ECF filing system to all counsel of record on this 29th day of December, 2014:

s/ Rachel Goldberg
Rachel Goldberg
Attorney
U.S. Department of Labor
Office of the Solicitor
Room N2716
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5555