No. _____

IN THE
Supreme Court of the United States

Paul W. Parker, as Personal Representative of the Estate of Curtis John Rookaird,

Petitioner,

v.

BNSF RAILWAY COMPANY, a Delaware corporation,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

William G. Jungbauer
Counsel of Record
John D. Magnuson
Yaeger & Jungbauer Barristers, PLC.
4661 Highway 61 N., Suite 204
Saint Paul, Minnesota 55110
651-288-9500
Attorneys for Petitioner

LEGAL PRINTERS LLC ● Washington, DC ● 202-747-2400 ● legalprinters.com

QUESTION PRESENTED

The Question Presented is:

Whether AIR 21's affirmative defense is satisfied where an employer proves protected activity played only a limited role along with non-protected conduct in an adverse personnel action, instead of proving the employee was not treated worse because of the protected conduct.

The Federal Railroad Safety Act's (FRSA) whistleblower provision expressly incorporates the two-part burden-shifting framework of the Wendell H. Ford Aviation Investment Act for the 21st Century (AIR 21) in providing, "[a]ny action brought under (d)(1) shall be governed by the legal burdens of proof set forth in section 42121(b)." 49 U.S.C. § 20109(d)(2)(A)(i).

Under the AIR 21 framework, an employer violates the law if an employee demonstrates that protected conduct "was a contributing factor in the unfavorable personnel action alleged in the complaint." 49 U.S.C. § 42121(b)(2)(B)(iii). A court may not order relief "if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that [protected conduct]." 49 U.S.C. § 42121(b)(2)(B)(iv).

In *Murray v. UBS Securities, LLC*, 601 U.S. 23, 28 (2024) this Court confirmed, "[t]he 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." (internal quotation marks omitted).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Paul W. Parker, as Personal Representative of the Estate of Curtis John Rookaird, is not a non-governmental corporation, has no parent corporation, and no publicly held company owns 10% or more of the Petitioner's stock.

PROCEEDINGS BELOW

United States District Court Western District of Washington at Seattle, Case No. 2:14-cv-00176-RAJ, *Paul W. Parker, as Personal Representative of the Estate of Curtis John Rookaird v. BNSF Railway Company*, Judgment entered March 29, 2022.

United States Court of Appeals for the Ninth Circuit, Case No. 22-35695, *Paul W. Parker, as Personal Representative of the Estate of Curtis John Rookaird v. BNSF Railway Company*, Judgment entered May 15, 2025.

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Paul W. Parker, as Personal Representative of the Estate of Curtis John Rookaird, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Ninth Circuit is reported at 137 F.4th 957, 2025 WL 1404273. The vacated opinion of the Ninth Circuit is available at 112 F.4th 687, 2024 WL 3734251. The order containing the Findings of Fact and Conclusions of Law of the United States District Court Western District of Washington at Seattle is unreported but available at 2022 WL 897604. The order denying Plaintiff's motion to alter or amend judgment, or in the alternative, motion for a new trial is unreported but available at 2022 WL 3135252.

JURISDICTION

The United States Court for the Western District of Washington had federal-question jurisdiction over the claims pursuant to 28 U.S.C. § 1331. The United States Court of Appeals for the Ninth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1291. On August 7, 2025, Justice Kagan extended the time to file a petition for writ of certiorari up to and including October 12, 2025. No. 25A162. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The whistleblower protection provision of the Federal Railroad Safety Act is codified at 49 U.S.C. § 20109. Section 519(b) of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, codified as amended at 49 U.S.C. § 42121(b), both are reproduced in the appendix to this petition.

INTRODUCTION

BNSF Railway Company violated the Federal Railroad Safety Act (FRSA) when it retaliated against Curtis Rookaird for conducting protected activity. 1-ER-18. The district court concluded that Rookaird's protected refusal to stop an air brake test on forty-two rail cars was a contributing factor in BNSF's decision to terminate him. 1-ER-9, 17-18. The district court then concluded BNSF was not liable for its unlawful retaliation reasoning, "though the [protected activity] was a contributing factor in Mr. Rookaird's termination, the Court concludes that the [protected activity] contributed very little." 1-ER-20.

This case asks whether an employer satisfies AIR 21's demanding affirmative defense standard by showing that protected activity played only a limited role ("very little") in adverse personnel action, rather than proving by clear and convincing evidence that the employer would have taken the same adverse action in the absence of protected conduct. The en banc Ninth Circuit answered yes, calling it the "logically salient factor" in an employer's affirmative defense. *Parker v. BNSF Ry. Co.*, 137 F.4th 957, 967-68 (9th Cir. 2025). This created an outlier rule that shifts the burden on employees to prove that their

protected activity was more than a "very little" factor in the employer's adverse action. Now in the Ninth Circuit employees must prove their protected conduct was a motivating factor in their employer's disciplinary decision, a standard that Congress and this Court rejected. As an en banc decision, the Ninth Circuit cemented an erroneous rule across one of the largest circuits and invites other courts to follow.

STATEMENT OF THE CASE

I. Statutory Background

The Federal Railroad Safety Act provides that "[t]he purpose of this chapter is to promote safety in every area of railroad operation and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. In 2007, Congress amended the FRSA to include anti-retaliation protections. *Araujo v. New Jersey Transit Rail Operations Inc.*, 708 F.3d 152, 156 (3d Cir. 2013). Courts have recognized that AIR 21's burden-shifting framework is deliberately a "tough standard" for the covered employers. *Id.* at 159 (quoting *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997)). As the Eleventh Circuit explained under another AIR 21 statute, the Energy Restoration Act, Congress intended companies in the covered industries to "face a difficult time defending themselves" due to a history of whistleblower retaliation in the industry. *Id.*

This Court recently addressed the AIR 21 burden-shifting framework in *Murray v. UBS Securities LLC,* 601 U.S. 23 (2024). Although the question in *Murray* concerned the plaintiff's burden at step one, this Court also emphasized how that

standard shapes the employer's affirmative defense burden at step two. This Court explained:

> To be sure, the contributing-factor framework that Congress chose here is not as protective of employers as a motivating-factor framework. That is by design. Congress has employed the contributing-factor framework in contexts where the health, safety, or well-being of the public may well depend on whistleblowers feeling empowered to come forward. This Court cannot override that policy choice by giving employers more protection than the statue itself provides.
>
> *Murray*, 601 U.S. at 39.

As this Court discussed in *Murray*, AIR 21's burden-shifting framework originates from the Whistleblower Protection Act of 1989 ("WPA") codified at 5 U.S.C. § 1221(e), which protects federal government employees. *See Murray*, 601 U.S. at 28. Congress later extended this framework to numerous other safety-sensitive or critical industries, including railroad, aviation, trucking, national defense, nuclear energy, finance, health care, and consumer safety. See infra footnote 1.

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[1] The Surface Transportation Assistance Act, 49 U.S.C. § 31105(b); the Criminal Antitrust Anti-Retaliation Act of 2019, 15 U.S.C. § 7a-3(b)(2): the William M. (Mac Thornberry National Defense Authorization Act for Fiscal Year 2021 (amending 31 U.S.C. § 5323(g)(3)(A); the Taxpayer First Act, 26 U.S.C. § 7623(d)(2)(B); Motor Vehicle and Highway Safety Improvement Act of 2012, 49 U.S.C. § 30171(b)(2)(B); the FDA Food Safety

The WPA was built on this Court's same-action affirmative defense established in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–86 (1977), 134 Cong. Rec. 27853-54 (1988) (Oct. 3, 1988 Joint Explanatory Statement for S. 20 (enacted as WPA) as part of S. 20's legislative history in 135 Cong. Rec. 5032-22 (1989)). In *Mt. Healthy*, this Court held that an employer may prevail if it proves it "would have reached the same decision . . . even in the absence of the protected conduct." *Id.* At 287. The Court explained that the employer must "prove to the trier of fact that quite apart from such conduct [the employee's] record was such that he would not have been rehired in any event." *Id.* At 286.

Importantly, this Court held that the affirmative defense is satisfied if a protected employee "is placed in no worse a position than if he had not engaged in the [protected] conduct." *Id.* 285-86. The Court further explained, "[a] borderline or marginal candidate should not have the employment question resolved against him because of" protected conduct. *Id.* The only distinction between *Mt. Healthy*'s holding and the statutory construction of AIR 21 is that Congress "increase[d] the level of proof which an [employer] must offer from 'preponderance of the evidence' to 'clear and convincing evidence.'" 135 Cong. Rec. 4510, 4513 (1989) (adopting Joint Explanatory Statement for S. 508 as controlling for S. 20) (stating that this was "[t]he only change" made to

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Modernization Act, 21 U.S.C. § 399d(b)(2)(C); the Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2087(b)(2)(B); the Energy Policy Act of 1992, 42 U.S.C. § 5851(b)(3); and the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(c)(1)(B), 123 Stat. 115, 299.

the *Mt. Healthy* affirmative defense). *Mt. Healthy* ensures covered employers can discipline employees for non-protected conduct but cannot treat employees worse for that non-protected conduct because of protected conduct.

The FRSA requires employees to proceed through an administrative review process before reaching federal court. That process has developed procedures and precedents applying the burden-shifting framework. The Department of Labor's Administrative Review Board has explained the affirmative defense as follows:

> [the employer] was required to demonstrate through factors extrinsic to [the protected conduct] that the discipline which [employee] was subjected was applied consistently, within clearly established company policy, and in a non-disparate manner consistent with discipline taken against employees who committed the same or similar violations [absent protected conduct].

DeFransesco v. Union RR Co., ALJ Case No. 2009-FRS-009, ARB Case No. 12-057, (2015).

Taken together, this Court's decisions in *Mt. Healthy* and *Murray*, legislative history, and administrative precedent all point in the same direction: Congress designed AIR 21 to impose a demanding burden on covered employers. The same-action defense is available only with clear and convincing proof, grounded in comparator and

consistency evidence ("same unfavorable personnel action"), that the employee was left in no worse position than if the protected conduct had never occurred.

II. Proceedings Below

At the first trial in this case in 2016 a jury found that Curtis Rookaird engaged in protected activity when he refused to stop conducting an air brake test on forty-two rail cars. 1-ER-17. The jury returned a verdict for Rookaird that BNSF failed to meet its affirmative defense and awarded damages. 1-ER-10, 17. On the case's first appeal, the Ninth Circuit affirmed that Rookaird engaged in protected activity but reversed the district court's grant of summary judgment on the contributing factor issue, holding that the court had "conflat[ed] . . . Rookaird's prima facie showing with his substantive case." *Rookaird v. BNSF Ry. Co.*, 908 F.3d 451, 461 (9th Cir. 2018). The panel remanded the case without addressing whether a new trial was justified regarding BNSF's affirmative defense case that the jury had determined in Rookaird's favor. *Id.* at fn 1.

On remand, the district court decided it would not maintain the prior jury's verdict that BNSF failed to meet its affirmative defense or the jury's award of damages, instead retrying the same issues on the same evidence. 1-ER-17. Rookaird passed away before the second trial and Paul W. Parker became the personal representative of the estate.

After a bench trial on remand, the district court entered findings of fact and conclusions of law. *See* App. B. The district court concluded that "Mr.

Rookaird's refusal to stop the air test was a contributing factor in his termination." 1-ER-18. The court explained, "BNSF conced[ed] that the crew's inefficiency was partly caused by Mr. Rookaird's decision to conduct an air test—a test that BNSF managers thought was unnecessary to conduct in the first place." 1-ER-18-19. BNSF's discipline notice was explicit in naming "failure to work efficiently" as a reason for termination. 6-ER-898. Under AIR 21, BNSF violated the law because Rookaird's protected activity contributed to BNSF's adverse personnel action.

The district court then concluded that BNSF met its affirmative defense because, "though the [protected activity] was a contributing factor in Mr. Rookaird's termination, the Court concludes that the [protected activity] contributed very little." 1-ER-20. The court made no finding that BNSF ever terminated or disciplined another employee for any non-protected rule violation that BNSF assessed against Rookaird or that BNSF had ever taken the same action against another non-protected employee.

Parker appealed. A Ninth Circuit panel vacated the district court's judgment and remanded. The panel explained:

> While applying the FRSA affirmative defense standard, the district court reasoned that BNSF could still prove its affirmative defense because Rookaird's refusal to stop the air-brake test 'contributed very little' to BNSF's decision to terminate him. The proper inquiry, however, is not whether

> protected activity 'contributed very little' to the firing; the proper inquiry is whether BNSF would have fired Rookaird regardless of whether he had conducted an air-brake test. *See* 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1982.109(b). Under the FRSA, the protected activity cannot contribute even "in part" to the employer's termination decision, so the FRSA affirmative defense standard needs to proceed with an analysis about whether and how the termination decision would have occurred absent the protected activity, given that the protected activity cannot contribute to the employer's adverse action decision even in part. *See* 49 U.S.C. § 20109(a)(2); *cf. Frost*, 914 F.3d at 1197; *Murray*, 601 U.S. at 28, 35–37, 39, 144 S.Ct. 445 (citations omitted).

Parker v. BNSF Ry. Co., 112 F.4th 687, 701 (9th Cir. 2024), vacated, *Parker v. BNSF Ry. Co.*, 137 F.4th 957 (9th Cir. 2025).

Judge Graber dissented, writing that the majority's reliance on previous Ninth Circuit and Supreme Court precedent "crafted a new, confusing, nonsensical, and unsupported legal standard" and that the majority "pointlessly remands for the district court to apply that bizarre standard." *Id.* at 707 (J. Graber, dissenting).

The Ninth Circuit granted rehearing en banc, vacated the panel's decision, and affirmed the district

court's conclusions of law holding that "[n]othing in the law suggests that a factfinder must disregard the logically salient factor of the role that the protected activity played in the firing decisions." *Parker v. BNSF Ry. Co.*, 137 F.4th 957, 967-68 (9th Cir. 2025). The en banc opinion, authored by Judge Graber, held that the district court's application of the FRSA affirmative defense was "purely factual" and subject only to clear-error review because the district court cited the proper standard. *Id.* at fn 3. This insulated the district court's application of the facts of the case to the legal standard from any meaningful legal review. The court concluded that, although "[a]nother factfinder could have viewed the evidence differently, credited other testimony, or simply reached the opposite ultimate finding," BNSF had nonetheless carried its clear and convincing burden, and the district court's judgment must be affirmed under a clear-error review. *Id.* At 968.

REASONS FOR GRANTING THE PETITION

The en banc Ninth Circuit accepted a new standard in affirming the district court's conclusion of law that BNSF met its affirmative defense because protected activity "contributed very little" to BNSF's termination decision. That framework shifts the burden onto employees to prove that their protected activity was more than a "very little" factor in the employer's adverse action. Under this new standard, an employee now must prove their protected activity was a motivating factor in their employer's disciplinary decision, a standard that Congress and this Court rejected. Other circuits require covered employers to prove they would have imposed the same disciplinary decision based on non-protected conduct,

ensuring the employee was left in no worse position because of their protected conduct.

I. Departure from the Law

The district court collapsed AIR 21's two-step burden-shifting analysis into a single motivating-factor test, concluding that BNSF satisfied its affirmative defense because, "though the [protected activity] was a contributing factor in Mr. Rookaird's termination, the Court concludes that the [protected activity] contributed very little." 1-ER-20. That is not the proper standard because as this Court explained in *Murray*, "the contributing-factor standard in [AIR 21] reflects a judgment that 'personnel actions against employees should quite simply not be based on protected [whistleblowing] activities'—not even a little bit." *Murray*, 601 U.S. at 36-37, quoting *Marano v. Dep't of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

The en banc Ninth Circuit nevertheless affirmed the district court, reasoning that "[n]othing in the law suggests that a factfinder must disregard the logically salient factor of the role that the protected activity played in the firing decisions." *Parker*, 137 F.4th at 967-68. But this Court explained that "[t]he framework was meant to relieve whistleblowing employees of the excessively heavy burden . . . 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 adverse personnel action." 601 U.S. 23, 28 (2024) (internal quotation marks omitted).

Whether the protected activity played a big factor, a "very little" factor, or a motivating or significant factor is not a "salient factor" to the affirmative defense. From the outset, "[t]he plaintiff need not prove that the protected conduct was the only reason or even that it was the principal reason for the adverse decision. Showing that it helped to cause or bring about that decision is enough." *Id.* at 41 (Alito, J, concurring) (internal quotation marks omitted). It is illogical to allow an employee to satisfy AIR 21's contributing-factor standard—which requires no showing that the protected activity was significant or motivating—only to then deny relief because that same evidence was not significant or motivating. Such reasoning deviates from AIR 21's plain text.

In this case, BNSF Railway Company stated it terminated conductor Curtis Rookaird citing his "failure to work efficiently" in addition to three other rule violations: "dishonesty when reporting your off-duty time," "failure to provide a FRA Tie-up timeslip," and "failure to comply with instructions." 1-ER-13 and 6-ER-898. Rookaird's protected activity was directly related to the "failure to work efficiently" charge. As the district court explained, "BNSF conced[ed] that the crew's inefficiency was partly caused by Mr. Rookaird's decision to conduct an air test—a test that BNSF managers thought was unnecessary to conduct in the first place." 1-ER-18-19. BNSF's review of Rookaird's discipline stated: "Moreover, the entire crew was named in the investigation for delaying the train for the airbrake test. This was a primary element of the investigation and Rookaird had an opportunity to address the issue at the investigation." 6-ER-1010. BNSF manager

Robert Johnson, who led the investigation against Rookaird, summarized in writing, "I am not going to tell you this crew was the only crew that played the slow down game! However, I will tell you this crew made a fatal mistake and we have to make an example out of them." 6-ER-897.

The district court reasoned Rookaird's protected activity "contributed very little" to BNSF's termination decision because "inefficiency and the air test—alone—would not have resulted in Mr. Rookaird's termination." 1-ER-21. This reasoning is legal error because nowhere in the text of AIR 21 or precedent of any court is an employee required to show that their protected conduct "alone" would have resulted in the same adverse personnel action. This standard shifts a new burden onto employees to prove that their protected activity was not only a contributing factor to their employer's adverse action, but actually the sole factor.

Additionally, the district court's affirmative defense reasoning relied on evidence that BNSF disciplined Rookaird's other crew members for "performing the same air test as Mr. Rookaird but were not fired." 1-ER-21. However, the court found that it was "Mr. Rookaird's decision to conduct an air test." 1-ER-18-19. The court's acknowledgment of BNSF's retaliation against Rookaird's crewmembers for *his decision* to engage in protected activity fails to answer the affirmative defense question. Evidence about disciplining other workers who also engaged in protected activity does not remove the express mandatory variable of what BNSF would have done absent Rookaird's or the crew's protected activity.

Ultimately, the district court distilled all of its flawed reasoning into its central conclusion: that BNSF's affirmative defense was satisfied because, "though the [protected activity] was a contributing factor in Mr. Rookaird's termination, the Court concludes that the [protected activity] contributed very little." 1-ER-20. Upon review of this conclusion, the en banc Ninth Circuit failed to appreciate the "ultimate determination as to whether the employer intentionally treated the employee differently, and worse, because of the employee's protected trait or activity." *Murray v. UBS Securities, LLC*, 601 U.S. 23, 36, (2024). The statute permits discipline for non-protected conduct; however, the employee cannot be treated worse for non-protected conduct because of their protected activity.

As this Court framed it in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 285–86 (1977), the employer's burden is to prove the employee was "placed in no worse a position than if he had not engaged in the [protected] conduct." *Id.* 285-86. In this case then, the question was whether BNSF would have terminated other employees for "dishonesty when reporting your off-duty time," "failure to provide a FRA Tie-up timeslip," and "failure to comply with instructions." 1-ER-13 and 6-ER-898. The court instead relied on its erroneous limited role test, requiring Rookaird to demonstrate that his protected activity "alone" would have resulted in termination.

As this Court incorporated from the Title VII context, the proper analysis is whether BNSF treated Rookaird worse than an "otherwise identical employee who had *not* engaged in the protected

activity." *Murray*, 601 U.S. at 38, quoting *Bostock v. Clayton County*, 590 U.S. 644, 660 (2020). That framing is also consistent with the origin of the same action test established in *Mt. Healthy* and is necessary to guarantee that in mixed-motive cases, "[a] borderline or marginal candidate should not have the employment question resolved against him because of" protected conduct. *Mt. Healthy*, 429 U.S. at 285–86.

The en banc Ninth Circuit affirmed the rejection of AIR 21's demanding same-action defense with the district court's limited role test, calling it the "logically salient factor" in the affirmative defense analysis. However, this test has no basis in the statute or this Court's precedent. This legal error collapses Congress's two-step framework into a single test, effectively permitting retaliation against whistleblowers for engaging in protected activity. The harmful effect this standard will have on health, safety, and corporate integrity warrants the review of this Court.

II. The Ninth Circuit's Limited Role Test Is Unique Among the Courts of Appeals

Having departed from the statutory text and this Court's precedent, the Ninth Circuit now stands alone among the courts of appeals in permitting covered employers to meet the AIR 21 affirmative defense by showing that protected conduct played only limited role in adverse employment action.

In *Shah v. United States Dep't of Lab.*, No. 23-6296, 2025 WL 45397 (2d Cir. Jan. 8, 2025), the

Second Circuit correctly relied on evidence wholly independent of the employee's protected activity to conclude that the employer would have terminated the employee absent his protected activity. The court noted that the employer "determined it had no need for Shah's position long before Shah contacted the relevant authorities to report securities violations." *Id.* at *1. It also pointed to evidence that another employee who had not engaged in protected activity was discharged for the same non-protected reason, underscoring that the outcome did not turn on Shah's whistleblowing. *Id.* quoting *Murray*, 601 U.S. 38-39 ("explaining that the relevant question is whether the employer would have retained an otherwise identical employee who did not engage in protected activity.").

In *Araujo v. New Jersey Transit Rail Operations*, Inc., 708 F.3d 152, 163 (3d Cir. 2013), the Third Circuit held that "[w]hile the facts in the record may show that [the employee] was technically in violation of written rules, they do not shed any light on whether [the employer's] decision to file disciplinary charges was retaliatory." The court clarified that the AIR 21 burden-shifting is different than *McDonnell Douglas* burden-shifting, where "the employer need only articulate a legitimate, non-discriminatory reason for the action." *Id.* at 162. The court explained that the proper analysis in AIR 21 burden-shifting must be based on what action, if any, the employer would have taken in the absence of the employee's protected activity. *Id.* Thus, the relevant inquiry is not whether the employee technically violated a written rule or whether the employer can articulate a legitimate basis for discipline. Rather, as the Third Circuit explained in *Araujo*, the proper focus is on whether the employer would have taken

the same action absent the protected activity, which requires evidence such as whether the rules were actually enforced in practice, whether similarly situated employees had been disciplined for comparable conduct, and whether the employer's decision to enforce the rules for the first time coincided with the employee's protected activity. *See Id.* at 163.

The Fourth Circuit held that "an 'intervening event' is not a talisman that makes all other evidence of causation disappear, establishing conclusively that there can be no connection between protected activity and adverse action." *Finley v. Kraft Heinz Inc.*, 146 F.4th 382, 391 (4th Cir. 2025). This case involved an employee who reported dangerous bone fragments and improperly sealed meat packages that allowed pathogens into the meat. *Id.* at 386. The circuit court rejected the district court's conclusion that Kraft Heinz met its affirmative defense, explaining that the question is not simply whether the company had a legitimate reason stemming from separate non-protected activity, but whether it would have taken the same action even absent the food safety complaint. *Id.* at 394. This mirrors the error in this case, where the district court below applied a limited role test that treated evidence of a legitimate rule violation as dispositive, rather than asking the statutory question of whether the employer would have taken the same action absent the protected activity.

The Eighth Circuit held that the affirmative defense is established when the employer presents "uncontroverted evidence that it consistently enforced [its] policy…." *Kuduk v. BNSF Ry. Co.,* 768 F.3d 786,

793 (8th Cir. 2014). Specifically, the court emphasized that "within six months of Kuduk's discharge, [BNSF] discharged two other Twin Cities Division employees who had committed a second serious safety violation while on disciplinary probation. One employee had fouled the tracks while on probation, the same infraction for which Kuduk was discharged." *Id.* In Rookaird's case, the district court made no finding that BNSF enforced its policies consistently, nor whether BNSF had ever terminated or disciplined another employee for any non-protected rule violation that BNSF assessed against Rookaird. In fact, Rookaird's manager testified in trial that he gave verbal reminders to other employees for unsigned time sheets. 5-ER-679. However, after Rookaird's protected activity, BNSF justified part of its termination decision based on an alleged "failure to provide a FRA tie-up timeslip." 1-ER-13. The district court's application of its limited-role test displaced the critical statutory inquiry of whether BNSF would have taken the same action against a non-protected employee or whether BNSF treated Rookaird worse than non-protected employees.

In *Fresquez v. BNSF Ry. Co.*, 52 F.4th 1280, 1293 (10th Cir. 2022), BNSF terminated a protected employee citing his separate non-protected conduct as "insubordination." The Tenth Circuit explained that even though BNSF's rules treat "insubordination" as a stand-alone dismissible offense, BNSF's rules also include a separate offense entitled "failure to comply with instructions," which is not a stand-alone dismissible offense. *Id.* at 1308. The Tenth Circuit ultimately held that even though BNSF terminated Fresquez citing "insubordination", a dismissible offense, "BNSF has failed to demonstrate by clear and

convincing evidence that it would have discharged Fresquez from his position even absent his involvement in activities that are protected under § 20109." *Id.* at 1311. The circuit court's holding placed the distinction between the two rule violations as central to the affirmative defense question because the employee's managers could have been treating the employee worse in charging him with insubordination instead of failure to comply with instructions. Thus, the proper affirmative defense reasoning includes whether the charged discipline was pretextual, in other words, whether the BNSF treated the protected employee worse than non-protected employees.

And the Eleventh Circuit upheld an affirmative defense on evidence that the discipline assessed was "consistent with [the employer's] policies and past practices. Indeed, [the employer] provided evidence that it disciplined several other employees who failed banner tests the same way as [protected employee] and that it terminated other employees who committed three non-major offenses in a three-year period." *Hitt v. CSX Transportation, Inc.,* 116 F.4th 1309, 1318 (11th Cir. 2024).

In an unpublished order denying a motion to dismiss in a Sarbanes-Oxley Act case, the Eastern District of Texas court cited the *Parker* en banc decision below: "Walmart's identification of actions alleged in the complaint that could have, but may not have, caused Walmart to terminate Jana is insufficient." *Jana v. Walmart, Inc.*, No. 4:24-CV-00698-SDJ-BD, 2025 WL 2529933, at *7 (E.D. Tex. Aug. 15, 2025) (quoting *Parker*, 137 F.4th at 964-65, "the employer must prove that it **'would have'** taken

the same personnel action had the employee not engaged in protected activity; proving simply that it 'could have' taken the same personnel action does not suffice") (emphasis in original). The en banc court indeed stated this. But nevertheless affirmed the district court, reasoning that the rule violations BNSF assessed "independently justified Rookaird's dismissal" and were "violation[s] of work rules that independently warranted dismissal." *Parker*, at 967. The exact legal analysis the en banc court said was improper was the center of its affirmation of the district court's conclusion on BNSF's affirmative defense. The *Jana* court, however, appropriately followed the correct statement of law in the en banc opinion while ignoring the Ninth Circuit's contradictory and erroneous application of that law. The *Jana* court could have had the opposite outcome simply by quoting a different part of the en banc opinion.

Together, the approaches of the Second, Third, Fourth, Eighth, Tenth, and Eleventh Circuits, all underscore the same principle: employers must prove, with clear and convincing evidence, that the same discipline would have been imposed on employees who engaged in no protected activity, which is directly contrary to the Ninth Circuit's limited role approach of which petitioner is seeking review. The Ninth Circuit's rule—allowing an employer to prevail merely by showing that protected conduct played only a limited role—creates an irreconcilable conflict. This Court's intervention is needed to restore uniformity to the burden-shifting framework Congress enacted and to ensure that whistleblower protections retain their intended force and effect.

III. The Question is Important

This Court was recently asked to resolve a similar issue in a recent petition by BofI Federal Bank. *See BofI Fed. Bank v. Erhart*, petition for cert. pending, No. 25-103 (U.S. filed July 24, 2025). Petitioner here agrees with BofI Federal Bank that "a collapsing of AIR-21's two distinct and nonoverlapping steps is wholly inconsistent with this Court's interpretation of SOX and AIR-21." *Id.* at 17.[2] As expressed, that is the same error presented here. To be sure, BofI Federal Bank's petition specifically identified the en banc Ninth Circuit's opinion in this case as an example of inconsistent application of AIR 21. *See Id.* at 17-18.

The fact that both an employer and an employee petitioner are seeking this Court's review of the same error underscores the significance of the question presented. Only this Court can clarify the proper application of AIR 21's burden-shifting framework and restore consistency to the whistleblower protections Congress enacted.

The AIR 21 framework is important and far-reaching. Congress deliberately incorporated the AIR 21 framework to protect whistleblowers in numerous safety-sensitive or other important industries. The

[2] Although Petitioner agrees with BoFI's framing of the error, Petitioner disagrees with BofI's conclusion that evidence of contributing factor "cannot possibly enter" the second-step analysis. *Id*. at 18. To the contrary—and central to the question presented here—"burden shifting plays the necessary role of 'forcing the defendant to come forward with some response' to the employee's circumstantial evidence." *Murray,* at 454 quoting *St. Mary's Honor Center* v. *Hicks*, 509 U. S. 502, 510– 511 (1993).

sheer scope of AIR 21's application is reflected in the fact that in 2023 the Occupational Safety and Health Administration alone issued more than 3,600 determinations on employee complaints under the whistleblower statutes administered by Department of Labor.

The FRSA provides "[t]he purpose of this chapter is to promote safety in every area of railroad operation and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. In this case, Rookaird's protected activity was refusing to stop conducting air-brake tests on forty-two rail cars. A safety procedure that BNSF specifically named as justification for his termination because BNSF management thought it was inefficient. Congress intended for covered employers to face a difficult time defending themselves. That intent must be reinforced by this Court's clarification of how the demanding affirmative defense is to be applied.

IV. Proper Vehicle

This case is an ideal vehicle for review because it squarely presents the question of how the AIR 21 affirmative defense should operate when the employer's stated reasons for discipline includes the employee's protected activity.

The record is clear: the contributing factor standard was satisfied, and BNSF itself identified the effect of Rookaird's protected activity as part of its disciplinary decision. This is a textbook mixed motive case—one in which the district court confirmed that retaliatory and non-retaliatory reasons contributed to BNSF's adverse action. With the legal standard

outcome-determinative, this case cleanly presents the question and leaves no vehicle concerns for this Court's review.

This case provides the opportunity to correct the en banc Ninth Circuit's influential decision, which, as the employer-petitioner BofI Federal Bank recognized, is "inconsistent" and will continue to create confusion among both employers and employees regarding the scope and application of the AIR 21 affirmative defense.

In sum, this case not only illustrates the misapplication of AIR 21's burden-shifting framework but also presents a fully developed record on which the Court can resolve a recurring and important statutory question. It is an ideal vehicle to clarify the law, restore uniformity among the circuits, and vindicate the whistleblower protections Congress enacted.

CONCLUSION

The question presented is not merely one of statutory construction or circuit conflict; it strikes at the heart of Congressional intent in protecting whistleblowers in our nation's most critical industries. As the conductor of his crew, Rookaird decided that his crew would not stop an air-brake test it was conducting on forty-two rail cars, and BNSF conceded that Rookaird's air brake test factored into its decision to terminate him for inefficiency. The Ninth Circuit's limited role approach undermines the legislative command that covered employers must meet a demanding burden when they have retaliated against employees for conducting protected activity.

There should be no ambiguity in the tough standard placed on employers when they deprive a whistleblower of their livelihood. Whistleblowers must feel emboldened to come forward.

Certiorari is warranted to resolve this important question because absent this Court's intervention, the statutory safeguard is rendered hollow, and the remedial aims of Congress are left unfulfilled. The full force of whistleblower protections must be enforced to safeguard the integrity and safety of our nation's critical industries. Respectfully, for the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/s/ William G. Jungbauer
WILLIAM G. JUNGBAUER
Counsel of Record
JOHN D. MAGNUSON
YAEGER & JUNGBAUER
BARRISTERS, PLC
4661 Highway 61 N.,
Ste. 204
St. Paul, MN 55110
(651) 288-9500
wjungbauer@yjblaw.com
jmagnuson@yjblaw.com

Counsel for Petitioner

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