No. 17-1098

In the Supreme Court of the United States

JOHN C. PARKINSON,
Petitioner,
v.
DEPARTMENT OF JUSTICE,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF MICHAEL GERMAN, ROBERT KOBUS, JANE TURNER, DR. FREDERIC WHITEHURST, NATIONAL WHISTLEBLOWER CENTER, AND PROJECT ON GOVERNMENT OVERSIGHT AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Michael German, Robert Kobus, Jane Turner, and Dr. Frederic Whitehurst are former employees of the Federal Bureau of Investigation. During their tenures, they all reported misconduct at the FBI; and the ensuing investigations or litigation, as well as the repercussions they suffered, highlight the importance of robust whistleblower protections. These *amici* continue to advocate for protection of whistleblowers in the Executive Branch.

The National Whistleblower Center (NWC) is a nonprofit, non-partisan, tax-exempt, charitable organization dedicated to the protection of whistleblowers. Founded in 1988, the NWC is keenly aware of the challenges facing FBI employees who report misconduct. *See* National Whistleblower Center, *www.whistleblowers.org*. Part of the NWC's core mission is to monitor major legal developments and file amicus briefs in order to assist courts in understanding the important public-policy implications raised in many whistleblower cases. Two of the individual *amici*, Ms. Turner and Dr. Whitehurst, currently serve in leadership positions with the NWC.

The Project On Government Oversight (POGO) is a non-partisan independent watchdog organization that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. Since its inception, POGO has been at the forefront of efforts to

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[1] All parties have given their consent to the filing of *amicus* briefs. No counsel for a party authored this brief in whole or in part, and no person other than *amici*'s counsel made a monetary contribution to fund the preparation or submission of this brief.

strengthen whistleblower protection laws, including the Whistleblower Protection Enhancement Act.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This case concerns a key protection for employees at the Federal Bureau of Investigation who blow the whistle on misconduct. Federal law expressly shields whistleblowers from reprisal for protected disclosures. 5 U.S.C. §§ 2302, 2303; *see also id.* § 2301(b)(9). The Federal Circuit nonetheless held below that FBI whistleblowers who otherwise qualify to appeal certain adverse employment actions, such as termination, to the Merit Systems Protection Board (MSPB) may not claim once there that they were targeted in retaliation for blowing the whistle. That holding contravenes the statutory scheme Congress mandated for whistleblowers and exposes FBI employees to inadequate internal agency procedures. Without this Court's intervention, the Federal Circuit's decision will chill critical disclosures by would-be whistleblowers.

As Congress has recognized, whistleblowers "play a critical role in keeping our government efficient and honest." S. Rep. No. 114-261, at 1-2 (2016). Whistleblowers at the FBI, including the individual *amici*, have alerted the public to serious abuses, maintaining the American people's trust in the integrity and competence of their government. By reporting misconduct, however, whistleblowers often "risk retaliation from their employers," including "being demoted, reassigned, or fired." *Id.*

Congress has thus accorded robust safeguards to ensure that federal employees feel protected and *are* protected when they sound the alarm. As a general matter, Congress has afforded all military veterans in federal service—regardless of the agency in which the

veteran serves—heightened procedural rights, including the right to appeal certain adverse employment actions to the MSPB and to eventually seek judicial review. 5 U.S.C. §§ 7511, 7513(d), 7701. Those "preference-eligible" employees have the right to challenge before the MSPB (and on appeal) the agency's adverse employment action on the grounds that it is "not in accordance with law." *Id.* § 7701(c)(2)(C). Access to those adjudicative forums, and the attendant right to argue that the employee suffered an adverse action that violated the law, are preferences designed to "reward veterans for the sacrifice of military service." *Lathram* v. *Snow*, 336 F.3d 1085, 1093 (D.C. Cir. 2003) (quoting *Pers. Adm'r of Massachusetts* v. *Feeney*, 442 U.S. 256, 265 (1979)). No other employees in the FBI (or in a number of other agencies) possess similar rights.

Notwithstanding the right of preference-eligible employees to challenge adverse employment actions that are inconsistent with law, the Federal Circuit concluded that preference-eligible employees at the FBI—and *only* those at the FBI—cannot raise retaliation for whistleblowing as a defense in front of the MSPB. According to the Federal Circuit, retaliation for whistleblowing, despite its undisputed illegality, nevertheless does not qualify as being "not in accordance with law" under 5 U.S.C. § 7701.

That holding is illogical on its face. And it will cause serious harm by depriving preference-eligible FBI whistleblowers of a key avenue for redress. If the Federal Circuit's holding is left undisturbed, supervisors at the FBI will have a freer hand to fire a preference-eligible whistleblower for a protected disclosure, with the whistleblower barred from raising reprisal as an affirmative defense before the MSPB. There is no support in law or policy for such a result, especially

because preference-eligible whistleblowers elsewhere in the Federal Government would enjoy better protection.

The Federal Circuit's decision exposes preference-eligible FBI employees to the proven inadequacies of internal FBI and Department of Justice procedures. As is made evident by the experiences of the individual *amici* and reports by government bodies, FBI whistleblowers who rely on internal channels are, unfortunately, often met with inordinate delay, inadequate investigations, and a lack of transparency. The Federal Circuit's decision thus frustrates Congress's intent to accord special protections to veterans.

Moreover, the Federal Circuit's decision is the latest in a long line of its decisions unduly narrowing whistleblower rights in the face of Congress's best efforts to provide otherwise. To restore the congressional plan for a comprehensive and effective regime of whistleblower protections, and to address a concerning trend of Federal Circuit decisions disregarding the whistleblower protections enacted by Congress, the Court should grant the petition and reverse the judgment below.

ARGUMENT

I. The Federal Circuit's Decision Leaves Preference-Eligible FBI Whistleblowers Without Adequate Protection from Reprisal.

A. The Federal Circuit's Decision Contravenes The Plain Text Of The Statute.

In recognition of the vital role federal whistleblowers play in maintaining the public trust, federal law shields whistleblowers from retaliation for protected disclosures. Specifically, employees are protected from

reprisal if they disclose information that they reasonably believe evidences violations of law, gross mismanagement or waste, an abuse of authority, or a substantial and specific danger to public health or safety. *See* 5 U.S.C. §§ 2302, 2303.

Although these substantive protections generally remain constant for whistleblowers across various federal agencies, the procedures used to enforce this bedrock guarantee depend on the agency in which the whistleblower works and the whistleblower's position.

FBI employees, as a general matter, must rely on internal procedures promulgated by the Attorney General and specific to the FBI to enforce their right to be free from retaliation. *See id.* § 2303(b) (directing the Attorney General to promulgate regulations "to ensure" that whistleblower reprisals "shall not" occur); 28 C.F.R. Ch. I, Pt. 27. Under this statutory scheme and the implementing regulations, FBI employees generally have fewer remedies than other government employees. For instance, they do not have the right to independently "seek corrective action from" the MSPB. *See* 5 U.S.C. § 1221.

"Preference-eligible" FBI employees, however, possess a means for redress beyond internal FBI and DOJ channels. Unlike their colleagues, preference-eligible FBI employees may appeal certain adverse employment actions to the MSPB. *Id.* § 7701. Once in front of the MSPB, these employees are entitled to contend, among other things, that they suffered an adverse employment action that "was not in accordance with law." *Id.* § 7701(c)(2)(C). Preference-eligible FBI employees may also seek judicial review of adverse MSPB decisions in the Federal Circuit. *Id.* § 7703. These special protections accord with the "preferred position" of veterans in the Civil Service generally. *See*

United States v. *Fausto*, 484 U.S. 439, 449 (1988); *Feeney*, 442 U.S. at 265; *see also, e.g.*, *Jarecki* v. *United States*, 590 F.2d 670, 679 (7th Cir. 1979) ("Congress chose to encourage and reward military service by granting certain preferences to veterans who desire public employment.").

Although it is undisputed that retaliation against FBI whistleblowers is an adverse employment action that is not in accordance with law, just as the statute requires, the Federal Circuit nonetheless concluded that preference-eligible FBI employees cannot raise whistleblower reprisal before the MSPB. That holding contravenes the plain text of the statute and means that preference-eligible FBI employees who want to do the right thing face a Hobson's choice: (1) entrust their careers to internal procedures that, as explained below, are inadequate, or (2) suppress vital information about internal misconduct. Moreover, the decision may dissuade qualified veterans from enlisting in the first place in an organization where they are unprotected from reprisal.

B. As The Experience Of *Amici* Shows, The Federal Circuit's Decision Exposes Preference-Eligible Whistleblowers To Flawed Procedures Simply Because They Work At The FBI.

The troubling experiences of individual *amici*—former FBI employees who blew the whistle, suffered retaliation, and failed to obtain timely justice from internal procedures—are a testament to the danger posed by depriving FBI whistleblowers who are veterans of any means for redress beyond internal channels, notwithstanding Congress's solicitude for civil servants who risked their lives for our country.

1. It was only in 1999 that the Attorney General first promulgated final regulations pursuant to 5 U.S.C. § 2303. Before those regulations were enacted, *Amicus* Dr. Frederic Whitehurst was a Supervisory Special Agent in the FBI. He worked as a chemist and leading explosives residue examiner in the FBI's Laboratory.

Dr. Whitehurst disclosed serious misconduct and flawed techniques used by the FBI's lab. The information Dr. Whitehurst reported implicated evidence and testimony proffered in important criminal cases, including the prosecution of Mohammed Salameh, one of the 1993 World Trade Center bombers. And a 1997 report by the DOJ Inspector General substantiated "important" allegations made by Dr. Whitehurst. Dep't of Justice, Office of the Inspector General, Executive Summary, The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases (Apr. 1997).[2] The DOJ report—"a scathing 500-page study"—"blasted the famed lab for flawed scientific work and inaccurate, pro-prosecution testimony in major cases." CNN, Feb. 27, 1998.[3]

Nonetheless, after Dr. Whitehurst made his disclosures, the FBI transferred him out of his position at the FBI laboratory, forced him to undergo fitness-for-duty evaluation, placed him on administrative leave, and denied him access to FBI facilities. Dr. Whitehurst filed suit in federal court alleging whistleblower retaliation and sought an injunction, among other things, to require the President to effectuate 5 U.S.C. § 2303. Shortly thereafter, President Clinton issued a

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[2] *Available at* https://oig.justice.gov/special/9704a/index.htm.

[3] *Available at* http://www.cnn.com/US/9802/27/fbi.whitehurst/.

memorandum directing the Attorney General to promulgate the relevant regulations. William J. Clinton, Memorandum for the Attorney General, 62 Fed. Reg. 23123 (Apr. 14, 1997). Eventually, Dr. Whitehurst settled his suit and left the FBI. *See Government Settles Suit Over F.B.I. Laboratory*, N.Y. Times, July 7, 2000.[4]

2. Unfortunately, despite Dr. Whitehurst's cautionary tale, the internal FBI and DOJ procedures created by regulation have proven to be an inadequate substitute for adjudication before a neutral arbiter.

a. A 2015 report by the Government Accountability Office (GAO) reviewed the 62 FBI whistleblower retaliation complaints that the DOJ closed from 2009 to 2013. *See* U.S. Gov't Accountability Off., GAO-15-112, Whistleblower Protection: Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints 45 (2015). Of the 62 complaints closed, only *four* were adjudicated on the merits, three of which were adjudicated in favor of the whistleblower. *Id.* at 22. Each of those three reprisal complaints took at least eight years to reach resolution. *Id.*

The GAO explained that the FBI's reprisal-complaint procedures were implemented in such a way that "could deny whistleblowers access to recourse, could permit retaliatory activity to go uninvestigated, and may have a chilling effect on other potential whistleblowers."[5] *Id.* at 20.

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[4] *Available at* http://www.nytimes.com/2000/07/07/us/national-news-briefs-government-settles-suit-over-fbi-laboratory.html.

[5] Congress addressed one of the issues raised in the GAO report in the FBI Whistleblower Protection Enhancement Act of 2016 by expanding the list of persons and entities to whom an FBI

b. The experiences of the individual *amici* are consistent with the GAO's findings and starkly illustrate the serious deficiencies in the FBI's internal procedures implemented since Dr. Whitehurst's case.

Amicus former Special Agent Michael German experienced those deficiencies firsthand. Mr. German, who worked for the FBI for 16 years, enjoyed an unblemished disciplinary record and consistent exceptional performance reviews. In 2002, Mr. German learned that the FBI made an illegal recording in violation of Title III wiretap regulations during a counterterrorism investigation. Mr. German reported this misconduct within his chain of command. Over the following two years, as the Inspector General failed to investigate Mr. German's allegations or protect him from retaliation, FBI officials backdated and falsified documents to cover up the misconduct he had reported. *See* National Security Whistleblowers in the Post-September 11th Era: Lost in a Labyrinth and Facing Subtle Retaliation: Hearing Before the Subcomm. On Nat'l Security, Emerging Threats, and Int'l Relations of the H. Comm. On Gov't Reform, 109th Cong. 132-34 (2006) (Statement of Michael German). Mr. German was subsequently prevented from participating in several investigations and was barred from training other agents, and FBI inspectors soon began investigating Mr. German. *Id.* at 133.

In 2004, Mr. German reported the violations to Congress and resigned from the FBI in protest. Only *after* Mr. German *publicly* disclosed the misconduct did the DOJ Inspector General begin an investigation in earnest. *Id.* Sixteen months later, the Inspector

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employee could make a protected disclosure, including "supervisor[s] in the direct chain of command" of the whistleblower. 5 U.S.C. § 2303(a)(1)(A).

General issued a report that "validated most of Mr. German's central accusations" and found that the FBI had retaliated against him for reporting the misconduct. Eric Lichtblau, *Report Finds Cover-Up in an F.B.I. Case*, N.Y. Times, Dec. 4, 2005.[6] The FBI appealed the Inspector General's findings, but, having already resigned from the FBI, Mr. German chose not to pursue years more in costly and protracted litigation.

The experience of another *amicus*, Jane Turner, demonstrates that even where a complaint made within internal channels does spur an investigation into whistleblower reprisal, the investigation (and the whistleblower) may languish for years. In 2002, FBI Special Agent Turner—who had served at the FBI since 1978—learned that colleagues had stolen items from Ground Zero after the September 11, 2001 terrorist attacks. She reported the thefts to the DOJ Inspector General. Shortly thereafter, Ms. Turner received a negative performance review and was placed on leave and given a notice of proposed removal. Rather than have a formal termination on her record, Ms. Turner retired from the FBI. She filed a complaint of whistleblower reprisal through the FBI's internal channels, pursuant to 5 U.S.C. § 2303 and 28 C.F.R. Ch. I, Part 27. It took over 10 years for the DOJ to adjudicate Ms. Turner's complaint, and the DOJ ultimately determined that Ms. Turner was indeed unlawfully subjected to retaliation. But it was a pyrrhic victory. By the time her complaint was held to be meritorious, Ms. Turner was beyond the FBI's mandatory retirement age. *See* Joe Davidson, *Report Says Proce-*

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[6] *Available at* http://www.nytimes.com/2005/12/04/politics/report-finds-coverup-in-an-fbi-terror-case.html.

dures Put a Chilling Effect on Potential FBI Whistleblowers, Wash. Post, Mar. 3, 2015[7]; *see also* Nat'l Whistleblower Ctr., Jane Turner, https://www.whistleblowers.org/meet-the-whistleblowers/84-jane-turner. For Ms. Turner, justice delayed became justice denied.

The Kafkaesque experience of *Amicus* Robert Kobus, who waited for nearly a decade for resolution of his complaint, is yet another illustration of the internal process's problems. Mr. Kobus worked at the FBI's New York Field Office for 35 years. In October 2005, Mr. Kobus made a protected disclosure regarding some of his colleagues' abuses of the FBI's leave policy. After his disclosure, Mr. Kobus was reassigned to work alone on a deserted floor, surrounded by over 100 empty desks. Within days of his disclosure, FBI agents came to his home to take away his assigned vehicle, in front of his family. And when Mr. Kobus requested flextime to allow him to visit his dying mother, the FBI took months to process the paperwork. Although the DOJ Inspector General found in 2006 that Mr. Kobus had been unlawfully subjected to whistleblower reprisal, the matter lingered for nearly 10 years thereafter without resolution. In 2015, the DOJ Office of Attorney Recruitment and Management finally entered an order upholding the Inspector General's findings. *See* Carrie Johnson, *A Decade After Blowing the Whistle on the FBI, Vindication*, Nat'l

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[7] *Available at* https://www.washingtonpost.com/politics/federal_government/report-says-procedures-put-a-chilling-effect-on-potential-fbi-whistleblowers/2015/03/03/160b8708-c1cf-11e4-9271-610273846239_story.html.

Public Radio (Apr. 15, 2015)[8]; *see also* Nat'l Whistleblower Ctr., Robert Kobus, https://www.whistleblowers.org/meet-the-whistleblowers/1544-robert-kobus.

C. The FBI Regulations Provide Lesser Protections Than Congress Intended To Grant To Veterans.

Even if the DOJ and FBI handled whistleblower complaints perfectly, the regulatory process adopted by the Attorney General is not designed to provide the full panoply of protections that Congress chose to make available to veterans who work at the FBI. For example, preference-eligible employees have an explicit right to an on-the-record hearing before a decision is rendered by the MSPB. *See* 5 U.S.C. § 7701(a)(1), (b)(1). By contrast, under internal FBI procedures, on-the-record evidentiary hearings are discretionary and are not conducted by judges (administrative or otherwise). *See* 28 C.F.R. § 27.4(e)(3).

Indeed, preference-eligible employees receive an unparalleled procedural safeguard: the ability to appeal from the MSPB to Article III judges, first in the Federal Circuit and, if review is granted, by the Justices of this Court. See 5 U.S.C. § 7703(a). A non-preference-eligible FBI employee whose complaint is rejected, by contrast, may appeal *only* to the Deputy Attorney General, a political appointee whose work is closely connected to the FBI, which is, of course, the exact subject of the employee's disclosure. 28 C.F.R. § 27.5; *cf. CFTC* v. *Schor*, 478 U.S. 833, 848 (1986) (Article III "safeguard[s] litigants' right to have claims

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[8] *Available at* https://www.npr.org/2015/04/15/398518857/9-years-after-blowing-the-whistle-on-the-fbi-he-s-been-vindicated.

decided before judges who are free from potential domination by other branches of government") (internal quotation marks omitted).

The Federal Circuit's decision contravenes Congress's intent to accord important protections to preference-eligible FBI employees, who risked their lives for our country. If the decision stands, those employees will be forced to call upon an internal process that, even if it functioned perfectly (it does not), cannot meet the high procedural bar Congress provided veterans who work in the Federal Government.

II. Certiorari Should Be Granted To Correct The Federal Circuit's Concerning Pattern Of Unduly Narrowing Whistleblower Protections.

This Court's intercession is needed not just to correct a clear error of statutory construction in this important case, but also because the Federal Circuit's decision is part of an unfortunate pattern with respect to whistleblower safeguards. The Federal Circuit and the MSPB have continuously eroded vital whistleblower protections despite "clear legislative history and the plain language" of the relevant statutes to the contrary. S. Rep. No. 112-155, at 4 (2012). Congress has been spurred to overrule the Federal Circuit's decisions in this area with alarming frequency. Yet Congress cannot, and should not be expected to, act every time the Federal Circuit issues a clearly erroneous interpretation; the Court should thus take this opportunity to intercede and arrest this troubling trend.

1. Consider the Court of Appeals' decisions improperly narrowing the types of disclosures that qualify for whistleblower protection. As enacted, the Civil Service Reform Act protected "a disclosure" evidencing a reasonable belief of specified misconduct. 5 U.S.C. § 2302(b)(8). Congress amended the CSRA in 1989 to

make clear that *any* disclosure is protected, changing the phrase "a disclosure" to "any disclosure." S. Rep. No. 100-413 at 12-13 (1988)[9]; *see* Pub. L. No. 101-12, § 4. Congress stressed that disclosures should "be encouraged," and instructed that the MSPB and the courts "should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing." S. Rep. No. 100-413, at 13 (1988).

Unfortunately, the Federal Circuit and the MSPB did just that. As Congress found just six years later, they mounted a "steady attack on achieving the legislative mandate" with rulings limiting the types of disclosures warranting whistleblower protection. H.R. Rep. No. 103-769, at 17-18 & n.15 (1994) (listing cases).[10] In blistering language, Congress denounced the MSPB's "inability to understand that 'any' means 'any'" as "perhaps [its] most troubling precedents." *Id.* at 18.

But the Federal Circuit and MSPB did not get the message. To the contrary, Congress found in 2012, they "continued to undermine the [statute's] intended

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[9] *See* 135 Cong. Rec. H740-01, at H747 (1989) (explaining that Senate Report 100-413 is part of the "legislative history of this measure").

[10] *See Haley* v. *Dep't of Treasury*, 977 F.2d 553 (Fed. Cir. 1992) (disclosure unprotected where implicated law afforded discretion to decisionmaker); *Padilla* v. *Dep't of Air Force*, 55 M.S.P.R. 540 (M.S.P.B. 1992) (disclosures unprotected where made in grievance and equal-employment opportunity processes, memorandum alleging "fraud, waste, and abuse," and letter to congressman); *Fisher* v. *Dep't of Defense*, 52 M.S.P.R. 470, 474 (M.S.P.B. 1992) (MSPB jurisdiction is limited to "only those disclosures made outside grievance procedures and discrimination complaint processes").

meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected." S. Rep. No. 112-155, at 4-5 (2012). So Congress, once again, amended the statute to overturn "several court decisions" that failed to apply the "very broad protection required by the plain language." *Id.* at 5; *see* Pub. L. No. 112-199, Title I, § 101, overruling *Horton* v. *Dep't of Navy*, 66 F.3d 279 (Fed. Cir. 1995), and *Willis* v. *Dep't of Agriculture*, 141 F.3d 1139 (Fed. Cir. 1998). The amendments were aimed at "mak[ing] clear, once and for all, that Congress intends to protect 'any disclosure' of certain types of wrongdoing in order to encourage such disclosures." S. Rep. No. 112-155, at 5 (2012).

2. In addition, Congress has been forced to overrule "a string of restrictive Merit Systems Protection Board and federal court decisions" that made it "unduly difficult" for whistleblowers to establish a *prima facie* case. 135 Cong. Rec. 4512 (1989); *see* Pub. L. No. 101-12, § 3(a)(13). The Federal Circuit "erased the [statute's] clear legislative intent." H.R. Rep. No. 103-769, at 18 (1994); *see Clark* v. *Dep't of Army*, 997 F.2d 1466, 1473 (Fed. Cir. 1993). In response, Congress amended the statute to restore its initial intent. *See* H.R. Rep. No. 103-769, at 3 (1994); Pub. L. No. 103-424, § 4(b). Some years later, however, Congress was once again moved to dispel an erroneously restrictive Federal Circuit interpretation of the requirements for a *prima facie* case. S. Rep. No. 112-155 at 9-10, 42 (2012); *see* Pub. L. No. 112-199, § 103.

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Retaliation for whistleblowing is sadly prevalent among employees of the Executive Branch. A 2011 report by the MSPB that included survey responses

from over 40,000 executive-branch employees revealed that *over a third*—36.9%—of individuals who had reported misconduct experienced reprisal or the threat of reprisal. U.S. Merit Systems Protection Board, Blowing The Whistle: Barriers to Federal Employees Making Disclosures 10 (2011).

Notwithstanding those grim facts and Congress's mandate of whistleblower protection, the Federal Circuit has repeatedly issued cramped and erroneous interpretations of whistleblower statutes. This Court's intervention is needed to correct this pattern. Halting the diminution of protections for whistleblowers will restore the confidence of patriotic employees whose disclosures uphold the integrity of the Federal Government.

CONCLUSION

The Court should grant the petition for a writ of certiorari and reverse the judgment of the Court of Appeals.

Respectfully submitted,

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