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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Two years ago, UBS told this Court that the meaning of "contributing factor" in 49 U.S.C. § 42121(b) was an "enormous[ly]" important question and that this case was "[c]ertainly" the right vehicle to resolve it. Tr. of Oral Arg. at 94, *Murray v. UBS Securities, LLC* (*Murray I*), 144 S. Ct. 445 (2024). Now, UBS attempts to un-ring that bell. What's changed? The issue remains just as important. And the vehicle has only gotten better: Post-*Murray I*, the *only* issue left is what "contributing factor" means, and the Second Circuit has now squarely addressed that issue.

UBS got it right two years ago. The meaning of "contributing factor" is important, and this case is now a perfect vehicle to address it. The Second Circuit's outlier interpretation of "contributing factor" has created a split with eight other circuits. And UBS's arguments would entirely undo Congress's decision to replace the "motivating factor" test with a "contributing factor" test in whistleblower statutes and effectively reinsert a retaliatory intent requirement into the whistleblower's burden.

This Court should grant certiorari.

1. ***Split.*** As the petition explained, some eight circuits interpret the phrase "contributing factor" in 49 U.S.C. § 42121(b) to mean a factor that "either alone or in combination with other factors tended to affect in any way" the adverse employment action. Pet. 14-16.[1] The Second Circuit tried to downplay the split

[1] Two other circuits use that same definition for the phrase "contributing factor" in whistleblower statutes other than Section 42121(b). *See* Pet. 16.

it created by noting that some cases in the split arose under different whistleblower statutes. Pet. App. 15a n.4. UBS doesn't defend that position, and with good reason. Those other statutes cite to Section 42121(b)'s burden-shifting framework—just as SOX does. *See* Pet. 3-4 (collecting statutes). Courts are thus interpreting the same phrase ("contributing factor") in the same statutory provision (Section 42121(b)) whether the claim arises under SOX or the Federal Railroad Safety Act or the Surface Transportation Assistance Act. *See* Pet. 17-18.

UBS instead offers three arguments to minimize the split, none availing.

a. UBS suggests there can be no split because this case came to the Second Circuit following trial, whereas cases in other circuits arose at summary judgment. BIO 15-16. But as the petition explains, that's a distinction without a difference: The circuits that define "contributing factor" as a factor that "tends to affect in any way" the adverse employment action do so both at summary judgment *and* at trial. *See* Pet. 17 n.1.

And the Second Circuit's holding does not rest on the jury-instructions posture of this case. Nor do the arguments that either Mr. Murray or UBS have made. The Second Circuit held that the district court's definition of "contributing factor" was an incorrect statement of law—not that it would mislead a jury. Pet. App. 11a-12a & n.2. The panel only considered this purported legal error's impact on jurors in a separate harmless error inquiry. *Id.* 16a-18a. Moreover, the tools of statutory construction used in the petition and BIO—canons, structure, precedent, and so on, *see* Pet. 24-28; BIO 28-35—aren't specific to jury instructions. These are arguments about the phrase's legal meaning, and that legal meaning applies whether the case is at a motion to dismiss, summary judgment, or trial.

b. UBS next tries to characterize the split as "pure semantics" that "would not substantively affect any plaintiff's case." BIO 25. But examples abound where the distinction between the "tends to affect" definition and UBS's preferred definition of "contributing factor" would make a difference.

Start with this very case. The jury found Mr. Murray's whistleblowing "tended to affect" his firing. But the Second Circuit thought that the jury would not have found for Mr. Murray under a different definition of "contributing factor." The court of appeals would hardly have vacated a jury's verdict if it thought nothing more than "pure semantics" was at stake.

Next consider an example UBS itself propounded in *Murray I*: Imagine an employee, Sarah, "whose job is to provide uniquely specialized services to one customer." *Murray I* Resp. Br. 33. Sarah reports fraud to her employer, who thanks her. But when the customer finds out about the fraud, it "no longer trusts the employer and terminates the relationship," leaving Sarah "without any work." Sarah is fired and sues the employer. *Id.* at 33-34.

As UBS itself argued in *Murray I*, under the "tends to affect" definition, Sarah has surely satisfied the "contributing factor" standard. *See id.* at 34. Indeed, *Marano* itself involved a variant of this hypothetical, and the Federal Circuit had no trouble concluding the whistleblower satisfied the "tends to affect" test. *Marano v. Dep't of Just.*, 2 F.3d 1137, 1138-39, 1141-42 (Fed. Cir. 1993). The burden would then shift to the employer, who'd likely win at the second step of the burden-shifting framework: It can prove it "would have taken the same unfavorable personnel action in the absence of" the whistleblowing, because it would have fired Sarah even if the customer left for a reason other than whistleblowing. *See* 49 U.S.C. § 42121(b)(2)(B)(ii).

But on UBS's telling, the burden would never shift to the employer. The employer didn't "ma[ke] an 'intentional choice' in which" Sarah's whistleblowing "'play[ed] some role' in its thinking." *See* BIO 31 (quoting *Murray I*, 144 S. Ct. at 457 (Alito, J., concurring)). So Sarah wouldn't have made out her "contributing factor" case. UBS's reading of the statute would effectively put the full burden of proving retaliatory intent on the employee—a stark departure from other circuits.

A third example: The Second Circuit acknowledged that its rule would prevent a plaintiff from establishing a "contributing factor" by showing that the defendant knew about the whistleblowing and that the adverse personnel action took place in close temporal proximity—a common way for plaintiffs to prove "contributing factor" in circuits that use the "tends to affect" instruction. Pet. 18-20.

UBS protests that "the Second Circuit touched upon temporal proximity only once, in a footnote." BIO 21. True—but rejecting knowledge and temporal proximity as proof of "contributing factor" was a necessary premise of the Second Circuit's holding. Recall that the phrase "contributing factor" in the Whistleblower Protection Act of 1989 (WPA) has long been held to mean "tends to affect in any way." *See* Pet. 6. To reject the "tends to affect" definition in this case, the panel majority thus had to distinguish Section 42121(b) from the WPA. Pet. App. 15a n.4. It did so by holding that the WPA has a "broader" definition of "contributing factor" than Section 42121(b). *Id.* And its evidence that the WPA is "broader" was that "contributing factor" under the WPA could be proven by showing knowledge and temporal proximity, whereas "contributing factor" under Section 42121(b) could not. *Id.*[2]

c. Finally, UBS contends that *Murray I* renders this circuit conflict "obsolete." BIO 12-13. That can't be right. The question in *Murray I* was whether SOX required plaintiffs to show "retaliatory intent." *Murray I*, 144 S. Ct. at 449. There, this Court addressed the "contributing factor" element to reject the argument that this element might require a showing of retaliatory intent. *Id.* at 455. Although UBS urged this Court to say more about the meaning of "contributing factor," this Court concluded the issue wasn't within the scope of the question presented. *See* Tr. of Oral Arg. at 94-95, *Murray I*, *supra*; *see Murray I*, 144 S. Ct. at 455 n.2. If anything, *Murray I* points in

[2] UBS claims that two of the circuits that have adopted the "tends to affect" definition have expressed doubt that knowledge and temporal proximity are sufficient to prove "contributing factor" under Section 42121(b). BIO 22-23. Not so. One of those cases, *Ameristar Airways, Inc. v. Admin. Rev. Bd.*, 650 F.3d 562 (5th Cir. 2011), does not dispute that knowledge and temporal proximity are sufficient to prove the "contributing factor" element. *Id.* at 569 & n.21. It holds only that different evidence would be necessary to undermine the employer's affirmative defense. *Id.* The second, *Kudak v. BNSF Ry. Co.*, 768 F.3d 786 (8th Cir. 2014), explains that knowledge and temporal proximity are "normally" enough to satisfy the "contributing factor" element except where there is "an intervening event that independently justified adverse disciplinary action." *Id.* at 791-92.

favor of petitioner's position. *Murray I* explained that "the ordinary meanings of the words 'contribute' and 'factor' suggest that the phrase 'contributing factor' is broad indeed," and it approvingly cited the Federal Circuit's discussion of the "contributing factor" element in the Whistleblower Protection Act. *See Murray I*, 144 S. Ct. at 455; *see also* Pet. 26-27.

Murray I thus does not provide a basis for a circuit that used the "tends to affect" definition for "contributing factor" to revisit its precedent. Indeed, three lower courts have already declined to do so. The en banc Ninth Circuit considered *Murray I* and reaffirmed that a "'contributing factor'" is one that "'tends to affect in any way the outcome.'" *See Parker v. BNSF Ry. Co.*, 137 F.4th 957, 963 (9th Cir. 2025) (en banc) (quoting *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 461 (9th Cir. 2018)) (reaffirming *Frost v. BNSF Ry. Co.*, 914 F.3d 1189 (9th Cir. 2019)). UBS faults *Parker* (and the parties in that case) for not asking whether the Ninth Circuit's "prior formulation could be reconciled" with *Murray I*. BIO 14 n.1. But if *Murray I* had redefined "contributing factor," the Ninth Circuit—or at least one of the parties—would have noticed.

The same is true in the Fourth and Eleventh Circuits. In *Finley v. Kraft Heinz, Inc.*, 146 F.4th 382 (4th Cir. 2025), the Fourth Circuit discussed *Murray I* at length before reaffirming that a contributing factor is one that "'tend[ed] to affect in any way'" the adverse action. *Id.* at 390 (quoting *Feldman v. Law Enf't Assocs. Corp.*, 752 F.3d 339, 348 (4th Cir. 2014)). So, too, in the Eleventh Circuit. UBS relies on *Hitt v. CSX Transportation, Inc.*, 116 F.4th 1309 (11th Cir. 2024). BIO 12-13. But *Hitt* doesn't even cite the portion of

Murray I that UBS claims redefined "contributing factor." *Hitt*, 116 F.4th at 1316. In fact, we know that the Eleventh Circuit didn't adopt the Second Circuit's reading, because *Hitt* reiterated that *its* "contributing factor" test may be satisfied by temporal proximity. *Id.* at 1317. *Contra* BIO 12-14.

2. ***Vehicle.*** Two years ago—when the Second Circuit had criticized the "tends to affect" formulation only in dicta in a footnote—UBS claimed that this case was "[c]ertainly" an appropriate vehicle for resolving this issue of "enormous" importance. Tr. of Oral Arg. at 94, *Murray I*, *supra*. Now, the Second Circuit has actually decided the issue. UBS's claim that this case has gone from "certainly" being an appropriate vehicle to one where the question is "poorly presented," BIO 20, 24, cannot be taken seriously.

3. ***Importance.*** UBS does not—and cannot—dispute that the Second Circuit's holding will affect statutes that aim to safeguard public health, markets, and safety. *See* Pet. 20. And its attempts to downplay the importance of the split between the Second Circuit and the Department of Labor are unavailing.

a. Whistleblower statutes in a dizzying array of contexts incorporate Section 42121(b). Pet. 3-4 (collecting statutes). So the resolution of cases under each of those statutes depends on the meaning of "contributing factor" in Section 42121(b). Moreover, as this Court previously explained, there are yet more whistleblower statutes that use the same "contributing factor" language, even if they don't explicitly incorporate Section 42121(b). *See Murray I*, 144 S. Ct. at 450 n.1 (collecting statutes). The Second Circuit's holding thus unsettles at least a dozen statutory regimes.

And these are undeniably important statutes. As this Court explained in *Murray I*, "Congress has employed the contributing-factor framework in contexts where the health, safety, or well-being of the public" depends on "whistleblowers feeling empowered to come forward." 144 S. Ct. at 456. If the Second Circuit's rule stands, fewer whistleblowers will come forward and more misconduct will go unreported. That risk is especially acute in the Second Circuit—it's home to Wall Street and thus plays an outsized role in enforcing whistleblower statutes. Pet. 23.

b. The split between the Second Circuit and the Department of Labor makes this case more important still. UBS tries to close the gap between the Department of Labor's position and the Second Circuit's (BIO 26-28), but it cannot. The Department of Labor holds that a "contributing factor" is any fact that "tends to affect in any way" the outcome of an employment decision. *See, e.g.*, *Benjamin v. Citationshares Mgmt., LLC*, at *9, ARB No. 12-029, 2013 WL 6385831 (DOL Admin. Rev. Bd. Nov. 5, 2013). And it holds that temporal proximity is sufficient to establish the contributing-factor element *both* at the screening stage (when deciding whether to investigate a claim) *and*—contra BIO 26-27—to satisfy the plaintiff's burden on the merits. *See, e.g.*, *Hukman v. U.S. Airways, Inc.*, at *17, ARB No. 2018-0048, 2020 WL 624344 (DOL Admin. Rev. Bd. Jan. 16, 2020) (relying on temporal proximity at merits proceedings); OSHA, *Investigator's Desk Aid to the Sarbanes-Oxley Act Whistleblower Protection Provision* at 10-11 (2018) (screening guide).

UBS doesn't deny that defendants in Department of Labor proceedings may opt to petition to the Second

Circuit based on that circuit's outlier construction of the "contributing factor" language. BIO 27. Its only response is that there may be other reasons that parties choose to venue shop. *Id.* Perhaps. But that doesn't undermine the importance of eliminating *this* reason for venue shopping: a disuniformity in how plaintiffs prove their case at the first step of the burden-shifting framework.

4. ***Merits.***

a. UBS's definition of "contributing factor" cannot be correct. According to UBS, protected activity "must be '*a* reason for the adverse decision'" in order for a plaintiff to prove it was a "'contributing factor.'" BIO 28 (citing *Murray I*, 144 S. Ct. at 457 (Alito, J., concurring)). But that's the definition of *motivating* factor, not *contributing* factor: A plaintiff satisfies the motivating-factor test by showing that "if we asked the employer at the moment of decision what its reasons were," then "one of those reasons would be" the protected whistleblower activity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). As this Court explained in *Murray I*, the "'contributing factor'" test was adopted to *replace* the "motivating" factor test with a more plaintiff-friendly one. 144 S. Ct. at 454-55; *see* Pet. 5.

The test UBS proposes would undo Congress's handiwork by restoring the "motivating factor" test. By contrast, under the "contributing factor" standard, protected activity need not be one of the employer's reasons for the adverse employment action at all—it is enough that the activity set in motion events that affected the outcome, as in the Sarah example discussed above. *See supra*, 3-4. It is the second step of the burden-shifting framework that ensures that where whistleblowing was not "a reason for the adverse decision" (BIO 28), an employer will not be held liable. *See* 49 U.S.C. § 42121(b). UBS's reading effectively requires the plaintiff to shoulder the entire burden of proving retaliatory intent, even though the statute plainly contemplates that the burden will shift between the plaintiff and the employer.

b. UBS's reading also contradicts *Marano*, the Federal Circuit's foundational decision holding that a "'contributing factor'" is one that "'alone or in connection with other factors, tends to affect in any way the outcome of the decision.'" *Marano v. Dep't of Just.*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (citation omitted).

UBS claims it "unlikely that Congress intended one circuit's ruling" to define "contributing factor." BIO 33. But the presumption that Congress "adopt[s] the earlier judicial construction" of a phrase applies with especial force where the judicial construction comes from a court with exclusive jurisdiction to interpret the relevant language. *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 586 U.S. 123, 124 (2019). Here, the "one circuit[]" UBS disparages is the Federal Circuit, the court with exclusive jurisdiction to construe "contributing factor" in the WPA, *see Marano*, 2 F.3d at 1141-43.

UBS's critiques of *Marano*'s interpretive methods (BIO 33) are beside the point. *Congress* clearly thought *Marano* got it right. That's why Congress drafted Section 42121(b) (not to mention SOX and the umpteen other statutes incorporating Section 42121(b) by reference) to use the phrase "contributing factor." Had Congress disagreed with *Marano*, it would have indicated as much, rather than carrying forward a phrase with a well-established definition.

c. UBS retorts that "contributing factor" must mean something different in the WPA than in Section 42121(b). BIO 34. In other words, UBS believes that Congress copy/pasted the elements of a claim, verbatim, from the WPA (a whistleblower statute) into Section 42121(b) (another whistleblower statute)—but somehow meant something different. *Compare* 5 U.S.C. § 1221(e) *with* 49 U.S.C. § 42121(b)(2)(B).

UBS's only evidence that the WPA and Section 42121(b) contemplate different burdens is that the text of the WPA explains that plaintiffs may prove the "contributing-factor" element by demonstrating "knowledge and temporal proximity." BIO 34. But there's a simpler explanation than assuming Congress used precisely the same language in Section 42121(b) as in the WPA to mean something entirely different. Congress thought the WPA—the first statute to use the "contributing factor" framework—needed an example to illustrate how a plaintiff might prove that element. By the time Congress enacted Section 42121(b), courts were used to adjudicating "contributing factor" claims and there was no need for such an example.

It is thus no surprise that eight circuits have held that *Marano*'s construction of "contributing factor" applies to that phrase in Section 42121(b). The Second Circuit's decision splitting from that longstanding consensus on an important question of whistleblower-protection law warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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