

No. 25-264

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**

BRIEF IN OPPOSITION

EUGENE SCALIA

Counsel of Record

THOMAS G. HUNGAR

ANDREW G.I. KILBERG

AARON SMITH

ANDREW Y. EBRAHEM

GIBSON, DUNN & CRUTCHER LLP

1700 M St., N.W.

Washington, DC 20036

(202) 955-8673

EScalia@gibsondunn.com

Counsel for Respondents

QUESTION PRESENTED

The Sarbanes-Oxley Act prohibits employers from taking adverse employment action against an employee “because of” protected activity. 18 U.S.C. § 1514A(a). To establish a prima facie whistleblower claim under the Act, a plaintiff must show that his protected activity was a “contributing factor” to the adverse employment action. *Id.* § 1514A(b)(2)(C) (incorporating 49 U.S.C. § 42121(b)). A “contributing factor” is one that has “a share in bringing about” the adverse employment action. *Murray v. UBS Sec., LLC*, 601 U.S. 23, 37 (2024) (citation omitted).

Yet the district court in this case instructed the jury that a “contributing factor” is anything that “*tended to affect in any way*” the employer’s decision. The court of appeals held that this jury instruction was overbroad because it allowed the jury to find liability even if the protected activity affected the adverse employment action in a way that did *not* ultimately contribute to the adverse outcome, or if it merely had the *potential* to influence the outcome without actually doing so.

The question presented is:

Whether it is error to instruct a jury that a plaintiff may establish the contributing-factor element of a Sarbanes-Oxley Act whistleblower claim as long as his protected activity “tended to affect in any way” the employer’s adverse employment action, even when the evidence at trial would have permitted the jury to find that the protected activity merely delayed the adverse action, or merely had the general tendency to affect the outcome without actually having done so.

RULE 29.6 STATEMENT

UBS AG is wholly owned by UBS Group AG, a publicly traded corporation, and no publicly held corporation holds 10 percent or more of UBS Group AG stock. UBS Group AG is a publicly owned corporation and does not have a parent company.

UBS Securities LLC's corporate parents are UBS Americas Holding LLC and UBS Americas Inc. UBS Americas Inc. is wholly owned by UBS Americas Holding LLC. UBS Americas Holding LLC is a wholly owned subsidiary of UBS AG. No publicly held corporation other than UBS Group AG owns 10 percent or more of the stock of UBS Securities LLC.

STATEMENT OF RELATED PROCEEDINGS

Trevor Murray v. UBS Securities, LLC, UBS AG,
Docket No. 12-cv-5914 (S.D.N.Y.) (case dismissed Dec.
30, 2020).

Trevor Murray v. UBS Securities, LLC, UBS AG,
Docket No. 1:14-cv-00927 (S.D.N.Y.) (judgment en-
tered Dec. 16, 2020).

Trevor Murray v. UBS Securities, LLC, UBS AG,
Docket No. 22-660 (U.S.) (judgment entered Mar. 11,
2024).

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

Respondents UBS Securities, LLC and UBS AG respectfully submit that the petition for a writ of certiorari should be denied.

INTRODUCTION

A plaintiff bringing a whistleblower claim under the Sarbanes-Oxley Act (“SOX”) must prove that his protected activity was a “contributing factor” to an adverse employment action. Just two Terms ago, this Court directly addressed the meaning of “contributing factor” in this very case. *Murray v. UBS Sec., LLC*, 601 U.S. 23 (2024). Petitioner now seeks an immediate return trip to this Court to decide whether the court of appeals correctly held that the jury instruction defining “contributing factor” as “tended to affect in any way” was prejudicially misleading in light of the evidence presented at trial.

Only one court of appeals—the Second Circuit, in the decision below—has applied this Court’s recent guidance regarding the meaning of “contributing factor” to examine whether “tended to affect in any way” is an appropriate manner in which to instruct a jury regarding the meaning of “contributing factor.” And no other court of appeals has ever considered the validity of a “tended to affect in any way” jury instruction in a case where, as here, that terminology created a substantial risk of misleading the jury in light of the evidence presented at trial. There is no need for this Court to address these novel questions before additional lower courts have had the opportunity to consider them in light of this Court’s recent opinion.

Regardless, Petitioner’s claimed 10-to-1 circuit conflict is illusory. The Second Circuit held that on the record in this case it was prejudicial error *to instruct the jury* that a SOX plaintiff need only show that his protected activity “tended to affect” adverse employment action “in any way.” Only one other decision in Petitioner’s purported conflict involved a jury instruction, and the parties’ dispute there centered principally on a separate issue—the defendant did not argue that the instruction had the potential to mislead the jury given the facts in that case. Meanwhile, the other nine courts in Petitioner’s purported split considered only how adjudicators should apply the “contributing factor” standard in the context of summary judgment or petitions for review of agency decisions. That difference matters. Terminology fit for a judicial opinion is not always fit for an instruction to laymen. Moreover, there is no reason to think that the prejudicial flaws identified by the Second Circuit here would have had any impact on the outcome in those cases.

Other problems plague the petition, too. The question that Petitioner says gives this petition meaning—whether temporal proximity alone suffices to prove that protected activity was a contributing factor in an adverse employment action—was not resolved below, and is entirely distinct from the jury-instruction question that was decided. Moreover, the jury-instruction question resolved below will rarely recur, given the paucity of trials. And even when jury trials do occur, the phrasing at issue will not usually have the capacity to turn the outcome that it had here, in “one of the closest cases” the district court had ever seen. Pet. App. 17a.

Finally, the decision below was correct. As this Court confirmed, a “contributing factor” is something that has “a share in bringing about” an adverse employment action. *Murray*, 601 U.S. at 37 (citation omitted). By contrast, in “common parlance, a tendency to affect is a theoretical ‘proneness’ to ‘produce an . . . alteration.’” Pet. App. 14a (citation omitted). That is, the “tended to affect in any way” formulation invited the jury to find that protected activity was a contributing factor to Petitioner’s termination based on the *possibility* that there was *some* influence on the *process*, whether positive, negative, or ultimately neutral. The “tended to affect in any way” jury instruction, therefore, opened the door to the jury finding UBS liable even if Petitioner’s protected activity played no role in bringing about the termination decision. The Second Circuit appropriately shut that door.

Certiorari should be denied.

STATEMENT

A. STATUTORY BACKGROUND

SOX prohibits publicly traded companies from retaliating against employees who have reported what they reasonably believe to be instances of criminal fraud or securities law violations. It provides that no employer may “discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment *because of* any lawful act done by the employee” that qualifies as protected activity under the statute. 18 U.S.C. § 1514A(a) (emphasis added).

The “legal burdens of proof” for a SOX whistleblower claim are borrowed from the Wendell H. Ford

Aviation Investment and Reform Act for the 21st Century (“AIR-21”), 49 U.S.C. § 42121(b). *See* 18 U.S.C. § 1514A(b)(2)(C). An employee has the initial burden of showing that his protected activity was a “contributing factor” in the adverse employment action. 49 U.S.C. § 42121(b)(2)(B)(iii). If an employee carries that burden, the employer may still prevail if it demonstrates by clear and convincing evidence that it “would have taken the same unfavorable personnel action in the absence of that behavior.” *Id.* § 42121(b)(2)(B)(iv).

B. FACTUAL BACKGROUND

In early 2011, UBS hired Petitioner as a strategist supporting its commercial mortgage-backed securities business (“CMBS”). Pet. App. 5a. Petitioner did not trade or sell securities; instead, he published research *about* the CMBS market. *Ibid.* Because a strategist does not directly generate revenue, the position is “by no means necessary” to running a successful CMBS business; it is merely “nice to have.” C.A. JA-867:5-7. As a witness at trial explained, “many, many businesses and many, many players in the CMBS space are very successful and they do not have the benefit of research” published by a CMBS strategist. C.A. JA-867:12-14.

After hiring Petitioner, UBS experienced financial difficulties. As UBS’s CEO explained to employees, the financial industry was “in the midst of a massive transformation” caused by “a fundamentally changed market environment,” “more cautious clients,” “debt reduction by governments and private individuals,” and “more stringent regulatory rules and extremely high capital requirements.” C.A. JA-2048. These market-wide difficulties were compounded by a

\$2 billion loss on a UBS trading desk in London. *Murray v. UBS Sec., LLC*, 43 F.4th 254, 262 (2d Cir. 2022).

These challenges prompted changes in UBS's CMBS business. UBS decided to invest only a relatively small amount of capital in the business and not to grow it going forward. C.A. JA-1317:1-7. The CMBS strategist position had become "not necessary," but merely "nice to have." *Murray*, 43 F.4th at 262.

Given UBS's financial challenges, senior management was forced to reduce costs through a series of reductions-in-force. 43 F.4th at 262. As part of a reduction-in-force around February 2012, Lawrence Hatheway, the Global Head of Macro Strategy and Chief Economist for UBS's Investment Bank, was required to eliminate seven positions from Petitioner's group. C.A. JA-1091:12-1092:6. He believed the CMBS business would not be "a focal point for the firm in terms of its strategy as it was then unfolding." *Ibid.* Hatheway thus made the business judgment to eliminate the research group's sole CMBS position. C.A. JA-1092:5-6.

That decision faced opposition. The head of the CMBS business was "not happy" about the idea of "eliminating [Petitioner's] position." C.A. JA-1104:6-12. Similarly, Petitioner's direct supervisor, Michael Schumacher, "opposed" the elimination of Petitioner's position. C.A. JA-1105:8-25. In fact, Schumacher tried to *keep* Petitioner at UBS by proposing to transfer him from the CMBS research position to a desk analyst position in the CMBS trading unit. *Murray*, 43 F.4th at 257. But Schumacher agreed that if this plan to maintain Petitioner's employment proved unsuccessful, Hatheway would need to make the "tough call" to eliminate the CMBS strategist position. *Ibid.* The CMBS business was unable to take Petitioner on

as a desk analyst; UBS thus terminated Petitioner's employment. *Ibid.*

C. PRIOR PROCEEDINGS

1. In 2014, Petitioner sued UBS, claiming that his termination violated SOX. Pet. App. 5a. He alleged that in December 2011 and January 2012 he had complained to his supervisor, Schumacher, about purportedly illegal pressure placed on him in his analyst position, and that these complaints caused UBS to terminate his employment. *Ibid.* The case eventually went to trial before a jury. *Ibid.*

Petitioner was required to prove that his protected activity was a “contributing factor” in the adverse employment decision against him. 49 U.S.C. § 42121(b)(2)(B); *see* 18 U.S.C. § 1514A(b)(2)(C). In its proposed jury instruction, the district court described a “contributing factor” as one that “tended to affect in any way UBS’s decision to terminate plaintiff.” C.A. JA-1239:18-19. UBS objected that this was overbroad. C.A. JA-1240:15-20. In the parties’ colloquy with the court, Petitioner actually agreed, stating that “the language ‘tended to affect in any way’ . . . is an improper statement of the law.” C.A. JA-1240:3-4.

The district court nonetheless overruled UBS’s objection, and instructed the jury 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.” Pet. App. 8a; C.A. JA-1393:18-21. The jury returned a verdict in Petitioner’s favor, and the district court entered final judgment. *Murray*, 43 F.4th at 258.

2. The Second Circuit vacated and remanded for a new trial. The court held that the district court erred by failing to instruct the jury that Petitioner must prove that UBS acted with retaliatory intent. *Murray*, 43 F.4th at 258. In a footnote, the court indicated a separate reason why the jury instructions were flawed: “‘tended to affect’ increases the level of abstraction such that a jury might look beyond whether the whistleblowing activity *actually* caused the termination to whether it was *the sort of behavior* that would *tend to affect* a termination decision.” *Id.* at 260 n.4.

3. This Court granted certiorari to decide whether a SOX whistleblower plaintiff must prove that his employer acted with retaliatory intent. *Murray v. UBS Sec., LLC*, 601 U.S. 23, 26 (2024). The Court concluded that SOX’s “text” imposes no standalone “animus-like ‘retaliatory intent’ requirement” on plaintiffs. *Id.* at 34. Rather, the burden-shifting framework employed by SOX is “a mechanism for getting at intent.” *Id.* at 35; *see also id.* at 37; *id.* at 40-41 (Alito, J., concurring) (“[A]s the Court confirms, a plaintiff must still show intent to discriminate.”). “That burden shifting—and not some separate, heavier burden on the plaintiff to show ‘retaliatory intent’—is what the statute requires.” *Id.* at 37 (maj. op.).

The Court declined to decide UBS’s “separate” argument about the “contributing factor” instruction because it “did not grant certiorari” on that question. *Murray*, 601 U.S. at 37 n.2. Nevertheless, the Court spoke directly to the meaning of the statutory term, stating that a “contributing factor” is one that has a “share in bringing about” and is “partly responsible

for” the adverse employment action. *Id.* at 37 (citation omitted). Stated differently, “the plaintiff must show that *a* reason for the adverse decision was the employee’s protected conduct,” which at the very least requires “[s]howing that [the plaintiff’s protected activity] ‘help[ed] to cause or bring about’ that decision.” *Id.* at 41 (Alito, J., concurring).

Notably, Petitioner distanced himself from the jury instruction in his prior briefing before this Court—perhaps recognizing that his argument for a low threshold to establish intent might be undermined if the standard for proving causation was low, too. Petitioner thus agreed that a “contributing factor” is something that “‘bring[s] about,’” “‘contribute[s]’ to,” is “‘partly responsible’ for,” or “‘has some share or agency in producing [a] result.’” Corrected Br. for Pet’r 22-23, No. 22-660 (U.S. July 11, 2023) (citation omitted). As Justice Sotomayor noted at oral argument, there was a good reason why Petitioner did not “actually use th[e] language” of the jury instruction in his briefs: asking whether something tends to affect in any way is “not the definition of ‘contributing factor.’” Tr. of Oral Argument at 21:11-14, No. 22-660 (U.S. Oct. 10, 2023).

4. On remand, the Second Circuit remained “free to consider UBS’s separate argument” about the contributing-factor instruction. *Murray*, 601 U.S. at 37 n.2. It did so. Relying in large part on this Court’s guidance, the Second Circuit held that the district court’s gloss on “contributing factor” was reversible error on the record here. Pet. App. 11a.

There were two problems with the instruction. *First*, the “tended to” portion was “imprecise” about

“the level of abstraction at which to assess” whether the alleged whistleblowing influenced Petitioner’s termination. Pet. App. 13a. In common parlance, a “tendency” to affect something is an “inclination” or a “proneness to a particular kind of . . . action.” Pet. App. 12a (quoting Merriam-Webster’s Collegiate Dictionary 1287 (11th ed. 2020)). Whistleblowing therefore “may ‘tend to affect’ termination generally,” the court explained, “without actually being partly responsible for a particular plaintiff’s termination.” Pet. App. 11a. That is, liability was possible under this instruction even if the plaintiff’s protected activity did not *actually* affect the termination decision.

Second, the “affect in any way” portion was “imprecise about the influence that whistleblowing needed to produce.” Pet. App. 13a-14a. Protected activity may “affect” a termination “in any way” if it produces any “‘alteration in’ how it came about.” Pet. App. 12a (quoting Merriam-Webster’s Collegiate Dictionary 21). Accordingly, this part of the instruction permitted the jury to find liability if the whistleblowing influenced the termination *process* at all, even “without” whistleblowing “playing a part in making [the termination] happen,” such as “by making it more likely.” Pet. App. 2a, 12a. The jury instruction therefore “allowed the jury to consider effects that did not contribute to Murray’s termination.” Pet. App. 11a.

The jury in this case could have made these precise mistakes. For example, a UBS Human Resources manager testified that when an employee complains about allegedly unlawful conduct, UBS would “probably hold off on a termination of the employment until the investigation had been completed.” C.A. JA-612:22-613:7. The jury thus could have concluded

that Petitioner’s purported report to his boss, Schumacher, tended to affect UBS’s decision merely because it *delayed* the termination. *Murray*, 43 F.4th at 260 n.4.

Similarly, the jury heard evidence that Schumacher, after hearing Petitioner blow the whistle, worked to keep him at UBS by moving him to a desk analyst role. C.A. JA-1105:8-25, JA-1544; *Murray*, 43 F.4th at 257. The jury could have concluded that Schumacher’s efforts “tended” to affect Petitioner’s termination “in any way” because it had a tendency to make his termination less likely or at least delay it as the potential new position was evaluated.

As the Second Circuit explained, all this conflicted with the statutory text. Pet. App. 11a. The instruction permitted a jury to find liability “even if the decision to terminate was not ‘based on whistleblowing—not even a little bit.’” Pet. App. 12a (quoting *Murray*, 601 U.S. at 37).

The Second Circuit also held that the error was not harmless. In the district court’s words, this was “one of the closest cases” it had ever seen. Pet. 17a. There was “no way of knowing” whether the jury held UBS liable without finding that whistleblowing played a role in Petitioner’s termination. *Ibid.*; accord Pet. App. 12a. The Second Circuit thus vacated the judgment and remanded for a new trial. Pet. App. 18a. Judge Perez dissented. Pet. App. 19a.

The Second Circuit denied Petitioner’s request for rehearing and rehearing en banc without opinion. Pet. App. 33a.

REASONS FOR DENYING THE PETITION

Further review is unnecessary and would be premature, given this Court’s recent guidance on the meaning of “contributing factor.” Moreover, the alleged circuit conflict is illusory, the proffered question is not cleanly presented, the question’s importance is overstated, and the question is meritless legally. *Certiorari* should be denied.

A. PETITIONER PRESENTS NO CERTWORTHY CONFLICT.

According to Petitioner, the Second Circuit broke with nearly every other circuit when it held that the trial judge misinstructed the jury. Pet. 14-16. Not so. No other circuit has considered whether “tended to affect in any way” is the correct understanding of “contributing factor” in *any* context in the light of this Court’s recent decision in *Murray v. UBS Sec., LLC*, 601 U.S. 23 (2024), which spoke directly to the meaning of that statutory term. And no other circuit, before or after *Murray*, has decided whether “tended to affect in any way” is an appropriate jury instruction, let alone in a case where, as here, that phrasing was demonstrably prejudicial and misleading.

1. All of the allegedly conflicting cases cited by Petitioner were decided before this Court directly addressed the meaning of “contributing factor” in March 2024. Accordingly, none of those courts had the benefit of this Court’s decision. The Court should permit the courts of appeals to consider the implications of *Murray* in the first instance before intervening to resolve another interstitial issue of liability under SOX.

As articulated by the petition, the question presented is whether a “contributing factor” under AIR-21 is one that “alone or in connection with other factors, tends to affect in any way the outcome of the decision.” Pet. i. But this Court addressed the meaning of “contributing factor” just last year, describing it as something that has “a share in bringing about”—in other words, is “partly responsible for”—the adverse employment action. *Murray*, 601 U.S. at 37 (quoting Webster’s New World College Dictionary 317 (4th ed. 1999)). Protected activity thus must be “a reason for the adverse decision.” *Id.* at 41 (Alito, J., concurring).

The Second Circuit appropriately relied on this Court’s opinion. It adopted this Court’s definition of “contributing factor,” Pet. App. 11a (quoting *Murray*, 601 U.S. at 37), and concluded that the jury instruction was flawed because whistleblowing may “tend to affect” a termination “in any way” even if the “decision to terminate was not ‘based on whistleblowing—not even a little bit,’” Pet. App. 12a (quoting *Murray*, 601 U.S. at 37).

By contrast, every case Petitioner cites as evidence of a conflict was decided *before* this Court’s decision in *Murray*. Pet. 15-16. Those courts should be given the opportunity to interpret “contributing factor” in light of this Court’s discussion of that term. And if the Second Circuit’s decision is any indication, other circuits are likely to rely on this Court’s decision in *Murray*, too.

In fact, that is what the court did in *Hitt v. CSX Transportation, Inc.*, 116 F.4th 1309 (11th Cir. 2024). There, the plaintiff brought a claim under the Federal Railroad Safety Act, which—like SOX—incorporates

AIR-21’s burden-shifting framework. 49 U.S.C. § 20109(d)(2)(A)(i). Like the decision below, the Eleventh Circuit relied on this Court’s “interpret[ation]” of the term “contributing factor” to assess the claim. *Hitt*, 116 F.4th at 1316. To “meet the contributing factor standard,” Judge Brasher wrote for the panel, the employee must prove the “employer’s ‘intent to take some adverse employment action against the employee because of his protected activity.’” *Ibid.* (quoting *Murray*, 601 U.S. at 35). “In other words,” the protected activity must have “‘played some role in the employer’s thinking.’” *Ibid.* (quoting *Murray*, 601 U.S. at 40 (Alito, J., concurring)). At no point did the Eleventh Circuit ask whether the protected activity tended to affect in any way the adverse employment action—unlike in the prior unpublished decision from that circuit cited by Petitioner. Pet. 16 (citing *Majali v. Dep’t of Labor*, 294 F. App’x 562, 566 (11th Cir. 2008)).

The *Hitt* decision illustrates that Petitioner’s claimed circuit conflict is obsolete. Before this Court intervenes, other courts of appeals should have the same opportunity the Second and Eleventh Circuits did to apply *Murray*’s teachings to the interpretation of “contributing factor.” As those courts do so, moreover, they will be mindful of another salient aspect of *Murray*—its holding that a plaintiff has no independent burden to prove retaliatory intent under AIR-21, which gives the Act’s causation requirement a particularly weighty role to perform. *See infra*, at 31. Until other courts have the opportunity to consider the teachings of *Murray*, the purported conflict is illusory and this Court’s review would be premature. *Cf. Baker v. City of McKinney*, 145 S. Ct. 11, 13 (2024)

(Sotomayor, J., joined by Gorsuch, J., statement respecting denial of certiorari) (agreeing that “further percolation in the lower courts” was warranted where all but one circuit decision in a purported conflict “pre-date[d]” another circuit’s decision recognizing a new exception to the Takings Clause).¹

2. Even setting aside the dearth of circuit court cases applying this Court’s guidance in *Murray*, there is no circuit conflict. On the actual question the Second Circuit decided—whether it is reversible error to instruct the jury that protected activity is a contributing factor if it “tended to affect in any way” the adverse employment action—the score is one to zero.

The Second Circuit held that the district court’s “contributing factor instruction” to the jury did “not adequately inform the jury of the law.” Pet. App. 13a (citation omitted). The jury instruction was inadequate, the court explained, because it “was imprecise about the influence that whistleblowing needed to produce” and “the level of abstraction at which to assess whether that influence occurred.” *Ibid.*

¹ In *Parker v. BNSF Railway Co.*, 137 F.4th 957 (9th Cir. 2025) (en banc)—a decision Petitioner does not cite—the Ninth Circuit both recited its pre-*Murray* “tends to affect in any way” precedent, *id.* at 963, and parenthetically cited *Murray*, *id.* at 964 (quoting *Murray*, 601 U.S. at 37). But the court did not consider whether its prior formulation could be reconciled with *Murray*’s statement, and the parties did not ask the court to do so. *Id.* at 963-64. Nor were the jury-instruction flaws identified by the Second Circuit relevant in *Parker*: For example, the employer there, unlike UBS, did not try to move the employee to another job within the company to avoid termination of his employment as part of a reduction-in-force. Compare *id.* at 960-61, with *supra*, at 5.

The Second Circuit did not break from any court of appeals on that question. Of the ten circuits' cases Petitioner cites, Pet. 15-16, none "considered whether 'tended to affect in any way' was proper language for a jury instruction," as the Second Circuit did, Pet. App. 14a. Petitioner thus mischaracterizes the Second Circuit's decision when he claims that the "panel opinion acknowledged it was splitting from three of the[] circuits." Pet. 18 (citing Pet. App. 15a n.4). The Second Circuit acknowledged that three other cases involved SOX claims. Pet. App. 15a n.4. But it expressly distinguished all the cases Petitioner cites—including those involving SOX—because none affirmed a jury instruction that used the terminology rejected by the Second Circuit. Pet. App. 14a.

The Second Circuit was correct. Only one of the cases that Petitioner cites even arose in the post-trial context. Pet. 15-16 (citing *Frost v. BNSF Ry. Co.*, 914 F.3d 1189, 1195 (9th Cir. 2019)). And *Frost* reversed a jury verdict for the defendant based on an instruction that stated the defendant could not be liable if it terminated an employee "based on its honestly held belief that [the employee] engaged in the conduct for which he was disciplined." 914 F.3d at 1196. Although the court referred to the "tended to affect in any way" terminology used in its prior cases, the court did not decide the appropriateness of that language in cases where it could mislead the jury given the trial record before it. *Id.* at 1197.

The other nine circuits, meanwhile, discussed the "contributing factor" standard only in ruling on mo-

tions for summary judgment or reviewing agency action, not in connection with jury instructions.² This context is not a “distinction without a difference.” Pet. 17. It matters a great deal. Legal shorthand that is understandable to the bench and bar can be misleading to a jury of laymen.

Jury instructions must reflect the law accurately, precisely, and in terms that are readily understandable to jurors. Jury instructions cannot, for example, “dilut[e]” a statutory standard. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005). Even small linguistic changes, such as instructing a jury in a criminal case that “beyond a reasonable doubt” requires “substantial” and “grave” doubt, can open the door to a jury finding liability without applying the correct legal standard. *Cage v. Louisiana*, 498 U.S. 39, 41 (1990). “Courts and commentators alike have opined on the need for reasonably clear jury instruc-

² On motions for summary judgment: *Araujo v. N.J. Transit Rail Ops.*, 708 F.3d 152, 153, 158 (3d Cir. 2013); *Wiest v. Tyco Elecs. Corp.*, 812 F.3d 319, 321, 330 (3d Cir. 2016); *Feldman v. L. Enft Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014); *Gammons v. Adroit Med. Sys., Inc.*, 91 F.4th 820, 825, 826 (6th Cir. 2024); *Kuduk v. BNSF Ry. Co.*, 768 F.3d 786, 787, 791 (8th Cir. 2014). On review of agency action: *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, 566, 567 (5th Cir. 2011); *Addis v. Dep’t of Lab.*, 575 F.3d 688, 690, 691 (7th Cir. 2009); *Lockheed Martin Corp. v. Admin. Rev. Bd.*, 717 F.3d 1121, 1136 (10th Cir. 2013); *Majali*, 294 F. App’x at 563, 566; *Marano v. DOJ*, 2 F.3d 1137 (Fed. Cir. 1993).

tions in employment discrimination cases” in particular. *Vance v. Ball State University*, 570 U.S. 421, 444 (2013).

By contrast, judges writing opinions often use legal terms of art as substitutes for statutory requirements. That is why this “Court has long stressed that ‘the language of an opinion is not always to be parsed as though we were dealing with the language of a statute.’” *Brown v. Davenport*, 596 U.S. 118, 141 (2022) (citation omitted) (alteration omitted).

Terminology that is suited for an opinion thus may not be suited for jury instructions. For example, judicial opinions commonly use “actual malice” as legal “shorthand” for the *mens rea* standard a public figure must meet to prove defamation. *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991). But that term of art is not suited for “jury instructions” because it can “confuse” a jury. *Ibid.* The “better practice” is to “refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.” *Ibid.* Similarly here, “even if the district court’s instruction were defensible as a matter of ‘legal jargon,’ the proper standard was not ‘readily understood by laymen.’” Pet. App. 14a.

Because jury instructions and judicial opinions are different, Petitioner’s claimed circuit conflict is illusory. The fact that some courts put a “tended to affect in any way” gloss on “contributing factor” in an opinion does not mean those courts would approve using that phrase in a jury instruction.

In fact, there is no reason to believe that those purportedly conflicting circuits would disagree with the Second Circuit’s decision below, if presented with

the jury-instruction question on a similar record. Of the cases Petitioner cites (at 15-16), only the Fourth and Ninth Circuits directly applied the “tends to affect in any way” formulation. *Feldman*, 752 F.3d at 348-49; *Frost*, 914 F.3d at 1195. And those decisions are consistent with the Second Circuit’s *substantive* interpretation of the “contributing factor” standard. The Fourth Circuit affirmed a grant of summary judgment for the employer because the plaintiff could not show “the alleged protected activities played a role in his termination.” *Feldman*, 752 F.3d at 349. Likewise, the Ninth Circuit required “that an impermissible factor or consideration contributed to the decision to discipline” a plaintiff, even if it “played only a very small role.” *Frost*, 914 F.3d at 1197. Both decisions suggest these circuits would agree that the jury instruction should reflect the statute’s meaning, not a legal term of art that could be easily misconstrued on a trial record such as in this case.

The other circuits simply alluded to the “contributing factor” standard in passing, reciting the “tended to affect in any way” phrase without meaningful analysis—often merely quoting another circuit, agency guidance, or legislative history about the Whistleblower Protection Act (“WPA”) that represented only the views of three members of Congress. *Wiest*, 812 F.3d at 330-32; *Allen*, 514 F.3d at 476 n.3; *Ameristar*, 650 F.3d at 566-67; *Lockheed*, 717 F.3d at 1136; *Araujo*, 708 F.3d at 158-59; *Gammons*, 91 F.4th at 826-28; *Addis*, 575 F.3d at 691-93; *Kuduk*, 768 F.3d at 791-92; *Majali*, 294 F. App’x at 567; *Marano*, 2 F.3d at 1143. With the benefit of the Second Circuit’s opinion—and this Court’s guidance from *Murray*—those courts might well conclude that the “tended to affect

in any way” formulation is too imprecise for a jury instruction.

For all of these reasons, the question actually decided by the Second Circuit below warrants further percolation.

3. The Second Circuit’s decision is also fact-bound, and factually distinct from other allegedly conflicting cases.

The Second Circuit explained that the jury instruction’s “overbreadth” created an impermissible risk that the jury could have found UBS liable without finding that protected activity “play[ed] a part in making [adverse action] happen.” Pet. App. 12a. That risk was acute because of unusual, case-specific facts. Petitioner’s supervisor, after receiving Petitioner’s purported whistleblower report, tried to salvage his job by moving him to another desk. C.A. JA-1105:8-25, JA-1544. In general, moreover, after an employee reports allegedly unlawful conduct, UBS would “probably hold off on a termination of the employment until the investigation had been completed.” C.A. JA-612:22-13:7. The jury thus could have concluded that protected activity “tended to affect in any way” adverse employment action merely because Petitioner’s protected activity was the type of conduct that would tend to delay his termination.

By contrast, the jury-instruction flaws identified by the Second Circuit would not have affected the outcome of other cases in the purported circuit conflict. Some courts ruled for the employer, mooted any concerns about the breadth of “tended to affect in any way.” *Wiest*, 812 F.3d at 332; *Feldman*, 752 F.3d at 349; *Kuduk*, 768 F.3d at 792; *Allen*, 514 F.3d at 471;

Addis, 575 F.3d at 690; *Majali*, 294 F. App'x at 567. Other cases involved disputes about whether to discount the defendant's proffered justifications as pretextual, *Araujo*, 708 F.3d at 161; *Ameristar*, 650 F.3d at 569, what inferences to draw from the timing of adverse action, *Gammons*, 91 F.4th at 827; *Lockheed*, 717 F.3d at 1136, or whether an investigation's results were "inextricably intertwined" with the whistleblowing itself, *Marano*, 2 F.3d at 1139, 1143. Accordingly, imprecision about the necessary "influence" of whistleblowing or "level of abstraction at which to assess whether that influence occurred" would not have changed the cases' outcomes. Pet. App. 13a.

B. THE QUESTION IS POORLY PRESENTED.

This case is not a "compelling vehicle" (Pet. 24) for review of either the broad question posed by Petitioner or the separate temporal-proximity question that Petitioner also attempts to interject.

1. The petition does not "perfectly" tee up the question presented. Pet. 24. Quite the opposite.

In the first place, the question articulated by Petitioner is not the question decided below. As discussed above, the Second Circuit rejected the use of the "tended to affect in any way" terminology in the specific context of jury instructions. *See supra*, at 14-19. Petitioner's framing of the question presented ignores this narrow context.

Additionally, the Second Circuit did *not* hold that courts could *never* use the "tended to affect in any way" formulation posited by the petition. That language might, for example, be appropriate as "legal jar-

gon.” Pet. App. 14a. Although the Second Circuit suggested that it was “not persuaded” that the “tends to affect” formulation would be correct in any context, Pet. App. 15a n.4, the court did not rule out the possibility that the answer to the question Petitioner articulates might be “yes” in other contexts. The Second Circuit’s conclusion that the “tends to affect” formulation was prejudicially misleading when presented to the jury considering this particular trial record does not constitute a holding that courts must never use that formulation as part of their legal analysis.

2. The issue that appears to actually animate Petitioner is a separate question that is also not presented: Whether a plaintiff can meet the contributing-factor element solely by showing that the adverse employment action took place “in close temporal proximity” to whistleblowing of which defendant had knowledge. Pet. 19; *see also* Pet. 26-27. According to Petitioner, “[a]lmost all the circuits” that use the “tends to affect [in any way]” phrasing have held that temporal proximity alone is sufficient, while the Second Circuit purportedly deemed such evidence legally insufficient. Pet. 19. But the temporal-proximity question that Petitioner identifies was simply not resolved below.

To start, the Second Circuit touched upon temporal proximity only once, in a footnote. It stated that the WPA is a “statute with a broader contributing factor requirement” than SOX, and cited parenthetically the WPA’s express textual mandate that the contributing-factor element may be met if the defendant knew of whistleblowing and the “personnel action occurred within a [reasonable] period of time.” Pet. App. 15a n.4 (quoting 5 U.S.C. § 1221(e)(1)). That

glancing, footnoted, parenthetical reference to temporal proximity provides no support for Petitioner's assertion that a plaintiff now faces a "far higher burden" of proof in the Second Circuit. Pet. 20; *cf. Murray*, 601 U.S. at 37 n.2 (declining to address the Second Circuit's "footnoted discussion" of the jury instruction in its first opinion).

The absence of any holding below on the temporal-proximity issue is unsurprising. The question whether temporal proximity alone can establish causation is entirely distinct from whether "tended to affect in any way" is a proper jury instruction. The former concerns whether or in what circumstances evidence regarding the timing of the protected activity and the adverse action is sufficient to send a case to the jury. The latter concerns whether the jury instruction is sufficiently accurate and precise to avoid misleading the jury regarding the meaning and content of the standard by which it is to decide whether the protected activity played a sufficient role in the adverse action. The answer to the latter question does not resolve the former.

Highlighting the disconnect, courts purportedly on the same side of the tended-to-affect-in-any-way issue disagree over the temporal-proximity question. Petitioner claims that "[s]everal" circuits that use the "tends to affect [in any way]" terminology have concluded that temporal proximity "may *alone* be sufficient to satisfy the contributing factor test." Pet. 19 (emphasis added) (citation omitted). But others have not. For example, the Eighth Circuit has "consistently held that 'more than a temporal connection between the protected conduct and the adverse employment action is required.'" *Kuduk*, 768 F.3d at 791-92 (citation

omitted). The Fifth Circuit similarly explained that “temporal proximity standing alone is *not* enough to sustain the plaintiff’s ultimate burden” to show by a preponderance of the evidence that protected activity was a contributing factor. *Ameristar*, 650 F.3d at 569 & n.21 (emphasis added).³

Conversely, courts purportedly on opposite sides of the tended-to-affect-in-any-way issue agree on a follow-on point: Any inference that might be drawn from temporal proximity “may be severed . . . by some legitimate intervening event” that independently justifies the adverse action. *Feldman*, 752 F.3d at 348 (quoted in *Tompkins v. Metro-North Commuter Railroad Co.*, 983 F.3d 74, 82 n.38 (2d Cir. 2020)).

As these decisions illustrate, whether temporal proximity alone proves the contributing-factor element is not a function of whether “tended to affect in any way” is an appropriate standard. Granting review of the question presented therefore would not provide an opportunity to resolve the temporal-proximity question that Petitioner claims gives the petition real-life meaning. Pet. 19. If this Court wishes to consider whether temporal proximity alone can establish that protected activity was a contributing factor to an adverse employment action, it should wait for a petition actually presenting that question in a

³ The Fifth Circuit stated that temporal proximity may satisfy a plaintiff’s initial “burden for establishing a *prima facie* case.” 650 F.3d at 568. But, contrary to Petitioner’s implication (at 19), the Fifth Circuit confirmed that when an employer proffers non-retaliatory reasons for adverse action, a plaintiff cannot prove the contributing-factor element based on temporal proximity alone. *Id.* at 568-69 & n.21.

case where the decision below actually resolved it. And it should await a case that does not involve a companywide reduction-in-force, since layoffs—even if close in time to whistleblowing—supply a legitimate, intervening rationale for the employer’s action.

C. THE QUESTION PRESENTED LACKS SUFFICIENT SIGNIFICANCE TO MERIT REVIEW.

Petitioner greatly exaggerates the significance of the question presented.

1. There is substantial agreement about the substantive meaning of “contributing factor.” When this case was last before the Court, Petitioner conceded that a contributing factor is something that “bring[s] about,” “contribute[s] to,” is “‘partly responsible’ for,” or “has some share or agency in producing [a] result.” Corrected Br. for Pet’r 22-23, No. 22-660 (citation omitted). This Court used those exact definitions in *Murray*. 601 U.S. at 37. And Petitioner now—as he must—again acknowledges that a plaintiff bringing a whistleblower claim governed by AIR-21’s burden-shifting framework must show at least that protected activity had a “share in bringing about” the adverse action. Pet. 27 (citation omitted). The petition, then, concerns only whether “tended to affect in any way” is a permissible way to frame jury instructions to reflect that agreed statutory meaning. But that question is insufficiently significant to merit this Court’s review, for two reasons.

First, the precise phrasing of the instruction will seldom be dispositive. Plaintiffs bringing a whistleblower claim, including within the Second Circuit, can prevail if they show their protected activity had “a share in bringing about” or was “partly responsible

for” the adverse employment action. *Murray*, 601 U.S. at 37 (citation omitted). In many cases, plaintiffs will be able to do so without resorting to a broader, unintuitive, and misleading “tended to affect in any way” formulation. For example, the dispute over that language will not matter in cases that turn on whether an employer’s proffered justifications are pretextual and the jury must simply choose who to believe. *Supra*, at 19-20.

Conversely, *if* Petitioner were correct that “tended to affect in any way” is synonymous with the required showing that protected activity had a share in bringing about adverse action, *see* Pet. 27, then the question would be pure semantics. This Court need not intervene to line-edit jury instructions if, under Petitioner’s view of the merits, those revisions would not substantively affect any plaintiff’s case except his.

Second, the issue of how to formulate a “contributing factor” jury instruction for the first step of the AIR-21 burden-shifting framework will rarely “recur[.]” Stephen M. Shapiro et al., *Supreme Court Practice* 246 (10th ed. 2013). The question whether a jury may be instructed that contributing factor means “tended to affect in any way” will arise only in cases that survive dispositive pre-trial motions and make it to a jury trial. Last year, only one percent of all civil-rights employment cases reached trial, and only a fraction of those were jury trials. U.S. Courts, *Table C-4—Trials Statistical Tables* (June 30, 2025).⁴ For the “1,000 whistleblowing complaints” filed each year

⁴ <https://www.uscourts.gov/data-news/data-tables/2025/06/30/statistical-tables-federal-judiciary/c-4> (rows H31, H33, H84, H86, H125, H127).

under statutes that use Section 42121(b)'s framework, district courts will need to decide how to instruct the jury in perhaps ten cases per year, on average. Pet. 22.

2. Petitioner argues that this case is nevertheless important because the Second Circuit broke ranks with the Department of Labor's interpretation of "contributing factor" in AIR-21 and other statutes. Pet. 21. But this argument suffers from the same flaws as Petitioner's supposed circuit conflict. None of the cited administrative decisions grappled with this Court's explanation of "contributing factor" in *Murray*, and none involved a jury instruction. See Pet. 21 n.3; *supra*, at 11-19. Moreover, the agency understands "tends to affect in any way" to mean the complainant must show "that the protected activity play[ed] some role in the adverse action" and must be a "reason[] for the adverse action." *Palmer v. Canadian Nat'l Ry.*, 2016 WL 5868560, at *32 (A.R.B. Sept. 30, 2016). And the government as *amicus curiae* in *Murray* defined contributing factor the same way: "A 'contributing factor'" is "most naturally understood" to mean "something that plays a role in producing a result." United States *Amicus* Br. 21, No. 22-660 (U.S. July 5, 2023). This interpretation of "contributing factor" is fully consistent with the Second Circuit's. *Supra*, at 8-10, 17-18.

Regardless, it will not be onerous for the Department to account for the decision below in cases that it "expects to be appealed to the Second Circuit." Pet. 21. The Department need only adhere to what this Court said: To be a contributing factor, the protected activity must have a "share in bringing about" the ad-

verse employment action. *Murray*, 601 U.S. at 37 (citation omitted). If the Department must meet that standard instead of, or in addition to, the “tended to affect in any way” formulation, it will only do what Petitioner previously conceded it must: Show that protected activity “bring[s] about,” “contribute[s] to,” is “‘partly responsible’ for,” or “‘has some share or agency in producing [a] result.’” Corrected Br. for Pet’r 22-23, No. 22-660 (citation omitted).

Petitioner’s concerns about a “race to the courthouse” after the Department of Labor issues a final order, meanwhile, are implausible. Pet. 22. Absent the Second Circuit’s ruling, parties may still choose to file in the circuit they prefer, so long as venue is proper—regardless of whether the reason is convenience, familiarity with the court, more favorable precedent applying the “tended to affect in any way” language, or otherwise. In any event, if parties file “dueling petitions for review,” *ibid.*, courts may consolidate and transfer petitions as appropriate—as happened in the case Petitioner cites. *Doyle v. Sec’y of Lab.*, 285 F.3d 243, 248 (3d Cir. 2002).

Petitioner also claims that the Department’s regulations differ from the Second Circuit’s decision because, under Department rules, temporal proximity is sufficient to establish the contributing-factor element. Pet. 21. But again, the temporal-proximity issue was not resolved below and is not presented here. *See supra*, at 21-24. In any event, those rules merely say that the Department may “investigate” a claim “if the complaint shows that the adverse personnel action took place within a temporal proximity after the protected activity.” *See, e.g.*, 29 C.F.R. § 1980.104(e)(3) (rule governing SOX claims) (emphasis added). In

other words, the Department has adopted a screening mechanism for purposes of its own docket management, not a substantive rule for establishing liability.⁵ The Second Circuit has not created any conflict with the Department’s regulations, let alone one that warrants burdening this Court’s scarce resources.

D. THE DECISION BELOW IS CORRECT.

The Second Circuit grounded its analysis in a faithful interpretation of statutory text and this Court’s prior decision. Petitioner’s resort to legislative history and the purportedly “old soil” of a single Federal Circuit case construing a different statute is meritless.

1. SOX prohibits employers from taking adverse action against an employee “because of” the employee’s protected activity. 18 U.S.C. § 1514A(a). An employee has the initial burden of showing that his protected activity was a “contributing factor” in the adverse action. 49 U.S.C. § 42121(b)(2)(B)(iii). A contributing factor is a factor that “ha[d] a share in bringing about (a result); [was] partly responsible for” the adverse employment action. *Murray*, 601 U.S. at 37 (citation omitted). Protected activity thus must be “a reason for the adverse decision.” *Id.* at 41 (Alito, J., concurring).

⁵ Nor could the Department have lawfully promulgated a substantive regulation governing SOX claims. Congress delegated to the SEC, not the Department of Labor, the authority to “promulgate” “rules and regulations” implementing SOX. 15 U.S.C. § 7202(a); *Lawson v. FMR LLC*, 571 U.S. 429, 477 (2014) (Sotomayor, J., dissenting, joined by Kennedy, J., and Alito, J.).

The jury instruction, by contrast, permitted the jury to find UBS liable if Petitioner’s protected activity “tended to affect” his termination “in any way.” As the Second Circuit explained, that instruction was misleading to the jury in two ways. Pet. App. 10a-12a.

First, the instruction permitted the jury to find liability where the protected activity merely “tended to affect” the termination generally—even if it did not *actually* help cause it. Pet. App. 11a-12a. “Tend” means “[t]o have a tendency, to be apt or inclined.” *Tend*, Oxford English Dictionary (2025), *s.v. tend*, sense I.3.b.ii; *see also Tend*, Merriam-Webster’s Collegiate Dictionary 1214 (10th ed. 1993), *s.v. tend*, sense 2 (“to exhibit an inclination or tendency”); *Tend*, Black’s Law Dictionary (11th ed. 2019) (to be “disposed toward (something)”). The fact that something is apt, inclined, or disposed to happen does not mean it actually happened. The jury therefore could have found that Petitioner’s protected activity “tended to affect” a termination without concluding that the protected activity in fact helped bring it about.

This Court embraced the same common-sense understanding of a similar statutory phrase in *Gooding v. Wilson*, 405 U.S. 518 (1972). A statute prohibited persons from using “‘opprobrious words or abusive language, *tending to cause* a breach of the peace.’” *Id.* at 519 (emphasis added). This statutory language encompassed situations where opprobrious or abusive words were used, even if those words did not “‘actually then and there’” cause a “‘breach of the peace,’” and indeed might never cause such a breach. *Id.* at 525-26 (citation omitted).

Second, by defining “contributing factor” as any factor that tended to affect “in any way” UBS’s termination decision, the district court improperly allowed the jury to impose liability even if protected activity did not contribute to the employee’s termination. Pet. App. 12a. “Affect” means to “produce” an “alteration in” how something comes about. *Affect*, Merriam-Webster’s Collegiate Dictionary 19. Thus, if “a company consults counsel to weigh the risk of a potential lawsuit before terminating” an employee, a jury could conclude that protected activity altered the process, “even if the decision to terminate was not ‘based on whistleblowing—not even a little bit.’” Pet. App. 12a (quoting *Murray*, 601 U.S. at 37). Under the instruction given, *any* influence—positive, negative, or ultimately neutral—on the adverse action would suffice for liability.

These concerns were not hypothetical in this case. The jury may have believed that Petitioner’s termination was delayed, or could potentially have been avoided, as a result of his supervisor’s attempt to find him an alternative position after hearing his whistleblower report. C.A. JA-1105:8-25, JA-1544; *Murray*, 43 F.4th at 257. Petitioner’s counsel argued that even if Schumacher was attempting “to help [Petitioner] by getting him a job as a desk analyst,” that “would be sufficient in terms of contributing in any way.” C.A. JA-1242:12-18. Similarly, the jury heard testimony that after an employee reports allegedly unlawful conduct, UBS would “probably hold off on a termination of the employment until the investigation had been completed.” C.A. JA-612:22-13:7. The jury’s verdict, therefore, could have been premised on a belief that Petitioner’s protected activity temporarily delayed, or

was the type of conduct that would tend to delay, his termination.

Given the record in this case, the two flaws in the jury instruction independently and collectively eliminated the requirement to show that protected activity actually did help bring about the termination. The instruction authorized the jury to improperly reach a verdict based on the *sort* of conduct that *might* affect (even if only delaying) a termination decision in the abstract, regardless of whether the employee’s protected activity is “partly responsible for” his termination. *Murray*, 601 U.S. at 37 (citation omitted).

The instruction thus also eliminated the burden-shifting framework’s capacity to act as “a mechanism for getting at intent.” *Murray*, 601 U.S. at 35; *see also id.* at 37; *id.* at 40-41 (Alito, J., concurring) (“[A]s the Court confirms, a plaintiff must still show intent to discriminate.”). If protected activity merely has an *inclination* to produce an alteration in *how* adverse action comes about, Pet. App. 12a, it does not follow that the defendant made an “intentional choice in which that factor plays some role” in its “thinking,” *Murray*, 601 U.S. at 40 (Alito, J., concurring). A SOX plaintiff should not prevail without proving *either* intent *or* causation.

Contrary to Petitioner’s cursory textual argument, the jury instruction was not a “reasonable, non-technical way” of conveying SOX’s requirements. Pet. 27 (citation omitted). Petitioner cherry-picks dictionary definitions of “tend” to suggest that the jury knew it must find that Petitioner’s alleged protected activity exerted “activity or influence in a particular direction” toward the termination decision. Pet. 27 (quoting

Webster’s Third New World International Dictionary 2354 (2002)). But that theory simply cannot be squared with how ordinary English speakers would understand “tend to affect in any way.”

In Petitioner’s prior merits brief to this Court, he abandoned the district court’s construction and agreed with UBS that a contributing factor is something that “bring[s] about,” “contribute[s] to,” is “‘partly responsible’ for,” or “‘has some share or agency in producing [a] result.’” Corrected Br. Pet’r at 22-23, No. 22-660. (Petitioner had also criticized the instruction when it was first proposed, telling the district court in a colloquy that “the language ‘tended to affect in any way’ . . . is an improper statement of the law.” C.A. JA-1240:3-4.) At oral argument, Justice Sotomayor—who authored the opinion in *Murray*—stated pointedly that “tends to affect in any way” is “not the definition of ‘contributing factor’”; a “better formulation” is “something that helps bring about.” Tr. of Oral Argument at 21:4-19, No. 22-660 (U.S. Oct. 10, 2023). Just so.⁶

2. Petitioner begins his challenge to the Second Circuit’s decision not with the statutory text, but with a lower-court decision interpreting a different statute. Pet. 25-26. Thirty-two years ago, the Federal Circuit construed “contributing factor” in the context of the WPA to mean a factor that “tends to affect in any way” the outcome of the decision. *Marano*, 2 F.3d at 1140,

⁶ *Amici* assert that whistleblowers “are not required to prove causation at the *prima facie* stage of a case.” Sen. Wyden, et al. *Amici* Br. 21. That argument contradicts the statute, 49 U.S.C. § 42121(b)(2)(B)(i), and confirms that the jury instruction improperly eliminated the causation requirement.

1143. When Congress later enacted AIR-21, in Petitioner’s telling, Congress intended for “contributing factor” to be construed the same way. Pet. 26.

Petitioner places too much stock in a single circuit’s construction of a different statute in an era when courts approached statutory interpretation quite differently. “It seems most unlikely . . . that a smattering of lower court opinions,” much less one, “could ever represent the sort of ‘judicial consensus so broad and unquestioned that we must presume Congress knew of and endorsed it.’” *BP P.L.C. v. Mayor & City Council of Baltimore*, 593 U.S. 230, 244 (2021) (citation omitted). And it is especially unlikely that Congress intended one circuit’s ruling on a petition for review of agency action, *see Marano*, 2 F.3d at 1138, to set the script for jury instructions under a different statute. After all, judicial “opinions are not jury instructions, nor are they meant to be.” *Noel v. Artson*, 641 F.3d 580, 588 (4th Cir. 2011).

Moreover, the Federal Circuit in *Marano*, like Petitioner, relied heavily on an “Explanatory Statement” dredged from the WPA’s legislative history. 135 Cong. Rec. 5033 (1989); Pet. 6; *Marano*, 2 F.3d at 1140. “[L]egislative history is not the law.” *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018). And the Explanatory Statement was offered by a single representative with the “approval and concurrence” of just two others. 135 Cong. Rec. at 5032. It lacks the “status of a conference report, or even a report of a single House.” *Nat’l Ass’n of Greeting Card Publishers v. U.S. Postal Serv.*, 462 U.S. 810, 832 n.28 (1983).

Petitioner also claims the Second Circuit erred by deciding that temporal proximity “would not be

enough to prove ‘contributing factor,’” despite AIR-21’s purported incorporation of the WPA, which states that temporal proximity is sufficient. Pet. 26-27 (citation omitted). Again, whether temporal proximity suffices is not the question presented and was not decided below. *See supra*, at 21-24.

In any event, Petitioner ignores critical differences between the WPA, which protects federal employees, and AIR-21, which protects private-sector employees. The WPA expressly states that a federal employee “may demonstrate” the contributing-factor element based on knowledge and temporal proximity. 5 U.S.C. § 1221(e)(1). But AIR-21 contains no similar proviso. 49 U.S.C. § 42121(b)(2)(B). Congress’s explicit inclusion of the knowledge-plus-proximity example in the WPA, combined with the *exclusion* of such language from AIR-21, raises an inference that Congress adopted for public-sector cases a special definition of “contributing factor” that was broader than ordinary usage. Such “counterintuitive definitions” often appear in statutes. Antonin Scalia & Bryan A. Garner, *Reading Law* 232 (2012). Congress’s decision *not* to adopt the same language in AIR-21 “reflects its choice” that these different statutes “warrant different treatment.” *Pereida v. Wilkinson*, 592 U.S. 224, 232 (2021).

Finally, Petitioner incorrectly argues that the Second Circuit’s decision “ignores the second step” of AIR-21’s burden-shifting framework. Pet. 28. Petitioner’s argument “overlooks the different causation standards and burdens of proof at SOX steps one and two.” Pet. App. 17a. Compared to the first step, the second step requires a higher standard of causation (but-for instead of contributing factor) and of proof (clear-and-

convincing instead of preponderance-of-the-evidence). 49 U.S.C. § 42121(b)(2)(B)(iii)-(iv). The employer’s opportunity to disprove a tighter causal nexus under a higher standard of proof does not negate the plaintiff’s burden to prove a lesser causal nexus at the first step. The fact that “the jury did not find *clear and convincing* evidence that UBS would have terminated” Petitioner regardless of his whistleblowing “does not mean that at step one, the jury found by a *preponderance* of the evidence that whistleblowing was a contributing factor in” Petitioner’s termination. Pet. App. 17a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EUGENE SCALIA
Counsel of Record
 THOMAS G. HUNGAR
 ANDREW G.I. KILBERG
 AARON SMITH
 ANDREW Y. EBRAHEM
 GIBSON, DUNN & CRUTCHER LLP
 1700 M St., N.W.
 Washington, DC 20036
 (202) 955-8673
 EScalia@gibsondunn.com

Counsel for Respondents

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