No. _____

In The
# Supreme Court of the United States

## UNITED STATES EX REL. MUGE CODY,
*Petitioner*,

v.

## MANTECH INTERNATIONAL CORPORATION,
*Respondent*.

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

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Court articulated standards for reviewing an appellate court's reversal of a jury verdict under Federal Rule of Civil Procedure 50(b). The Court emphasized that in reviewing a motion for judgment as a matter of law "the court should review all the evidence … and the court must draw all favorable inferences in favor of the non-moving party, and it may not make credibility determinations or weigh the evidence."

The question presented is whether the appellate court erred in not applying the Reeves standards in a case brought under the False Claims Act and the Defense Contractor Whistleblower Protection Act and erred in reversing the jury verdict in favor of Muge Cody and subsequently reversing the trial court's denial of the employer's Rule 50 motion for a judgment as a matter of law.

## PARTIES TO THE PROCEEDINGS

Petitioner in this Court is Muge Cody who was plaintiff in the district court and plaintiff-appellee in the court of appeals. Kevin Cody was a plaintiff in the district court and plaintiff-appellee in the court of appeals but is not a party before this Court.

Respondent in this Court is ManTech International Corporation, which was the defendant in district court and defendant-appellant in the court of appeals.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Muge Cody is an individual.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Muge Cody respectfully requests this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, entered in this case on August 8, 2018.

## OPINIONS BELOW

The August 8, 2018 opinion of the United States Court of Appeals for the Fourth Circuit is an unpublished decision. App. 1a-42a. The September 5, 2018 opinion of the United States Court of Appeals for the Fourth Circuit denying en banc review is an unpublished decision. App. 69a-70a. The Order of the United States District Court for the Eastern District of Virginia denying ManTech's motion under Rule 50(b) as to liability is reported at 260 F. Supp. 3d 556 (E.D. Va. 2017), App. 48a-69a.

## STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its final judgment on August 18, 2018. On November 27, 2018 Chief Justice Roberts extended the time for filing a petition for writ of certiorari to February 2, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves whistleblower claims under the False Claims Act, the Defense Contractor

Whistleblower Protection Act, and Federal Rule of Civil Procedure 50(b).

The False Claims Act provides in relevant part:

> **In general.**--Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action under this section or other efforts to stop 1 or more violations of this subchapter.

31 U.S.C. § 3730(h)(1).

The Defense Contractor Whistleblower Protection Act provides, in relevant part:

> An employee of a contractor, subcontractor, grantee, or subgrantee or personal services contractor may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing to a person or body described in paragraph (2) information that the employee reasonably believes is evidence of the following:

> **(A)** Gross mismanagement of a Department of Defense contract or grant, a gross waste of Department funds, an abuse of authority relating to a Department contract or grant, or a violation of law, rule, or regulation related to a Department contract (including the competition for or negotiation of a contract) or grant.

10 U.S.C. § 2409.

Federal Rules of Civil Procedure 50(b) provides:

> (b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:
>
> (1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or
(3) direct the entry of judgment as a matter of law.

## STATEMENT OF THE CASE

### A. Overview

Following a five-day jury trial and after considering over 70 exhibits and weighing testimony from nine witnesses, including Muge and Kevin Cody and senior executives from ManTech, the jury found that the Codys' protected activity of filing a *qui tam* lawsuit against ManTech was a contributing factor in ManTech's decision to fire both of them. Judge Anthony Trenga, who presided over the trial and observed the testimony, in a thoughtful and measured opinion, denied ManTech's Rule 50(b) motion. App. 58a. Judge Trenga explained "a jury was entitled to assess the credibility of these interested witnesses and draw inferences other than those Man Tech has argued." App. 58a. Judge Trenga concluded "[i]n sum, the evidence at trial was sufficient to sustain the jury's verdict that the Codys' lawsuit was a contributing factor in ManTech's decision to terminate them and that Man Tech would not have terminated them absent the lawsuit." App. 58a. Judge Trenga also reminded the parties that "a finding of motive should not be set aside by a reviewing court unless the evidence clearly compels rejection." App. 58a (citations omitted). While denying ManTech's motion on liability, Judge Trenga granted its motion as to the compensatory damages. App. 67a-68a.

On appeal based on the lifeless record, a divided Fourth Circuit panel reversed Judge Trenga's ruling on liability as to Muge Cody. App 4a. Judge Diaz dissented, explaining "[i]t may have been reasonable for the jury to find that Muge was fired for legitimate, non-retaliatory reasons. But it's something else entirely to conclude—as we must to overturn the verdict—that this was the only result a reasonable jury could have reached." App. 41a. Judge Diaz further explained that "[d]eciding questions of motive, and how ManTech felt about Kevin and Muge, is also 'a function peculiarly within the province of the fact finder, because so much depends on the opportunity to appraise the antagonists as they testify.'" App. 44a-45a. Judge Diaz continued, "[b]ut the majority usurps this role by suggesting ManTech had a greater desire to retaliate against Kevin. The jury evidently didn't think so, and its 'finding of motive should not be set aside … unless the evidence clearly compels rejection.'" App 45a.

Judge Diaz concluded with this observation:

> The majority holds that a jury could find Kevin Cody was fired because of his *qui tam* lawsuit, but that no reasonable jury could say the same about Muge Cody. This is an awkward result. It's also one that the majority reaches by emphasizing individual people and events rather than considering the record as a whole. Viewed within the broader context of this dispute, the supposed differences between Kevin and

> Muge relied upon by the majority are at best, debatable propositions, and at worst, unfounded conclusions.

App 45a.

### B. Factual History

Kevin and Muge Cody are a married couple who are both former executives at ManTech International Corporation, a large government contractor that specializes in contracts with the United States Department of Defense. App. 5a. [1] Kevin Cody began working at ManTech in 1990, rising "steadily" to President of the ManTech business unit that "managed large" contracts with the United States Army Tank-Automotive and Armaments Command (TACOM). App. 5a (internal citation omitted). Among the contracts with TACOM was a contract for the maintenance of Mine-Resistant Ambush Protected (MRAP) vehicles for use in Afghanistan. App. 5a. Muge Cody began working at ManTech in 2001 and eventually was promoted to Vice President at ManTech and served as Program Manager for the MRAP contract that ManTech secured with the United States Army. App. 5a. This was "an important position largely responsible for day-to-day performance on ManTech's largest contract." App. 5a. "Both Codys interacted on a daily basis with the Army's contracting officer for the MRAP program and enjoyed a close working relationship with him." App. 5a.

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[1] Although only Muge Cody petitions for a writ of certiorari from this Court, facts about Kevin Cody's dispute with ManTech are included because they are inextricably intertwined with the facts of Muge Cody's dispute.

In Fall 2011, Kevin Cody worked on the ManTech team responsible for submitting a bid for a new five-year contract for the maintenance of MRAP vehicles. App. 5a-6a. Kevin Cody was responsible for developing the pricing component of the bid, and Muge Cody also worked on developing certain aspects of the proposal. App. 6a. Kevin Cody first raised concerns during the bid process that he felt ManTech had significantly underestimated the costs of labor on the contract. App. 6a. Both Kevin and Muge Cody raised concerns that the reduced pay to employees on the contract, which was a part of ManTech's proposal, would be unsustainable, and thus, rendered the estimated costs submitted in ManTech's bid to the United States Government misleading. App. 50a. Ultimately, ManTech submitted the bid in April 2012 despite the Codys' objection. App. 6a.

After ManTech won the new MRAP contract, Kevin Cody's business unit remained responsible for the maintenance of this contract. App. 6a. Then, in late 2012, only months into the five-year contract, Kevin Cody learned that the actual costs on the contract had already exceeded the costs estimated by ManTech during the bidding process. In response, Kevin Cody directed an investigation into the reasons for the overrun of costs. App. 6a.

In December 2012, coinciding with the Codys' voicing concerns with this contract, ManTech removed the MRAP contract from Kevin Cody's control and reassigned the contract to Mike Brogan. App. 7a. ManTech's purported reasons for this change were complaints of "behavioral issues" ManTech had allegedly received about Muge Cody who nevertheless

was to remain as the Program Manager. It also alleged concerns about the Codys being a married couple. App. 7a-8a. Alex Urbina (the Army's contracting officer's representative on the MRAP contract), who interacted with Muge Cody on a daily basis, testified that he had never heard any concerns on the part of anyone at ManTech about the Codys' relationship and any potential impact it might have on the MRAP contract. App. 7a. ManTech's Executive Vice President for the Technical Services Group, Dan Keefe, attended the meeting at which Kevin Cody learned of this action. He later drafted a memorandum summarizing ManTech's reasons for removing Kevin Cody: 1) Muge Cody's alleged behavioral issues and Kevin Cody's purported lack of addressing those issues and 2) the need for Kevin Cody to focus on the development of new business. App. 7a-8a.

Subsequently, Lou Addeo, the then President of ManTech's Technical Services Group, met with Muge Cody and told her that the MRAP contract would no longer be under Kevin Cody's business unit and would instead be placed under Brogan. App. 8a. Addeo also informed Muge Cody that ManTech would appoint a new deputy program manager to assist her. ManTech later hired Nate Webster for that position. App. 8a. At this meeting, Addeo also told Muge Cody of purported complaints about her treatment of subordinates, but failed to identify any specifics of the alleged conduct. App. 8a-9a. And Addeo

> did not describe the specifics of any verbal complaints … did not provide any written complaints … did not ask her to

> respond or provide her side of the events … never interviewed any of the individuals who purported to complain about Muge Cody … and did not order that she attend any kind of training.

App. 9a.

Similarly Dan Keefe—who was involved in removing Kevin Cody from his previous position allegedly because of Muge Cody's behavior problems—"never showed Muge a copy of any written complaint; did not take notes of any conversations that he had with people who purportedly complained about Muge; and did not share with Muge or Kevin the memo he wrote summarizing the purported December 2012 complaints against Muge." App. 9a.

Following these meetings, in January 2013, both Kevin and Muge Cody sent separate complaints to Chief Compliance Officer Terry Myers expressing concerns about retaliation because of the complaints they had raised about the MRAP contract. App. 9a. Myers interviewed Kevin Cody, who said the removal of the MRAP contract from his business unit was retaliation. App. 9a-10a. Myers later interviewed Addeo who told Myers "[i]f [the Codys] are wrangling about the government getting screwed, they are getting paid for it." App. 10a. Addeo went on to tell Myers, "It's an offense we let them go this far … They don't care about ManTech, and they are officers of the company." App. 10a. Addeo further told Myers he felt the Codys had no right to complain because of the large compensation they both received from ManTech. App. 10a. Myers concluded her investigation in May

2013 and told both Codys that she had found no evidence of retaliation or any impropriety. App. 10a.

In both March and June of 2013, Muge Cody sent complaints to ManTech's Senior Vice President of Human Resources Margo Mentus, saying that she had been excluded from communications to the MRAP team. App. 10a-11a. Muge Cody also complained to Mentus in June 2013 about being bullied and harassed by her co-workers. App. 11a. Kevin Cody also complained to Mentus in June 2013, stating that ManTech had retaliated against him by removing the MRAP contract from his business unit and demoting him. App. 12a.

Keefe, who had since become the President of the Technical Services Group, met with both Codys about their complaints and stated that internal compliance at ManTech had found no evidence of financial irregularities on the MRAP contract and had found no evidence of any retaliation against the Codys. App. 11a. Six months after the Codys had been removed from their previous positions, Keefe sent Muge Cody a memorandum detailing a purported series of more than a dozen complaints received by ManTech about Muge Cody's behavior over a five year period. App. 11a. ManTech had never previously informed Muge Cody of any such complaints, and Urbina testified that he had witnessed Muge Cody's interactions with subordinates and had never seen any of the alleged behavior. App. 11a. In July 2013, both Codys objected to this accusation in an email to Keefe. App. 11a. In October 2013, ManTech completely removed Kevin Cody from his business unit and assigned him to work as a Senior Vice

President in ManTech's corporate headquarters. App. 11a-12a.

On December 12, 2013, the Codys filed this case under seal as a *qui tam* action against ManTech. App. 12a. The Codys alleged that ManTech had fraudulently represented pricing to the United States government on the MRAP contract bid proposal and that ManTech had retaliated against the Codys for raising concerns about the fraud. App. 12a.

In April 2014, Kevin Cody complained to ManTech that his compensation had been reduced in 2013 as retaliation for his complaints. App. 12a. Kevin Cody continued to reiterate his complaints throughout 2014. App. 12a-13a.

In mid-2014, ManTech learned from a former employee that he had been contacted by an investigator from the Department of Defense regarding the pricing on the MRAP contract. App. 13a. Kevin Phillips, ManTech's President and Chief Operating Officer testified that he assumed "either one of the Codys had made a complaint, or if the Codys may have had a complaint to one of their customers, the customer may have made the complaint." App. 13a, 51a. The United States government declined to intervene in the *qui tam* action in November 2014, and the complaint became unsealed. App. 13a. The Codys' counsel informed ManTech of the lawsuit on December 23, 2014 and subsequently served ManTech with the complaint on January 8, 2015. App. 13a.

ManTech notified both the Codys on January 12, 2015 that it would conduct an internal investigation of their complaints. App. 13a. Kevin Phillips testified at trial that he was "[d]isappointed but not surprised" to learn about the Codys' lawsuit and testified that ManTech became concerned with developing a "press and reputational plan" regarding the lawsuit. In this context, Phillips testified that he made the decision that Muge Cody "could not represent ManTech as the program manager … to the very customer that she was saying that ManTech had defrauded." App. 14a. At the same time, Phillips testified that Kevin Cody "should not be in the corporate office with … the same team that had to … address these legal issues raised in the lawsuit." App. 14a. ManTech then placed both the Codys on administrative leave and appointed Nate Webster as the acting Program Manager on the MRAP contract. App. 14a.

On March 8, 2015, ten weeks after being served with the complaint, ManTech fired Kevin Cody effective March 20, 2015, purportedly due to a decrease in revenue at ManTech. App. 14a-15a, 29a. Then, on June 17, 2015, only thirteen weeks after ManTech had fired Kevin Cody, ManTech fired Muge Cody effective July 1, 2015, purportedly due to the Army's decision to eliminate the MRAP contract's Program Manager position. App. 14a-15a, 29a.

### C. Proceedings Below

Kevin and Muge Cody brought this single *qui tam* action against ManTech International Corporation, and later amended their complaint to

allege only claims of retaliatory discharge in violation of both the False Claims Act and the Defense Contractor Whistleblower Protection Act. A jury found in favor of the Codys on their retaliation claims, finding that "[the Codys] [had] proven by a preponderance of the evidence that [their] filing of [the *qui tam*] lawsuit was a contributing factor to ManTech's decision to terminate [their] employment" and that "ManTech [had not] proven by clear and convincing evidence that it would have terminated [the Codys'] employment even if [they] had not filed this lawsuit." App. 16a-17a. The jury awarded compensatory damages for emotional distress to Kevin for $500,000 and to Muge for $300,000. ManTech moved for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure.

The district court denied the Rule 50(b) motion as to liability and upheld the jury's verdict in favor of the Codys on their retaliation claims under the False Claims Act (FCA) and the Defense Contractor Whistleblower Protection Act (DCWPA), but granted ManTech's Rule 50(b) motion "insofar as the Court f[ound] the evidence at trial insufficient to support the jury's compensatory damages awards for emotional distress." App.17a. In a separate order, the district court awarded back and front pay to both Kevin and Muge.

## REASONS FOR GRANTING THE WRIT

### I. The Circuit Court decision directly conflicts with the Court's unanimous longstanding decision in *Reeves v. Sanderson Plumbing Products* and ignores the Court's decision in *Desert Palace v. Costa*.

#### A. Introduction

"It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge." *Sioux City & Pac. R.R. v. Stout*, 84 U.S. (17 Wall.) 657, 664 (1873). Courts continue to recognize it is the role of juries, not judges, to resolve issues of fact and draw reasonable inferences from them. "[T]he jury is the proper trier of contested facts." *Arbaugh v. Y & H Corp.*, 546 U.S. 502, 514 (2006) *citing Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000).

Given these explicit directives from the Court, respect for the jury's role is a road well-traveled by the courts of appeal.

> When the Court reviews a jury verdict …. The relevant question is whether any rational trier of fact could have ruled in favor of the prevailing party. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the

> jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

*EEOC v. St. Joseph's Hosp., Inc.*, 842 F.3d 1333, 1343 (11th Cir. 2016) (citations and internal quotations omitted). "In undertaking our deferential review of the jury's verdict, we draw no distinction between direct and circumstantial evidence and give full play to the right of the jury to determine credibility, weigh the evidence and draw justifiable inferences of fact." *United States v. Glover*, 681 F.3d 411, 423 (D.C. Cir. 2012) (citations and internal quotations omitted).

> We uphold a jury verdict on appeal as long as a reasonable basis exists in the record to support this verdict … Moreover, we are particularly careful in employment discrimination cases to avoid supplanting our view of the credibility or weight of the evidence for that of both the jury (in its verdict) and the judge (in not interfering with the verdict).

*Pickett v. Sheridan Health Care Ctr.*, 610 F.3d 434, 440 (7th Cir. 2010) (citations and internal quotations omitted).

> When reviewing the sufficiency of the evidence, a jury's verdict must be upheld unless the facts and inferences, viewed in the light most favorable to the verdict,

> point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have returned the verdict. Our analysis is weighted toward preservation of the jury verdict.

*Aponte-Rivera v. DHL Sols. (USA), Inc.*, 650 F.3d 803, 808 (1st Cir. 2011) (citations and internal quotations omitted).

> In reviewing a district court's grant of a motion for judgment as a matter of law *de novo,* we take as our starting point that [s]uch a judgment is warranted only if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion. We do not weigh the evidence, pass on the credibility of the witnesses, or substitute our conclusions for those of the jury.

*Williams v. W.D. Sports, N.M., Inc.*, 497 F.3d 1079, 1086 (10th Cir. 2007) (citations and internal quotations omitted).

This is not an outdated concept. The district courts — along with the juries that are closest to the facts and witnesses — recognize and respect this fundamental principle of our judicial system. In this case, Judge Trenga reiterated the point that "a jury was entitled to assess the credibility of these interested witnesses and draw inferences other than those Man Tech has argued." App. 58a. Recently, another federal trial judge explained the jury function

as "the life's blood of our third branch of government. It is not too much to say that a courthouse without jurors is a building without a purpose." *Marchan v. John Miller Farms, Inc.*, __ F.Supp.3d __, 2018 WL 6518660, at *7 (D.N.D. 2018).

Unfortunately, here the panel assumed the role of a second jury, making credibility determinations and rejecting reasonable inferences that had been drawn by the jury that actually heard the evidence. This Court should step in and correct this error.

Deference to factual finding of a jury is a bedrock of our judicial system. "The jury system is the cornerstone of our system of civil justice, as evidenced by the Seventh Amendment's guarantee." H.R. Rep. No. 102-40(1), at 72, *reprinted in* 1991 U.S.C.C.A.N. 610. This foundation is built both on the Seventh Amendment, but also on the commonsense observation that "only the [jury] can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson v. City of Bessemer City, NC*, 470 U.S. 564, 575 (1985), *citing Wainwright v. Witt*, 469 U.S. 412 (1985). "[T]he jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." *Lavender v. Kurn*, 327 U.S. 645, 653 (1946).

This is especially true when the trial judge has reviewed and denied a party's Rule 50(b) motion

which "calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case which no appellate transcript can impart." *Cone v. West Virginia Pulp &Paper Co.* 330 U.S. 212, 216 (1947). "The court that can see the witnesses, hear their statements, observe their demeanor, and compare their degree of intelligence, is better able than an appellate tribunal to reconcile differences in testimony, or if that be not possible, to ascertain the real nature of the transaction." *The Quickstep*, 76 U.S. 665, 669 (1869).

> The occurrence of events, the reason why these events took place, and the motives of the men who participated in them are drawn in question. The issue of credibility is of great importance. The District Judge had the opportunity to observe the demeanor of the witnesses and to judge their credibility at first hand.

*United States v. E.I. du Pont de Nemours & Co.,* 353 U.S. 586, 646 (1957).

The Seventh Amendment provides that "no fact tried by a jury, shall otherwise be re-examined in any Court of the United States, than according to the common law." U.S. Const. Amend. VII. "During the first 180 years of the Bill of Rights, the constitutional guarantee most frequently and aggressively enforced by the Supreme Court was the Seventh Amendment right to a jury trial in civil cases." Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Jury Verdicts*, 1989 Wis. L. Rev. 237, 237 (1989). At

that time the Court routinely granted review "to consider the sufficiency of the evidence to support a disputed jury verdict and in the overwhelming majority of the [those] cases did so to reinstate a civil jury verdict that had been overturned by an appellate court." *Id.* at 237-38.

This Court has continued to be protective of the role of the jury. "[T]his Court is vigilant to exercise its power of review in any case where it appears that the litigants have been improperly deprived of that determination." *Rogers v. Mo. Pac.ific R.R. Co.,* 352 U.S. 500, 509 (1957). The Court further held that "[s]pecial and important reasons for the grant of certiorari ... are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination." *Id.* This is one of those cases. Muge Cody simply asks that this Court exercise that vigilance here.

More recently, this Court has recognized the legitimate but limited role that appellate courts play in reviewing jury verdicts. For example, in *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415 (1996), the Court held that "[n]othing in the Seventh Amendment … precludes appellate review of the trial judge's denial of a motion to set aside [a jury verdict] as excessive." *Id.* at 436 (alteration in the original (quoting *Grunenthal v. Long Island R.R. Co.*, 393 U.S. 156, 164 (1968) (Stewart, J. dissenting)). But significantly, the Court gave telling examples of when the courts could appropriately set aside a jury verdict – for example, "if it should clearly appear that the jury have committed gross error, or have acted with improper motives …." 518 U.S. at 433 quoting *Blunt*

*v. Little*, 3 F.Cas. 760, 761-762 (Cir. Ct. Mass. 1822) (Story, J.).

This Court's recent framing of the standard has reinforced the limited role of the courts of appeal in overturning jury verdicts of liability. This Court has held the appellate courts may not "reverse the finding of the trier of fact simply because it is convinced it would have decided the case differently." *Anderson v Bessemer City*, 470 U.S. 564, 573 (1985). To the contrary, the factfinder's "account of the evidence" need only be "plausible in light of the record viewed in in its entirety," *ibid.* and if "there are two permissible views of the evidence, the factfinder's choice between them cannot be erroneous." *Ibid.*[2]

In *Reeves v. Sanderson Plumbing Prods., Inc.*, the Court addressed this issue and unanimously reiterated the well-traveled standard that the appellate courts must follow to ensure they are not re-examining the finding of the jury. The Fourth Circuit panel ignored all this precedent and acted as a second jury.

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[2] *Anderson v. Bessemer* involved the review of the trial judge's finding of facts under FRCP 52(a). However, given the Seventh Amendment's prohibition of reconsidering facts found by a jury, even more deference should be accorded the jury's determination—especially in cases like the instant one where the trial judge refused to grant the defendant's motion for a judgment as a matter of law.

### B. The Fourth Circuit's review in this case mirrors the lower court action in *Reeves*, where this Court held the Appellate Court usurped the role of the jury.

The Fourth Circuit panel decision is palpably in conflict with *Reeves*.

In *Reeves*, the jury found discrimination and returned a verdict for the plaintiff. *Reeve*s, 530 U.S. at 139. Defendant Sanderson Plumbing moved for judgments as a matter of law twice under Federal Rules of Civil Procedure Rule 50. *Id.* Both motions were denied.[3] *Id.* at 138. On appeal, like the panel here, the Fifth Circuit reversed the judgment, holding that Defendant was entitled to judgment as a matter of law under Rule 50 because "there was insufficient evidence for a jury to find [plaintiff] was discharged for unlawful discriminatory reasons." *Reeves v. Sanderson Plumbing Prods.,* 197 F.3d 688, 693-94 (5th Cir. 1999).

This Court reinstated the jury verdict. The Court was precise in articulating the role appellate courts must play in reviewing a jury verdict that has been upheld by the trial judge.[4] It criticized the

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[3] Rule 50 motions for directed verdict or for judgment notwithstanding the verdict are motions for judgment as a matter of law, which are assessed under the summary judgment standards. *Reeves*, 530 U.S. 150. (citing a consistent and longstanding line of Supreme Court authority).

[4] The ultimate holding in *Reeves* was that "[a] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves,* 530 U.S. at 148.

appellate court for substituting its own judgment for the jury's and for failing to construe the record in the light most favorable to the plaintiff. The Supreme Court reminded the appellate court that it "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves*, 530 U.S. at 150. Citing its earlier precedent, this Court re-emphasized that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." *Id.* at 150-151. *See also*, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986). Recently in *Tolan v. Cotton*, 572 U.S. 650 (2014), the Court reaffirmed the directives from *Reeves* that it is not the role of judges "to weigh the evidence and determine the truth of the matter [and] [i]n making that determination, a court must view the evidence. in the light most favorable to the opposing party." *Id* at 656-57.) (citations and internal quotations omitted).

Muge Cody's case is an appropriate opportunity to determine whether the lower court should be corrected for disregarding this Court's precedents in acting as a second jury. Even a limited review of the facts easily demonstrates that the Fourth Circuit panel made "credibility determinations" and weighed the evidence. Additionally, in direct conflict with *Reeves*, the panel "failed to draw all reasonable inferences in favor of the nonmoving party." *Reeves*, 530 U.S. at 150.

A glaring example of both errors is the panel determination that, even accepting Muge had established a prima facie retaliation case, "ManTech nonetheless established … it would have taken the same personnel action in the absence of the protected activity …." App. 34a. But to reach this conclusion, the panel made the credibility determination to believe ManTech's version of the facts. The jury clearly did not, and acted reasonably in rejecting ManTech's version of the facts.

The jury had ample evidence to reject ManTech's testimony. Until the Codys raised concerns about the contracts and filed their lawsuit, they were rising stars for the company. Kevin Cody rose "steadily," becoming President of the ManTech business unit that "managed large" contracts with the United States Army Tank-Automotive and Armaments Command. App. 5a (internal citation omitted). Muge Cody was promoted to Vice President at ManTech and served as Program Manager for the MRAP contract. App. 5a. This was "an important position largely responsible for day-to-day performance on ManTech's largest contract." App. 5a. The jury reasonably concluded that it strained credibility for ManTech to terminate these two rising stars for the reasons given, and that the real reason for firing each of them was their lawsuit.

Based upon the evidence it heard, the jury reasonably concluded that Muge's alleged performance problems were pretextual and thus evidence of ManTech's lack of credibility. Again, the facts presented at trial show how this was a

reasonable inference for the jury to draw. The ManTech official admitted he

> did not describe the specifics of any verbal complaints … did not provide any written complaints … did not ask her to respond or provide her side of the events … never interviewed any of the individuals who purported to complain about Muge Cody … and did not order that she attend any kind of training.

App. 9a. Similarly, the other ManTech official who was involved in removing Kevin Cody from his previous position, allegedly because of Muge Cody's behavior problems, "never showed Muge a copy of any written complaint; did not take notes of any conversations that he had with people who purportedly complained about Muge; and did not share with Muge or Kevin the memo he wrote summarizing the purported December 2012 complaints against Muge." App. 9a.

This testimony was not lost on the trial judge. In rejecting ManTech's motion to set aside the jury verdict, Judge Trenga explained:

> While ManTech's executives testified to a number of cogent reasons for the Codys' terminations, including ManTech's President and Chief Operating Officer, who testified unequivocally that his decision to eliminate Mr. Cody's position was not influenced by the Codys filing this *qui*

> *tam* suit, ManTech offered no corroboration for their testimony, such as internal documents reflecting that such a decision had, in fact, been made before learning of the *qui tam* action; and a jury was entitled to assess the credibility of these interested witnesses and draw inferences other than those ManTech has argued.

App. 58a.

A second glaring example of the panel acting as a second jury in Muge Cody's case, and failing to draw all favorable inferences in her favor, is the panel conclusion that "Kevin was unquestionably the primary complainant stirring the pot about the accuracy and honesty of ManTech's bid." App. 35a. This is irrelevant. If the reason for Muge Cody's termination was because of her *qui tam* lawsuit, it does not matter if she was the "primary" complainant. The jury answered "yes" to the following question about Muge's case: "Has plaintiff proven by a preponderance of the evidence that her filing of this law suit was a contributing factor to ManTech's decision to terminate her employment?" Special Verdict Form Docket number 118. Again, the jury reasonably reached this conclusion based on the testimony and reasonable inferences flowing from the testimony.

ManTech consistently treated the Codys as a team. ManTech officials, in discussing the Codys, said "[i]f [the *Codys*] are wrangling about the government getting screwed, *they* are getting paid for

it." App. 10a (emphases added). "It's an offense we let *them* go this far … *They* don't care about ManTech, and *they* are officers of the company." App. 10a. (emphases added). After ManTech learned of the lawsuit, Kevin Phillips testified that he assumed that "*either one of the Codys* had made a complaint, or if the *Codys* may have had a complaint to one of their customers, the customer may have made the complaint." App. 13a (emphases added). After the law suit was filed, Kevin Phillips testified at trial that he was "[d]isappointed but not surprised" to learn about the *Codys'* lawsuit and testified that ManTech became concerned with developing a "press and reputational plan" regarding the lawsuit. App. 14a. (emphasis added). The jury reasonably concluded that ManTech saw both Kevin and Muge as complainants but the panel, contrary to *Reeves*, reached an opposite conclusion, again directly contrary to *Reeves*.

A final example[5] of the panel acting as a jury and not drawing inferences in Muge Cody's favor is its downplaying the temporal proximity of Muge Cody's termination to the filing of the law suit. The panel majority stated "[t]he temporal gap between Muge's protected activity and her termination was six months – much longer than Kevin's gap." App. 34a. ManTech placed the Codys on administrative leave 20 days after learning of their *qui tam* lawsuit; Kevin was fired 10 weeks after the lawsuit was served; and Muge was fired a mere 13 weeks after her husband was fired. There is an often used saying that revenge

[5] There are numerous other examples of the panel acting as a jury but these three examples highlight the significance of the errors.

is a dish best served cold. Here, the dish had little or no time to cool. The jury reasonably concluded that this minor time differential was not significant and that the entire context of the testimony it heard supported its finding that Muge's involvement in the lawsuit was a contributing factor in her termination. This reasonable inference from the facts should not have been revisited and reversed by the appellate court.

The district court, after overseeing the trial and carefully reviewing the extensive briefing of the parties, concluded:

> [I]t was reasonable for the jury to infer that this lawsuit, as the culmination of the dispute between the Codys and ManTech, was the last straw for ManTech and that ManTech placed the Codys on administrative leave without any intention to ever allow them to return to work, an intention further reflected in ManTech's decision not to afford either an opportunity to be considered for other positions at ManTech despite testimony from its Chief Compliance Officer that in recent years ManTech has placed an emphasis on attempting to find other positions for employees who may otherwise be terminated.

App. 57a

The panel also acted as a jury when it concluded there was a lack of evidence linking Muge Cody's termination to her filing of a *qui tam* lawsuit because the panel assumed that ManTech would otherwise have returned her to her position in the absence of a decision from the Army. App. 34a. But Judge Diaz explained the fallacy with the assumption.

> The problem with relying on the Army's decision as the reason for Muge's termination is that it implicitly assumes she would otherwise returned to her role on the MRAP contract. But as the district court explained the jury was free to consider whether "'ManTech placed the Codys on administrative leave without any intention to ever allow them to return to work.'"

App. 42a. The panel, unlike the jury and the district court that oversaw the trial, did not, as Judge Diaz's dissent stated, account for testimony from Kevin Phillips that he had "made the decision that Muge could not represent ManTech as the program manager on the program to the very customer she was saying that ManTech had defrauded." App. 42a. And the panel did not weigh, as the jury and district court may very well have, the fact that at the time of the Army's decision, Muge Cody had not been the program manager for six months, and the Army made the decision to eliminate the position then held by Nate Webster, not Muge Cody. App. 43a.

The Fourth Circuit panel, which neither attended the five-day trial nor observed ManTech's witnesses, nonetheless "reverse[d] the finding of the trier of fact simply because it [was] convinced it would have decided the case differently." *Anderson*, 570 U.S. at 573. This error on the part of the Fourth Circuit is systemic and should therefore be corrected by this Court.

### C. The Fourth Circuit's error is further compounded because it failed to recognize this Court's Ruling in *Desert Palace v. Costa* that, in cases where motive is required, circumstantial evidence is just as probative as direct evidence.

The panel's error in acting as a jury also ignored the Court's holding in *Desert Palace, Inc. v. Costa*, 529 U.S. 90 (2003). Instead, the panel appeared to be looking for direct evidence of ManTech's retaliatory motive toward Muge Cody specifically. In *Costa*, this Court was clear in explaining that direct evidence is not required. "The 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.'" *Costa*, 529 U.S, at 100. Here, the district court followed both *Reeves* and *Costa* when it addressed ManTech's argument that the "Codys' fate was decided before ManTech learned of the suit." App. 57a. Judge Trenga explained:

> [B]ut [ManTech's] position ignores the overall context within which this lawsuit arose; and it was reasonable for the jury to infer that this lawsuit, as the culmination of the dispute between the Codys and ManTech, was the last straw for ManTech and that ManTech placed the Codys on administrative leave without any intention to ever allow them to return to work ….

App. 57a-58a. Judge Trenga continued explaining there was other circumstantial evidence supporting the jury's verdict. ManTech's unlawful action is "further reflected in ManTech's decision not to afford an opportunity to be considered for other positions in ManTech despite testimony from its Chief Compliance Officer that in recent years ManTech placed an emphasis on attempting to find other positions for employees who may otherwise be terminated." App. 57a-58a. In reversing the jury verdict, the panel both made credibility determinations and ignored the substantial circumstantial evidence supporting the jury's determination.

## II. The issue is of significant national importance given Congressional intent to create a meaningful cause of action protecting those who challenge fraud under the False Claims Act and the Defense Contractor Whistleblower Protection Act

War fosters fraud. Responding to this, Congress enacted the False Claims Act in 1863 to "stop[ ] the massive frauds perpetrated by large contractors during the Civil War." *Universal Health Serv. Inc. v. United States ex rel. Escobar*, 136 S.Ct. 1989, 1996 (2016). Both preventing fraud against the federal government and vigorously protecting those who attempt to expose fraud are in our country's national and fiscal interest.[6] However, if the law does not provide robust anti-retaliation protections to those who complain about government

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[6] "Whistleblowers have played a vital role in unmasking fraudulent schemes that might otherwise evade detection," said Assistant Attorney General Jody Hunt. "The taxpayers owe a debt of gratitude to those who often put much on the line to expose such schemes." Press Release, U.S. Dep't of Justice, Justice Department Recovers Over $2.8 Billion from False Claims Act Cases in Fiscal Year 2018 (December 21, 2018). One organization that monitors these issues estimates that since the act was strengthened by Congress in 1986, the government has recovered $56 billion of taxpayer money because of the FCA. *Top False Claims Act Cases by Civil Award Amount*, Taxpayers Against Fraud Education Fund. (Jan. 15, 2019), https://taf.org/top-false-claims-act-cases-by-civil-award-amount, last visited January 27, 2019. It further estimates that by incentivizing whistleblowers through monetary rewards and protection from retaliation, the government has recovered over $3 billion dollars per year for eight consecutive years from 2011-2017. *Id.*

fraud, the laws prohibiting this fraud become meaningless. Recognizing this, Congress amended the Act, in 1986, to add anti-retaliation protection for whistleblowers. *See* Pub. L. No. 99-562 (October 27, 1986) and 31 U.S.C. § 3730(h). Congress added this anti-retaliation provision to "assure those who may be considering exposing fraud that they are legally protected from retaliatory acts." S. REP. 99-345, 34, 1986 U.S.C.C.A.N. 5266, 5299. Congress recognized that this protection was important, because the fear of retaliation from employers would deter individuals from exposing fraud. *Id.*

In considering amendments to the FCA, the House of Representatives echoed these same views: "[t]he central purpose of the False Claims Act is to enlist private citizens in combating fraud against the United States. The Act's *qui tam* provisions were crafted to provide clear procedures and appropriate incentives for private citizens to report fraudulent schemes and participate in the resulting investigations and prosecutions." HR 1788, 111-97, https://www.congress.gov/congressional-report/111th-congress/house-report/97/1, last visited January 27, 2019. The report further pointed out that when *qui tam* actions are weakened, fraud against the government greatly increases and causes "monetary loss, diminished confidence in Government programs, Government benefits diverted from intended recipients, and harm to public health and safety." *Id.* at fn 16. When an appellate court acts as a second jury and disregards the trial judge's view that the jury verdict was proper, the core purpose of the whistleblower protection laws is undermined. Why

would any citizen run the risk and possible financial ruin by blowing the whistle?

Since the False Claims Act, Congress has enacted numerous laws with whistleblower protection provisions for the same purpose—encouraging whistleblowers to report fraudulent claims against the federal government. *See generally Digital Realty Tr., Inc. v. Somers*, 138 S. Ct. 767, 770 (2018) (In an attempt to uncover fraud, Congress passed the Sarbanes-Oxley Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act and added whistleblower protection provisions to prevent retaliation). The Defense Contractor Whistleblower Protection Act 10 U.S.C. § 2409, enacted in 1986, was one of these laws and, in addition to the FCA, is relied upon by the Codys.

In 2009, the government increased the scope of actions that fall under the purview of the False Claims Act. Even more importantly, Congress gave enhanced protections to shield whistleblowers from retaliation and included in that definition not just employees, but also "any employee, contractor, or agent for lawful acts done by the employee, contractor, agent or associated others." This again signals the robust and broad protections Congress expected these laws to have.

When the district court ruled on ManTech's Rule 50 post-trial motion, it recognized this important Congressional intent. The district court noted that Congress intended to encourage employees to report fraud against the government by protecting them from being "discharged, demoted, suspended,

threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee . . . in furtherance of an action under [the False Claims Act]." *United States ex rel. Cody v. ManTech Int'l, Corp.,* 207 F. Supp. 3d 610, 620 (E.D. Va. 2016). However, the appellate panel stripped this protection of meaning by reversing both the jury, and the district court, which after hearing all the evidence determined that ManTech had violated the law and had retaliated against Muge Cody just as it had retaliated against Kevin Cody. The panel did this without the benefit of observing one witness. This runs directly contrary to decades of instruction from this Court as discussed in the previous section.

Recently, the Court has been interested in refining technical issues under these whistleblower protections.[7] Muge Cody's case goes to the heart of the retaliation protections and the policies as enunciated by Congress as well as the practical impact of not respecting the fact finder's reasonable conclusion in these retaliation cases. Given the explicit Congressional intent to provide robust protections to whistleblowers and the negative impact that allowing an appellate court to act as a second jury reversing a

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[7] *See State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436 (2016); *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401 (2011); *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280 (2010); *United States ex rel. Eisenstein v. City of N.Y.*, 556 U.S. 928 (2009); *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008); *Rockwell Int'l Corp. v. United States*, 549 U.S. 457 (2007); *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005).

finding of liability will have on enforcement of the FCA and the Defense Contractor Whistleblower Protection Act, this Court should grant review.

## III. This case presents an excellent vehicle to address this important issue and reinforce the appellate court's limited role in reviewing factual determinations made by a jury and accepted by the trial judge.

First, the panel decision ignores express instructions from this Court. Both *Reeves* and *Costa* outlined the limited role appellate courts should play in reviewing jury findings and the important role that circumstantial evidence plays in cases like this where intent is critical. In *Costa*, this Court stressed that circumstantial evidence is equally probative as direct evidence. Here the Codys provided substantial circumstantial evidence from which a jury could and did find unlawful retaliation as to both Kevin Cody and Muge Cody. Furthermore, the panel inappropriately acted as a second fact finder and utilized its review to make substantial credibility and factual determinations. This directly conflicts with *Reeves*. Citizens expect that when this Court provides guidance, that guidance will be followed by the lower courts. When a federal appellate court fails to respect this Court's guidance, this Court is literally the last stop.

Second, the issue is cleanly presented from the jury instructions through the Fourth Circuit's review. As these instructions were clear and legally sufficient, the panel had no authority to overtake the role of the jury. This Court has the benefits of these instructions,

ManTech's Rule 50 motions, Judge Trenga's ruling on the motion, and the Fourth Circuit's analysis of the issue.

Finally, although the panel decision is an unpublished decision, it is a fully reasoned one with a fully reasoned and thorough dissent, and a detailed opinion by the district judge. Publication is not a prerequisite to certiorari. As this Court has instructed, "[T]he fact that the Court of Appeals order under challenge here is unpublished carries no weight in our decision to review this case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987). This Court in *McCoy* and in *Reeves* did not hesitate to review an unpublished decision. This case is an ideal vehicle to consider the issue of lower courts' disregard for the precedent established by this Court.

## CONCLUSION

Under Supreme Court Rule 10(c), this Court may grant certiorari when "a United States court of appeals … has decided an important federal question in a way that conflicts with relevant decisions of this Court." When the federal circuit courts deviate from this Court's clear precedent in a manner that undermines a national goal," *McKennon v. Nashville Banner Publ. Co.,* 513 U.S. 352, 358 (1995), this Court can and does issue rulings to correct their course. *See Ash v. Tyson Foods, Inc.,* 546 U.S. 454 (2006) (per *curiam*).

Muge Cody's case presents such a clear opportunity to reinforce the whistleblower protection laws in a manner that preserves the broad protection

of the law by clearly reaffirming settled principles. In *Tolan* v. *Cotton,* the Court noted that while "this Court is not equipped to correct every perceived error coming from the lower federal courts, … we intervene here because the opinion below reflects a clear misapprehension of [the legal standards] in light of our precedents." *Tolan* v. *Cotton,* 572 U.S. 650, 659 (2014). The panel decision here reflects a similar systemic misapprehension, and the Court's intervention is warranted.

For the foregoing reasons, this Court should issue a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Fourth Circuit. If this Court concludes that plenary review of this petition is not warranted, it should nonetheless grant the Petition, vacate the Fourth Circuit panel decision as to Muge Cody and remand for the proper application of *Reeves* and *Costa*.

Respectfully submitted this 1st day of February, 2019.

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