Case No. 15-1713

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WILLIAM SMITH, Petitioner,

v.

THOMAS PEREZ, Respondent.

On petition for review from the U.S. Department of Labor, Administrative Review Board, No. 14-027

Brief of *Amici Curiae*, Metropolitan Washington Employment Lawyers Association and the Government Accountability Project

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 15-1713 Caption: Smith v. Perez

Pursuant to FRAP 26.1 and Local Rule 26.1,

Metropolitan Washington Employment Lawyers Association (MWELA) and
(name of party/amicus)

Government Accountability Project (GAP)

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☑YES ☐NO
If yes, identify entity and nature of interest:

DUKE ENERGY CAROLINAS, LLC, and ATLANTIC GROUP, INC, d/b/a DZ Atlantic, are intervenors.

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☐NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Richard R. Renner Date: 2015-11-16

Counsel for: Amici

CERTIFICATE OF SERVICE

****

I certify that on 2015-11-16 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ Richard R. Renner
(signature)

2015-11-16
(date)

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Statement of Interest

The Metropolitan Washington Employment Lawyers Association ("MWELA") is a local affiliate of the National Employment Lawyers Association. MWELA has over 300 members who represent employees in employment and civil rights litigation in Virginia, Washington, D.C., and Maryland. MWELA's purposes include promoting the efficiency of the legal system, elevating the practice of employment law, and promoting fair and equal treatment under the law. MWELA has participated in numerous cases as *amicus curiae* before this Court, the Court of Appeals for the D.C. Circuit, and the appellate courts of the District of Columbia and Maryland.

MWELA has an interest in the disposition of this case because the ARB's holding opens the door for employers to immunize themselves from whistleblower retaliation claims by requiring that all concerns must be reported immediately and through official channels. MWELA members often need time to counsel their clients about the advantages, risks and means of coming forward with compliance concerns. If a client's employer maintains a policy such as that of Duke Energy in this case, it will become exceedingly difficult to effectively counsel clients to raise their safety

concerns. Employees will face a Hobson's choice between letting a safety violation fester into a potential disaster, and losing their jobs for taking any time at all to consider whether to come forward.

The Government Accountability Project ("GAP") is a non-partisan, non-profit public interest law firm specializing in legal advocacy for "whistleblowers" - government and corporate employees who use free speech rights to challenge abuses of power that betray the public interest. GAP has a 30-year history of working on behalf of government and corporate employees who expose illegality, gross waste, mismanagement, abuse of authority, substantial or specific dangers to public health and safety, and other institutional misconduct undermining the public interest.

GAP's efforts are based on the belief that professional and dedicated employees are essential to an effective democracy. When whistleblowers encounter retaliation for speaking truth to power, safety issues can go undetected until they mushroom.

GAP has substantial expertise on protecting employees' rights, having assisted more than 5,000 whistleblowers since 1979. GAP attorneys have testified before Congress on the effectiveness of statutory protections, filed

numerous *amicus curiae* briefs on constitutional and statutory whistleblower issues, and led legislative campaigns for whistleblower protection laws.

MWELA and GAP declare that no party or party's counsel: (a) authored any portion of this Brief, or (b) contributed money that was intended to fund preparation or submission of this brief.

ARGUMENT

STANDARD OF REVIEW

The Administrative Procedure Act, 5 U.S.C. § 706(2) (2006), sets forth the standard of review for this action, as referenced in 42 U.S.C. § 5851(c)(1). The ARB's legal conclusions are reviewed *de novo*, with due deference accorded by this Court to the ARB's interpretation of § 5851, and the findings should be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (2000). *See also Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984); *Welch v. Chao*, 536 F.3d 269, 275-76 (4th Cir. 2008).

SUMMARY OF ARGUMENT

The ARB held that employers may lawfully fire whistleblowers for violating a company policy requiring disclosures of safety violations to be

made immediately. This holding will discourage employees from raising safety concerns as it allows employers to impose discipline based on the time or manner of making the disclosure. As employee tips are a key source of detecting frauds and other misconduct, the ARB's holding will increase the risk that safety issues will fester into catastrophes.

William Smith discovered that his colleague, Chris Borders, had signed a log showing that she had performed inspections before those inspections were actually performed. Consistent with company practice, he disclosed the violation to a co-worker, Pence, and directed Pence to correct it, to no avail. A week later, Duke officials interviewed Smith about why Borders had made a false complaint of sexual harassment against him. Smith disclosed his concern about Border's falsification of the log. Smith elevated his concerns to Duke managers. Duke suspended his access to the facility and DZA thereafter fired him for taking too long to elevate that disclosure.

The ARB's holding failed to apply properly the statutory requirement for an employer's "same-decision" defense. It missed the crucial fact that Border's sexual harassment accusation was a consequence of Smith's protected activity of telling Pence to correct the log. Moreover, Smith would

not have been fired had he chosen to stay quiet about his concern. Coworkers seeing Smith get fired would reasonably conclude that they could also be fired if they raise a safety concern. That is the chilling effect the ERA's employee protection was enacted to prevent.

The ARB holding also goes against its long-established precedents that bar enforcement of employer limits on the time and manner of protected disclosures. Whistleblowers must be protected in making their disclosures when they are ready, and through the channels they believe will be effective, as long as they are not so disruptive as to damage "shop discipline."

The majority decision below impermissibly modifies the exception Congress set for protecting safety disclosures. Through 42 U.S.C. § 5851(g), Congress required a finding that the employee intentionally caused the violation to deny whistleblower protection. There is no dispute that Smith did not falsify the log. His actions consistently sought its correction.

If the ARB determines that a delay in reporting can result in a denial of protection, it must recognize its prior holdings, explain its reasons for changing its policy, and adopt its new policy with an explanation of how it will comport with the remedial purpose of encouraging employees to make

protected disclosures. *Amici* offer a set of factors that would be appropriate to consider in distinguishing (1) an irresponsible breach of duty to report an imminent danger from (2) genuine protected activity.

I. THE ARB'S HOLDING FAILS TO PROPERLY APPLY THE "CLEAR AND CONVINCING" STANDARD FOR THE EMPLOYER'S SAME-DECISION DEFENSE.

A. Congress made the decision to elevate the standard of proof for employer defenses, accepting that some undeserving whistleblowers would find protection to assure that deserving whistleblowers would also be protected.

Even before the "clear and convincing" standard for an employer's defense was added to the ERA, Congress required that standard for the 1989 federal Whistleblower Protection Act (WPA). Under 5 U.S.C, § 1221(e)(2), once a federal employee shows that protected activity was a contributing factor in an adverse action, the agency cannot thereafter prevail unless it proves by clear and convincing evidence that it would have taken the same adverse action absent the protected conduct. The Supreme Court has imposed the "clear and convincing" standard only in cases involving the protection of interests that are "far more precious than any property right." *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982) (termination of parental

rights); *see also, e.g.*, *Addington v. Texas*, 441 U.S. 418, 424 (1979) (requiring interests "more substantial than mere loss of money"). It is a heightened standard of proof that "concede[s] the possibility of error" but "ensure[s] that the error is generally in one direction." Ralph K. Winter, Jr., *The Jury and the Risk of Non-persuasion*, 5 Law & Soc'y Rev. 335, 339-40 (1971); cf. 4 William Blackstone, Commentaries *352 ("[B]etter that ten guilty persons escape, than that one innocent suffer.").

In 1994, Congress adopted the same "clear and convincing" standard for the ERA, now codified at 42 U.S.C. § 5851(b)(3)(D) ("Relief may not be ordered … if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.").[1] "For employers, this is a tough standard, and not by accident. Congress appears to have intended that companies in the nuclear industry face a difficult time defending themselves." *Stone & Webster Eng. Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997).

Explaining the purpose of the elevated burden in *Whitmore v. Dep't of Labor*, 680 F.3d 1353 (Fed. Cir. 2012), the Federal Circuit stated that the

[1] The ARB has noted that the ERA burdens are modeled on the WPA. *Bechtel v. Competitive Techs., Inc*., ARB No. 09-052, ALJ No. 2005-SOX-033, p. 24, n.124 (ARB Sept. 30, 2011).

law seeks to balance the public interest of protecting whistleblowers with an eye toward the inherent advantages agency management would otherwise have:

> The laws protecting whistleblowers from retaliatory personnel actions provide important benefits to the public, yet whistleblowers are at a severe evidentiary disadvantage to succeed in their defenses. Thus, the tribunals hearing those defenses must remain vigilant to ensure that an agency taking adverse employment action against a whistleblower carries its statutory burden to prove—by clear and convincing evidence—that the same adverse action would have been taken absent the whistleblowing.

Whitmore, 680 F.3d at 1377. "Congress intended to be protective of plaintiff-employees." *Araujo v. New Jersey Transit Rail Operations, Inc*., 708 F.3d 152, 160 (3d Cir. 2013) (Federal Rail Safety Act case).

The Department of Labor explained the burden as follows in connection with the Federal Rail Safety Act:

> Once the complainant establishes that the protected activity was a contributing factor in the adverse action, the employer can escape liability only by proving by clear and convincing evidence that it would have reached the same decision even in the absence of the prohibited rationale. 75 Fed. Reg. 53,524-25 (Aug. 31, 2010).

The ARB has fully embraced the "clear and convincing" standard,

imposing it in the adjudication of any case in which protected activity was a contributing factor. *Powers v. Union Pacific Railroad Co*., ARB No. 13-034, ALJ No. 2010-FRS-30, (ARB Mar. 20, 2015) (en banc); *Speegle v. Stone & Webster Construction, Inc.*, ARB No. 13-074, ALJ No. 2005-ERA-6 (ARB Apr. 25, 2014).

B. When the employer punishes a whistleblower for the time or manner of making a protected disclosure, it must have an exceedingly difficult burden to show that it would have imposed the same adverse action in the absence of the protected activity.

In *Whitmore*, the Federal Circuit held that despite the employee's admittedly egregious workplace conduct, the employer did not satisfy its burden of showing it would have imposed the same adverse action. In that case, the employee's workplace conduct included the following:

> Whitmore put his foot in the way and told Dubois that if he ever spit on him again, he would "knock him into the basement." *** In the hallway Whitmore encountered Dave Schmidt, director of OSA, standing in a narrow passageway between a wall and some filing cabinets. *** Whitmore claimed Schmidt would not allow him to pass to Goddard's office. Whitmore then physically pushed past Schmidt while yelling "get out of my way," and possibly also spit on Schmidt. Whitmore expressed that he was so angry he "could have just cold cocked [Mr.

> Schmidt] right then and there" for blocking his way out of the area.

Whitmore, 680 F.3d at 1360. This conduct is much worse than William Smith's action of disclosing Border's falsification during a management interrogation.

Significantly, the Federal Circuit recognized that Whitmore's protected activity contributed to the leave-balance dispute that was central to the articulated reason for his termination.[2] *Id*. at 1364. The Federal Circuit found:

> Congress decided that we as a people are better off knowing than not knowing about such violations and improper conduct, even if it means that an insubordinate employee like Mr. Whitmore becomes, via such disclosures, more difficult to discipline or terminate. Indeed, it is in the presence of such non-sympathetic employees that commitment to the clear and convincing evidence standard is most tested and is most in need of preservation.
>
> *Id*. at 1377.

This is the holding that the ARB majority failed to apply correctly. It is precisely because Smith's protected activity is central to Duke's stated

[2] Judge Royce's dissent, p. 13, notes that Border's false accusation of sexual harassment by Smith was also a consequence of Smith's efforts to correct the fire watch log.

reason for firing him that Duke cannot meet the "clear and convincing" standard.[3]

II. THE ARB'S HOLDING DEVIATES FROM LONG-ESTABLISHED PRECEDENT BARRING EMPLOYERS FROM ENFORCING LIMITS ON PROTECTED ACTIVITIES.

A. The ARB and courts have long prohibited enforcement of employer rules that limit the means or channels of raising concerns.

The Department has long frowned upon employer restrictions on the time or manner of raising compliance concerns. These restrictions limit a protection that Congress has established by law.

ARB precedent has denied enforcement of restrictions on the mode or channels of reporting. Once the law protects a disclosure, it does not permit a chain of command reporting requirement. In raising safety concerns, employees are under no obligation to report their concerns to their

[3] It is well established that a whistleblower's motive for disclosing the violation is immaterial to the legal protection for that disclosure. *Lassin v. Michigan State University,* 93-ERA-31 (ALJ Sept. 29, 1993) (seeking information); *Smith v. Western Sales & Testing*, ARB No. 02 080, 2001 CAA 17 (ARB Mar. 31, 2004)(stopping paint damage to personal vehicle); *Hasan v. Sargent & Lundy*, 2000 ERA 7 (ALJ Dec. 5, 2002) (allegedly to obtain more work correcting the violation); *Immanuel v. Wyoming Concrete Industries, Inc.*, 95-WPC-3 (ARB May 28, 1997) (allegedly to establish a basis to claim protected activity for a retaliation claim).

supervisors. *Fabricus v. Town of Braintree*, 97-CAA-14, D&O of ARB, at 4 (February 9, 1999)[4] (collecting cases); *Talbert v. Washington Public Power Supply Sys.*, 93-ERA-35, D&O of ARB, at 8 (Sept. 27, 1996) ("chain of command" restrictions on reporting concerns would "seriously undermine the purpose of whistleblower law"). Accordingly, the Department has adopted the following rule: "an employer may not with impunity, discipline an employee for failing to follow the chain-of-command, failing to conform to established channels, or circumventing a superior, when the employee raises an environmental health or safety issue." *Leveille v. New York Air Nat'l Guard*, 94-TSC-3/4, D&O of Remand by SOL, at 16-17 (Dec. 11, 1995). Consequently, taking adverse action against an employee merely because the employee "circumvented the chain of command" constitutes a violation of the whistleblower protection statutes. *Dutkiewicz v. Clean Harbors Envtl. Servs.*, 95-STA-34, D&O of ARB, at 7 (Aug. 8, 1997), *aff'd*, *Clean Harbors Envtl. Servs. v. Herman*, 146 F.3d 12 (1st Cir. 1998); *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 565 (8th Cir. 1980).

In this vein, employees are protected even if they go "around

[4] Available at http://www.oalj.dol.gov/Public/WHISTLEBLOWER/DECISIONS/ARB_DECISIONS/CAA/97CAA14C.HTM

established channels" in bringing forward a safety complaint; go "over" their "supervisor's head" in raising a concern, *Nichols v. Bechtel Construction, Inc.*, 87-ERA-44, D&O of SOL, at 17 (Oct. 26, 1992); violate or fail to follow the workforce "chain of command" or normal procedure, *McMahan v. California Water Quality Control Board*, 90-WPC-1, D&O of SOL, at 4 (July 16, 1993); *Brockell v. Norton*, 732 F.2d 664, 668 (8th Cir. 1984); or refuse to disclose information they confidentially told the government. *Saporito v. Florida Power & Light Co.*, 89-ERA-7/17, SOL Remand Order, at 5, n. 4 (June 3, 1994).

Reviewing *Nichols*, the Eleventh Circuit explained:

> Even without *Chevron,* it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws. *See, e.g., Jones v. Metropolitan Atlanta Rapid Transit Auth.,* 681 F.2d 1376, 1380 (11th Cir. 1982) . . .. The Secretary's interpretation promotes the remedial purposes of the statute and avoids the unwitting consequence of preemptive retaliation, which would allow the whistleblowers to be fired or otherwise discriminated against with impunity for internal complaints before they have a chance to bring them before an appropriate agency. *See, e.g., Macktal v. Secretary of Labor,* 923 F.2d 1150, 1152 (5th Cir.1991).

Bechtel Const. Co. v. Sec'y of Labor, 50 F.3d 926, 932-33 (11th Cir. 1995).

The ability of an employee to communicate directly with corporate, law enforcement or regulatory authorities is a critical component of employee whistleblowing.

The ARB has also rejected defenses based on a whistleblower's violation of company policies about the confidentiality of information. In *Vannoy v. Celanese Corp*., ARB No. 09-118, ALJ No. 2008-SOX-64 (ARB Sept. 28, 2011), pp. 15-17, the ARB explained how Congress clearly intended that employees would be protected in "lawfully" collecting inside information about violations of law, even though the conduct, "may have violated company policy[.]"[5] The law on the scope of protection trumps company policies that would punish what the law protects.

B. The ARB and courts have long required protected activity to upset "shop discipline" to lose protection.

As to the manner of raising protected concerns, the Secretary of Labor held that, "[t]he right to engage in statutorily-protected activity permits some

[5] Courts have held that collecting evidence can be protected under other laws. *Grant v. Hazelett Strip-Casting*, 880 F.2d 1564, 1570 (2nd Cir. 1989)(finding protected activity in attempting to gather evidence for a future lawsuit); *Niswander v. Cincinnati Insurance Co*., 529 F.3d 714, 728 (6th Cir. 2008)(delivery of documents in discovery is protected if the employee reasonably believes the documents support the claim of a violation of law); *Quinlan v. Curtiss-Wright Corp*., 204 N.J. 239 (2010) (New Jersey Law Against Discrimination).

leeway for impulsive behavior, which is balanced against the employer's right to maintain order and respect in its business by correcting insubordinate acts." *Kenneway v. Matlack*, 1988-STA-20 (Sec'y June 15, 1996), slip op. at 3.

> A key inquiry is whether the employee has upset the balance that must be maintained between protected activity and shop discipline. The issue of whether an employee's actions are indefensible under the circumstances turns on the distinctive facts of the case. *Id.* (citations omitted).[6] Dissenters and whistleblowers rarely win popularity contests or Dale Carnegie awards. They are frequently irritating and unsettling. These qualities, however, do not necessarily make their views wrong or unhelpful, and the Supreme Court has concluded that it is in the public interest and consonant with the First Amendment for them to express opinions on subjects of public concern without fear of retaliation.

Greenberg v. Kmetko, 840 F.2d 467, 477 (7th Cir. 1988) (*en banc*) (Cudahy,

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[6] In *Moravec v. H C & M Transp., Inc.,* 90-STA-44 (Sec'y Jan. 6, 1992), the Secretary of Labor found that the employee's impulsive behavior of "hollering and shouting" at supervisor during a discussion about his complaint was not sufficient to justify discipline. *Moravec*, slip op. at 8-10. *Martin v. Dep't of the Army,* 93-SDW-1 (Sec'y July 13, 1995) arose under the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i). The protected activity consisted of complaints to supervisors and to the Army Inspector General about claimed violations of SDWA. The Secretary found that the employee's conduct was disruptive, but "not indefensible under the circumstances." The employee conduct in *Whitmore* was even more egregious, yet the Federal Circuit said it did not permit the employer to engage in retaliation.

J., dissenting); *see also Lajoie v. Envtl. Mgmt. Sys., Inc.*, 1990-STA-3 (Sec'y Oct. 27, 1992) (where a complainant who has engaged in a protected activity also engages in spontaneous intemperate conduct privately communicated over the telephone, the intemperate conduct does not remove the statutory protection nor provide the respondent with a legitimate, nondiscriminatory reason for adverse action.); *NLRB v. Mueller Brass Co.,* 501 F.2d 680, 685-6 (5th Cir. 1974) (termination unjustified where employee called supervisor a "damn liar" and invited him to "step outside" to settle matters because outburst was provoked).

In contrast, Mr. Smith's conduct consists of responding honestly to a management interrogation about why Borders would make a false claim against him. Providing his honest answers in a management investigation is nowhere close enough to the boundary of disruption to warrant a denial of protection.[7]

[7] Indeed, the Supreme Court has specifically recognized that disclosing sexual harassment in response to a management investigation is protected under Title VII's opposition clause. *Crawford v. Metro. Gov't of Nashville and Davidson County*, 555 U.S. 271, 277-78 (2009).

C. The ARB's holding here deviates from the established precedent without acknowledgment or explanation.

1. Agencies are required to acknowledge their prior precedent, and explain their reasons when they change policy.

The Department of Labor is permitted to modify its regulations to reflect any policy permitted by law. *FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 513-14 (2009). In doing so, however, it must provide "a reasoned analysis for the change." *Id*. at 514 (quoting *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U. S. 29, 42 (1983)). In *FCC v. Fox*, the Court added:

> To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it is changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. *See United States v. Nixon*, 418 U. S. 683, 696 (1974).

Id. at 515.

2. The ARB's decision fails to comply with the requirements for a change in policy

Here, the ARB majority fails to recognize that its holding unravels Departmental policy established in *Siemaszko*, *Fabricus*, *Moravec*, *Martin*,

Leveille, *Vannoy* and the Fairfax memo. This failure, alone, warrants granting the petition for review and remanding for an explanation of this sudden departure from prior policy.

III. THE ARB'S HOLDING FAILS TO COMPORT WITH 42 U.S.C. § 5851(g) BY CREATING A NEW EXCEPTION TO THE ERA'S WHISTLEBLOWER PROTECTION.

Congress made its own assessment of what employee misconduct should deprive that employee of protection under the ERA. In 42 U.S.C. § 5851(g) (Section 211(g) of the ERA), Congress provides:

> Subsection (a) shall not apply with respect to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of this Act or of the Atomic Energy Act of 1954, as amended.

In *Siemaszko v. First Energy Nuclear Operating Co. Inc*., ARB No. 09-123, ALJ No. 2003-ERA-13 (ARB Feb. 29, 2012), the ARB expressed reticence about applying Section 211(g). The ARB noted that it would be "cognizant of the need to exercise caution in application of the § 211(g) affirmative defense to avoid undermining the broader remedial purpose of the statute." *Id*. at 12. The ARB held that the three elements of a § 211(g) affirmative defense are that (1) the complainant caused a violation of the

ERA or Atomic Energy Act; (2) the violation was deliberate; and (3) the conduct occurred without the employer's direction. *Id*. at 12. Even when the employee was criminally convicted of lying to NRC investigators to cover up violations,[8] that conviction would only establish elements (1) and (2). *Id*. at 12

Here, William Smith did not falsify the firewatch log and did not cause others to make any false entries. Indeed, when he discovered that Borders had left before completing the inspection she had signed for, Smith directed Pence to correct the log. ARB Final Order, p. 4. While the ARB's majority focused on its finding that Smith deliberately delayed his disclosure of the violation, its analysis failed to address the fact that Smith himself did not cause the violation.

It is simply improper for the ARB to enact and enforce a new exception for ERA's whistleblower protection. Congress limited the conditions for denying whistleblower claims to employees who caused the violation that is being disclosed. 42 U.S.C. §5851(g). Courts may not ignore the plain, unambiguous language of a statute where it achieves its intended purpose merely because it has additional unintended consequences. *See*

[8] *See United States v. Siemaszko*, 612 F.3d 450 (6th Cir. 2010).

Brogan v. United States, 522 U.S. 398, 403 (1998) ("[I]t is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy -- even assuming that it is possible to identify that evil from something other than the text of the statute itself."); *see also Thompson v. Goetzmann,* 337 F.3d 489, 493 (5th Cir. 2003) ("[W]e reiterate that the courts are not in the business of amending legislation. If the plain language of the [] statute produces the legislatively unintended result claimed by the government, the government's complaint should be addressed to Congress, not to the courts, for such revision as Congress may deem warranted, if any.").

IV. WHISTLEBLOWER PROTECTIONS WILL FAIL IN THEIR PURPOSE OF ENCOURAGING EMPLOYEES TO RAISE SAFETY CONCERNS IF EMPLOYERS CAN PUNISH THEM FOR FAILING TO MEET EMPLOYER DEADLINES FOR RAISING THEIR CONCERNS.

A. The purpose of the employee protection in the Energy Reorganization Act (ERA) and other whistleblower laws is to encourage employees to raise safety and compliance concerns.

In its recent whistleblower decision, *Lawson v. FMR LLC*, 134 S. Ct. 1158 (2014), the Supreme Court demonstrated that the purpose of a statute is

a vital part of a textual analysis. For each of the 22 whistleblower statutes through which Congress has given the Department of Labor responsibility to adjudicate whistleblower retaliation claims,[9] some public safety, environmental, or financial interest is at stake. Whistleblower protection statutes "should be liberally interpreted to protect victims of discrimination and to further its underlying purpose of encouraging employees to report perceived . . . violations without fear of retaliation." *Fields v. Florida Power Corp.*, ARB No. 97-070, ALJ No. 96-ERA-22, at 10 (ARB Mar. 13, 1998); *see also*, *English v. Gen'l Elec. Co.*, 496 U.S. 72 (1990); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 932 (11th Cir. 1995) ("it is appropriate to give a broad construction to remedial statutes such as nondiscrimination provisions in federal labor laws"). When interpreting a case under the employee protections, there is a need for "broad construction" of the statutes in order to effectuate their purposes. *DeFord v. Sec'y of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). "Narrow" or "hypertechnical" interpretations to these laws, are to be avoided as undermining Congressional purposes. *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985).

Especially in the nuclear power industry, "[i]f employees are coerced

[9] A list is available at: http://www.whistleblowers.gov/statutes_page.html

and intimidated into remaining silent when they should speak out, the result can be catastrophic." *Rose v. Sec'y of Dep't of Labor*, 800 F.2d 563, 565 (6th Cir. 1986).

B. Employer rules setting a time limit, or requiring immediacy, in reporting concerns discourage employees from coming forward.

Through a May 12, 2012, memorandum by Deputy Assistant Secretary Richard Fairfax (known as the "Fairfax memo"),[10] the Department of Labor listed common and potentially discriminatory practices that discourage railway workers from reporting injuries. The first listed practice was blaming the worker for causing the injury that the worker reported.

> In another situation, an employee who reports an injury or illness is disciplined, and the stated reason is that the employee has violated an employer rule about the time or manner for reporting injuries and illnesses. Such cases deserve careful scrutiny. Because the act of reporting the injury directly results in discipline, there is a clear potential for violating section 11(c) [29 U.S.C. § 660(c)] or FRSA [Federal Rail Safety Act, 49 U.S.C. § 20109].[11]

If the Department can recognize that a railroad's punishment of a worker for reporting an injury too late can be discriminatory, then surely it

[10] Available at https://www.osha.gov/as/opa/whistleblowermemo.html

[11] *Id*. On August 3, 2007, Congress enhanced the FRSA pursuant to recommendations of the 9/11 Commission. Pub. L. 110–53, title XV, § 1521, 121 Stat. 444; H.R. REP. NO. 110-336, at 39 (2007).

can recognize that nuclear plant employees also need protection from reprisals justified by "an employer rule about the time or manner for reporting[.]"[12]

A key issue for prospective whistleblowers will be the assessment of the employer's intent. If the employees perceive management as wanting to punish whistleblowers, and using the time and manner rules as a ruse, that will discourage workers from coming forward. The material point of view is from the mind of the cautious employee. These are the ones who can be persuaded to come forward through adjudications that give confidence in the statutory protections.

C. Employees who have discovered a possible violation often need time to determine if a violation exists, and whether they will risk their careers by disclosing their concerns.

Sometimes employees may, through the performance of their regular duties, notice an irregularity or curiosity that, standing alone, would not indicate a reportable violation. However, as a chain of events unfolds, the employee might gradually realize that a safety violation was committed, a fraud is afoot, or a disastrous accident is looming. Enforcement of an

[12] Quoting Fairfax Memo.

employer's "report immediately" rule will discourage these thoughtful employees from disclosing what needs to be addressed.

Indeed, taken to its logical conclusion, the ARB's holding effectively creates a Zeno's paradox in which (a) the employer requires that employees report safety and compliance issues immediately, (b) an employee reports a safety or compliance issue, and (c) the employer fires the employee because the employee could have, and was required to, report the concern earlier.[13] No matter how fast the employee reports a concern, the employer could point out that it could have been reported in half the time.

Courts have recognized that these employees who discover wrongdoing deserve protection from their first moment of detection and throughout their efforts to get to the bottom of the compliance issue. For example, the False Claims Act protects employees who are collecting information about a possible violation, "before they have put all the pieces of the puzzle together." *Accord, U.S. ex rel. Yesudian v. Howard Univ.*, 153 F.3d 731, 739-40 (D.C. Cir. 1998). The Fifth Circuit recently recognized

[13] One of Zeno's paradoxes argued that since a racer must travel half the distance to the finish line, no matter how close the finish line is, a racer could never reach it. This argument against the existence of infinity stymied mathematics for two millennia until the advent of calculus. The ARB's holding here will stymie whistleblower protections if it is not reversed.

that:

> an employee who is providing information about potential fraud or assisting in a nascent fraud investigation might not know who is making the false representations or what that person is obtaining by the fraud; indeed, that may be the point of the investigation. Leaving those employees unprotected would have grave consequences for the statutory scheme of employee protection embodied in § 1514A and would do so in a way that appears completely unrelated to whether a belief actually is reasonable.

Wallace v. Tesoro Corp., 796 F.3d 468, 480 (5th Cir. 2015). If employees felt rushed to make reports quickly to avoid discipline, company and law enforcement personnel might have to investigate more unmeritorious claims. Some of these employees may seek legal counsel, and the statutory goal would be frustrated if attorneys had to caution employees about the risk of discipline for any delay in reporting. Affirming the ARB decision below would undo the holdings in *Yesudian* and *Wallace*. When employees make a protected disclosure, the employer could point to the time between the first clue and the final disclosure and fire the employee for that delay.

D. Congress specifically prohibited courts from denying protection to federal sector whistleblowers because of delays in making reports.

The 1994 amendment to the ERA is based on the 1989 Whistleblower Protection Act (WPA), which first enacted the "clear and convincing" standard for the same-decision defense. Congress strengthened the WPA in response to agency and court decisions that established restrictions on what disclosures would be protected. S. Rep. No. 103-358, at 8-10 (1994) (criticizing the Federal Circuit's "construction of the legislative history" and declaring that "the Board and the courts should not erect barriers to disclosures which will limit the necessary information from employees who have knowledge of ... wrongdoing."). Congress reaffirmed its intent to protect *all* disclosures that an employee reasonably believes evidence a violation of law or a danger to public health or safety. In articulating this intent, Congress specifically declared that it:

> intends that disclosures be encouraged. The OSC, the Board 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. For example, it 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 . . .

S. REP. NO. 100-413, at 13 (1989).

In 2012, Congress was again frustrated with judicial limits that denied remedies to whistleblowers. In passing the Whistleblower Protection Enhancement Act ("WPEA"), Congress stated that 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." S. REP. NO. 112-155, at 5 (2012). Congress added 5 U.S.C. § 2302(f)(1)(F) declaring:

> A disclosure shall not be excluded from subsection (b)(8) because—
>
> (F) of the amount of time which has passed since the occurrence of the events described in the disclosure.

It is ironic that the ARB majority would adopt the opposite rule so soon after Congress made its intentions so clear.

E. Corporations depend on internal disclosures to detect misconduct, and their compliance programs depend on encouraging their own employees to come forward.

The United States Chamber of Commerce recognizes internal reporting as its preferred method of whistleblowing, because of the need to prevent violations of the law in the workplace. It made these comments to

the Securities and Exchange Commission on implementation of Section 21F of the Securities Exchange Act in December of 2010 (pp. 3-4):

> Effective compliance programs rely heavily on internal reporting of potential violations of law and corporate policy to identify instances of non-compliance. These internal reporting mechanisms are cornerstones of effective compliance processes because they permit companies to discover instances of potential wrongdoing, to investigate the underlying facts, and to take remedial actions, including voluntary disclosures to relevant authorities, as the circumstances may warrant… Moreover, if the effectiveness of corporate compliance programs in identifying potential wrongdoing is undermined, their attendant benefits, such as promotion of a culture of compliance within corporations, as well as their value to enforcement efforts, will likewise be diminished.[14]

The Chamber went on to state that when it comes to malfeasance, companies are "dependent on internal reporting of such instances," and that these companies are "best positioned to quickly and effectively investigate potential wrongdoing …. Thus, individuals with relevant information should be incentivized to utilize internal reporting mechanisms, rather than discouraged from doing so." *Id.* at 5.

The Sixth Circuit addressed this issue in a comparable nuclear

[14] Full text of the Chamber's comments can be found at http://www.sec.-gov/comments/s7-33-10/s73310-110.pdf

whistleblower case:

> Under this antidiscriminatory provision, as under the NLRA, the need for broad construction of the statutory purpose can be well characterized as "necessary 'to prevent the [investigating agency's] channels of information from being dried up by employer intimidation,' " *NLRB v. Schrivener*, 405 U.S. 117, 122, . . . (1972) . . ..

DeFord v. Sec'y of Labor, 700 F.2d 281, 286 (6th Cir. 1983).

This Court has recognized that when an employee engages in protected activity over a period of time, each such act is protected. *Carter v. Ball*, 33 F.3d 450, 460 (4th Cir. 1994) ("Carter filed several EEO complaints, including one on September 26, 1988 and another on February 9, 1990, thus engaging in a protected activity."). By applying the statutory protections to safety disclosures, regardless of the time or manner, these courts encourage employees to come forward and raise concerns that can lead to proactive measures enhancing everyone's safety.

V. REMAND IS NECESSARY TO ALLOW THE ARB TO CONSIDER ITS PAST POSITIONS, EXPLAIN ITS REASONS FOR A CHANGE IN POLICY AND ARTICULATE A POLICY THAT WILL ENCOURAGE EMPLOYEES TO RAISE CONCERNS.

A. To avoid discouraging employees from raising legitimate safety concerns, the ARB must limit the "safety" exception to whistleblower protection to disclosures that actually require a rapid disclosure.

Judge Corchado's concurring opinion does raise a compelling scenario for those times when we need firewatchers to make a rapid disclosure. An employee hired to watch for and report actual fires cannot use a whistleblower protection to defend against a failure to report a fire in time to suppress it. That is, admittedly, indefensible.

However, that is not the situation Smith was in. Smith took immediate corrective action to make the fire log accurate. He had no reason to believe that irreparable injury was likely to result from his not making an additional report of the false log entry. The ERA, like all whistleblower protections, seeks to encourage employees to report violations. Its effect can be most pronounced for the employee who is concerned about reprisal, but also concerned about the public safety dangers that can flow if a violation is

never disclosed.

It is now well recognized that protected activity can overlap an employee's official job duties. Indeed, many employers laudably maintain safety and compliance programs to detect and correct violations. While the employer may have legitimate interests in regulating the time and manner of pursuing compliance issues by these dedicated compliance officers, it is quite a different context when an employer requires all its employees to make disclosures through certain means or at certain times.

Merely because the employer chooses to make protected activity a duty does not alter the statutory protection or its prohibitions on restricting the time or manner of making disclosures. If a new exception to whistleblower protection is going to be recognized, it needs to be narrowly drawn to avoid discouraging legitimate whistleblower disclosures, and it needs to comport with the statutory burden of proof.

B. A multi-factored assessment would better protect the public from wrongful delays in reporting safety violations, while simultaneously encouraging employees to raise safety concerns.

Amici offer the following non-exhaustive list of factors the ARB might consider on remand in assessing whether an employee's conduct was

so indefensible as to warrant a denial of whistleblower protections. The ARB, of course, would still be bound to require the employer to prove, by "clear and convincing evidence" that it would have fired Smith "in the absence of such [protected] behavior." 42 U.S.C. § 5851(b)(3)(D).

a. Is the rule reasonably crafted to encourage, and not discourage, employees considering whether to make a disclosure about a violation or danger?

b. Does the rule allow a reasonable time for an employee to make a disclosure under the totality of circumstances?

c. Has the employer conducted training of the employee to demonstrate the employer's commitment to encourage the disclosures? Employers who are truly concerned about receiving reports in a particular time can conduct effective training to make employee reporting routine, rather than notorious.

d. Is it the employee's principal duty to make the type of disclosure at issue?

e. How likely is it that harm will flow from a delay in disclosure?

f. Is the harm from a delay obvious to the employee?

g. Do the circumstances permit other employees to infer that the employer's intent is to discourage other employees from engaging in protected activity?

As with other mixed questions of law and fact, no one factor will be controlling in every case, and the assessment must be based on the totality of circumstances.

The issues must be addressed from the employee's point of view because the law seeks to encourage employees to make disclosures. The ARB fully developed this "reasonable belief" doctrine in *Sylvester v. Parexel Int'l*, ARB No. 07-123, 2011 WL 2165854 (ARB, May 25, 2011). If the circumstances do not make the need for prompt reporting obvious to the employee, then there should be no time limit on protected activity. Stated another way, if the employee has a reasonable basis to believe that the disclosure is made in a reasonable time, then the report must still be protected to encourage the employee to make the report. Employers may conduct training to assure that all employees are aware of the consequences of their delays in making reports.

A key issue for prospective whistleblowers will be the assessment of

the employer's intent. If the employees perceive management as wanting to punish whistleblowers, and using the time and manner rules as a vehicle to accomplish this goal, that will discourage workers from coming forward. This reasoning in *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), guides assessments about which employer actions are materially adverse enough to be actionable. If other employees are intimidated, then the mission of ERA's employee protection has failed.

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.

If the influence of legal and illegal motives cannot be separated, the employer will fail in its affirmative defense. *Mandreger v. The Detroit Edison Co*., 88-ERA-17 (Sec'y Mar. 30, 1994). When the employer's evidence for its action is "inextricably intertwined" with the complainant's causation evidence, such that the competing evidence could not be separated, the ARB has held that the employer "bears the risk that the

influence of legal and illegal motives cannot be separated." *Abdur-Rahman v. Dekalb Cnty.*, ARB No. 08-003; ALJ No. 2006-WPC-002, slip op. at 12, 15 (ARB May 18, 2010). Accord *Pogue v. Dep't of Labor*, 940 F.2d 1287, 1291 (9th Cir. 1991) ("It is well-settled that '[i]n dual motive cases, the employer bears the risk that the influence of legal and illegal motives cannot be separated.'").

CONCLUSION

Amici urge this Court to grant the petition for review and remand this matter to the ARB for further proceedings consistent with this Court's opinion.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 16, 2015, I caused the foregoing Brief of *Amici Curiae*, to be served through this Court's electronic filing system on all counsel of record.

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