No. 25-___

IN THE

Supreme Court of the United States

TREVOR MURRAY,

Petitioner,

v.

UBS SECURITIES, LLC AND UBS AG,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert L. Herbst
Counsel of Record
Benjamin J. Ashmore, Sr.
HERBST LAW PLLC
420 Lexington Avenue
Suite 300
New York, NY 10170
(646) 543-2354
rherbst@herbstlawny.com

Easha Anand
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Robert B. Stulberg
Patrick J. Walsh
STULBERG & WALSH, LLP
14 Wall Street, Suite 5G
New York, NY 10005

Scott A. Korenbaum
SCOTT A. KORENBAUM, ESQ.
14 Wall Street, Suite 1603
New York, NY 10005

QUESTION PRESENTED

Two Terms ago, in this very case, the Court unanimously held that the Second Circuit had erred in adding an atextual element to a whistleblower's initial burden and remanded for further proceedings. *Murray v. UBS Securities, LLC*, 144 S. Ct. 445 (2024). Despite UBS's urging, this Court did not resolve an important question: the meaning of the phrase "contributing factor" in 49 U.S.C. § 42121(b), the statutory provision whose two-part burden-shifting framework governs whistleblower protection claims across a variety of industries. *Id.* at 455 n.2. On remand, the Second Circuit squarely resolved the question by rejecting the definition that every other circuit to address the issue has adopted.

The question presented is: Whether a "contributing factor" in Section 42121(b) is one that "alone or in connection with other factors, tends to affect in any way the outcome of the decision," a definition eight circuits have adopted but the Second Circuit rejected?

RELATED PROCEEDINGS

Trevor Murray v. UBS Securities, LLC, UBS AG, Docket No. 1:14-cv-00927 (S.D.N.Y. 2014).

Trevor Murray v. UBS Securities, LLC, et al., No. Docket No. 22-660 (U.S. 2024)

Trevor Murray v. UBS Securities, LLC, UBS AG, Docket Nos. 20-4202 and 21-56 (2d Cir. 2025)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Trevor Murray respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a) is reported at 128 F.4th 363. The Court of Appeals' order denying rehearing en banc (Pet. App. 33a) is not reported. The order of the United States District Court for the Southern District of New York denying respondent's motion for judgment as a matter of law or for a new trial is unreported but available at 2018 WL 11437630.

JURISDICTION

The Court of Appeals issued its decision on February 10, 2025, and denied the petition for rehearing en banc on May 16, 2025. On August 5, 2025, Justice Sotomayor extended the time to file a petition for a writ of certiorari from August 15, 2025 to September 4, 2025. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

49 U.S.C. § 42121(b)(2)(B) is reproduced in the appendix to this petition. Pet. App. 34a.

STATEMENT OF THE CASE

Statutes that protect against whistleblower retaliation in a wide variety of industries—finance, aviation, trucking, and railroads, to name a few—utilize the burden-shifting framework set forth in 49 U.S.C. § 42121(b), which requires whistleblowers to make a prima facie case that their whistleblowing was a "contributing factor" in their firing. *See* 49 U.S.C. § 42121(b); Pet. App. 14a n.3 (collecting cases). When this case came before this Court last year, respondent UBS urged this Court to resolve the meaning of that phrase. *See, e.g.*, Transcript of Oral Argument at 94-95, *Murray v. UBS Securities, LLC*, 144 S. Ct. 445 (2024) (Court would be "leaving an enormous amount unsettled in whistleblower law" if it did not address definition of "contributing factor"). The Court ultimately concluded the issue was not within the scope of the question presented and left it for further proceedings. *Murray*, 144 S. Ct. at 455 n.2.

Now the Second Circuit has defined the phrase, and it has done so in a way that breaks ranks with every other circuit to have considered the question. In at least eight circuits, the phrase "contributing factor" in 49 U.S.C. § 42121(b) is defined to mean "a factor that, alone or in combination with other factors, tends to affect in any way the outcome of the decision." Pet. App. 14a n.3. But the Second Circuit rejected a jury instruction with that precise definition.

This Court should grant certiorari to review that holding. The Second Circuit's opinion means that whistleblowers in that jurisdiction have a substantially higher evidentiary burden than whistleblowers in other circuits. It opens a split not just with its fellow circuits but also with the Department of Labor, which adjudicates many whistleblower retaliation claims in the first instance. It ignores the long-established meaning of "contributing factor" as a term of art. And it means that Trevor Murray—who was fired 13 years ago and who, a jury expressly found, would not have been fired but for his whistleblowing—faces the possibility of many more years before he sees any relief.

A. Statutory background

1. Enacted in 2000 following growing concerns about aviation safety, the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (often referred to as "AIR-21") created a cause of action for whistleblowers who were discharged, demoted, or otherwise discriminated against for reporting violations of federal aviation safety regulations.

AIR-21 employs a burden-shifting framework, codified at 49 U.S.C. § 42121(b). Whistleblowers file a complaint with the Department of Labor and must prove that protected whistleblowing conduct "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii). Then the employer has the chance to "demonstrate[] by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior." *Id.* §§ 42121(b)(2)(B)(ii), (iv).

2. In the decades since AIR-21, Congress has incorporated Section 42121(b)'s burden-shifting framework by reference into a half-dozen other statutes, protecting whistleblowers across industries ranging from finance to trucking to food and drugs to railroads. *See* 15 U.S.C. § 7a-3(b)(2)(C) (Criminal Antitrust Anti-Retaliation Act); 18 U.S.C. § 1514A(b)(2)(C) (Sarbanes-Oxley Act); 26 U.S.C. § 7623(d)(2)(B) (Taxpayer First Act); 31 U.S.C. § 5323(g)(3)(A) (Anti-Money Laundering Act); 49 U.S.C. § 20109(d)(2)(A)(i) (Federal Railroad Safety

Act); 49 U.S.C. § 31105(a)(2)(B) (Surface Transportation Assistance Act).

The Sarbanes-Oxley Act (SOX) is representative. In 2002, Congress enacted SOX "[t]o safeguard investors in public companies and restore trust in the financial markets following the collapse of Enron Corporation." *Lawson v. FRM LLC*, 571 U.S. 429, 432 (2014). SOX makes it unlawful for a publicly traded company to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of" protected whistleblowing activity. 18 U.S.C. § 1514A(a). That provision created a private cause of action for employees who claim their rights have been violated. *Id.* § 1514A(b)(1)(B). Congress specified that any action brought under that provision "shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49" (that is, AIR-21). 18 U.S.C. § 1514A(b)(2)(C).

Other statutes incorporate Section 42121 using the same or similar locutions. *See, e.g.*, 15 U.S.C. § 7a-3(b)(2)(C) (antitrust whistleblower action "shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49"); 26 U.S.C. § 7623(d)(2)(B) (same, in tax evasion whistleblower action); 49 U.S.C. § 20109(d)(2)(A)(i) (same, under Federal Railroad Safety Act); 49 U.S.C. § 31105(a)(2)(B) (same, under Surface Transportation Assistance Act); 31 U.S.C. § 5323(g)(3)(A) ("the requirements under section 42121(b) of title 49, including the legal burdens of proof described in such section 42121(b), shall apply" to complaints filed with Department of Labor under Anti-Money Laundering Act).

3. Section 42121(b) is not the first provision to employ this two-part, burden-shifting framework to adjudicate whistleblower claims. Instead, Section 42121(b) copies the Whistleblower Protection Act of 1989 (WPA), a statute that protects federal employee whistleblowers. *See Murray*, 144 S. Ct. at 450. As in Section 42121(b), the WPA first requires a whistleblower to "demonstrate[] that a disclosure or protected activity … was a contributing factor in the personnel action." 5 U.S.C. § 1221(e)(1). And as in Section 42121(b), the defendant is nonetheless spared from liability if it "demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e)(2).

The WPA replaced a prior statutory regime that imposed an "excessively heavy burden" on whistleblowers. 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20, 101st Cong., 1st Sess. 1989). The WPA's burden-shifting framework was "specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a 'significant', 'motivating', 'substantial', or 'predominant' factor in a personnel action in order to overturn that action." *Id.* Congress replaced those words with "a contributing factor." *Id.*

Because the WPA was the first statute to use the "a contributing factor" standard, Congress included in the text of the statute an example of what might suffice to prove the element: An employee may prove the "contributing factor" element by showing that the defendant "knew of the disclosure or protected activity" and that the adverse employment action "occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action." 5 U.S.C. § 1221(e).

Congress's Explanatory Statement elaborated further: "The words 'a contributing factor' … mean any factor which, alone or in connection, with other factors, tends to affect in any way the outcome of the decision." 135 Cong. Rec. 5033; *see also id.* at 4509 (statement of Sen. Carl Levin); *id.* at 4518 (statement of Sen. Charles Grassley); *id.* at 4522 (statement of Sen. David Pryor); *id.* at 5037 (statement of Rep. Patricia Schroeder).

Shortly after the WPA's passage, the Federal Circuit—which had exclusive jurisdiction over the WPA—adopted the Explanatory Statement's definition in its foundational decision *Marano v. Dep't of Just.*, 2 F.3d 1137, 1140 (Fed. Cir. 1993). There, it held that a factor that "alone or in connection with other factors, tends to affect in any way the outcome of the decision" constitutes a "contributing factor." *Id.* at 1140; *see also Murray*, 144 S. Ct. at 455.

Since *Marano*, Congress has "incorporated the easier-to-satisfy 'contributing factor' framework into a series of similar whistleblower statutes that protect non-civil-service employees in industries where whistleblowing plays an especially important role in protecting the public welfare." *Murray*, 144 S. Ct. at 450. Some statutes incorporate Section 42121(b) by reference, while others have the text of the two-part framework written into the statute directly. *See id.* at 450 n.1; *supra* at 3-4. All told, at least a dozen statutes use the WPA's two-part framework to adjudicate whistleblower claims.

B. Factual background

1. In April 2011, UBS hired petitioner Trevor Murray as a research strategist servicing the firm's commercial mortgage-backed securities business. C.A. J.A. 193. His job was to report on markets to UBS's current and potential customers. That year, Murray's supervisor drafted a "glowing review" of Murray's performance. *Id.* 3118. He highlighted Murray's reputation as a "great ambassador for the [UBS] franchise." *Id.* 1499.

2. Given Murray's responsibilities, Securities and Exchange Commission regulations required him to certify that his research was independent. 17 C.F.R. § 242.501; *see Murray*, 144 S. Ct. at 450. Certifying a report that was not independently produced would violate those regulations and constitute a fraud on shareholders. C.A. J.A. 1340-41.

Despite these federal requirements, UBS's trading desk repeatedly pressured Murray to skew his research in support of UBS business strategies. In June 2011, the head of the mortgage-backed securities trading desk, Ken Cohen, told Murray to produce "a research article" that would "smooth[] over" concerns investors might otherwise have about participating in UBS's mortgage-backed securities trades. C.A. J.A. 211-12.

A few months later, Cohen told Murray that it was important to "maintain consistency of message between originations, trading desk, and research." *Murray v. UBS*, 43 F.4th 254, 256 (2d Cir. 2022). For that reason, Cohen instructed Murray to "clear your research articles with the [trading] desk going forward." *Id.* When Murray published another independent report forecasting market turbulence, Cohen complained that Murray's report was "too bearish" and had not delivered a "consistent message with what we're trying to do around here." C.A. J.A. 276; *Murray*,144 S. Ct. at 450.

3. In December 2011, Murray reported the trading desk's improper pressure campaign to his supervisor, Michael Schumacher. C.A. J.A. 284. Murray told Schumacher the situation "wasn't just unethical, it was illegal." *Murray*, 43 F.4th at 257. But his supervisor responded that "it is very important you do not alienate [the mortgage-backed securities trading desk]." *Id.* A few weeks later, when Murray informed Schumacher that the situation with the trading desk "was bad and getting worse," Schumacher told him to "just write what the business line wanted." *Murray*, 144 S. Ct. at 450.

Despite having written Murray a glowing performance review just one month prior, Schumacher emailed UBS higher-ups and recommended that Murray "be removed from [UBS's] head count." C.A. J.A. 536. As an alternative, Schumacher suggested that Murray could be transferred to a desk analyst position, where he would no longer be subject to SEC certification requirements. *Id.* 539-40. The trading desk declined to take on Murray as a trading desk analyst and recommended that UBS "let him go." *Id.* 876.

Less than two months after Murray reported violations of securities regulations, he was fired. *Murray*, 144 S. Ct. at 450.

C. Procedural background

1. In August 2012, Murray filed a whistleblower complaint with the U.S. Department of Labor alleging

that his termination violated the Sarbanes-Oxley Act. Compl. ¶ 31, ECF No. 2. The Department of Labor took no action. *Id.* After waiting 180 days, as required by statute, Murray filed a de novo action in the Southern District of New York. *Id.*

The case eventually went to trial, which lasted more than two weeks. Murray presented evidence that the leaders of UBS's trading desk unlawfully pressured him to skew his research to conform to the trading desk's business strategies, that he reported this conduct to his immediate supervisor, and that he was fired for making the report. C.A. J.A. 1388. UBS's defense was that it had fired Murray for financial reasons unconnected to any protected activity and that there had been no pressure to skew his analysis and no reports of pressure to his supervisor. *Id.* 1388-89. UBS never suggested it had any performance-based reason for firing Murray. *Id.*

The district court instructed the jury that Murray was entitled to compensation only "[i]f you find that defendants improperly retaliated against Plaintiff in terminating him from UBS." C.A. J.A. 1396. Specifically, the court instructed the jury in accordance with Section 42121(b)'s two-part burden-shifting framework, telling the jury it must find "that the protected activity in which [Murray] engaged was a contributing factor in his termination." *Id.* 1393. It explained that "[f]or a protected activity to be a contributing factor, it must have either alone or in combination with other factors tended to affect in any way UBS's decision to terminate plaintiff's employment." *Id.* If the jury made that finding, the burden would shift to UBS to "show by clear and convincing evidence that it would have taken the adverse action anyway." Pet. App. 6a.

During deliberations, the jury sent out a question: "It says 'tended to affect in any way UBS's decision...' What is UBS here? Is it a) the person w/ the final decision? Or b) people who contributed to the decision formally or informally? c) contributed actively, ie 'fire him' or inactively, ie 'I'm not fighting for him.'" ECF No. 391 at 5. In response, the trial court, with UBS's agreement, issued a supplemental instruction: "You should consider (1) who had knowledge of any protected activity in which Mr. Murray engaged, and (2) did anyone with that knowledge of the protected activity, because of the protected activity, affect in any way the decision to terminate Mr. Murray's employment." ECF No. 393 at 4.

The jury returned a verdict in Murray's favor. It expressly found that Murray's reporting of regulatory violations was a "contributing factor" in his termination. Pet. App. 6a. It also specifically found that UBS had not shown it would have fired Murray absent that protected conduct, a conclusion UBS has never challenged. *Id.* The jury awarded Murray back pay and compensatory damages. *Id.*

2. On appeal, the Second Circuit vacated the jury's verdict. The panel held that "even though the jury found that Murray's whistleblowing was a contributing factor to his termination, we cannot know whether it would have found that UBS acted with retaliatory intent." *Murray*, 43 F.4th at 262.

3. Murray petitioned for certiorari, asking this Court to resolve whether a whistleblower must prove, separate and apart from satisfying the two-part burden-shifting framework, that his employer acted

with "retaliatory intent." *Murray*, 144 S. Ct. at 452. This Court granted the petition.

At oral argument, Justices repeatedly asked whether the Court should address the definition of "contributing factor." For instance, Justice Barrett asked whether, in addition to deciding whether retaliatory intent was an independent element of SOX, "it would be valuable to say something more about the contributing factor in the burden-shifting test?" Transcript of Oral Argument at 94, *Murray*, 144 S. Ct. 445. UBS answered in the affirmative: Because "tends to affect" is "a widely used instruction," the Court would be "leaving an enormous amount unsettled in whistleblower law if you do not address that." *Id.* at 94-95. When Justice Gorsuch suggested a minimalist opinion that did not define "contributing factor," Justice Kavanaugh asked, "You probably need a little more, right?" *Id.* at 20.

This Court unanimously reversed, holding that the jury need not find proof of retaliatory intent as a separate element. *Murray*, 144 S. Ct. at 452. Instead, the jury's findings that Murray's whistleblowing was a "contributing factor" to his termination and that UBS would not have fired Murray absent the protected conduct served as proof of the only intent required by the statute: that UBS fired Murray because of his protected conduct. *Id.*

The Court described the "contributing factor" test as "easier-to-satisfy" than other employment discrimination tests and "reflect[ing] a judgment that 'personnel actions against employees should quite simply not be based on protected [whistleblowing] activities'—not even a little bit." *Id.* at 450, 455 (citing *Marano*, 2 F.3d at 1141). It also explained that "[t]he ordinary meaning of the words 'contribute' and 'factor' suggest that the phrase 'contributing factor' is broad indeed." *Id.* at 455 (citations omitted). The Court ultimately concluded that the "burden-shifting framework worked as it should," the jury having "determined that Murray had shown his protected activity was a contributing factor in his firing while UBS had not shown that it would have taken the same action in the absence of his protected activity." *Id.*

Despite UBS's claim at argument that an "enormous amount" of whistleblower law was "unsettled," this Court ultimately declined to reach the precise definition of "contributing factor," because the Second Circuit had not found reversible error on that point. *See* Transcript of Oral Argument at 94-95; *Murray*, 144 S. Ct. at 455 n.2.

4. The second time around, the Second Circuit again vacated the verdict, this time in a 2-1 opinion with Judge Pérez dissenting. It held that the "tended to affect in any way" definition of "contributing factor" was wrong because it "allowed the jury to hold UBS liable without finding that Murray's whistleblowing contributed to his termination." Pet. App. 2a. The panel also held that knowledge and temporal proximity—enough to prove "contributing factor" under the WPA, *see supra* at 5-6—was not sufficient to prove "contributing factor" under SOX. Pet. App. 15a n.4.

The panel majority acknowledged that other circuits have defined "contributing factor" using the "tends to affect in any way" language. Pet. App. 14a n.3. But it attempted to distinguish those cases on two bases. First, the panel majority thought it significant that several of the other circuits' cases came at summary judgment, rather than in the context of jury instructions. Pet. App. 13a-14a. Second, the panel majority stressed that several of the cases in the split involved claims that arose under statutes other than SOX, albeit statutes that also incorporated Section 42121(b). Pet. App. 15a.

The panel majority then considered the district court's supplemental instruction requiring the jury to find that someone with "knowledge of the protected activity, because of the protected activity, affected the decision to terminate Mr. Murray's employment." Pet. App. 9a. It held that the supplemental instruction did not cure the purported initial error, because while it did not repeat the "'tended to' language," it "failed to repudiate" it. Pet. App. 16a.

Judge Pérez dissented. She argued that the definition of "contributing factor" universally adopted by other circuits was correct. She explained that "[t]he phrase 'tended to affect' is a reasonable, nontechnical way of conveying … that Murray needed to show that his whistleblowing increased the probability that UBS would fire him, but not that it was a but-for cause of his being fired." Pet. App. 25a.

Even if there were some error with the instruction, Judge Pérez would have affirmed the decision below because she had "trouble envisioning a reasonable juror who would misconstrue this instruction so badly" as the majority suggested, particularly in light of the supplemental instruction. Pet. App. 20a. Judge Pérez also noted that the supplemental instruction if anything "exaggerated Murray's burden, since it suggested that he needed to prove that his whistleblowing was a but-for cause of any act or omission that contributed to his firing." *Id.*

Finally, Judge Pérez criticized the majority for "doubling down" on its original decision after a unanimous reversal by this Court. Pet. App. 32a. She concluded: "We ought to take our lumps and apply the law as it stands, even when it leads us to a new result." *Id.* The Second Circuit denied rehearing en banc. Pet. App. 33a.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's definition of "contributing factor" in Section 42121(b) conflicts with the uniform construction of its sister circuits.

The district court in this case defined "contributing factor" for the jury as a factor that, "either alone or in combination with other factors tended to affect in any way UBS's decision to terminate plaintiff's employment." Pet. App. 8a. The Second Circuit rejected that jury instruction as overly lenient. In doing so, it broke ranks with every one of its sister circuits that has considered the definition of "contributing factor."

1. In total, *ten* circuits have held that "contributing factor" in the two-step whistleblower protection framework means exactly what the district court here said it meant. Eight have interpreted the phrase "contributing factor" in Section 42121(b) itself. And two others have interpreted the same phrase in virtually identical whistleblower protection statutes.

The Tenth Circuit's opinion in *Lockheed Martin Corp. v. Admin. Rev. Bd.*, 717 F.3d 1121 (2013), is illustrative. In that case, the plaintiff was constructively discharged shortly after reporting inappropriate conduct between the Lockheed Martin employees who ran a pen pals program with the military and the soldiers they corresponded with (including use of company funds to buy gifts, laptops, and expensive hotels for soldiers). *Id.* at 1126. The plaintiff then filed a complaint with the Department of Labor under SOX. *Id.* at 1128. The Department of Labor's administrative review board found for the plaintiff. *Id.*

On appeal, Lockheed Martin challenged the determination that plaintiff had established the "contributing factor" part of her case. The Tenth Circuit rejected the challenge. It explained that the "contributing factor" element was "broad and forgiving." *Id.* at 1136. Drawing on the Department of Labor Administrative Review Board definition, the Tenth Circuit defined "contributing factor" as "any factor, which alone or in combination with other factors, tends to affect *in any way* the outcome of the decision," *id.*—precisely the definition offered by the district judge and squarely rejected by the Second Circuit here.

In addition to the Tenth, seven other circuits have defined "contributing factor" in Section 42121(b) the same way the district court did in this case. *See, e.g.*, *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158-59 (3d Cir. 2013); *Wiest v. Tyco Elecs. Corp.*, 812 F.3d 319, 330 (3d Cir. 2016); *Feldman v. L. Enf't Assocs. Corp.*, 752 F.3d 339, 348-49 (4th Cir. 2014); *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008); *Ameristar Airways, Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 567 (5th Cir. 2011); *Gammons v. Adroit Med. Sys., Inc.*, 91 F.4th 820, 826-27 (6th Cir. 2024); *Kudak v. BNSF Ry. Co.*, 768 F.3d 786, 791 (8th Cir. 2014); *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195

(9th Cir. 2019); *Majali v. U.S. Dep't of Lab.*, 294 F. App'x 562, 566 (11th Cir. 2008);.

To top it off, at least two other circuits—the Seventh and the Federal circuits—define the phrase "contributing factor" in other whistleblowing statutes as "tends to affect in any way." *See Addis v. Dep't of Lab.*, 575 F.3d 688, 691 (7th Cir. 2009) (Energy Reorganization Act); *Marano v. Dep't of Just.*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (Whistleblower Protection Act of 1989).

Each of those statutes uses the same two-part framework as Section 42121(b): (1) The plaintiff proves protected conduct "was a contributing factor" in the adverse employment action, then (2) the defendant can show "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." *Compare* 42 U.S.C. § 5851(b)(3) (Energy Reorganization Act) *and* 5 U.S.C. § 1221(e) (Whistleblower Protection Act of 1989) *with* 49 U.S.C. § 42121(b). Indeed, district courts in the Seventh Circuit assume that the Seventh Circuit's definition of "contributing factor" from the Energy Reorganization Act applies to Section 42121(b). *See, e.g.*, *Armstrong v. BNSF Ry. Co.*, 128 F. Supp. 3d 1079, 1091 (N.D. Ill. 2015) (quoting *Addis*, 575 F.3d at 691); *Burton v. Ill. Cent. Ry. Co.*, 2016 WL 302109 (N.D. Ill. Jan. 25, 2016). And as this Court has explained, Section 42121(b) draws directly from the Whistleblower Protection Act of 1989, the statute at issue in the Federal Circuit case. *Murray*, 144 S. Ct. at 36-37.

2. The panel's attempt to distinguish the consensus of other circuits is unpersuasive.

First, the panel asserted that some of the other circuits' cases are distinguishable because they involved summary judgement decisions rather than jury instructions. Pet. App. 13a-14a. That is a distinction without a difference: The definition of "contributing factor" is the same at summary judgment as at trial. Indeed, the panel majority held that it was not "correct *in any sense*"—not just at trial—"to describe a 'contributing factor' under SOX as a factor that 'tends to affect' termination 'in any way.'" *See* Pet. App. 15a n.4. And, unsurprisingly, jury instructions in sister circuits reflect precisely the "tends to affect in any way" interpretation those circuits have adopted in summary-judgment cases.[1]

Second, the panel dismissed several of the other circuits' definitions because they were adopted in cases where the underlying claim didn't arise under SOX but instead under another statute that incorporates Section 42121(b) by reference. Pet. App. 15a n.4. But that makes no sense at all. The meaning of the term "contributing factor" in Section 42121(b) does not change based on the statute incorporating it.

For instance, some of the cases in the split arise in the context of claims under the Federal Railroad Safety Act. *See, e.g.*, *Kudak*, 768 F.3d at 791; *Frost*,

[1] *See, e.g.*, *U.S. ex rel. Cody v. ManTech Int'l, Corp.*, 746 F. App'x 166, 178-79 (4th Cir. 2018); *Taylor v. Union Pac. R.R.*, No. CV 18--1110-SDD-EWD (M.D. La.) (filed Dec. 09, 2021); *Rhinehimer v. U.S. Bancorp Invs.*, No. CV-2011-136 (E.D. Ky.) (filed Oct. 4, 2013); *Armstrong v. BNSF Ry. Co.*, No. 12-CV-07962 (N.D. Ill.) (filed Sept. 21, 2016); *Erhart v. BOFI Fed. Bank*, No. 15-CV-02287-BAS-NLS (S.D. Cal.) (filed May 19, 2022); *Fresquez v. BSNF Ry. Co.*, No. 17-cv-844 (D. Colo) (filed Feb. 19, 2019); *Coleman v. Dist. of Columbia*, 1:09-cv-50, (D.D.C) (filed Sept. 28, 2016).

914 F.3d at 1195. That statute provides that any action "shall be governed by the legal burdens of proof set forth in section 42121(b)." 49 U.S.C. § 20109(d)(2). So when those circuits are interpreting "contributing factor" for purposes of a FRSA claim, they're interpreting the phrase in Section 42121(b)—not some separate phrase in FRSA itself. Indeed, the Second Circuit itself previously held in this very case that the meaning of "contributing factor" in Section 42121(b) is the same no matter what statute the original claim arises under. *See Murray v. UBS*, 43 F.4th 254, 260-62 (2d Cir. 2022). Accordingly, district courts in each of the cited circuits use the same definition of "contributing factor" in Section 42121(b) when adjudicating SOX claims.[2]

Besides, even just looking at cases where the underlying claim arises under SOX, the panel decision is at odds with four circuits. *See Wiest*, 812 F.3d at 330; *Feldman*, 752 F.3d at 339*; Allen*, 514 F.3d at 468*; Lockheed Martin Corp.*, 717 F.3d at 1121. Indeed, the panel opinion acknowledged it was splitting with three of those circuits. Pet. App. 15a n.4. Even a 3-1 split is more than sufficient to warrant certiorari.

3. The split between the Second Circuit and the other courts of appeals isn't just a question of phrasing. Under the Second Circuit's outlier

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[2] *See, e.g.*, *Wood v. Dow Chem. Corp.*, 72 F. Supp. 3d 777, 794 (E.D. Mich. 2014); *Wallander v. Can. Nat'l Ry. Co.*, 2015 WL 10818741 (W.D. Tenn. Feb. 10, 2015); *Quast v. MidAmerican Energy Co.*, 2016 WL 4536460, at *13 (S.D. Iowa Feb. 8, 2016); *Botta v. PricewaterhouseCoopers LLP*, 2021 WL 3140717, at *8 (N.D. Cal. July 26, 2021); *Collins v. Beazer Homes USA, Inc.*, 334 F. Supp. 2d 1365, 1379 (N.D. Ga. 2004); *Shea v. Kohl's Dep't Stores, Inc.*, 2019 WL 1452887 (N.D. Ala. April 2, 2019).

definition, whistleblower plaintiffs face a higher evidentiary burden than they would in other circuits.

Recall that, under the WPA, a plaintiff may establish the "contributing factor" element by proving that the defendant knew about the whistleblowing and that the adverse personnel action took place in close temporal proximity to the whistleblowing. *Supra* at 5-6 (discussing 5 U.S.C. § 1221(e)); *see also* Pet. App. 15a n.4.

Almost all the circuits that define "contributing factor" using the "tends to affect" language have held that the same is true under Section 42121(b). Again, the Tenth Circuit is illustrative: In *Lockheed Martin Corp.*, the court held that "[t]emporal proximity between the protected activity and adverse employment action may alone be sufficient to satisfy the contributing factor test." 717 F.3d at 1126. The "cascade of difficulties which culminated in [plaintiff's] constructive termination" began "shortly" after her identity as the whistleblower was revealed, leading the Tenth Circuit to uphold the administrative review board's verdict. *Id.* at 1136-37. Several other circuits have reached the same conclusion. *See, e.g., Wiest*, 812 F.3d at 330; *Feldman*, 752 F.3d at 348-49; *Ameristar Airways, Inc.*, 650 F.3d at 567; *Gammons*, 91 F.4th at 826-27; *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 1003 (9th Cir. 2009); *Hitt v. CSV Transportation, Inc.*, 116 F.4th 1309, 1317 (11th Cir. 2024); *see also Addis*, 575 F.3d at 691; *Marano*, 2 F.3d at 1140.

But the Second Circuit explained that, given its definition of "contributing factor," a plaintiff could not succeed using that same evidence under Section 42121(b). Pet. App. 15a n.4. As a result, a plaintiff raising a claim in the Second Circuit has a far higher burden than a plaintiff in another circuit.

II. The question presented is important.

1. The question presented has high stakes. Congress employed the contributing-factor framework of Section 42121(b) in a host of "contexts where the health, safety, or well-being of the public may well depend on whistleblowers feeling empowered to come forward." *Murray v. UBS Securities, LLC*, 144 S. Ct. 445, 456 (2024).

What's more, whistleblower protection provisions incorporating Section 42121(b) were passed in response to crisis levels of danger or instability. For instance, SOX's whistleblower protection provision was intended "to ward off another Enron debacle." *Lawson v. FMR, LLC*, 571 U.S. 429, 447 (2014). Similarly, Congress passed the Surface Transportation Assistance Act in response to an "'increasing number of deaths, injuries, and property damage due to commercial motor vehicle accidents'" on America's highways. *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 262 (1987) (quoting 128 Cong. Rec. 35209, 32510 (1982)). And the Federal Railroad Safety Act adopted the "contributing factor" standard in response to reports that "railroad safety management programs sometimes either subtly or overtly intimidate employees from reporting on-the-job-injuries." *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 159 (3d Cir. 2013) (quoting *Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads: Hearing Before the H. Comm. on Transp. and Infrastructure*, 110th Cong. (2007)).

2. If splitting with every other circuit to consider the question weren't enough, the Second Circuit also breaks ranks with the Department of Labor. *Cf. Lawson*, 571 U.S. at 440 (granting certiorari "to resolve the division of opinion" between the First Circuit and the Department of Labor regarding SOX). Across multiple decades, multiple statutes, and hundreds of cases, the Department of Labor has maintained that a "contributing factor" is any fact that "tends to affect in any way the outcome of the decision."[3]

The Department's regulations also differ from the Second Circuit's rule because they provide that the "contributing factor" showing "may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity." 29 C.F.R. § 1989.104(e)(3) (Taxpayer First Act); *id.* § 1992.104(e)(3) (Anti-Money Laundering Act); *id.* § 1991.104(e)(3) (Criminal Antitrust Anti-Retaliation Act); *see also* 29 C.F.R. § 1979.104(b)(2) (AIR-21) (Federal Railroad Safety Act); *id.* § 1978.104(e)(3) (Surface Transportation Assistance Act); *id.* § 1980.104(e)(3) (SOX).

In cases that the Department of Labor expects to be appealed to the Second Circuit, the Department must now choose between adhering to its longstanding interpretation of "contributing factor" (and dooming

[3] *See, e.g.*, *Benjamin v. Citationshares Mgmt., LLC*, 2013 WL 6385831, at *9 (Nov. 5, 2013) (AIR-21); *In re Stacey M. Platone*, 2004 WL 5032621, at *23 (Apr. 30, 2004) (SOX); *In re Arngeletta Wells*, 2025 WL 327464, at *12 (Jan. 15, 2025) (Surface Transportation Assistance Act); *Palmer v. Can. Nat'l Ry.*, 2016 WL 5868560, at *31 (Sept. 30, 2016) (Federal Railroad Safety Act).

its decisions to reversal on appeal) or devising a different test.

To make matters still worse, the statutes that use the Section 42121(b) framework permit judicial review either where the violation occurred or where the plaintiff resided. *See, e.g.*, 49 U.S.C. § 42121(b)(4) (AIR-21); 49 U.S.C. § 20109(d)(4) (Federal Railroad Safety Act); 49 U.S.C. § 31105(d) (Surface Transportation Assistance Act). So the Department of Labor cannot know ex ante which circuit will ultimately review its findings—frustrating any effort to adjudicate cases arising within the Second Circuit differently from cases arising everywhere else. For instance, an analyst who works on Wall Street might live in New Jersey. A long-haul truck driver who lives in Buffalo might refuse an overweight load at a Newark shipper. Or a rail technician might commute from northern Massachusetts to a job in Albany, where he's fired for insisting on conducting safety tests the railroad is trying to shirk.

In practice, outcomes might turn on which party gets to the courthouse first after the Department of Labor issues a final order. There's precedent for such a race to the courthouse where each litigant believes a different circuit is the more favorable venue. For example, in a case where the whistleblower statute permitted filing either where the plaintiff resided or where the violation occurred, the parties filed dueling petitions for review—one in the Third Circuit and one in the Sixth—just a day apart. *Doyle v. Sec'y of Lab.*, 285 F.3d 243, 248 & n.3 (3d Cir. 2002).

3. At least 1,000 whistleblowing complaints governed by statutes that use Section 42121(b)'s "contributing factor" framework are filed each year.

OSHA, *Whistleblower Investigation Data: Fiscal Years 2016-2021* (n.d.), https://perma.cc/9H3W-8AYL. And the Second Circuit has outsized importance for some of these statutes. Because the Second Circuit is home to the financial industry, for example, it handles 21.5 percent of all SOX whistleblower cases. Br. for the Government Accountability Project as Amicus Curiae in support of Appellee-Cross-Appellant, *Murray v. UBS Securities LLC* (No. 20-4202) (2d Cir. Sept. 3, 2021).

4. Indeed, respondents have conceded the importance of the question presented. They previously urged this Court to define "contributing factor," warning that the Court would be "leaving an enormous amount unsettled in whistleblower law if you do not address that." Transcript of Oral Argument at 94-95, *Murray*, 144 S. Ct. 445; *see also* Brief for Respondent at 47, *Murray*, 144 S. Ct. 445 (arguing that the district court's definition of "contributing factor" independently required the Court to set aside the jury's verdict). At oral argument, several Justices, too, suggested that the Court should at some point provide guidance on the proper definition of "contributing factor" in an appropriate case. *See supra* at 11.

Previously, however, this Court concluded it could not reach this important question because the Second Circuit had not issued a holding and it was outside the scope of the question presented in the petition. *Murray*, 144 S. Ct. at 455 n.2. Following remand, the Second Circuit has definitively addressed this issue—creating a split in the process—and it is now squarely before the Court.

III. This case presents a compelling vehicle.

This case perfectly tees up the question presented. Every other issue related to liability—from whether Murray's conduct was protected to whether UBS established its affirmative defense—has been decided in Murray's favor. Pet. App. 5a-7a. This Court has already resolved the only other issue on appeal: whether SOX's burden-shifting framework requires a whistleblower to prove that his employer acted with "retaliatory intent." *Murray*, 144 S. Ct. at 449. And Murray defended the "contributing factor" instruction at every stage in the litigation. *See, e.g.*, Pet. App. 13a-15a.

This case is a particularly compelling vehicle for this Court's intervention. UBS terminated Trevor Murray for reporting financial fraud more than 13 years ago—a termination that, a jury found, would not have occurred had Murray not reported the misconduct. After this Court unanimously rejected UBS's position, it "trie[d] to salvage its earlier victory, pressing an argument" that the Second Circuit had not originally adopted. Pet. App. 19a (Pérez, J., dissenting). Rather than "tak[ing] its lumps and apply[ing] the law as it stands, even when it leads [] to a new result," as Judge Pérez put it, the Second Circuit "doubl[ed] down," siding with UBS yet again. Pet. App. 32a. Absent this Court's intervention, the Second Circuit's decision leaves Murray—who prevailed before the jury and in this Court—stripped of the protections Congress guaranteed to whistleblowers.

IV. The Second Circuit's ruling is wrong.

1. "Where Congress employs a term of art obviously transplanted from another legal source, it

brings the old soil with it." *George v. McDonough*, 142 S. Ct. 1953, 1959 (2022) (internal quotation marks omitted). That presumption is particularly strong when Congress used "the very same terminology" in "the very same field, such as securities law or civil-rights law"—or, as here, whistleblower protection. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 54 (2012). The "old soil" includes authoritative judicial constructions by a court with "exclusive jurisdiction" over the prior statute. *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633 (2019).

Section 42121(b)'s burden-shifting framework is "obviously transplanted from another legal source," the Whistleblower Protection Act of 1989, a statute in "the very same field" of whistleblower law. Section 42121(b) uses almost identical language to the WPA to lay out the burden-shifting framework. At the first step, both statutes require that a plaintiff prove that a protected activity "was a contributing factor" in the "personnel action." 5 U.S.C. § 1221(e)(1); 49 U.S.C. §§ 42121(b)(2)(B)(i), (iii). At the second step, both statutes require that the employer "demonstrate[] by clear and convincing evidence" that it "would have taken the same" "personnel action in the absence of such" protected activity. 5 U.S.C. § 1221(e)(2); 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv). Indeed, Congress's goal in passing the statutes that incorporate Section 42121(b) was to give private-sector whistleblowers the same right of action as the WPA gave their public-sector counterparts.[4] And this Court has described the

[4] *See* 148 Cong. Rec. No. 92, S6541 (2002) (SOX sponsor statement of Sen. Tom Harkin) ("[W]orkers who discover corporate fraud should be protected just as we protect

Section 42121(b) as "originat[ing]" with the WPA. *Murray*, 144 S. Ct. at 450.

So in interpreting Section 42121(b), this Court must consider the "old soil" that Congress intended to come with the key language it transplanted from the WPA. *See George*, 142 S. Ct. at 1959. The foundational case interpreting the WPA's "contributing factor" standard remains *Marano v. Dep't of Just.*, 2 F.3d 1137 (Fed. Cir. 1993), a decision of the Federal Circuit—the court vested with exclusive jurisdiction over WPA claims. *See* 5 U.S.C. § 7703(b)(1)(A) (1993). Indeed, this Court cited *Marano* in explaining the contributing-factor standard under Section 42121(b). *Murray*, 144 S. Ct. at 455.

There can be no question that *Marano* defined "contributing factor" precisely the same way the district court did in this case: "[A]ny factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Marano*, 2 F.3d at 1140; *compare* Pet. App. 6a-7a.

The "old soil" of the WPA also includes the example—given in the text of the WPA itself—about how "contributing factor" is to be proven. The WPA explains that an employee may prove the "contributing factor" element by showing the defendant's knowledge of the protected conduct along with temporal proximity between the whistleblowing and the adverse employment action. 5 U.S.C. § 1221(e)(1). When Congress used the same operative

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government whistleblowers."); S. Rep., at 30 ("Because we had already extended whistleblower protection to non civil service employees" like airline workers, "we thought it best to track those protections as closely as possible.").

language in Section 42121, it directed that the same kind of conduct (knowledge plus temporal proximity) would suffice to prove “contributing factor.” Further proof, then, that the Second Circuit must be wrong about its definition of “contributing factor”: As a result of that definition, the Second Circuit acknowledges that knowledge and temporal proximity would not be enough to prove “contributing factor”—contra the statutory text of the WPA itself. *See* Pet. App. 11a n.4

2. Even absent the “old soil” of the WPA, the plain language of Section 42121(b) would dictate the same outcome. As this Court observed, “the ordinary meanings of the words ‘contribute’ and ‘factor’ suggest that the phrase ‘contributing factor’ is broad indeed.” *Murray*, 144 S. Ct. at 455. It encompasses any consideration that has “a share in bringing about” or is “party responsible for” a result. *Id.* (quoting *Webster’s New World College Dictionary* 317 (4th ed. 1999)).

As Judge Pérez put the point, “‘[t]ended to affect’ is thus a reasonable, nontechnical way of conveying” Murray’s burden—“that UBS’s decision to fire him was affected by his whistleblowing, ‘even a little bit.’” Pet. App. 25a (quoting *Murray*, 144 S. Ct. at 455). “Tend” means “to exert activity or influence in a particular direction.” *Id.* (quoting Webster’s Third New World International Dictionary 2354 (2002)); *see also* Black’s Law Dictionary (1990) (defining “tend” as “serve, contribute, or conduce in some degree or way, or have a more or less direct bearing or effect”).

3. The panel below rejected the long-settled definition of “contributing factor” as inconsistent with the text of SOX. Recall that a whistleblower raising a SOX claim is alleging that he was “discharge[d],

demote[d], suspend[ed], threaten[ed], harass[ed], or in any other manner discriminate[d] against … *because of*" protected whistleblowing activity. 18 U.S.C. § 1514A. During litigation, that claim is proven using "the legal burdens of proof set forth in section 42121(b)." 18 U.S.C. § 1514A(b)(2)(C). Per the panel majority, "contributing factor" *cannot* mean "tends to affect in any way" because proof of "contributing factor" then would not establish that the termination was "because of" whistleblowing. Pet. App. 11a-13a.

The panel majority is wrong. To start, it's hard to see how the language "because of" in the Sarbanes-Oxley Act could change the meaning of "contributing factor" in Section 42121(b), which was passed before SOX.

Moreover, the panel's opinion ignores the second step of the Section 42121(b) burden-shifting framework. After a plaintiff establishes that his whistleblowing was a "contributing factor," the defendant has the opportunity to prove that it "would have taken the same unfavorable personnel action in the absence of" the protected activity. 49 U.S.C. §§ 42121(b)(2)(B)(ii), (iv). An employer who did not discharge the plaintiff "because of" protected activity will thus be exonerated at the second step of the burden-shifting framework. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1739 (2020) (to find whether an action was taken "because of" a protected trait, "change one thing at a time and see if the outcome changes"). In this case, the jury found that UBS would not have fired Murray in the absence of protected activity—a finding UBS has never challenged. The jury thus necessarily found that UBS fired Murray because of the protected activity.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Easha Anand
Pamela S. Karlan
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Robert B. Stulberg
Patrick J. Walsh
STULBERG & WALSH, LLP
14 Wall Street, Suite 5G
New York, NY 10005

Robert L. Herbst
Counsel of Record
Benjamin J. Ashmore, Sr.
HERBST LAW PLLC
420 Lexington Avenue
Suite 300
New York, NY 10170
(646) 543-2354
rherbst@herbstlawny.com

Scott A. Korenbaum
SCOTT A. KORENBAUM, ESQ.
14 Wall Street, Suite 1603
New York, NY 10005

September 4, 2025