

IN THE
Supreme Court of the United States

TREVOR MURRAY,

Petitioner,

v.

UBS SECURITIES, LLC, *et al.*,

Respondents.

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

**BRIEF OF *AMICI CURIAE* U.S. SENATOR RON
WYDEN, GOVERNMENT ACCOUNTABILITY
PROJECT, NATIONAL WHISTLEBLOWER
CENTER, PROJECT ON GOVERNMENT
OVERSIGHT AND WHISTLEBLOWERS OF
AMERICA IN SUPPORT OF THE PETITIONER**

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IDENTITY AND INTERESTS OF AMICI CURIAE¹

Senator Ron Wyden serves as Vice-Chairman of the bipartisan U.S. Senate Whistleblower Protection Caucus. He was the original sponsor of legislation protecting nuclear whistleblowers in the Energy Reorganization Act of 2005, 42 U.S.C. §5851, which was the first whistleblower protection statute that incorporated the WPA's two-tiered test for "contributing factor" burden of proof scheme in the private sector, which is at issue in this case.

Government Accountability Project (GAP) was founded in 1977 and is an independent, nonpartisan, nonprofit, public interest organization that promotes corporate and government accountability by protecting whistleblowers and advancing free speech in the civilian and governmental workforce.

National Whistleblower Center (NWC) was founded in 1988 and is a nonprofit nonpartisan organization dedicated to the protection of civilian and governmental whistleblowers. NWC is referenced in SOX's legislative history as one of the public interest organizations that supported the SOX legislation, S.Rep. No. 107-146, at 6 (2002) at issue in this case.

1. Pursuant to Supreme Court Rule 37.6, undersigned counsel states that no party's counsel authored this brief in whole or in part and that no person or entity other than the amici or their counsel contributed money to the preparation or submission of this brief, and pursuant to Supreme Court Rule 37.2, undersigned counsel states that counsel of record for all parties have received timely notice of *amici's* intention to file this brief.

Project On Government Oversight (POGO) was founded in 1981 and is a nonpartisan independent watchdog that investigates and exposes waste, corruption, and abuse of power and leads efforts to enact SOX, the WPA, and other whistleblower protection statutes.

Whistleblowers of America (WOA) is a non-profit that provides voluntary trauma informed peer support services to whistleblowers to prevent suicide and address other mental health challenges. Whistleblowers suffering from retaliation can heal when they connect to someone who understands their plight.

Last year, Senator Wyden, GAP, and NWC participated in this Court as amici in *Murray v. UBS Securities, LLC*, 601 U.S. 23 (2024).

SUMMARY OF ARGUMENT

This case centers on what constitutes a “contributing factor” in assessing an employer’s retaliation against a whistleblower-employee’s protected disclosures in cases brought in under the Sarbanes-Oxley Act (SOX).

There are two reasons why this Court should grant the petition for a writ of certiorari filed by Petitioner Trevor Murray.

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE THE 5:1 CIRCUIT SPLIT ON SOX’S TWO-TIERED, BURDEN-SHIFTING “CONTRIBUTING FACTOR” FRAMEWORK.

Last year, this Court granted Murray’s previous petition for a writ of certiorari to resolve a 2:1 conflict between the Second Circuit—which required whistleblower employees to prove their employers acted with “retaliatory intent” in terminating employees who have made whistleblowing disclosures protected under SOX—*Murray v. UBS Securities, LLC*, 41 F.3d 254, 262 (2d Cir.2022)(hereinafter *Murray I*) and the Fifth and the Ninth Circuits, which had expressly rejected such a requirement.

Earlier this year, the Second Circuit ruled, on remand, that SOX’s “contributing factor” test requires whistleblowers to prove protected disclosures “actually caused” firings. Contrary to the Second Circuit, five Circuits (the Third, Fourth, Fifth, Seventh, and Tenth Circuits) have held SOX’s “contributing factor” test merely requires that protected disclosures “tended to

affect in any way” adverse employment decisions, e.g., terminations.

Only this Court can resolve this 5:1 split, which has important consequences not only in the securities industry governed by SOX but in the score of industries governed by the 16 whistleblower protection statutes which, like SOX, are modeled on the Whistleblower Protection Act of 1989 (WPA) and the Wendell H. Ford Aviation Act of 2000 (AIR-21) the identical “contributing factor” framework, tests, and standards.

II. THIS COURT ALSO SHOULD GRANT CERTIORARI BECAUSE THE SECOND CIRCUIT MISCONSTRUED SOX

The Second Circuit held:

The district court’s instruction strayed from the text of § 1514A by expanding the definition of a contributing factor ... beyond what [SOX] allows. A contributing factor causes or helps cause a subsequent event. But it must actually cause or help cause the termination decision—it is not enough merely to influence the termination, or generally to be the type of thing that tends to cause termination.

Murray v. UBS Securities, LLC, 128 F.4th 363, 366 (2d Cir.2025)(hereinafter *Murray II*).

The Second Circuit’s holding stands alone among the Circuits. That holding is not only a jurisprudential orphan on the issue presented by Murray’s petition but an erroneous one. It is erroneous because, unlike five other

Circuits, the Second Circuit overlooked SOX's language, structure, history, and purpose and ignored the relevant canons of construction.

First, the Second Circuit ignored that SOX's "contributing factor" framework was borrowed, verbatim, from the WPA and AIR 21.

Second, the court below also ignored that it was Congress, not the courts, which defined a "contributing factor" as "any factor which, alone or in connection with other factors, tends to affect in any way the outcome."

Third, the Second Circuit ignored that, as the Federal Circuit explained three decades ago, Congress deliberately chose this "tends to affect in any way" formulation precisely to make *it* easier for whistleblowers to meet their burden, i.e., easier than their burden under pre-existing whistleblower protection statutes like the Civil Service Reform Act and easier than a defendant-employer's burden. *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed.Cir.1993). *See Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158-59 (3d Cir.2013).

Fourth, the Second Circuit overlooked that five circuits have endorsed *Marano's* analysis and conclusion

Fifth, the Second Circuit ignored the fact that since *Marano* was decided in 1993 Congress has effectively reaffirmed *Marano's* reading of the contributing factor framework and burdens by enacting 16 whistleblower statutes that, like SOX, were modeled on the WPA's and AIR-21 and incorporate their frameworks, burdens, and standards. Pursuant to the doctrine of Congressional

acquiescence, Congress is presumed to know court constructions of earlier statutes and, in enacting new statutes indistinguishable from the old, to approve and to endorse those decisions. *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)).

Sixth, the Second Circuit ignored that a statute’s words and structure must be construed a whole, not in a vacuum.

Seventh, the Second Circuit ignored that courts should consider Congress’ purpose in enacting a statute.

Finally, the Second Circuit erred in concluding the “tends to affects in any way” formulation was vague, confused juries, and was biased against employer-defendants and in favor of whistleblower, ignoring the fact that SOX was intended to be plaintiff friendly and to ease their burdens while being tougher on defendants.

FACTUAL AND PROCEDURAL BACKGROUND

In the Fall of 2011, shortly after UBS hired Murray, the company began pressuring him to slant his reports to boost their sales and profits, going so far as to command their approval before he published his ostensibly independent views. In December 2011 and January 2012, he made several internal whistleblowing complaints to his supervisor to protest demands that he act unlawfully. Although Murray’s supervisor had lauded him in a December 2011 performance review, UBS fired him in February 2012, a month after his last protected disclosures.

In August 2012, Murray filed an administrative whistleblower claim against UBS with the U.S. Department of Labor pursuant to the Sarbanes-Oxley Act of 2002 (SOX), 18 U.S.C. §1514A(a). He alleged that UBS fired him in retaliation for making protected disclosures that UBS executives had pressured him to unlawfully slant his research reports for the benefit of UBS’s traders. In 2014, after the Department of Labor failed to act promptly on Murray’s administrative complaint, he filed an original action in U.S. District Court for the Southern District of New York.

Following a 2018 jury trial, the district court entered judgment on the verdict that Murray had satisfied his *prima facie* burden of proof under SOX’s two-tiered burden-shifting “contributing factor” framework, *i.e.*, that he had shown that his protected whistleblowing disclosures “tended to affect in any way” UBS’s decision to fire him. At the same time, the jury found that UBS had failed to satisfy its own burden under the contributing factor test, *i.e.*, that it had failed to show by clear-and-convincing evidence that it would have terminated his employment even in the absence of his protected disclosures.

UBS subsequently appealed to the U.S. Court of Appeals for the Second Circuit, which vacated the judgment and remanded. The Second Circuit held that SOX §1514A requires a plaintiff to prove his employer acted with “retaliatory intent”—a subjective state of mind in separate from and addition to SOX’s express and objective statutory requirements—and that the district court had committed a non-harmless error by failing to instruct the jury accordingly. *Murray v. UBS Securities, LLC*, 41 F.3d 254, 262 (2d Cir. 2022)(hereinafter *Murray I*).

In 2022, Murray successfully petitioned this Court for a writ of certiorari. In a unanimous opinion, this Court vacated and remanded, explaining that although a SOX whistleblower “bears the burden to prove that his protected activity ‘was a contributing factor in the unfavorable personnel action alleged in the complaint,’” SOX does not require a SOX whistleblower “to make some further showing that his employer acted with ‘retaliatory intent.’” *Murray*, 601 U.S. at 39.

In February of this year, the Second Circuit, on remand, vacated the original jury verdict for a second time, once again for instructional errors. This time, the court held that the district court’s “tend to affect in any way” elaboration of the “contributing factor” jury instruction was ambiguous, confusing, and unfair, because whistleblowing “must ***actually cause*** or help cause the termination decision—it is not enough merely to influence the termination, or generally to be the type of thing that tends to cause termination.” *Murray II*, 128 F.4th at 366 (italicized emphasis in the original).

The Second Circuit’s decision prompted Murray to petition this Court for another writ of certiorari, this time presenting the question now before this Court:

“Whether a ‘contributing factor’ in [SOX] Section 42121(b) is one that ‘alone or in connection with other factors, tends to affect in any way the outcome of the decision?’”

STATUTORY BACKGROUND

Congress enacted SOX “after a series of celebrated accounting debacles.” *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010). This Court said these “debacles” were epitomized by decade-long shareholder frauds of the Enron Corporation, a Fortune “Top 10” company, which caused significant “spillover economic effects” throughout the Nation, including massive bankruptcies, widespread unemployment, and collapsed confidence in the securities markets. *Skilling v. United States*, 561 U.S. 358, 376 (2010).

According to what this Court described as the “‘official legislative history’ of Sarbanes-Oxley,” S.Rep. 107-146 (2002) at 10, 2), Members of Congress introduced a bill that ultimately was enacted as SOX after Congress learned that “Enron had succeeded in perpetuating its massive shareholder fraud in large part due to a ‘corporate code of silence,’ an informal but stringently enforced program that effectively ‘discourage[d] employees from reporting fraudulent behavior.’” *Lawson v. FMR LLC*, 571 U.S. 429, 435 n.1 and 447 (2014)(quoting SOX’s “official legislative history,” S.Rep. 107-146 (2002) at 10, 2).

In 2002 while enacting SOX Congress learned that although “then-existing” whistleblower protection statutes protected many federal civil service and private-sector whistleblowers from employer retribution for protected disclosures, “there [was] no similar protection for employees of publicly traded companies.” *Lawson*, 571 U.S. at 435.

As Congress subsequently explained when enacting the American Recovery and Reinvestment Act of 2009 (ARRA), Pub.L. 111-5, 123 Stat. 115, a whistleblower “function[s]” like “a canary in a coal mine ... to warn of [sic] us of impending dangers.” House-Senate Conf. Report on ARRA, 155 Cong.Rec. H1307-03 (Feb. 12, 2009). In like fashion, in enacting SOX, Congress underscored that the absence of protection for whistleblowers not only jeopardized their employment and careers but chilled them and others from making protected whistleblowing disclosures, which ill-served investors and the Nation because “in complex securities fraud investigations, employees ‘are [often] the only firsthand witnesses to the fraud.’” *Lawson*, 571 U.S. at 435 (quoting S.Rep. 107-146 at 10).

Congress “identified the lack of whistleblower protection as ‘a significant deficiency’” in deterring corporate misconduct, in alerting Congress about hidden chicanery in the securities industry, and in safeguarding investors and other members of the public. *Lawson*, 571 U.S. at 435, n.1. To prevent whistleblowers from being chilled and to forestall “another Enron debacle,” Congress “installed whistleblower protection” in SOX. *Id.* at 448 (citing S.Rep. 107-146 at 2-11).

While Congress recognized that securities industry whistleblowers needed protection through a private right of action, Congress concurrently realized it did not need to devise a wholly new framework of protection, to formulate new burdens of proof, or to articulate new standards for those burdens, in other words, to “reinvent the ... wheel.” *Cf. Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 577 (1999).

Instead, to avoid confusion and unnecessary duplication, Congress specified all §1514A(b)(2) suits would be “governed by [AIR-21’s] legal burdens of proof.” SOX §1514A(b)(2)(cross-referencing AIR-21, 49 U.S.C. §4212(b)). In turn, AIR-21 §4212(b)) expressly incorporated the “contributing factor” framework that Congress had specified thirteen years earlier in enacting the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. §1214(b)(4)(B)(i) and §1221(e)(1).

Thus, as SOX’s “official legislative history,” S.Rep. 107-146,² explains, Congress chose to replicate AIR-21’s overall “contributing factor” framework—and AIR-21’s disparate burdens of proof, which differed for whistleblowers and employers—“[b]ecause we had already extended whistleblower protection to non-civil service employees” just two years earlier in enacting AIR-21 (for airline workers), and so “Congress designed §1514A to **‘track ... as closely as possible’ the protections afforded by [AIR-21] §42121**” and to “incorporate[] by cross-reference AIR-21’s administrative enforcement regime.” *Lawson*, 571 U.S. at 457 (quoting S.Rep. 107-146 at 30)(emphases added).

In sum, SOX—like both AIR-21 and the WPA—establishes a two-tiered burden-shifting “enforcement regime.” *Id.* The only thing an AIR-21 (or a SOX) whistleblower-plaintiff needs to do to satisfy his *prima facie* burden is to demonstrate, by a preponderance-of-

2. “In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill” *Garcia v. United States*, 469 U.S. 70, 76 (1984)(citation omitted).

the-evidence, that his whistleblowing “was a contributing factor in the unfavorable personnel action alleged.” 49 U.S.C. §42121(b)(iii). If the whistleblower makes such a demonstration, the burden shifts to his employer to “demonstrate[] by clear-and-convincing evidence that [it] would have taken the same unfavorable personnel action in the absence of that behavior,” §42121(b)(iv), *i.e.*, that the employer’s action was based on non-discriminatory grounds. The whistleblower will prevail unless the employer meets that heightened burden.

Congress intended this clear-and-convincing burden to be demanding. “For employers, this is a tough standard, and not by accident.” *Araujo*, 708 F.3d 152, 159 (3d Cir.2013)(quoting *Stone & Webster Eng’g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir.1987)). As this Court explained in *Murray* last year:

This framework is not unique to Sarbanes-Oxley and AIR-21. It originated in the WPA, 5 U.S.C. §1221(e) The framework was meant to relieve whistleblowing employees of the “excessively heavy burden” under then-existing law of showing that their protected activity was a “‘significant’, ‘motivating’, ‘substantial’, or ‘predominant’” factor in the adverse personnel action, and it reflected a determination that “[w]histleblowing should never be a factor that **contributes in any way** to an adverse personnel action.”

Murray, 601 U.S. at 28 (emphasis added; quoting 135 Cong.Rec. 5032, 5033 (1989)(Joint Explanatory Statement on the WPA, S.B. 20, 101st Cong., 1st Sess. (1989)).³

Accordingly, in enacting SOX, Congress purposely “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*, 601 U.S. at 28 (listing, as examples, the airline industry (governed by AIR-21) and the securities industry (governed by SOX).

Because Congress drew the “contributing factor” standard from the WPA, it is useful to review the WPA’s history, purpose, and structure.

Before the WPA was enacted in 1989, the Civil Service Reform Act of 1978 (CSRA), Pub.L. 95-454, 92 Stat. 1111, had exclusively governed whistleblowing claims by federal civil-service workers.⁴ The CSRA “defined a prohibited personnel practice as ‘tak[ing] or fail[ing] to take a personnel action ... as a reprisal for’ a protected disclosure of information.” *Marano v. Dep’t of Justice*, 2 F.3d 1137,

3. See 135 Cong.Rec. at 5033 (Explanatory Statement of Senate Bill (“S.B.”) 20); *id.* at 4518 (statement of Sen. Charles E. Grassley); *id.* at 4522 (statement of Sen. Mark Pryor); and *id.* at 4522 (statement Rep. Pat Schroeder).

4. See *Mount v. Dep’t of Homeland Sec.*, 937 F.3d 37, 46 (1st Cir.2019)(citing Thomas M. Devine, *The Whistleblower Protection Act of 1989*, 51 Admin. L. Rev. 531, 570, n.218 (1999)). See also Karlie M. Bischoff, *Breaking the Corporate Code of Silence*, 24 U.C. Davis Bus. L.J. 47, 51-59 (2024).

1140 (Fed.Cir.1993)(Clevinger, J.)(quoting 5 U.S.C. §2302(b)(8)). By 1989, Congress had come to realize that the CSRA's "reprisal for" test imposed an "excessively heavy burden ... on the employee," and "in effect, had gutted the CSRA's protection of whistleblowers." *Id.* (citing the WPA's Joint Explanatory Statement on the WPA, 135 Cong.Rec. 5033 (1989)).

"Thus, in 1989 Congress amended the CSRA's statutory scheme" by enacting the WPA, which "substantially reduc[ed] a whistleblower's burden to establish his case" and "sent a strong, clear signal to whistleblowers that Congress intends that they be protected from any retaliation related to their whistleblowing." *Marano*, 2 F.3d at 1140 (quoting 135 Cong.Rec. 5033).

Rather than being required to prove that the whistleblowing disclosure was a 'significant' or 'motivating' factor, the whistleblower under the WPA ... must evidence only that his protected disclosure played a role in, or was 'a contributing factor' to, the personnel action taken.

Id. (quoting 1 Joint Explanatory Statement on Senate Bill 20, 35 Cong.Rec. 5033).

Significantly, although the text of the WPA did not define "contributing factor," Congress left no question about what that phrase meant. During floor speeches and through consensus legislative histories submitted prior to several unanimous votes, the WPA's primary drafters defined the contributing factor burden as "any factor, which alone or in connection with other factors, tends to affect in any way the outcome" *See* 135 Cong.Rec. 4509 (1989).

As *Marano* summarized SOX’s consensus legislative history:

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. This test is specifically intended to overrule existing case law [construing the CSRA], which require[d] 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.

Marano, 2 F.3d at 1140 quoting Joint Explanatory Statement on the WPA, S.20, 101st Cong., 1st Sess. (1989)).

In analyzing the meaning and import of the “tends to affect in any way” phrase that lays at the heart of both the Federal Circuit’s 1993 decision in *Marano* and the Second Circuit’s decision in *Murray II*, the following sequence of events is highly significant. See *Watson v. United States*, 552 U.S. 74, 82–83 (2007).

- The WPA was enacted in 1989.
- *Marano*, which construed the WPA and relied on Conference Reports, Committee Reports, Senate Reports, and floor statements by WPA’s sponsors about the meaning and import of the phrase “tends to affect in any way” phrase was decided in 1993.

- AIR-21—which was based on the WPA and thereby incorporated the “tends to affect in any way” phrase—was enacted in 2000 and amended twice, in 2020, *see* 134 Stat. 2337, and again in 2024. *See* 138 Stat. 1139.
- SOX—which was based on the WPA and AIR-21 and which also incorporated the phrase “tends to affect in any way”—was enacted in 2002 and amended in 2010. *See* 124 Stat. 1848, 1852.

This sequence is telling because *Marano*—and especially the ““tends to affect in any way”” phrase that *Marano* took from the WPA’s legislative history—has been cited and quoted with approval—and always in whistleblowers’ favor—in four SOX cases by three Circuits in (the Fourth, Fifth, and Tenth). *See Feldman v. Law Enft Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir.2014); *Allen v. Admin. Rev. Bd.*, 514 F.3d 468, 476 n.3 (5th Cir.2008); *Halliburton, Inc. v. Admin. Rev. Bd.*, 771 F.3d 254, 263 (5th Cir.2014); *Lockheed Martin Corp. v. Admin. Rev. Bd.*, *U.S. Dep’t of Lab.*, 717 F.3d 1121, 1136 (10th Cir.2013).⁵

Finally, five Circuits have cited *Marano* (or approvingly quoted its “tends to affect” language) in deciding in

5. The Third, Fifth, and Tenth Circuits also have relied on the “tends to affect” language in deciding SOX cases in whistleblowers’ favor, albeit without mentioning *Marano*. *See Genberg v. Porter*, 882 F.3d 1249, 1257 (10th Cir.Cir.2018); *Wiest v. Tyco Elecs. Corp.*, 812 F.3d 319, 330 (3d Cir.2016); *Hemphill v. Celanese Corp.*, 430 F.App’x 341, 344 (5th Cir.2011).

whistleblowers’ favor in five non-SOX cases brought under the WPA and AIR-21 or one of their non-SOX progeny.⁶

AIR-21 enacted this two-tiered burden-shifting scheme (and its accompanying disparate burdens) “without change,” *Forrest Grove*, 557 U.S. at 239-49. SOX did so, too, with SOX carefully “track[ing]” AIR-21’s formulation “as closely as possible.” *Lawson*, 571 U.S. at 437. In fact, SOX duplicated AIR-21’s scheme, burdens, and standards in their entirety precisely because, as Congress highlighted, they are “‘much easier for a plaintiff to satisfy’ than previous standards.” *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir.2015)(quoting *Araujo*, 708 F.3d at 158-59).

ARGUMENT

I. ONLY THIS COURT CAN RESOLVE THE 5:1 CIRCUIT SPLIT REGARDING FOR THE “CONTRIBUTING FACTOR” TEST.

Last year, this Court explained that it granted certiorari in *Murray* to resolve a “direct conflict” between the Second Circuit’s “opinion requiring whistleblowers to prove retaliatory intent” and the opinions of two Circuits, the Fifth and the Ninth Circuits, “which had rejected any

6. See *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir.2013)(Federal Railroad Safety Act (FRSA); *Greatwide Dedicated Transp. II, LLC v. Dep’t of Lab.*, 72 F.4th 544, 556 (4th Cir.2023)(Surface Transportation & Assistance Act; *BNSF R. Co. v. Dep’t of Lab.*, 816 F.3d 628, 638 (10th Cir.2016)(FRSA); *Addis v. Dep’t of Lab.*, 575 F.3d 688, 691 (7th Cir.2009) (Energy Reorganization Act); *Majali v. Dep’t of Lab.*, 294 F.App’x 562, 566 (11th Cir.2008)(WPA).

such requirement for [SOX] § 1514A claims.” *Murray*, 601 at 32 (citations omitted).

The conflict between the Second Circuit’s holding in *Murray II* and the opinions in SOX cases by five other Circuits (the Third, Fourth, Fifth, Seventh, and Tenth Circuits) on the same “tend to ... affect in any way” jury instruction issue is just as direct as the 2:1 Circuit conflict in *Murray I*. The only difference is the instant split is much deeper.

Amici submit that this deep and direct conflict, by itself, provides compelling grounds for this Court to grant *Murray*’s pending petition for certiorari, particularly in light of the legal uncertainty this split reflects and the forum shopping this split may encourage.

There are two other reasons why this Court should grant certiorari to resolve the split. First, *Murray II* is likely to have a disproportionate influence on the seven Circuits that have not ruled on the issue in SOX cases. This is so because the Nation’s courts often have “deferred to the Second Circuit because of” what Judge Bork characterized as “its ‘preeminence in the field of securities law.’” *Morrison v. Nat’l Australia Bank Ltd.*, 561 U.S. 247, 260 (2010)(citations omitted).

Second, if allowed to stand *Murray II* will affect decisions in non-SOX cases. This is so because SOX’s burden-shifting framework and standards are drawn expressly from AIR-21, *Murray*, 601 U.S. at 27-28, and because this burden-shifting framework is not unique to Sarbanes-Oxley and AIR 21” but instead “originated in the Whistleblower Protection Act of 1989 (WPA), 5

U.S.C. § 1221(e)” *Id.* at 28. Moreover, as the Fifth Circuit noted earlier this year, “Congress incorporated the AIR21 standards expressly in [four] other statutes” besides SOX, and “Congress provided similar legal burdens in [five] more statutes still.” *Parker v. BNSF Ry. Co.*, 137 F.4th 957, 963, n.1 (9th Cir. 2025) (listing statutes). In all, the legal burdens of proof that Congress introduced in the Whistleblower Protection Act of 1989 have been reaffirmed sixteen times, including all thirteen whistleblower laws since enacted that are administered by the Department of Labor (“DOL”).⁷

II. THE SECOND CIRCUIT REACHED AN ERRONEOUS CONCLUSION ON THE MERITS HERE AND DID SO BECAUSE IT VIOLATED FOUR OF THE MOST FUNDAMENTAL “IMPERATIVES” OF STATUTORY CONSTRUCTION.

As noted above, *Murray II*’s conclusion about the scope and meaning of the “tends to ... affect in any way” phrase is unique and finds no support in any of the dozens of appellate decisions involving SOX, AIR-21, or the WPA or any of their progeny. This is not surprising. The Second Circuit rejected and rewrote plain statutory guidance to produce a substitute that defeats the statutory purpose. Further, *Murray II* completely ignores this Court’s

7. The Library of Congress and the Department of Labor have separately compiled lists of the WPA, AIR-21, and SOX families of whistleblower protection statutes. See Library of Congress, *Compilation of Federal Whistleblower Protection Statutes* (2025), <https://www.congress.gov/crs-product/R46979>; U.S. Dep’t of Labor, *Whistleblower Statutes Summary Chart* (8/29/25) <https://www.whistleblowers.gov/sites/wb/files/2025-09/Whistleblower-Statutes-Summary-Chart-8-29-25-Update-508.pdf>.

repeated guidance about how courts should interpret statutes, guidance that this Court has emphasized in *Murray* and other decisions interpreting whistleblower statutes. *See, e.g., Dep't of Homeland Security v. MacLean*, 574 U.S. 383 (2015).

A. *Murray II* erroneously violates the doctrine of acquiescence.

This doctrine is necessary for consistent, stable interpretation of statutory terms. “Congress is presumed to be aware of a[] judicial interpretation[s] of a statute and to adopt that interpretation when it re-enacts a statute without change.” *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239–40 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). *See Keene Corp. v. United States*, 508 U.S. 200, 212–13 (1993) (“when [Congress] re-enacts the statute without change, it is presumed to have acquiesced in that settled interpretation.”). *See also United States v. Atl. Mut. Ins. Co.*, 343 U.S. 236, 239 (1952).

Congress’ enactment of multiple statutes based on the WPA and AIR-21 after *Marano* was decided “demonstrates” that it “implicitly approved” *Marano*’s construction of the WPA. *Dames & Moore v. Regan*, 453 U.S. 654, 680 (1981).

B. *Murray II* erroneously mischaracterizes favorable statutory language as overbroad.

1. The controlling language “tends to” is not overbroad

The circuit court rejected “tends to” as so vague it could allow whistleblowers to prevail short of proving

causation. *Murray II*, 128 F.4th at 369-70. However, Judge Perez’ dissent calls the majority’s bluff, explaining, there is no basis for the majority’s conclusion that the phrase “tended to ... affect in any way” confused the jury. “Rather, this instruction unambiguously conveys the correct law as applied to Murray’s suit: to meet his initial burden, all Murray needed to show was that his whistleblowing made UBS ‘even a little bit’ more likely to fire him.” *Murray II*, 128 F.4th at 369-70 (Perez, J., dissenting; quoting *Murray*, 601 U.S. at 376).

[T]ended to affect’ is a reasonable, nontechnical way of conveying that burden If a particular factor tended to affect a “decision to terminate” someone, it made the decision more or less likely. When it was specifically a ‘contributing factor,’ it made the decision more (rather than less) likely.”

Id.

Further, the undesirable consequences hypothesized by the Second Circuit are consistent with the statute, rather than adverse. First, *Murray II* rejected “tends to” as so vague it could allow whistleblowers to prevail short of proving causation. *Murray II*, 128 F.4th at 366. However, whistleblowers are not required to prove causation at the *prima facie* stage of a case. The judgment of whether the employer unlawfully against a whistleblower is an ultimate conclusion to be made by the trier of fact at the end of a case, *i.e.*, after hearing the employer’s defense.⁸

8. In section 1514A(a)(1), SOX does not even require an ultimate conclusion of retaliation; merely discrimination.

The contributing factor test is a low bar for the *prima facie* case.

As this Court emphasized, the “contributing factor test is deliberately modest. The “framework ... was meant to relieve whistleblowing employees of the ‘excessively heavy burden’” under then-existing law of showing that their protected activity was a “ ‘significant’, ‘motivating’, ‘substantial’, or ‘predominant’ “ factor in the adverse personnel action, and it reflected a determination that “[w]histleblowing should never be a factor that contributes in any way to an adverse personnel action” *Murray*, 601 U.S. at 28. Moreover, as this case shows, employers can always find some other reason, with at least surface plausibility, to justify terminating an employee, with the employee having little access to the evidence to overcome that defense. Yet by setting the barrier low for employees and high for the employer, employees are more likely to take the risk of blowing the whistle.

In short, the “tends to” language that the Second Circuit found objectionable is meant to be “employee-friendly.” *Araujo v. N.J. Rail Operations, Inc.*, 708 F.3d 152, 162 (3d Cir. 2013). *See Murray*, 601 U.S. at 453-55. No court, in any jurisdiction, has ever found this language ambiguous or perplexing, or otherwise problematic.

2. The controlling language “in any way” is not overbroad.

The circuit court continued that “in any way” allows the jury to consider other causes for an employee’s termination. *Murray II*, 128 F.4th at 370. Again, the dissenting opinion in *Murray II* called this bluff.

The phrase “affect in any way” is an appropriate way to convey the multiple routes, both direct and indirect, through which Murray’s whistleblowing could have increased the probability of his being fired. UBS could have fired him outright after he reported misconduct. Or it could have transferred him to a different job that was more likely to be on the chopping block. The phrase “in any way” properly encompasses effects resembling the latter situation, which a jury might otherwise improperly disregard. *Murray II*, 128 F.4th at 376-77.

Most basic, the jury is supposed to consider other alleged causes. That is the whole objective for the employer’s burden of proof. The contributing factor test for a *prima facie* case just sets the stage for requiring employers to prove those independent factors were controlling for an action.⁹

C. *Murray II* erroneously fails to consider the statutory purpose.

If there is ambiguity, that is not grounds for courts to reject or rewrite statutory language. Instead, the court should resort to the statute’s “legislative history and statutory purpose ... to interpret [the] ambiguous statutory text.” *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 187 n.8 (2004)(per Rehnquist, J.)(citation omitted). See *King v. Burwell*, 576 U.S. 473, 487 (2015); *SEC v. Joiner*, 320 U.S. 344, 350-51 (1943)(per Jackson, J.).

This explains why this Court has often and extensively explained, specifically “the mischief to which Congress

9. See Devine, 51 *Admin. L. Rev.* at 553-58.

was responding.” *Lawson*, 571 U.S. at 433. *See id.* at 433-35, 447-49; *Murray*, 601 U.S. at 23-28.

Unfortunately, *Murray II* includes discussion of or even no references to SOX’s purpose. As discussed above, the congressional purpose for burdens of proof in SOX and all other modern statutes is for an employee to have only a modest burden in showing that retaliation was relevant as a contributing factor. *Murray II* ignores and then directly attacks that purpose. Instead of requiring the employer to prove non-retaliatory motives, all the burdens are on the whistleblower with none for the employer. The purpose of *Murray II* is to defeat Congress’ purpose for SOX.

D. *Murray II* erroneously fails to consider the statute as a whole.

Murray II considers in isolation six words that it finds ambiguous and confusing: “tend to ... affect in any way.” No other court has construed those words in that way because no other court assessed the language in isolation.

In ascertaining a statute’s meaning, a “court must look [not just] to the particular statutory language at issue, [but also] the language and design of the statute as a whole,” *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988). As this Court reaffirmed, “Statutory language ... ‘cannot be construed in a vacuum. It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.’” *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 101–02 (2012) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). This Court has carefully and consistently relied

on this fundamental canon in cases involving SOX, AIR-21, and other whistleblower statutes,¹⁰ and most recently in *Murray*.

Exactly because looking at a few words rarely yields an accurate interpretation of a statute or a useful “reso[ution] of the question” in dispute, it is almost always “necessary to look to the text of [a statute] as a whole to illuminate Congress’ intent.” *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 632–33 (2011).¹¹ See *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 239 (2004).

In reviewing the whole statute, courts must consider all its language. Another “cardinal principle of statutory construction” is that “a statute ought, upon the whole, to be so *construed* that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.” *Babbitt v. Sweet Home Chapter Communities for Great Ore.*, 515 US 687, 698 (1995). See *Advoc. Health Care Network v. Stapleton*, 581 U.S. 468, 477 (2017)(citing Scalia, *Reading Law, supra*, at 174-79).

Murray II would eviscerate the statutory structure for all whistleblower laws by functionally canceling the

10. See *Lawson v. FMR LLC*, 571 U.S. 429, 434, 444 (2014); *Fischer v. United States*, 603 U.S. 480, 502 (2024); *Digital Realty Tr., Inc. v. Somers*, 583 U.S. 149, 152 (2018); *Yates v. United States*, 574 U.S. 528, 557 (2015); *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 509 (2010).

11. See also Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, at xxix (2012)(extolling the “holistic canon”).

employer's burden of proof, a cornerstone of fairness first created by this Court for First Amendment cases in *Mt. Healthy v. Doyle*, 429 U.S. 274 (1977). If an employee proves an action was whistleblower retaliation, this is the ultimate conclusion and the case is over without getting to the employer's burden of proof. If the employee fails, the case again is over for not making a *prima facie* showing, again without getting to the employer's burden of proof. *Murray II's* interpretation would render superfluous the structural second half of burdens of proof for all whistleblower laws. See Ian Kinghorn, *Reversing the Burden*, 43 J.Corp.L. 181, 182–83 (2017). Courts “are not free to rewrite [what] Congress has enacted.” *Dodd v. United States*, 545 U.S. 353, 359 (2005).

CONCLUSION

The Second Circuit rejected and effectively rewrote SOX's plain text and plain history in order to embrace an alternative that Congress rejected and to that frustrate rather than further the statute's purpose. To maintain the burdens of proof in virtually all modern whistleblower laws, amici request that the Court grant certiorari and reverse the decision below.

Respectfully submitted,

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