

No. 25-103

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IN THE  
**Supreme Court of the United States**

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BofI FEDERAL BANK

*Petitioner,*

v.

CHARLES MATTHEW ERHART

*Respondent.*

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ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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**SUPPLEMENTAL BRIEF IN SUPPORT OF  
PETITION FOR A WRIT OF CERTIORARI**

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**CORPORATE DISCLOSURE STATEMENT**

BofI Federal Bank, which has since rebranded as Axos Bank, is a wholly owned subsidiary of Axos Financial, Inc. (“Axos”), which is a publicly traded company (NYSE: AX). Axos has no parent company. BlackRock, Inc. and Vanguard Group, Inc., both publicly held companies, each own more than ten percent of Axos’s stock.

Pursuant to Supreme Court Rule 15.8, Petitioner BofI Federal Bank respectfully submits this supplemental brief in support of its petition for a writ of certiorari filed on July 24, 2025, to call attention to the anticipated filing of a closely related petition for a writ of certiorari in the case of *Parker v. BNSF Railway Co.*, D.C. No. 2:14-cv-00176-RAJ (W.D. Wash.), App. No. 22-35695 (9th Cir.), the fact of which was not available to BofI at the time it filed its petition.

BofI's petition presents a single, straightforward question regarding the two-step burden-shifting framework set forth in the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR-21"), 18 U.S.C. § 1514A(b)(2)(C): Can evidence showing an employee's protected activity was a contributing factor in an unfavorable personnel action, relevant at AIR-21's first step, discredit the employer's separate same-action affirmative defense at step two?<sup>1</sup>

In its petition, BofI describes how lower courts have answered this question in vastly different ways, with many disregarding this Court's instruction in *Murray v. UBS Securities, LLC*, 601 U.S. 23, 38 (2024), that "[t]he right way to think about" the employer's same-action affirmative defense under AIR-21 is to ask "whether the employer would have retained an otherwise identical employee who had *not*

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<sup>1</sup> On August 5, 2025, respondent Charles Matthew Erhart filed a waiver declaring his intent not to file a response to BofI's petition.

engaged in the protected activity.” (Emphasis added.) Among the cases that have addressed this issue is *Parker v. BNSF Railway Co.*, 134 F.4th 957, 965 (9th Cir. 2025) (en banc), in which the Ninth Circuit struck a middle ground between the rapidly diverging lines of cases applying AIR-21’s two-step framework.

On August 4, 2025, after BofI filed its petition, Mr. Paul W. Parker applied for, and was subsequently granted, a 60-day extension of time to file a petition for a writ of certiorari challenging the Ninth Circuit’s en banc decision in *Parker* until October 12, 2025. No. 25A162. In his application, Mr. Parker identifies two questions he intends to present in his forthcoming petition, the second being “how courts apply [the] burden-shifting framework from [AIR-21],” and specifically, “whether and to what extent evidence showing an employee’s protected activity was a contributing factor in the unfavorable personnel action at step one is incorporated into the employer’s separate same-action affirmative defense at step two.” Mr. Parker expressly referenced BofI’s petition in his application, explaining that it raises “a similar question.”

Mr. Parker’s second question is effectively the same as the one presented by BofI in its petition, demonstrating the widespread and growing confusion among courts and administrative agencies that face this issue. BofI submits this supplemental brief to call attention to Mr. Parker’s anticipated petition for a writ of certiorari, should this Court find it efficient

to concurrently consider both petitions when deciding whether to grant or deny them.

Respectfully submitted,

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