Case No. 23-1901

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

KIM ANNE FARRINGTON,
Petitioner,

v.

U.S. DEPARTMENT OF TRANSPORTATION,
Respondent.

On petition for review from the Merit Systems Protection Board in AT-1221-09-0543-B-2

CORRECTED BRIEF OF *AMICI CURIAE* PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, PROJECT ON GOVERNMENT OVERSIGHT, AND WHISTLEBLOWERS OF AMERICA SUPPORTING PETITIONER AND SEEKING REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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v.
U.S. DEPARTMENT OF TRANSPORTATION

CERTIFICATE OF INTEREST

Counsel for *amici* certifies the following:

1. The full names of the parties I represent are Public Employees for Environmental Responsibility (PEER), the Project On Government Oversight (POGO), and Whistleblowers of America (WoA).

2. The names of the real parties in interest are the same.

3. All parent corporations and publicly held companies that own 10 percent or more of the stock of the party I represent are: N/A

4. The names of all law firms and the partners or associates that appeared before the MSPB for the party I represent will be entering an appearance in this case (although there are none as the *Amici* were not parties before the MSPB).

5. To the best of counsel's knowledge, there are no cases pending in this or any other court or agency that will directly affect or be affected by this Court's decision in this matter.

Date: October 4, 2023

Respectfully submitted,

/s/ Richard R. Renner
Attorney for *amici*

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Public Employees for Environmental Responsibility (PEER) is a national non-profit, public interest organization. PEER advocates on behalf of public employees in environmental fields such as public land management, pollution control, toxic chemicals, wildlife protection, and historic preservation. PEER represents federal employees in whistleblower proceedings under the Whistleblower Protection Act, as amended, before the Merit Systems Protection Board and federal courts. PEER also engages in advocacy for strong whistleblower protections generally.

Founded in 1981, the Project On Government Oversight (POGO) is a nonpartisan independent watchdog that investigates and exposes waste, corruption, abuse of power, and when the government fails to serve the public or silences those who report wrongdoing. POGO champions reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. Working with whistleblowers for such purposes is an integral part of POGO's mission, and ensuring strong whistleblower protections is one of our core policy priorities. POGO helped to lead efforts to pass and strengthen the Whistleblower Protection Enhancement Act ("WPEA"), testifying about the legislation before Congress, lobbying for the strongest possible whistleblower provisions, urging

the public to take action, and organizing critical support. The organization supports whistleblower protection laws, which were created to protect the public interest, and they should not be eviscerated.

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

Amici are concerned that the MSPB decision here seriously undermines protections for whistleblowers by greatly expanding the category of employees subject to the requirement to show that an adverse action was taken in reprisal for a disclosure, beyond those whose function is to regularly investigate and disclose wrongdoing, as directed by Congress. The decision also imposes an improperly high standard of proof for showing such reprisal.

STATEMENTS REQUIRED BY RULE 29(a)(2) AND (a)(4)(E)

Counsel for both parties have consented to filing this *amici* brief.

No party's counsel authored this brief in whole or part.

No party or party's counsel contributed money that was intended to fund preparing or submitting the brief.

No person — other than the amicus curiae, its members, or its counsel —

contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the Board err in finding that Farrington made her disclosures in the normal course of her duties?
2. Did the Board err in applying the heightened causation standard in 5 U.S.C. § 2302(f)(2) when it made no finding that Farrington's principal job function is to regularly investigate and disclose wrongdoing?
3. Is the causation standard in 5 U.S.C. § 2302(f)(2) the same as the motivating factor standard in 42 U.S.C. § 2000e–2(m)?
4. Did the Board err in failing to apply the proper available methods of proving an unlawful motive?

SUMMARY OF THE ARGUMENT

Whether and to what extent whistleblowers are protected when they make disclosures pursuant to their normal duties has been a fraught issue for decades. For claims brought under 42 U.S.C. § 1983 to enforce the First Amendment, the Supreme Court's seminal case, *Garcetti v. Ceballos*, 547 U.S. 410 (2006), identified a narrow group of employees for whom the employer would have commissioned the disclosures at issue. The Supreme Court also cautioned against using the employer's job description to determine the scope of duties because "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform[.]" *Id*., at 422. Employers must establish that the disclosure at issue is the type for which the employer has regularly required the employee to make. *Lane v. Franks*, 573 U.S. 228, 238 (2014). *Garcetti* clarified that it was addressing only the scope of First Amendment protection and legislatures may enact laws that protect whistleblowers citing the Whistleblower Protection Act (WPA), 5 U.S.C. § 2302(b)(8). 547 U.S. at 425.

In 2012, Congress amended the WPA to explicitly protect federal employees from reprisal when they disclose misconduct as part of their normal job duties. 5 U.S.C. § 2302(f)(2); Whistleblower Protection Enhancement Act (WPEA), 126 Stat. 1465–1468, 1472; Pub. L. 112–277, Title V, § 505(a) (2012). Congress ex-

plicitly overruled *Willis v. Department of Agriculture*, 141 F. 3d 1139, 1143 (Fed. Cir. 1998), which had denied protection for disclosures made pursuant to job duties. S. Rep. 112-155, 2012 U.S.C.C.A.N. 589, 593 (2012), p. 5. However, Congress also required such whistleblowers to show that the agency acted "in reprisal for the disclosure[.]" 5 U.S.C. § 2302(f)(2). "This provision is intended to strike the balance of protecting disclosures made in the normal course of duties but imposing a slightly higher burden to show that the personnel action was made for the actual purpose of retaliating against the auditor for having made a protected whistleblower disclosure." S. Rep. 112-155, p. 6.

In 2017, Congress clarified the scope of employees subject to this "slightly higher burden" by adding the requirement that "the principal job function" of the disclosing employee "is to regularly investigate and disclose wrongdoing[.]" As the Supreme Court did in *Lane v. Franks*, this amendment clarifies that the "duty speech" category is limited to those few employees for whom the employer has specifically commissioned making disclosures about wrongdoing by coworkers or superiors. Few employees are actually required by their employer to report their boss's misconduct.

In Kim Farrington's case, the Board below erred in relying solely on the employer's position description to determine that her disclosures to the NTSB were

part of her normal duties. The Board failed to distinguish her duty to cooperate with NTSB investigation from her disclosure which sought to initiate action – outside her chain-of-command and normal job duties. Moreover, the Board never made the required finding that her "principal job function" was "to regularly investigate and disclose wrongdoing[.]" Quoting 5 U.S.C. § 2302(f)(2).

Amici ask this Court to find that Farrington's disclosure is protected, not by 5 U.S.C. § 2302(f)(2), but rather by 5 U.S.C. § 2302(b)(8) and subject to the normal causation standards set out in 5 U.S.C. § 1221(e) (contributing factor for the employee and clear and convincing evidence for the agency).

Further, *amici* ask this Court to clarify that the "slightly higher" causation standard that Congress established for 5 U.S.C. § 2302(f)(2) is the long-established motivating factor standard used in Title VII discrimination cases. 42 U.S.C. § 2000e–2(m) ("when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."). Congress did not use "but for" or "because of" in 5 U.S.C. § 2302(f)(2). Instead, it required a showing of "reprisal" which is appropriately focused on evidence of improper motivation.

Finally, *amici* ask this Court to make clear that the required showing of im-

proper motivation can be made with any of the types of evidence already used to find that reprisals are unlawful. These include both direct and circumstantial evidence, deviation from normal practice, or shifting explanations that point to pretext.

ARGUMENT

STANDARD OF REVIEW

In reviewing Board decisions, Congress specified that this Court "shall ... set aside any agency action, findings, or conclusions found to be— arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 7703(c)

The Federal Circuit reviews the Board's determinations of law for correctness without deference to the Board's decision. *Becker v. OPM*, 853 F.3d 1311, 1313 (Fed. Cir. 2017).

An agency must establish three criteria when taking an adverse action—such as a removal—against an employee. *Malloy v. U.S. Postal Serv.,* 578 F.3d 1351, 1356 (Fed. Cir. 2009). First, it must prove that the charged conduct occurred. *Id.* (citing 5 U.S.C. § 7701(c)(1)(B)). Second, the agency must establish a nexus between that conduct and the efficiency of the service. *Id*. (citing § 7513(a)). Third, it must demonstrate that the penalty imposed was reasonable in light of the relevant

factors set forth in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305–06 (1981). *Cerwonka v. Dep't of Veterans Affs.,* 915 F.3d 1351, 1356 (Fed. Cir. 2019).

I. THE BOARD ERRED IN HOLDING THAT FARRINGTON MADE HER DISCLOSURES IN THE NORMAL COURSE OF HER DUTIES.

A. For an exclusion from First Amendment claims, *Garcetti v. Ceballos* established a specific requirement that the employer commissioned the disclosure at issue as part of the employee's normal duties.

The "duty speech" doctrine has roots in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). In 2000, Gil Garcetti was the District Attorney for Los Angeles. He employed Richard Ceballos as a calendar deputy supervising other attorneys. A defense lawyer asked Ceballos to review an affidavit his office used to obtain a search warrant. After reviewing the affidavit and visiting the subject location, Ceballos determined the affidavit contained serious misrepresentations, making its key conclusions untenable. Ceballos consequently advised his superiors to dismiss the case. 547 U.S. at 414. They rejected his recommendation, transferred Ceballos to a non-supervisory position, and then denied him promotion. 547 U.S. at 415.

Ceballos sued in federal court claiming that writing a memo about intentional government misconduct was protected by the First Amendment right to Free Speech. The District Court granted summary judgment against him reasoning that

Ceballos never exercised any First Amendment right because he wrote the memo pursuant to his employment duties. The Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment" because governmental misconduct was "inherently a matter of public concern." *Ceballos v. Garcetti*, 361 F. 3d 1168, 1173-74 (2004). Judge O'Scannlain, however, wrote separately to make the distinction "between speech offered by a public employee acting as an employee carrying out his or her ordinary job duties and that spoken by an employee acting as a citizen expressing his or her personal views on disputed matters of public import." *Id*. at 1187. In his view, "when public employees speak in the course of carrying out their routine, required employment obligations, they have no personal interest in the content of that speech that gives rise to a First Amendment right." *Id*., at 1189.

Garcetti petitioned to the Supreme Court which granted *certiorari* and emphasized that "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." 547 U.S. at 417, citing *Connick v. Myers*, 461 U. S. 138, 142 (1983), and other cases. "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions … necessary for their employers to operate efficiently and effectively." *Id*., at 419. The Court noted that its decision in

Ceballos's case was not controlled by where he made his disclosure (in the office) or that the topic of his disclosure concerned a matter of his employment. *Id*., at 420-21. Rather, the controlling factor was that Ceballos wrote his memo "pursuant to his duties as a calendar deputy." *Id*., at 421. The Court repeated that the parties did not dispute this point. *Id*., at 424. "It [the restrictions on speech] simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id*., at 422. The Court added:

> We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. See post, at 431, n. 2 (SOUTER, J., dissenting). The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Garcetti had less application than originally thought, precisely because employers had difficulty showing that it commissioned the disclosure at issue as part of the employee's professional duties.[1]

[1] See, e.g., *Fuerst v. Clarke*, 454 F.3d 770, 774 (7th Cir. 2006) ("Because Fuerst's comments ... were made in his capacity as a union representative ... the Supreme Court's recent decision in *Garcetti* ... is inapposite."); *Lindsey v. City of Orrick*, 491 F.3d 892, 898 (8th Cir. 2007) ("Unlike in *Garcetti* ..., there is no evidence Lindsey's job duties even arguably included sunshine law compliance."); *Thomas v. Blanchard*, 548 F.3d 1317, 1324 (10th Cir. 2008) ("Thomas was not hired to detect fraud …. Thomas's act went well beyond his official responsibilities."); *Batt v. City of Oakland*, No. C 02-04975 MHP, 6, 2006 WL 1980401, at

Nine years ago, the Supreme Court revisited *Garcetti* "to resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities." *Lane v. Franks*, 573 U.S. 228, 235 (2014). Edward Lane worked for the Central Alabama Community College (CACC) as director of a statewide youth training program financed with federal funds. 573 U.S. at 231-32. He discovered that the program paid a salary to an elected state representative, despite the fact that she performed no services for the program. He fired that representative and testified pursuant to a prosecutor's subpoenas in two criminal trials. *Id*. at 233. CACC's president, Steve Franks, fired Lane thereafter. The Eleventh Circuit affirmed a summary judgment dismissing Lane's retaliation claim relying on *Garcetti*. *Lane v. Cent. Ala. Cmty. Coll*., No. 12-16192, 523 Fed.Appx., 709, 710 (11th Cir. 2013).

The Supreme Court reversed noting that "[i]t is undisputed that Lane's ordinary job responsibilities did not include testifying in court proceedings." 573 U.S. at 238 n. 4. Further, "[a]nyone who testifies in court bears an obligation, to the court and society at large, to tell the truth." *Id*., at 238. While the Court in *Lane* re-

*7 (N.D. Cal. Jul. 12, 2006) ("[T]he culture of the OPD and the express commands of his direct supervisors established that plaintiff had a duty *not* to report misconduct.").

lied on 18 U.S.C. § 1623 (criminalizing false statements under oath in judicial proceedings), 18 U.S.C. § 1001 creates a similar obligation for anyone providing information to any federal agency. The Court emphasized that "*Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment." *Id.*, 239. "[I]t is essential that they [public employees] be able to speak out freely on such questions [of public concern] without fear of retaliatory dismissal." *Id.*, 240; quoting *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563, 572 (1968).

In its statement most relevant to this case, the majority opinion in *Garcetti* concluded (547 U.S. at 425):

> As the Court noted in *Connick*, public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees." 461 U. S., at 149. The dictates of sound judgment are reinforced by the powerful network of legislative enactments — such as whistleblower protection laws and labor codes — available to those who seek to expose wrongdoing. See, e.g., 5 U.S.C. § 2302(b)(8); [California statutes omitted].

Kim Farrington's claims here arise from 5 U. S. C. § 2302(b)(8) – the very statute the Supreme Court cited in *Garcetti* to explain that federal employees would have relief untethered to the limitation in the First Amendment.

B. Congress invalidated the "duty speech" defense from the WPA and replaced it with a narrow modification for a small group of federal employees.

Dissenting in *Garcetti*, Justice Souter said existing statutory protections were inadequate and cited this Circuit's holding in *Willis* that "federal employees have been held to have no protection for disclosures made to immediate supervisors[.]" 547 U.S. at 441.

In 2012, Congress reversed the holding in *Willis* through the Whistleblower Protection Enhancement Act (WPEA), 126 Stat. 1465–1468, 1472; Pub. L. 112–277, Title V, § 505(a). The Committee Report stated, "Section 101 of S. 743 overturns several court decisions that narrowed the scope of protected disclosures." S. Rep. 112-155, 2012 U.S.C.C.A.N. 589, 593 (2012), p. 5. It cited *Willis* for holding "that a disclosure made as part of an employee's normal job duties is not protected." *Id*.

The 2012 amendments were but one of a series Congress has made to the WPA to neutralize "restrictive decisions by the MSPB and federal courts [that] hindered the ability of whistleblowers to win redress." *Id*., at 3; see also, S. Rep. 100-413, at 6-16 (1988); H. Rep. 103-769, at 12-18 (1994). The Senate Committee explained that "the 1994 amendments were intended to reaffirm the Committee's long-held view that the WPA's plain language covers *any* disclosure[.]" *Id*. at 4,

quoting S. Rep. 103-358 (1994), at 10, which in turn was quoting S. Rep. 100-413 (1988) at 13 ("[I]t is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue."). The WPEA

> makes clear, once and for all, that Congress intends to protect "any disclosure" of certain types of wrongdoing in order to encourage such disclosures. It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward.

S. Rep. 112-155 at 5.

For employees such as auditors and investigators "whose job is to regularly report wrongdoing[,]" the WPEA enacted 5 U. S. C. § 2302(f)(2) "to preserve protection for such disclosures, for example where an auditor can show that she was retaliated against for refusing to water down a report." *Id*. at 6. Congress recognized that employees engaged in compliance and oversight make disclosures daily as part of their normal job duties. To avoid attempts to stymie normal personnel actions by claiming temporal proximity to the latest disclosure of wrongdoing, "[t]his provision is intended to strike the balance of protecting disclosures made in the normal course of duties but imposing a slightly higher burden to show that the personnel action was made for the actual purpose of retaliating against the auditor for

having made a protected whistleblower disclosure." *Id*.

The nature of this provision makes clear that it is not meant to apply to those inspectors such as Kim Farrington who regularly monitor compliance by those outside of the federal government, but rather those whose day-in and day-out duties are to investigate and report violations by federal employees, such as employees of an Inspector General. It is not enough that the Agency permitted Farrington to make the disclosures at issue; instead, it must show that such disclosures are made pursuant to her normal duties.

Congress clarified this provision in 2017 by adding to 5 U.S.C. § 2302(f)(2) the requirement that the disclosing employee have "the principal job function of whom is to regularly investigate and disclose wrongdoing[.]" National Defense Authorization Act for Fiscal Year 2018 (2018 NDAA) (December 12, 2017), Pub. L. 115-91, div. A, title X, § 1097, 131 Stat. 1616, 1618. Employees such as Farrington whose regular duties involve inspecting air carriers and occasionally responding to requests from the National Transportation Safety Board (NTSB) cannot be said to have a "principal job function" to "investigate and disclose wrongdoing."

C. A finding of an employee's coverage under 5 U.S.C. § 2302(f)(2) arises not from the position description alone, but rather from evidence of the duties actually performed on a regular basis.

In *Garcetti*, the Court made clear that whether the employer commissioned the speech at issue is not determined by the employer's statement of the job duties alone. 547 U.S. at 422, quoted above. Instead, the employer must present evidence of what the employee actually does on a regular basis. Congress emphasized this point by requiring the employer to show that the employee's "principal job function" "is to regularly investigate and disclose wrongdoing[.]" 5 U.S.C. § 2302(f)(2). This is the issue on which many employer attempts to invoke *Garcetti* have failed. See *Fuerst*, *Lindsay*, *Thomas, Batt*, and *Lane*, cited above.

The Board's Final Order below too casually applied 5 U.S.C. § 2302(f)(2) by finding that talking to the NTSB was listed in Farrington's position description. Final Order, p. 5, ¶ 7. There, the Board relied exclusively on "appellant's position description" to find that her duties include "[p]articipat[ing] in cabin safety related incident/accident investigations of air carriers and air operators." *Id*. There is a wide gap between what a job description permits an employee to do as a matter of discretion, and a responsibility for which the employee could be held accountable for failing to fulfill. Here, participating in an NTSB investigation is quite different

than initiating a disclosure to the NTSB outside of one's normal chain-of-command. The Board failed to require the Agency to show that Farrington's particular disclosures were the ones the Agency had commissioned her to make as part of her normal and principal job functions.

The Supreme Court and numerous Circuit courts regularly decide cases involving an employee's job duties by using evidence of what the employee actually does on the job. For example, in cases under the National Labor Relations Act (NLRA), 29 U.S.C. § 152(3), such evidence determines if an employee is a supervisor or manager. *See*, *e.g.*, *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) ("The burden of proving the applicability of the supervisory exception … should thus fall on the party asserting it."); *NLRB v. Bell Aerospace Co*., 416 U.S. 267 (1974) (employees could not properly be classified as "managerial" because they failed to exercise sufficient discretion to be aligned with management); *Oil, Chem. & Atomic Workers Int'l Union, AFL-CIO v. NLRB*, 445 F.2d 237, 243 (D.C. Cir. 1971) ("[W]hat the statute requires is evidence of actual supervisory authority visibly translated into tangible examples demonstrating the existence of such authority."). The status under the Act "is determined by an individual's duties, not by his [or her] title or job classification." *Chicago Metallic Corp*., 273 NLRB 1677 (1985).

As this court has repeatedly held, an employer's "designation of an employee's position as 'nonbargaining'" – or supervisory – does not establish that the employee is a supervisor or manager; instead, that determination must be based on an examination of the actual job duties of the position. *Gregory v. MSPB*, 96 F. App'x 690, 693–94 (Fed. Cir. 2004) (*citing Coursen v. U.S. Postal Serv*., 256 F.3d 1353, 1356 (Fed.Cir.2001); *Carrier v. MSPB*, 183 F.3d 1376, 1379 (Fed.Cir.1999)). As the Eleventh Circuit recently explained: an employee's "'paper authority' does not establish supervisory status; rather, an employer must present evidence that the authority was actually exercised by the purported supervisor." *United Nurses Associations of California v. NLRB,* 871 F.3d 767, 784 (9th Cir. 2017).[2]

One useful indicator of what the employer actually commissioned the employee to do arises when the employer takes an adverse action against an employee because the employee "circumvented the chain of command" or otherwise went outside of accepted channels. Such punishment violates whistleblower protection statutes. *Dutkiewicz v. Clean Harbors Envtl. Servs.*, 95-STA-34, D&O of ARB, at

[2] *See also Transdev Servs., Inc. v. NLRB*, 991 F.3d 889, 898 (8th Cir. 2021) (in order for the NLRB to determine if employees qualify as supervisors, the Board may require "proof" that putative supervisors "actually exercise the authority to discipline."); *Atlantic City Elec. Co. v. NLRB*, 5 F.4th 298, 305 (3d Cir. 2021) ("the party asserting supervisor status … bears the burden of proving supervisory authority by a preponderance of the evidence."); *Frenchtown Acquisition Co. v. NLRB*, 683 F.3d 298, 311, 314 (6th Cir. 2012) (same); *Jochims v. NLRB*, 480 F.3d 1161, 1166 (D.C. Cir. 2007) (same).

7, 1997 WL 471980 (Aug. 8, 1997),[3] *aff'd*, *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12, 24 (1st Cir. 1998); *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 565 (8th Cir. 1980) (hospital disciplined a doctor for "fail[ing] to extend to the staff and administration of this hospital ... the professional courtesy to follow normal procedures in bringing problems to the attention of those persons ultimately responsible for the operation of the hospital.").

In *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015), the Court protected a federal air marshal when he leaked to the media an agency plan to stop air marshals from traveling due to budget constraints. This was certainly a disclosure outside the chain of command. It even violated official agency regulations. Nevertheless, the Court held it was protected and reinstated Robert MacLean as an Air Marshal.

In this vein, employees are protected even if they go "around established channels" or go "over" their "supervisor's head" in raising a compliance concern, *Nichols v. Bechtel Construction, Inc.*, 87-ERA-44, D&O of SOL, at 17, 1992 WL 752733 (Oct. 26, 1992), *aff'd, Bechtel Const. Co. v. Sec'y of Lab*., 50 F.3d 926 (11th Cir. 1995).

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[3] Congress has given the Department of Labor the responsibility to adjudicate whistleblower retaliation claims under 22 statutes listed at: http://www.whistleblowers.gov/statutes_page.html

The Board recognized that the Agency here practiced a chain-of-command through which disagreements were kept within the chain. Final Order, ¶ 9; Appellant's Brief, p. 25, ¶ 6. That Kim Farrington made her disclosures to the NTSB outside of the normal channels – and thereby upset her superiors at the FAA – is a strong indication that her disclosures were not the ones the FAA had commissioned her to make. Further, management's upset at her deviations from normal channels is strong evidence of animus against those disclosures.

II. THE BOARD ERRED IN APPLYING 5 U.S.C. § 2302(f)(2) WHEN THE RECORD FAILED TO SHOW THAT FARRINGTON'S PRINCIPAL JOB FUNCTION WAS TO REGULARLY INVESTIGATE AND DISCLOSE WRONG-DOING.

Farrington did not work for any Inspector General or internal affairs component responsible for investigating and disclosing wrongdoing. Moreover, the Board's Final Order contains no finding that Farrington's "principal job function" was "to regularly investigate and disclose wrongdoing." This finding is required by 5 U.S.C. § 2302(f)(2). The Board itself quoted this requirement at Final Order, p. 4, ¶ 5, but then never mentioned it again.

The Board was correct to apply the 2017 amendment to 5 U.S.C. § 2302(f)(2) as Congress made the amendment to clarify its original purpose. The Board itself has held that Congress's clarifying amendments to the scope of protected ac-

tivity have retroactive effect because they clarify what Congress had intended. *Day v. Dep't of Homeland Security*, 2013 MSPB 49 (2013).

As the Board failed to find the "principal job function" as required by 5 U.S.C. § 2302(f)(2), its decision must be vacated and remanded. Without a reversal, the decision below will become a serious impediment to the WPA's remedial purpose. A substantially larger group of federal employees would be subjected to the elevated causation standard – specifically, any employee for whom the agency has assigned any role in investigating or reporting anything. This group would be larger than the narrow class of employees envisioned by the *Garcetti* decision, and much larger than the even narrower group Congress designated in § 2302(f)(2). Moreover, employees would be in doubt about whether their disclosures would be protected, and this doubt would undermine the remedial purpose of assuring federal employees that they will be protected if they speak up.

III. THE APPROPRIATE CAUSATION STANDARD FOR SHOWING THE ADVERSE ACTION WAS "IN REPRISAL FOR" PROTECTED ACTIVITY IS THE MOTIVATING FACTOR STANDARD USED IN DISCRIMINATION CLAIMS UNDER TITLE VII, 42 U.S.C. § 2000e-2(m).

In the alternative to holding that Farrington is not subject to the WPA's "duty speech" provision, this Court should determine as a matter of law that this provision only requires the normal showing that reprisal was a motivating factor

for the adverse action. Congress made clear that it intended the "in reprisal for" standard in 5 U.S.C. § 2302(f)(2) to be "slightly higher" than the normal causation standard for WPA claims. As "in reprisal for" specifically references the employer's motivation, the logical standard would be the motivating factor standard that is familiar from its use in Title VII discrimination cases. 42 U.S.C. § 2000e–2(m) ("when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

The normal causation standard for WPA claimants is to show that the protected activity was a "contributing factor" in the adverse action 5 U.S.C. § 1221(e)(1). Thereafter, the agency can prevail only with "clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e)(2). This 1989 addition to the WPA was the first time Congress established a bifurcated "contributing factor"/ "clear and convincing" framework to protect whistleblowers.[4] "Contributing factor" means that an employee must establish by a preponderance of the evidence that protected activity

[4] Three years later, Congress amended the whistleblower provisions of the Energy Reorganization Act (1992 ERA amendments) to pointedly insert nearly the exact same burden-of-proof framework. 42 U.S.C. §5851(b)(3). Since then, Congress has used this bifurcated standard of causation for employee protections in other laws listed in the Addendum, pp. 35-36.

was a factor that, alone or in connection with other factors, tended to affect the employer's decision to take an adverse action in any way. *Sylvester v. Parexel Int'l*, ARB No. 07-123, 2011 WL 2165854, *9 (ARB, May 25, 2011); *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 158 (3d Cir. 2013). Congress, in an oft-quoted explanatory statement, characterized a "contributing factor" as:

> any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his [or her] protected conduct was a 'significant,' 'motivating,' 'substantial,' or 'predominant' factor in a personnel action in order to overturn that action.

135 Cong. Rec. 5033 (1989). As this Court has stressed, "the legislative history of the WPA emphasizes that 'any' weight given to the protected disclosures, either alone or even in combination with other factors, can satisfy the 'contributing factor' test." *Kewley v. Dep't of Health & Hum. Servs*., 153 F.3d 1357, 1362 (Fed. Cir. 1998) (quoting *Marano v. Department of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). *See also, Estabrook v. Admin. Rev. Bd., United States Dep't of Lab.*, 814 F. App'x 870, 874 (5th Cir. 2020); *Mercier v. United States Dep't of Lab., Admin. Rev. Bd.,* 850 F.3d 382, 388 (8th Cir. 2017).

For the WPA, Congress specified that the whistleblower's burden can be met when "the personnel action occurred within a period of time such that a rea-

sonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action." 5 U.S.C. § 1221(e)(1)(B). This provision would mean that for those employees whose daily duties include disclosures of wrongdoings by other federal employees, temporal proximity would always exist for any adverse action. Employees working for an Inspector General, or a law enforcement Internal Affairs unit, could always point to some disclosure they recently made just through the flow of their normal work duties. In balancing this concern, Congress chose the "slightly higher" standard of showing that the adverse action was in reprisal for a protected activity. Quoting S. Rep. 112-155, p. 6.

It is appropriate to use the "motivating factor" standard for 5 U.S.C. § 2302(f)(2) claims because "in reprisal for" specifically references the agency's motive.

Congress did not use "but for" or "because of" in 5 U.S.C. § 2302(f)(2). Therefore, there is no textual basis to require "but for" causation as there was in *Gross v. FBL Financial Services, Inc*., 557 U.S. 167, 176 (2009) (ADEA case), and *University of Tex. Southwestern Medical Center v. Nassar*, 570 U.S. 338, 350 (2013) (Title VII retaliation case). Moreover, applying "but for" causation in 5 U.S.C. § 2302(f)(2) cases would impose a substantially heavier burden, and Congress intended only a "slightly higher" burden. S. Rep. 112-155, p. 6.

Therefore, *amici* urge this Court to hold that "in reprisal for" in 5 U.S.C. § 2302(f)(2) means that the whistleblower needs to show that reprisal for protected activity was a motivating factor in the adverse action.

IV. THE BOARD ERRED IN FAILING TO APPLY THE FULL RANGE OF METHODS FOR DETERMINING AN UNLAWFUL REPRISAL.

A standard of causation addresses how the trier of fact determines liability. It does not address the types of evidence parties may use to urge one determination or the other. For example, in *Nassar*, 570 U.S. at 351, the Court clarified that "but for" causation applied to Title VII retaliation claims under 42 U.S.C. § 2000e-3(a).[5] The Court, however, did not address what evidence could meet this standard, and Circuit courts concluded that "but for" causation can be established with the same types of evidence that courts use to establish a motivating factor under 42 U.S.C. § 2000e-2(m). *See Kwan v. Andelax Group*, PLLC, 737 F.3d 834, 845 (2nd Cir. 2013) ("[T]he but-for causation standard does not alter the plaintiff's ability to demonstrate causation at the prima facie stage on summary judgment or at trial indirectly through temporal proximity."). *See also*, *Wright v. St. Vincent Hospital*, 730 F.3d 732, 739 (8th Cir. 2013) (court considered circumstantial evidence of dis-

[5] Applying 42 U.S.C. § 2000e-2(m), the Court in *Nassar* recognized, though, that the causation standard for **discrimination** claims requires only a showing that discrimination was a motivating factor. 570 U.S. at 348-49.

criminatory motive before affirming decision from a bench trial); *Sayger v. Riceland Foods, Inc*., 735 F.3d 1025, 1032 (8th Cir. 2013) (affirming judgment after jury heard statements about "troublemakers" being gone and antagonists being involved in the adverse decisions); *Foster v. Univ. of Md.-E. Shore*, 787 F.3d 243, 251 (4th Cir. 2015) ("We therefore hold that *Nassar* does not alter the causation prong of a *prima facie* case of retaliation."); *Bishop v. Ohio Department of Rehabilitation and Correction Facilities*, 529 Fed. Appx. 685, 693-96 (6th Cir. 2013) (discussing *Nassar*, then reversing summary judgment based on "cat's paw" theory and evidence of pretext).

Here, too, the types of evidence Farrington can use to establish that her adverse treatment was "in reprisal for" her protected activities include all types of evidence she could use to show that the protected activity was a contributing factor. The only difference would be in how the trier-of-fact weighs that evidence to determine causation.

As discussed above, enforcement of a chain-of-command is evidence that the employer is seeking to cabin in the employee's disclosures and is evidence of animus against deviating from the established channels. In a law enforcement agency, the chain-of-command could be improperly enforced to prohibit any disclosure at all of wrongdoing. In essence, a chain-of-command becomes a code

of silence. This effect is evident in Walker's counseling Farrington to avoid upsetting AirTran management. Appellant's Brief, p. 20-21, ¶¶ 12-13.

An agency's shifting explanations permit an inference of causation. *See, e.g.*, *Cicero v. Borg-Warner Auto., Inc.*, 280 F.3d 579, 592 (6th Cir. 2002) ("Shifting justifications over time calls the credibility of those justifications into question. By showing that the defendants' justification for firing him changed over time, [plaintiff] shows a genuine issue of fact that the defendants' proffered reason was not only false, but that the falsity was a pretext for discrimination."); *Abramson v. William Patterson Coll. of N.J.*, 260 F.3d 265, 285 (3d Cir. 2003); *Bechtel Const. Co.,* 50 F.3d at 934-35.[6] In *Miller-El v. Dretke*, 545 U.S. 231, 243 (2005) ("*Miller-El II*"), the Supreme Court considered a *Batson* challenge. During *voir dire*, the government defended its strike against a black juror based on the juror's views about the death penalty and rehabilitation. After the defense showed that the juror's actual testimony did not support this reason, the prosecutor came up with a different reason for the strike. *Id*. at 237, 245-46. The Supreme Court noted the "pretextual timing" of the prosecutor's second reason and said it "would be difficult to

[6] *See also, King v. Guardian ad Litem Bd.*, 39 F.4th 979, 987 n. 4 (8th Cir. 2022); *Ameristar Airways, Inc. v. Admin. Rev. Bd., U.S. Dep't of Lab.,* 650 F.3d 562, 569 (5th Cir. 2011); *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1063 (9th Cir. 2002); *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1167 (6th Cir. 1996) ("An employer's changing rationale for making an adverse employment decision can be evidence of pretext.").

credit the State's new explanation, which reeks of afterthought." *Id*. at 246.

An agency's deviation from its normal practices is also evidence from which an unlawful motive can be found. A plaintiff may support an inference that the employer's stated reasons were pretextual, and the real reasons were prohibited discrimination or retaliation, by citing the employer's better treatment of similarly situated employees outside the plaintiff's protected group, its inconsistent or dishonest explanations, its deviation from established procedures or criteria, or the employer's pattern of poor treatment of other employees in the same protected group as the plaintiff, or other relevant evidence that a jury could reasonably conclude evinces an illicit motive.*Walker v. Johnson*, 798 F.3d 1085, 1092 (D.C. Cir. 2015). *See also, Johnson v. Nordstrom, Inc.*, 260 F.3d 727, 733–34 (7th Cir. 2001)*;* (explaining that while pretext can be demonstrated by "not only shifting but also conflicting, and at times retracted, justifications for adverse treatment,"); *U.S. ex rel. Hamrick v. GlaxoSmithKline LLC*, 814 F.3d 10, 22 (1st Cir. 2016); *Norville v. Staten Island University Hosp.*, 196 F.3d 89, 97 (2d Cir. 1999) (evidence that the employer 'departed from its usual employment practices and procedures' in dealing with the plaintiff supports an inference of discrimination); *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252, 267 (1977) ("Departures from the normal procedural sequence also may afford evi-

dence that improper purposes are playing a role."); *Salazar v. Wash. Metro. Area Transit Auth.*, 401 F.3d 504, 508-09 (D.C. Cir. 2005) (jury could infer something "fishy" from the deviation from ordinary procedures).

Indeed, circumstantial evidence is a permissible and coequal form of evidence widely used to prove unlawful motive. In *Aman v. Cort Furniture Rental Corp*., 85 F.3d 1074, 1081-82 (3d Cir. 1996), the court articulates a fact of life:

> It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior. In other words, while discriminatory conduct persists, violators have learned not to leave the proverbial 'smoking gun' behind.

See also, Richardson v. Axion Logistics, L.L.C., 780 F.3d 304, 307 (5th Cir. 2015); *Braithwaite v. Dep't of Homeland Sec.*, 473 F. App'x 405, 411 (6th Cir. 2012). That is why, in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003), the Court said that "[t]he reason for treating circumstantial and direct evidence alike is both clear and deep-rooted: 'Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.'"

In assessing a dispute about intent, courts must consider the totality of circumstances. *U.S. v. Arzivu*, 534 U.S. 266 (2002) (admonishing the lower courts for examining the facts surrounding the investigatory stop in isolation, since only by viewing the totality of the circumstances could the court give due weight to the

factual inferences drawn by the agent in deciding to conduct the stop.) The mental process of stereotyping is a "reflexive reaction." *School Board of Nassau County v. Arline*, 480 U.S. 273, 285 (1987). *See also, Bless v. Cook Cnty. Sheriff's Off.,* 9 F.4th 565, 572 (7th Cir. 2021); *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 584 (5th Cir. 2020); *Jespersen v. Harrah's Operating Co.*, 444 F.3d 1104, 1113 (9th Cir. 2006).

Discriminators may be unaware of their own biases. In *Miller-El II*, Justice Breyer, concurring, noticed that "unconscious internalization of racial stereotypes may lead litigants more easily to conclude that a prospective black juror is 'sullen' or 'distant', even though that characterization would not have sprung to mind had the prospective juror been white." 545 U.S. at 268. He continued,

> More powerful than those bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists allowed to serve. If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination ....

Id. at 241.

Accordingly, a determination of the central issue of intent must include consideration of all the surrounding circumstances. Indeed, employee protection cases may be based entirely on circumstantial evidence of discriminatory intent.

Bless, 9 F.4th at 572; *Alkhawaldeh v. Dow Chem. Co.,* 851 F.3d 422, 426 (5th Cir. 2017); *Mackowiak v. University Nuclear Systems, Inc*., 735 F.2d 1159, 1162 (9th Cir. 1984) (quoting *Ellis Fischel State Cancer Hospital*, 629 F.2d at 566).

Without considering any of these types of evidence, the Board held that Farrington suffered no reprisal. Its conclusion was, therefore, arbitrary and contrary to law.

STATEMENT REGARDING ORAL ARGUMENT

If this Court conducts oral argument in this matter and permits undersigned to participate, then undersigned will participate. Oral argument could facilitate the Court's understanding of the applicable provisions of the Whistleblower Protection Act (WPA) in its context within the Civil Service Reform Act (CSRA) and other whistleblower protections.

CONCLUSION

For the foregoing reasons, a*mici* ask this Court to reverse the Board's decision, declare that 5 U.S.C. § 2302(f)(2) does not apply to Farrington's disclosures, and remand this matter to the Board for further proceedings.

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ADDENDUM

5 U.S.C. § 1221(e)

5 U.S.C. § 2302(b)(8) and (f)

42 U.S.C. § 2000e-2(m)

Federal whistleblower laws using the bifurcated "contributing factor" / "clear and convincing evidence" causation standards

ADDENDUM

5 U.S.C. § 1221(e)

(e)

(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure or protected activity; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

5 U.S.C. § 2302(b)(8) and (f)

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority— ...

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant

which the employee or applicant reasonably believes evidences —

(i) any violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences —

(i) any violation (other than a violation of this section) of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; or

(C) any disclosure to Congress (including any committee of Congress) by any employee of an agency or applicant for employment at an agency of information described in subparagraph (B) that is—

(i) not classified; or

(ii) if classified—

(I) has been classified by the head of an agency that is not an element of the intelligence community (as defined by section 3 of the National Security Act of 1947 (50 U.S.C. 3003)); and

(II) does not reveal intelligence sources and methods.

(f)

(1) A disclosure shall not be excluded from subsection (b)(8) because —

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reason-

ably believed to be covered by subsection (b)(8)(A)(i) and (ii);
(B) the disclosure revealed information that had been previously disclosed;
(C) of the employee's or applicant's motive for making the disclosure;
(D) the disclosure was not made in writing;
(E) the disclosure was made while the employee was off duty;
(F) the disclosure was made before the date on which the individual was appointed or applied for appointment to a position; or
(G) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the principal job function of whom is to regularly investigate and disclose wrongdoing (referred to in this paragraph as the "disclosing employee"), the disclosure shall not be excluded from subsection (b)(8) if the disclosing employee demonstrates that an employee who has the authority to take, direct other individuals to take, recommend, or approve any personnel action with respect to the disclosing employee took, failed to take, or threatened to take or fail to take a personnel action with respect to the disclosing employee in reprisal for the disclosure made by the disclosing employee.

42 U.S.C. § 2000e-2(m)

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

Federal whistleblower laws using the bifurcated "contributing factor" / "clear and convincing evidence" causation standards:

Energy Reorganization Act (1992 ERA amendments), 42

U.S.C. §5851(b)(3);

Surface Transportation Assistance Act (STAA), 49 U.S.C. § 31105;

Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121;

Sarbanes-Oxley Act (SOX), 18 U.S.C. § 1514A;

Pipeline Safety Improvement Act (PSIA), 49 U.S.C. § 60129;

Federal Railroad Safety Act, 49 U.S.C. § 20109;

National Transit Systems Security Act (NTSSA), 6 U.S.C. §1142;

Consumer Product Safety Improvement Act (CPSIA), 15 U.S.C. § 2087;

Affordable Care Act (ACA), 29 U.S.C. § 218c;

Seaman's Protection Act (SPA), 46 U.S.C. § 2114;

Consumer Financial Protection Act (CFPA), 12 U.S.C. § 5567;

Food Safety Modernization Act (FSMA), 21 U.S.C. § 399d;

Moving Ahead for Progress in the 21st Century Act (MAP-21), 49 U.S.C. § 30171; and the

National Defense Authorization Act, 41 U.S.C. § 4712(c)(6).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 12, 2023, I caused the Corrected Brief of *Amici Curiae* to be served through this Court's electronic filing system on all counsel of record.

/s/ Richard R. Renner
Richard R. Renner

RULE 32(a)(7)(C) CERTIFICATE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

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Dated: October 12, 2023

Respectfully submitted by:

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