No. 21-7077

IN THE

SUPREME COURT OF THE UNITED STATES

Catherine Kurkjian Petitioner

v.

Christine Wormuth Respondent

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

PETITION FOR REHEARING

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PREAMBLE

Pursuant to Rule 44.2 of this Court, Petitioner Catherine Kurkjian, respectfully petitions for a rehearing of the denial of a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit on the grounds of substantial intervening circumstances and substantial grounds not previously presented.

A. Pending Docket 21-1028, INTERNATIONAL ENERGY VENTURES MANAGEMENT, L.L.C. v. UNITED ENERGY GROUP, LTD would have an impact on this case if this Court decides that when a district court fails to make proper fact findings, no deference is owed.

B. The aggregate of petitions questioning the Federal Circuit's affirmation of lower Court opinions; without any meaningful review in accordance with 5 U.S. Code § 7703 (C) and 5 U.S.C. § 706, requires the attention of this Court as it is a violation of due process rights of the Fifth amendment of the Constitution.

C. The neglect of the Court to acknowledge the specific and substantial danger of non-compliant inspection criteria increasing the risk of soldiers being sickened by Salmonella contaminated rations. In the B revision of PCR-N-003; Nut and Fruit Mix, US Army Soldier System Command changed the sample size for the inspection of the ration component from 60 samples back to the non-compliant sample size of 5; for which, according to the Food and Drug Administration, Bacterial Analytical Methods (BAM), renders the test results meaningless.

PETITION FOR REHEARING

The original certiorari petition asked this Court to resolve four issues: (1) whether a Court can neglect the legal and statutory obligation of an Agency to adhere to the signed contract and references cited thereunder by saying the contract was "effectively completed", (2) whether a court can neglect the testimony of the Contracting Officer which discounted the "hearsay" evidence relied upon by the Court ; (3) whether the Federal Court of Appeals discounted evidence that the contractor suffered a reprisal for her disclosures about issues that she believed posed a specific and substantial danger, and (4) to resolve the conflict in circuit decisions regarding whether or not "bad faith" entitles a contractor to the lost profits of the option years.

The Petitioner argued that the Board's evisceration of the contract and the well-established contract law was unlawful and that the failure to provide fair notice and due process was unconstitutional. Petitioner argued that The Federal Circuit's holding that the government did not have to adhere to the contract - which has the "force of law" - because of its "conclusion" that the Base year was effectively completed: is not in accordance with law; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; and is without observance of procedures required by law. which violates 5 U.S.C. 706 (A)(C) &(D) and should have been set aside.

The law judges of the US Court of Appeals review responsibilities are as follows.

5 U.S. Code § 7703(c) "In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be— (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence"

5 U.S.C. § 706 To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. I The reviewing court shall— (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be— (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

This is problematic if the Federal Circuit can absolve itself from all of the above responsibilities by allowing strict deference to Administrative Judges in lower Courts who are not held to the same standards of review. Agency action, findings, and conclusions that should be set aside; in accordance with the above stated laws, are affirmed instead.

Armed Services Board of Contract Appeals

The charter for the Armed Forces Board of Contract Appeals (AFBCA) states that the members are not law judges and are not appointed by either the executive or the legislative branch of the government, but by the Agency's themselves. The Charter states that "Membership of the Board shall consist of attorneys at law who have been qualified in the manner prescribed by the Contract Disputes Act of 1978. Appointment of Board members shall be made by the Secretary of Defense. Members of the Board are hereby designated "Administrative Judges". The Administrative Judge's responsibility for review follows:

> It shall be the duty and obligation of the Judges of the Armed Services Board of Contract Appeals to decide appeals on the record of the appeal to the best of their knowledge and ability in accordance with applicable contract provisions and in accordance with law and regulation pertinent thereto.

This charter allowed Judge Prouty to establish his own rules, in violation of the contract, decades of well-established and sound contract laws, the Federal Rules of Evidence, and the Federal laws that govern review of these cases, 5 U.S. Code § 7703 (C) and 5 U.S.C. § 706.

Kurkjian was a contractor with a signed contract; not a government employee. A different outcome would result if the Federal Circuit reviewed this Appeal with consideration of the contract and (FAR). FAR 1.603-3; Appointment. FAR 1.603-4 Termination. FARl.602-2 Contracting Officer Responsibility. FAR42.1303 Stop-work orders. FAR 49.607 Delinquency notices. FAR 49.607 (a) Cure Notice. FAR 49.102 Notice of Termination. AppxOSl 52.217-9 Option to Extend the Contract.1 FAR 4.804-4 Physically Completed Contract. FAR 4.804-5 Procedures for closing out contract files.

He stated, "The Board is not strictly limited to considering evidence in accordance with the Federal Rules of Evidence, but they, nevertheless, may serve as a guide"

Th Federal Circuit deferred to Agency findings that are unsupported by substantial evidence which is unlawful in accordance with 5 U.S.C. § 706. (E) :

Employee Supervisor Carter could not proffer any evidence to substantiate his testimony

The Administrative Judge reported: "Mrs. Kurkjian testified that Dr. Carter had "continuously" threatened her option years "if I didn't do as I was told" (tr. 1/53) and that Dr. Carter told her to "care less, think less, and ask less questions and do as you're told" (tr. 1/68-69) because she was making people look bad. He reports that Dr. Carter flat out denies both sets of allegations (tr.1/209)." The evidence; however, shows that Dr. Carter's threats came to fruition and that his instructions were not in accordance with USDA regulations, the tasks in her contract, or office protocol.

5 U.S.C. § 706. (E): requires whole record review but he stated his opinion was largely based on a memo written by the Assistant to the Director, Evangelos, which compromises less than 2% of the evidence. He also stated: "The Government is permitted to consider the evidence that it had before it, including hearsay. The point is this witness is reporting information which, of course, can be discounted appropriately as hearsay, but it is the basis for the Government's decision. Moreover, the Board's rules allow hearsay, so you may continue."

5 U.S. Code § 7703 (C) requires that a finding be held unlawful and set aside if found to be an abuse of discretion . The following sentence was quoted out of context to support an erroneous finding of fact that Petitioner had a terrible relationship with co -workers.

Sentence in context: *Considering how many haw dsparted in the fast few years (3 transferred out, 2 retired, and 2 died), it seems some effort should be made in determining why so many are gone rather than driving another poor soul into the ground for caring too much.*

Out of context: *seeing so many people depart, including two who had died, he would understand. She characterized the actions of her coworkers as "driving another soul into the ground for caring too much."*

The Administrative Judge allowed the government attorney to lead witnesses, "I have let you lead but at some point, it becomes too much."

He led the Contracting Officer to say that he was at the decision meeting when Streeter actually testified "I don't recall if I sat in on the telephone conversation".

Carter testified: about the meeting: I think we talked about different scenarios, one was not to terminate, let her finish out the contract. I think we also discussed letting her do it from home. And I think that the lawyers came up with just paying the contract and just saying the contract was completed.

The Administrative Judge refers to meetings but does not know the dates because there is no documentation "Sometime during the September to November 2012 time frame, Kurkjian convened a meeting to discuss Salmonella testing issues". "It is possible that this is the meeting that Ms. Bates is referring to. though it was slightly later than the time period she believed the meeting took place:

The above does not reflect appropriate fact finding and should be cause for setting aside the Decision; not affirming it with strict deference.

In Kurkjian v United States, The Federal Circuit's affirmation of an "effective" completion will throw contract law into disarray, as different courts will begin to use differing standards to justify the wrongful terminations of government contractors. There are no laws, rules, or regulations that define effective completion. Kurkjian v US Sec of the Army sets the mark at 95% (which was actually 91% on the termination date) of the hours paid as an "effective completion" even though the contract is stated in terms of delivery dates and inspected supplies. This is also particularly problematic given that current contract law requires that a contract be "physically completed"

The Decision is such a departure from the proper procedures of the FAR regulations - which the Federal Circuit affirmed without any real briefing on the significant change it was making—and will make it near impossible for a contractor to overcome the deference given to the Board Administrative Judges to make their own rules that run counter to the contract, contract law, and the constitutional right to fair notice and due process. If contract law is going to be completely upended, it should be thoroughly briefed and not brought about through procedural sleight of hand. Adherence to precedent is a "foundation stone of the rule of law," Michigan v Bay Mills Indian community, 572 U S 782, 798, and any departure from the doctrine demands "special justification, " Halliburton Co v Erica P. John Fund, Inc, 573 U.S. 258, 266.

The laws that govern the "conclusion" of contracts are well established and sound contract laws. The individuals who made the decision to discharge the contractor without notice after defaming her with libelous publications were able to skirt all the laws by the Boards establishment of the "post hoc" rationalization that completing 95% of the hours meant she was not terminated even though the evidence shows that she was discharged without notice 7 weeks premature of the February 26, 2013 delivery date with 4 undelivered and uninspected supplies.

This new case law allows employee supervisors to not only unlawfully interfere in a contractor's performance but to slander them with no recourse in the Courts. In this case, the Administrative

Judge further perpetuated the defamation based on undocumented and unsubstantiated allegations. The Contracting Officer testified that the contract file contained no evidence of the Board's holdings. Hundreds of pages of evidence supporting the petitioner's claims were disposed of. The Armed Forces Board of Contract Appeals decided the case as it wanted to do, not the case actually before it. US v. Sineneng-Smith, 140 S. Ct. 1575, 590 US __ - (2020).

The rights and privileges of all government contractors in America will be affected by this new case precedent. Consider, the Court purported to define an "effectively completed" contract when no such thing exists and resulted in an unfair surprise to the contractor. A court should decline to defer, for example, to a merely "convenient litigating position" Christopher, 567 U.S. at 155 or to a new interpretation that creates "unfair surprise to regulated parties, Long Island Care at Home, Ltd v Coke, 551 U. S. 158, 170. Pp 11-19. Moreover, fair notice and due process rights is a constitutional requirement which can only be changed through constitutional amendment or by this Court. See Feist Publications, Inc. v. Rural Telephone Service Co., 499 US 340, 348-51 (1991)

Docket 21-7077 US Court of Appeals for the Federal Circuit:

The US Court of Appeals, Federal Court deferred to the Board's Opinion without considering any of the evidence in the brief or the 520-page Appendix; The Federal Court "parroted" findings of fact verbatim from the Board's opinion without even considering the blatant contradictions in the record, The contract law was discounted, as was the specific and substantial danger of non -compliant sample sizes being cited in government documents.

Petitioner cited ample evidence; including the FDA Bacterial Analytical Methods that describes the three categories of food and the required sample sizes to ensure the statistical probability that the food is safe for human consumption, to prove that her concerns were legitimate in "looking out for the best interests of the soldiers" but the Federal Circuit deferred to Judge Prouty's opinion that her concerns were just an "annoyance".

The conflicts in Circuit precedence regarding whether "bad faith" entitles a contractor to the lost profits of the option years was overlooked and no explanation was provided as to why the record evidence did not establish prima facie for retaliation.

Reasons for Granting the Rehearing

If this case was decided by a different District Court of Appeals with less deference, the outcome would be different. The US Court of Appeals, Federal Circuit gave deference to the Board without consideration of the fact that the opinions ran counter to the record, the testimony of the Contracting Officer, and was not in accordance with law.

A. A decision in Pending Docket 21-1028, INTERNATIONAL ENERGY VENTURES MANAGEMENT, L.L.C. v. UNITED ENERGY GROUP, LTD would have an impact on this case if this Court decides that when a district court fails to make proper fact findings, no deference is owed. Presenting question:

Must a reviewing court strictly adhere to Federal Rule of Civil Procedure 52(a)'s requirement that a district court's fact-findings "must not be set aside unless clearly erroneous," as the First, Eighth, Ninth, and D.C. Circuits have held, or may the appellate court engage in its own review with less deference (or "no" deference, ...) when the court of appeals decides the fact-findings are insufficient, as the Second, Fifth, Sixth, and Eleventh Circuits have concluded?

INTERNATIONAL ENERGY VENTURES MANAGEMENT, L.L.C., states:
The longstanding split ought to be resolved by this Court because there is no question this case would be resolved differently in different circuits. The Second, Fifth, Sixth, and Eleventh Circuits have created an apparent exception to Rule 52(a)'s clear-error rule: When the district court fails to make proper fact-finding's, no deference is owed and the court of appeals may come to its own conclusions. The remaining 19 circuits, however, especially the First, Eighth, Ninth, and D.C. Circuits, refuse to review the district court under any standard but clear error—even when confronted with such weak findings. B. The question presented is important

The Fifth Circuit has also previously held that a remand for findings is unnecessary if, as in this case, "the evidence is documentary and the appellate court can pass upon the facts as well as the trial court, or if all facts relied upon to support the judgment are in the record and are undisputed." Jenkens & Gilchrist v. Groia & Co., 542 F.3d 114, 118 (5th Cir. 2008). The Second Circuit has held similarly, making factual determinations, rather than remanding to the district court, if it is "able to discern enough solid facts from the record to permit [it] to render a decision." Mobil Shipping & Transp. Co. 190 F.3d at 69 (quoting Davis v. NYC Hous. Auth., 166 F.3d 432, 436 (2d Cir. 1991)). Thus, even in a case where the trial court failed to make a relevant factual finding because it simply "did not address" the issue, the Second Circuit has held that it may still conduct its own review where "the relevant evidence is documentary and undisputed." Id. at 67, 69. The Sixth and Eleventh Circuits have not broken with Rule 52 as cleanly, but their decisions have the same effect. The Sixth Circuit has not emphasized whether the record contained only documentary evidence, for example, but it has held that it may "dispose of the appeal on its merits despite the insufficiency of the findings of fact" simply "to avoid further extension of . . . protracted litigation." G.G. Marck, 309 F. App'x at 936. Meanwhile, the Eleventh Circuit has simply decided issues on its own, saying that remand is unnecessary when "a complete understanding of the issues is possible in the absence of separate findings and if there is a sufficient basis for the appellate court's consideration of the merits of the case." E.g., Tejada, 941 F.2d at 1555. These cases conflict with the approaches of the First, Eighth, Ninth, and D.C. Circuits, which all refuse to conduct their own review in the face of insufficient findings. See Supermercados Econo, Inc., 375 F.3d at 3 (1st Cir. 2004); Duffy, 111 F.3d at 74 (8th Cir. 1997); Crittenden, 804 F.3d at 1006-07 & n.4 (9th Cir. 2015); Berger, 843 F.2d at 1407-08 (D.C. Cir. 1988). And even more circuits state in general terms that they "must remand" to the district court when insufficient or nonexistent findings prevent clear-error review, or that remand is necessary or required in such circumstances. See e.g., PharMethod, Inc. v. Caserta, 382 F. App'x 214, 218 (3d Cir. 2010); Hoechst Diafoil Co.

v. Nan Ya Plastics Corp., 174 F.3d 411, 414 (4th Cir. 1999); Sellers v. United States, 902 F.2d 598, 601 (7th Cir. 1990); In re Young, 91 F.3d 1367, 1375 (10th Cir. 1996); Golden Blount, Inc. v. Robert H. Peterson Co., 365 F.3d 1054, 1061 (Fed. Cir. 2004). The circuits that strictly adhere to the principle that only the district court may make fact-findings choose one of two paths when the findings of fact are wanting. Generally, they follow the "usual rule" endorsed by this Court that the case be remanded for further findings. See Pullman-Standard, 456 U.S. at 291. In rare circumstances, they may still attempt a clear error review, although the task is arduous without proper findings of fact.

Under this Court's decision in Pullman-Standard v. Swint, an appellate court must generally remand for further fact-finding when the district court fails to make adequate findings. Yet the Fifth Circuit staked out a position previously taken by the Second, Sixth, and Eleventh Circuits to allow a less deferential or de novo review of factual findings when the prior findings are "insufficient" for some reason, unlike many circuits who take a strict approach to Rule 52(a)'s plain language.

INTERNATIONAL ENERGY VENTURES MANAGEMENT, L.L.C makes no mention of the Federal Circuit's position. *But the* resolution of this conflict has a direct impact on this case because the Federal Circuit's deference resulted in a 'clipped view of the record". In Kurkjian v Secretary of the Army, the US Court of Appeals, Federal Circuit granted deference to the Armed Forces Board of Contract Appeals based on the Board's expertise in interpreting the Federal Acquisition Regulations (FAR) which is problematic; in that, the Board did not interpret or apply even one FAR regulation in its review. The Board disposed of the FAR regulations by saying that the contractor was not terminated.

INTERNATIONAL ENERGY VENTURES MANAGEMENT, L.L.C may have significant consequences for this case if the deference allowed the Board was misapplied. The Board Decision should have been granted no deference because the proper procedures of the law were not followed. Depending on the Court's decision as to the deference allowed to Board Decisions, it may then be appropriate to grant, vacate, and remand (GVR) this case for reconsideration. If the Federal Circuit reviewed the hundreds of pages of record evidence contained in the briefs and the 520 page appendix, a different outcome would result. The Federal Circuit deferred to the Board's expertise in interpretation of the Federal Acquisition Regulations (FAR) which is problematic; in that, the Board did not interpret the FAR. The Board disposed of the proper procedures of the FAR by saying that the contract was not terminated even though Kurkjian was involuntarily discharged 7 months premature of the February 26, 2013 delivery date for the base year of the contract with 4 undelivered and uninspected supplies. If the Federal circuit deferred to the sound and well-established contract laws to review this case, a vastly different outcome would also result.

Under the "prevailing standard," Elmbrook School District v. Doe, 134 S. Ct. 2283 (2014), a GVR should be granted "where an intervening factor has arisen that has a legal bearing upon the decision." Lawrence v. Chater, 516 U.S. 163, 168-69 (1996) (per curiam); see also Youngblood

v. West Virginia, 547 U.S. 867, 875 (2006) (Kennedy, J., dissenting) (explaining that "issuing a GVR order in light of some new development" is "traditional practice"). The standard for issuing a GVR is not as demanding as the standard for a traditional grant of certiorari. A GVR order is warranted whenever, "in light of 'intervening developments,'" "there [i]s a 'reasonable probability' that the court of appeals would reject a legal premise on which it relied and which may affect the outcome of the litigation." Tyler v. Cain, 533 U.S. 656, 666 n.6 (2001) (quoting Lawrence, 516 U.S. at 167); see also Wellons v. Hall, 558 U.S. 220, 225 (2010) (per curiam). This is so because a GVR "conserves the scarce resources of this Court," "assists the court below by flagging a particular issue that it does not appear to have fully considered," and "assists this Court by procuring the benefit of the lower court's insight before we rule on the merits." Lawrence, 516 U.S. at 167.

Moreover, the establishment of the "post hoc" rationalization that because 95% of the hours were paid, or invoiced, the government was not required to adhere to the legal and statutory obligations of the contract, essentially gives the unscrupulous the authority to terminate contracts whenever; and however, they choose with no accountability. The Federal Circuit also neglected the fact that the 95% percent figure for the hours paid, or invoiced on January 9, 2013 is wrong. The correct percentage is 91%. The Federal Circuit did not answer the question as to whether a contract that was 91% paid would meet the threshold for "effective" completion or if a termination; with 9% of the hours remaining, would be considered a "wrongful termination" and a breach of the contract. Who will determine this percentage in the future? An employee Supervisor (prohibited from interfering in the performance of a contractor), a Contracting Officer, the Agency, or the Courts after a contractor is discharged in violation of their contract terms? The percent completion should be one hundred percent unless the contractor is furnished a termination notice.

B. The aggregate of petitions questioning the Federal Circuit's blind affirmation of lower Court opinions; without any meaningful review of U.S. Code § 7703 (C) and 5 U.S.C. § 706, requires the attention of this Court as it is a violation of due process rights of the Fifth amendment of the Constitution.

1. Docket 21-781; NVS TECHNOLOGIES, INC., v. DEPARTMENT OF HOMELAND SECURITY describes a similar Federal Circuit Decision to Kurkjian v Secretary of the Army, both denied within a week

The Federal Circuit's Decision Endorses a Board Decision That Is Patently Arbitrary and Unsupported by Any, Much Less Substantial, Evidence, The Federal Circuit's Summary Affirmance of the Board's Decision Violates Due Process, This Case Is a Good Vehicle by Which the Court Can Clarify Critically Important Legal Principles Governing the Government's Obligation to Honor Its Contracts

Just as in Kurkjian, where the Board relied on newly appointed Supervisor Carter's undocumented and unsubstantiated allegations, Petitioner NVS Technologies, Inc argued that "*the Board's decision was arbitrary and unsupported by substantial evidence in large measure*

because it credited Woodbury's bald assertions, which were internally inconsistent and for which there was no supporting evidence in the record."

Excerpts from Docket

According to the Board, Woodbury "persuasively and credibly explained the basis of his decision." App. 41a. But the Board never points to anything in the record that supports such a conclusion, simply offering its own general conclusions in the place of any evidence in the record. See Biestek v. Berryhill, 139 S.Ct. 1148, 1162 (2019) (Gorsuch, J. dissenting) ("The principle that the government must support its allegations with substantial evidence, not conclusions and secret evidence, guards against arbitrary executive decision making."). An agency's mere conclusion does not constitute substantial evidence. Id., at 1159

We do not have the space here to address each unsupported statement by the Board. At bottom, the Board's decision was not just unsupported by substantial evidence, it was supported by no evidence.

The Contract Disputes Act authorizes the Federal Circuit to set aside a Board decision that is arbitrary, capricious, or not supported by substantial evidence. 41 U.S.C.§ 7107(b)(2)(A) & (C). These are familiar concepts in judicial review of agency action that require agencies to engage in "reasoned decision making." Michigan v. EPA, 576 U.S. 743, 750 (2015). Agency action is arbitrary or capricious if it is "not rational and based on consideration of the relevant factors." F.C.C. v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 803 (1978). Furthermore, agency action is "arbitrary and capricious if the agency ... offered an explanation for its decision that runs counter to the 23 evidences before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Am. Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 522–23 (1981) (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951)). In evaluating the evidence, "[t]he reviewing court must take into account contradictory evidence in the record." Id. In this case, the Federal Circuit summarily affirmed the Board's gross misapplication of these standards. Indeed, the Board credited and almost exclusively relied on Woodbury's utterly unsupported explanations for his decision to discontinue funding of Petitioner's contract in the face of an overwhelming record of testimony and other evidence directly contradicting Woodbury's conclusions. The Board simply misrepresents or ignores the record to achieve its preferred outcome.

The United States are as much bound by their contracts as are individuals." Lynch v. United States, 292 U.S. 571, 580 (1934). This proposition is not simply a matter of justice, but reflects a practical recognition of "the Government's own long-run interest as a reliable contracting party in the myriad workaday transactions of its agencies." United States v. Winstar Corp., 518 U.S. 839, 883 (1996). Yet reality does not match this

ideal. Government contractors have been confronted by disparate decisions from Boards of Contract Appeals and from the judges of the Federal Circuit and the Court of Federal Claims, spurred by the extreme positions taken by federal agencies and the Justice Department on their behalf, that construe contracts to give the Government "the legal right to disregard its contractual promises." 4 Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 631, 644 (2005). And agencies are not blocked from exercising this discretion for arbitrary and unsupported reasons. This whole exercise in "contractual abrogation," Winstar, 518 U.S. at 884, is often then cloaked from further scrutiny by the Federal Circuit's profligate use of summary affirmance under its Rule 36.

brings to the Court an excellent opportunity to restore the legal principles that ensure that the Government will be a reliable contracting partner.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED The Fifth Amendment to the Constitution provides, in pertinent part: "No person shall ... be deprived of life, liberty, or property, without due process of law." The Contract Disputes Act, 41 U.S.C. §7107(b)(2), provides in pertinent part that a decision of the Board may be set aside if it is "(A) fraudulent, arbitrary or capricious; (B) so grossly 2 erroneous as to imply bad faith; or (C) not supported by substantial evidence."
. While one cannot predict how many lives Petitioner's system could have saved, there is little doubt it would have made a major contribution to the fight against Covid-19. It is important that the bureaucracies that were stumbling blocks to the development of pathogen tests be held accountable, not simply as a punitive gesture, but so they will improve their processes for the future. Indeed, the OIG report concluded that Woodbury did not have sufficient information to halt funding of Petitioner's contract because the agency did not have adequate processes and procedures to ensure management could make well-informed decisions in their oversight of the agency's contracts. App. 60a-62a. As far as we know, S&T has not adopted any of the procedural reforms recommended by the IG. This Court is the last hope for effective judicial review in this case to hold DHS accountable for its part in hampering the development of effective Covid-19Tests

2) 21- 1256; Docket Robert M. Athey et al. v. United States states: "Significantly, the Federal Circuit panel held that it rejected any independent responsibility to review the entire record as to whether the government's position was substantially justified" because it deferred to the trial court's determination."

Plaintiffs respectfully urge the Court to "grant certiorari in order to consider correction of the panel's egregious errors of statutory interpretation" and to affirm Congress' constitutional authority to address by statute pursuant to 28 U.S.C. 2412(b) and (d) the government's liability for prevailing plaintiffs' reasonable attorney fees and costs. Moreover, there is no decision of any court in any jurisdiction since Congress enacted section 2412(b) which refutes the reasoning and holding of Gavette and Mortenson, except the decision of the panel of the Court of Appeals for the Federal Circuit.

3) Docket Pyrotechnic Specialties, Inc., Petitioner, v. Secretary of Defense, Respondent, describes how "Federal Circuit Rule 36 allows the Court of Appeals to issue one-word rulings of

"Affirmed" and relieves the Appeal Court of the obligation to issue an opinion. The Federal Court of Appeals affirmed an Armed Forces Board of Contract Appeals Decision acknowledging that the tribunal applied the law incorrectly.

The Court of Appeals Erred in Affirming the Ruling Pursuant to Fed. Cir. R. 36 After Acknowledging that the Tribunal Below Applied the Law Incorrectly. Federal Circuit Rule 36 allows the Court of Appeals to issue one-word rulings of "Affirmed" and relieves the Court of Appeals of the obligation to issue an opinion. This rule can help streamline the Court of Appeals' docket, but it also has the impact of undermining the judicial appellate system by hiding the basis of the Court of Appeals' ruling, especially considering that a Rule 36 ruling can be based on five different and independent grounds. The Court of Appeals uses this rule to determine the outcome of a huge number of cases in its docket each year. This is especially problematic in instances such as the instant case, where the Court of Appeals and the opposing party acknowledged in briefs and during oral argument that the lower tribunal applied the wrong standard of law. The original panel recognized during oral argument, and the government admitted in its response brief and again during oral argument, that the wrong standard of review was applied by the ASBCA. As a result, the judgment was not without error of law. The appropriate standard of review was not applied by the ASBCA meaning it cannot be the basis for affirmance. And, even if it were, as explained at length above, the application of the wrong standard of review prevented the introduction of evidence necessary for a developed record and a just ruling. The record cannot support the tribunal's ruling because the application of the wrong standard of review below prevented the admission of evidence necessary to create a developed and just record. The only basis on which the Fed. Cir. R. 36 order could have been issued was that the ruling was based on facts that were not clearly erroneous. This is critical, because the application of the wrong standard of review by the ASBCA prevented the ASBCA from ever considering the evidence on a mandatory element. Thus, the ASBCA could not issue a ruling based on facts that are not clearly erroneous because the ASBCA refused to consider or admit the relevant facts. The Court of Appeals should not be able to uphold a ruling in which the ASBCA applied the wrong standard of review, particularly when the application of the wrong standard impacted both the legal review and the facts admitted upon which that review was made. The ASBCA's decisions prevented a full record from being formed and thereby prevented any court on appeal from considering whether the tribunal correctly applied the law to all of the facts underlying the original contract termination. Regardless of whether this Court would agree with the Court of Appeals' decision had the Court of Appeals issued a full opinion, it is in the best interest of the public's confidence in the judicial system that such one-word opinions be limited to cases without openly acknowledged legal error, especially when that error effects the facts upon which the ruling is based and where there is no clear or apparent legitimate basis on which to issue the Rule 36 opinion. Otherwise, the opaque shield of the one-word affirmance may result in a less robust legal system and lowered public confidence in the judicial system as a whole. X. CONCLUSION For the foregoing reasons, Petitioner Pyrotechnic Specialties, Inc. respectfully requests that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit

4) Docket 21-158, BOBCAR MEDIA, LLC, Petitioner, —v.— AARDVARK EVENT LOGISTICS, INC., Respondent,

B. distrust is copious when it comes to the Federal Circuit. By its own admission, it employs one-word affirmances in an astounding percentage of decisions. It is no wonder that the frequent use of CAFC Rule 36 has resulted in a profound loss of confidence in the court. See e.g., Dennis Crouch, Wrongly Affirmed Without Opinion, 52 Wake Forest L. Rev. 561 (2017); Rebecca A. Lindhorst, Because I Said So: The Federal Circuit, the PTAB, and the Problem with Rule 36 Affirmances, 69 Case W. Res. 17 As CAFC Judge Wallach observed, 60% of all Inter Partes Reviews (IPRs) by 2016 were affirmed under CAFC Rule 36. Evan J. Wallach et al., Federal Circuit Review of USPTO Inter Partes Review Decisions, by the Numbers: How the AIA Has Impacted the Caseload of the Federal Circuit, 98 J. Pat. & Trademark Off. Soc'y 105, 113 (2016). Likewise, from 2008- 2016, the rate of disposal of appeals from the district courts rose from 21% to 43%. Jason Rantanen, Federal Circuit Now Receiving More Appeals Arising from the PTO than the District Courts, PatentlyO (Mar. 2, 2016), https://patentlyo.com/ patent/2016/06/circuit-appeals-decisions.html. 28 L. Rev. 247 (2018); Andrew Hoffman, The Federal Circuit's Summary Affirmance Habit, 2018 B.Y.U.L. Rev. 419 (2018). See also, Martha J. Dragich, op. cit. As some experienced commentators put it: "The Supreme Court recognized that there are some rare instances where the outcome of the case is so clear a full opinion wouldn't be necessary. It seems doubtful, however, that the Supreme Court envisioned Rule 36 decisions, which are all of one short sentence, would be used in close to half of all cases brought to a Circuit Court. But that is precisely what is happening at the United States Court of Appeals for the Federal Circuit. America's innovators feel as if they are under siege, and by any honest objective review that feeling is based on substantial fact. ... None of the so-called Regional Circuits use Rule 36 as extensively as does the Federal Circuit, particularly with respect to novel and controversial issues." Peter Harter & Gene Quinn, Rule 36: Unprecedented Abuse at the Federal Circuit, https://www.ip watchdog.com/2017/01/12/rule-36-abuse-federal circuit/ id=6971. . . . This wisdom of the crowd reflects a long-simmering dissatisfaction that nobody is immune from the potential injustice that Rule 36 can mask. The CAFC's pervasive Rule 36 practice has served "to sap the foundations of public and private confidence" in the judiciary. Federalist 78. This can only be corrected by this Court's intervention. VIII. THIS CASE IS AN EXCELLENT VEHICLE TO ADDRESS THESE ISSUES This case squarely presents the legal and policy issues above, and arises out of an inequitable use of CAFC Rule 36 which implicated issues of Due Process, the Seventh Amendment, and Article III standing. That the Federal Circuit could silently gloss over constitutional and private property rights illustrates the need for review. A. Bobcar Received No Response to Its Due Process Concerns Bobcar suffered a Due Process violation wherein its claim was dismissed under a sua sponte argument, without prior notice, or a chance to respond. That alone called for reversal. 30 "The Supreme Court has emphasized that prior notice is a prerequisite to a sua sponte grant of summary

judgment." ING Bank, 892 F.3d at 523-24 (2d Cir. 2018), citing Celotex Corp. v. Catrett, 477 U.S. 317, 326 (1986). "A district court's failure to provide adequate notice is almost always reversible error." Id. at 524 (emphasis added). And yet, the Federal Circuit did not reverse. The Second Circuit's ING Bank decision was binding, but the CAFC jettisoned it. Nor is this a minor matter. The district court violated one of the most ancient principles of justice: audi alteram partem, "listen to the other side." It created a theory of dismissal, and failed to let Bobcar's side be heard.) . . .

E. All of Which Illustrate the Serious Risks of Rule 36 Practice Ultimately, this petition does not rise or fall on whether the lower courts were right or wrong. The far greater concern is how Bobcar's appeal was addressed. Serious issues were swept under the rug with a single word. If such appellate action is acceptable, no rights are truly safe. Minutes after the Constitution was ratified, Benjamin Franklin famously said that we have "A republic, if you can keep it." Constitutional principles can only sustain the republic if they are protected. If they can be brushed off, without explanation, then there is no protection at all.

These denied Petitions for Writ of Certiorari may not be considered "cert worthy" on an individual basis but the aggregate of these complaints indicate that the Supervisory powers of this Court is needed to ensure the constitutional rights of its citizens are being protected. Strict deference cannot be used as amens to forego meaningful review. The blatant disregard of contradictions in facts and findings that run counter to each other in the same opinion is unlawful. cannot be discounted on the grounds of due deference. Correct fact finding is the bed rock of meaningful decision making; without accurate facts, there is no justice. It is unlawful for a Court to intentionally neglect facts and laws that would result in different decision and more important, pose a specific and substantial danger.

5) Petitioner **also** brings new information to this Court's attention pertaining to non-compliant inspection criteria for Salmonella testing in PCR-N-003B, Nut and fruit Mix; approved on July 19, 2019. The US Army Soldier system Command changed the sample size of 60 back to the non-compliant sample size of 5 for salmonella testing in the B revision of PCR-N-003. Non-conforming Salmonella sample sizes render the test results meaningless; increasing the risk of Salmonella contaminated rations sickening Military personnel. A Salmonella recall is considered a class 1 recall because it could cause serious injury or death. PCR-N-003A is the document at issue in this petition that resulted in the adverse employment actions that destroyed Petitioner's livelihood, her reputation, and her sense of wellbeing. Petitioner cited ample evidence; including the FDA Bacterial Analytical Methods that describes the three categories of food and the required sample sizes to ensure the statistical probability that the food is safe for human consumption, proving that her concerns were legitimate in "looking out for the best interests of the soldiers". Petitioner's refusal to forward the document with non-compliant inspection criteria (described as an "annoyance" by Judge Prouty) resulted in demands from the Employee Supervisor Melvin Carter (prohibited from interfering in her contract) to do as she was told and draw less attention to herself. She continued up the chain of command and made disclosures. His note states: She went to the Director of Combat feeding after being told No to!

Carter also testified:

> *And before that, she had gone over. -1 don't know if she tried to tell if she went to the office of the director over at Natick, and I think a lot of this stuff got back to Gerrv. I think she went to HR and talked so someone and pretty much anything that would happen at Natick is going to get back to Gerrv. So, there was this it was happening in the building; it was starting to go out of the building. it was just escalating. It iust didn't seem like there was a way that this was going to calm down.*

The unlawful interference and retaliatory actions by government employees constitutes bad faith The evidence shows that Mrs. Kurkjian's contract and the failure to renew subsequent contract options was pre-textual, done in bad faith and based upon false reasons and conclusions that were retaliatory in nature; and based upon Mrs. Kurkjian's legitimate concerns about ensuring the appropriate testing was included in her document to screen contaminated product out of the military food supply.

As a pro se litigant filing in a motion pauperis, I was cognizant that the petition was doomed for denial but I continued on in the hope that justice would eventually prevail because of the exceptional nationwide importance of the issues and questions presented; citing compliant inspection criteria to ensure the statistical probability that Military rations are safe for human consumption, combatting the intentional infliction of emotional distress (IIED) inflicted upon the individuals in the Documentation Branch from the "bullies" in the Combat Feeding Directorate, protecting the rights and privileges of all contractors, and whether any one is required to adhere to the laws. I have exhausted my finances and sacrificed an exorbitant amount of my life and that of my family, in researching standards of review, the rules, and the laws to stand up for myself; and all the others, who have been wronged by those in authority who think that they can do whatever they want; only to find out that it is true. This 9 year ordeal has proven to me that the "wrong doers" can continue doing wrong and there are no laws that can make them accountable if our Court system does not even require adherence to the laws; not even the laws that govern their own reviews in these cases.

The Board did not apply well- established contract law, the terms of the contract, USDA/FDA Aflatoxin and Salmonella testing regulations, hundreds of pages of record evidence, the testimony of the Contracting Officer, Retaliation Laws, Interference Laws, Intentional Infliction of Emotional Distress Laws, Defamation Laws , the Covenant of Good Faith and Fair Dealings, Federal Rules of evidence, independent contractor rights; and most important, the constitutional right to fair notice and due process. Plaintiff challenged the Board's failure to follow any of the laws, not even the laws that govern their own reviews. The Board's self-proclaimed reliance on "hearsay" and its "clipped view of the record" perpetuated the defamation of an honest, conscientious professional with a 28-year history, as both a full-time government employee and a contractor awarded six consecutive contracts with no issues. She was deemed a critical part of the CFD Mission based on her level of expertise and knowledge of CFD procedures. Plaintiff sacrificed her own self-interest speaking out about the refusal of Employee Supervisors to include compliant Aflatoxin and Salmonella inspection (requested by the US Department of

Agriculture) into government documents to be used for the procurement of Military rations, the dissipating Knowledge base and the hostile work environment that resulted in the demise of the Documentation Branch of the Food Engineering Services Branch of the Combat Feeding Directorate at the US Army Soldier Systems Command. (9 individuals reduced to 3 during Supervisor's Canniff's tenure).

The deck will be stacked against contractors by this new case law that allows employee supervisors to not only unlawfully interfere in a contractor's performance but to slander them with no recourse in the Courts. In this case, the Judge further perpetuated the defamation based on undocumented, unsubstantiated testimony. The Contracting Officer testified that the contract file contained no evidence of any of the opinions reported by Judge Prouty. Hundreds of pages of evidence supporting the petitioner's claims were disposed of and the Court disposed of all evidence that did not fit with his opinions. A sentence was quoted out of context to support erroneous finding of fact.

On the basis of the substantial evidence contained in the record that was ignored, and the the conflicting case law, Appellant avers that a rehearing of the case to consider all of the evidence. Would result in a different outcome. There is convincing evidence that the government's decision to terminate Petitioner and the refusal to exercise her option contracts was done in bad faith. The government retaliated against her for disclosing and objecting to conduct that she reasonably believed posed a specific and substantial danger. Appellant, through no fault of her own, was prevented from performing her obligations under the contract, and for the three subsequent contracts, by government employees who breached their duty of good faith and fair dealing.

This Court has a duty to step in to address a monumental shift taking place in contract law with almost no oversight or deliberation. A signed contract will no longer be recognizable as having the "force of law" if Administrative Judges are allowed to establish their own criteria to overrule the law. The Federal Circuit's opinion establishes case precedent that heralds the end of accountability on the government's part to honor the terms of a contract, to adhere to contract law, the laws that govern their own reviews, the constitution, and even the laws that protect the health and safety of our citizens and our soldiers. This is not an overstatement, but a fact unless this Court reconsiders its denial of this petition. The blatant disregard of the law and the reliance on erroneous findings of facts cannot go unaddressed. This is where contract law is implacably headed unless this Court grants a writ of certiorari to review this decision. Of even greater importance is the fundamental attack on the principles of the Covenant of Good Faith and fair Dealings and the constitutional rights afforded by the Constitution.

CONCLUSION

For the reasons set forth in this Petition, Catherine Kurkjian respectfully requests this Honorable Court grant rehearing on the denial of her Petition for a Writ of Certiorari, or grant a GVR for a holding until a decision is made that resolves the conflict in the Circuit Courts regarding the deference due the Armed Forces Board of Contract Appeals.

Respectfully Submitted,

Catherine Kurkjian

April 22, 2022

CERTIFICATE OF COUNSEL

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds specified in Supreme Court Rule 44.2.

Catherine Kurkjian

4/22/22