No. _____

In the
Supreme Court of the United States

KENNETH PRITCHARD,
Petitioner,
v.

METROPOLITAN WASHINGTON AIRPORTS AUTHORITY,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether whistleblower provision of the 2013 National Defense Authorization Act (NDAA) protects employees from retaliation occurring after the provision's effective date, when some of the protected activities occurred prior to that effective date.

2. Whether a jury could find it reasonable for a whistleblower to believe that the employer's in-house attorney is a "management official or other employee … who has the responsibility to investigate, discover, or address misconduct." 41 U.S.C. § 4712(a)(2)(G).

3. Whether the lower courts' failure to address issues raised by Petitioner precludes summary judgment.

LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

- *Kenneth Pritchard v. Metropolitan Washington Airports Authority,* Civil Action No.1:18-cv-1432,U.S. District Court for the Eastern District of Virginia. Judgment entered Nov. 4, 2019.
- *Kenneth Prichard v. Metropolitan Washington Airports Authority,* No. 19-2386, U.S. Court of Appeal for the Fourth Circuit. Judgment entered May 21, 2021.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix pages **** and

[ ] reported at _____ or,

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

[ ] For cases from **state courts**:

The opinion of the highest court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided this case was May 21, 2019.

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 6, 2021, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

[ ] For case from **state courts**:

The date on which the highest court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date:_____, a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____A_____.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. National Defense Authorization Act for Fiscal Year 2013, 41 USC § 4712(a) states:

§4712. Enhancement of contractor protection from reprisal for disclosure of certain information.

(a) Prohibition of Reprisals –

(1) IN GENERAL – An employee of a contractor, 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 gross mismanagement of a Federal contract or grant, a substantial and specific danger to public health or safety, or a violation of law, rule, or regulation related to a Federal contract (including the competition for or negotiation of a contract) or grant.

(2) PERSONS AND BODIES COVERED – The person and bodies described in this paragraph are the persons and bodies as follows:

(A) A Member of Congress or a representative of a committee of Congress.
(B) The Inspector General.
(C) The Government Accountability Office.
(D) A Federal employee responsible for a contract or grant oversight or management at the relevant agency.
(E) An authorized official of the Department of Justice or other law enforcement agency.
(F) A court or grand jury.
(G) A management official or other employee of the contractor, subcontractor, grantee, or subgrantee who has the responsibility to investigate, discover, or address misconduct.

2. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1553(a), 123 Stat. 115 states:

Sec. 1553 Protecting State and Local Government and Contractor Whistleblowers.

(a) Prohibition of Reprisals. – An employee of any non-Federal employer receiving covered funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee's duties to the Board, an inspector general, the Comptroller General., a member of Congress, a State or

Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee reasonably believes is evidence of–

(1) gross mismanagement of an agency contract or grant relating to covered funds;
(2) a gross waste of covered funds;
(3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds;
(4) an abuse of authority related to the implementation or use of covered funds; or
(5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.

STATEMENT OF THE CASE

The Metropolitan Washington Airports Authority (MWAA) hired Kenneth Pritchard on February 14, 1988, eventually promoting him to the position of Manager of its Human Resources Policy, Strategy and Compensation Program. In this position, Pritchard was responsible for administering and improving all job evaluation and compensation programs. Every year, MWAA rated Pritchard's performance as "fully successful," "achieved" or better. Before Pritchard was terminated on February 7, 2017, he had received no discipline during his twenty-nine (29) years of service to MWAA.

In 2010, Pritchard reported numerous violations of Title VII and the misuse of federal funds by his supervisor, Vice President for Human Resources Arl Williams, Employment Manager Deborah Lockhart, and Benefits/Retirement Manager Warren Reisig. Pritchard made his reports to CEO James Bennett, Interim CEO Lynn Hampton, COO Margaret McKeough, and General Counsel Philip Sunderland.

On March 29, 2011, Pritchard made multiple disclosures of Title VII violations at MWAA, as well as the misuse of federal funds on the Dulles Rail Project, to Congressman Frank Wolf, Wolf's Chief of Staff Dan Scandling, and two other members of Wolf's staff. Pritchard was soon contacted by the Department of Transportation Office of Inspector General (DOT OIG) and an FBI Special Agent. The DOT OIG conducted a sixteen (16) month investigation issuing a report finding that MWWA's "ambiguous policies and ineffectual controls" had put "millions of Federal

dollars at significant risk of fraud, waste, and abuse . . . ."

In July of 2011, MWAA hired a new CEO, John "Jack" Potter. In May of 2013, Potter hired a new Vice President for Human Resources, Anthony "Tony" Vegliante. Both Potter and Vegliante knew that Pritchard was a whistleblower who had worked with a variety of Federal agencies investigating MWAA corruption. In fact, in 2013, Pritchard told Vegliante there was still corruption at MWAA.

On November 8, 2012, Pritchard, through counsel, complained to Potter and two MWAA Board officers of retaliation for reporting "massive and continuing violations of Title VI," favoritism, nepotism and insurance fraud, misuse and theft of funds, racketeering and extortion in contracting. Pritchard acknowledged that he was "the source of the allegations" with the DOT OIG. Pritchard pointed to Potter as one of the individuals who had retaliated against him.

Pritchard also complained that MWAA's HR manager, Deborah Lockhart, violated Title VII and engaged in harassment, retaliation, and timecard fraud. Despite Pritchard's complaints, MWAA did not initiate any investigation of Lockhart.

In January 16, 2014, DOT OIG issued a report from "a separate audit focused on MWA's financial controls for the Dulles rail project" because "MWAA was unable to provide support for a number of expenditures" related to Federal Transit Administration grants. DOT OIG's report found that MWAA continued to assert

"unsupported and unallowable costs" which were "attributable to MWAA's lack of sound grant management controls."

From approximately March 29, 2011, to April 10, 2014, Pritchard worked with the DOT OIG on its investigation of the MWAA. In April, 2012, Pritchard informed MWAA officials of the violations he discovered, including the actions of Vice President of Human Resources, Arl Williams. Williams retaliated against Pritchard in June 2012 by "impos[ing] incredible supervision upon [Pritchard], supervision that [he hadn't] had…in [his] whole life." Sunderland hired an outside law firm to investigate Williams which was later used to justify his firing.

On November 6, 2012, in part due to Pritchard's disclosures regarding Williams' unlawful activities, MWAA asked for and received Williams' agreement to resign. Sunderland also testified that MWAA wanted Pritchard to "move on".

Pritchard's disclosures of MWAA's malfeasance did not cease after Williams' departure and the DOT OIG reports. MWAA's hostile treatment of Pritchard also continued. In January of 2013, Potter threatened to remove Pritchard's cross functional work, which included developing employment programs, performance management, and Enterprise Resource Planning. In April of 2013, Pritchard advised Potter that he was "experiencing continuing retaliation."

In Pritchard's May of 2013 report to Vegliante, he raised additional allegations of discrimination and improper practices. On June 27, 2013, Prichard

disclosed to Vegliante that concerns he had raised with the DOT OIG had not yet been addressed by MWAA. Pritchard continued to make reports of MWAA violations to Vegliante in 2014 and 2015. MWAA, in turn, continued to retaliate against Pritchard by diminishing his duties and withholding information from Pritchard which was necessary for his work.

On January 14, 2016, during an Human Resources Managers Meeting, Pritchard reported that MWAA still had not addressed issues raised by the DOT OIG in its reports and that MWAA was still violating Title VII. From January through November of 2016, Pritchard reported violations of Title VII regarding job grading and the disparate treatment of women.

On October 19, 2016, Pritchard told MWAA Board officer Anthony "Tony" Griffin that the MWAA had violated "Federal-MWAA contract and grants" and that he "was the primary whistleblower against MWAA's wrongdoing in years prior and had worked with DOT OIG concerning the wrongdoing and, as a result, had been retaliated against by MWAA." Potter angrily walked in and out of this meeting.

In April of 2016, Pritchard promoted Gail Endicott to Senior Compensation Specialist in Prichard's department. Endicott had worked for Pritchard for years and had complained to Pritchard how other MWAA employees acted corruptly. After the promotion, Pritchard determined that Endicott could not perform at the higher grade level. Endicott then began to complain to higher supervisors about Pritchard. Other MWAA employees testified about Endicott's work deficiencies following her promotion.

On November 2, 2016, Endicott complained that Prichard was "yelling obscenities to her" and that he told staff not to talk to certain other MWAA officials that Pritchard called the "Brain Trust." Endicott complained that Pritchard monitored the schedules and travel of MWAA Board members and that he was highly critical of the Office of Human Resources. On November 4, 2016, MWAA hired outside attorney Morris Kletzkin to investigate Endicott's claims.

On November 18, 2016, Pritchard disclosed to MWAA's Associate General Counsel Bruce Heppen a potential ongoing threat to the safety of Federal law enforcement officers, MWAA law enforcement personnel, other MWAA employees, and the public at both Ronald Reagan Washington National Airport and Dulles International Airport stemming from untimely checks of warrants by the MWAA public safety dispatch center.

On November 29, 2016, Heppen notified Pritchard that MWAA had decided to place him on administrative leave.

On January 11, 2017, Pritchard's counsel requested that Morris Kletzkin, MWAA's counsel, place a litigation hold on relevant and irreplaceable information possessed by MWAA regarding his status. Kletzkin refused to implement a litigation hold. Instead, MWAA trashed Prichard's files left in his office when he was placed on leave.

On January 17, 2017, Kletzkin completed his investigation. Three weeks later, on February 7, 2017, the MWAA terminated Pritchard for his "gratuitous

attacks on many Airports Authority personnel." MWAA rejected Pritchard's whistleblower claims, asserting "there is no statute, federal or state, applicable to you which creates any enforceable rights for you as a 'whistleblower'."

On November 19, 2018, Pritchard filed suit in the United States District Court for the Eastern District of Virginia alleging that the MWAA subjected him to a hostile work environment and then terminated him in violation of Title VII. On July 17, 2019, after completing the required administrative exhaustion, Pritchard amended his complaint to add claims under ARRA and NDAA. Pritchard's claims included one for spoliation, based on MWAA's failure to preserve relevant documents as Pritchard had requested. MWAA moved for summary judgment which the District Court granted on November 4, 2019, without addressing Pritchard's "spoliation" argument. Pritchard timely noticed his appeal on December 2, 2019.

On May 21, 2021, the United States Court of Appeals for the Fourth Circuit affirmed the District Court's grant of summary judgement. On June 21, 2021, Pritchard filed a Petition for Rehearing *En Banc*. On July 6, 2021, the United States Court of Appeals for the Fourth Circuit denied Pritchard's Petition for Rehearing *En Banc*.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION THAT PRITCHARD'S CONDUCT IS NOT PROTECTED BY THE NDAA BECAUSE HIS DISCLOSURES WERE MADE BEFORE THE ACT'S EFFECTIVE DATE IS INCONSISTENT WITH NDAA'S DECISIONS OF THIS COURT.

The Fourth Circuit's ruling that the National Defense Authorization Act for Fiscal Year 2013 (NDAA), 41 U.S.C. § 4712, only protects disclosures made after the Act's passage is in conflict with this Court's precedents. The conduct prohibited by the NDAA is the "discharge[ ], demot[ion], or other [act of discrimination] against [a protected person] as a reprisal for disclosing" identified wrongdoing. *Id.* § 4712(a)(1). There is nothing in the Act limiting reprisal to disclosures occurring after the Act's effective date. An employer with knowledge of a whistleblower's disclosures before the law is effective but who waits to retaliate until after the law is effective, is still breaking the law. It was clear error for the lower courts to limit the reach of the statute to disclosures that occurred after the laws' effective dates.

The idea that protected activity must occur after the NDAA's effective date misapprehends the nature of a retaliation claim. Such claims arise when the employer imposes discipline or similar adverse action, not when the employee engages in the protected activity; the latter is merely evidence that the adverse action was illegal. There is no temporal limit on such evidence. *Sprint v. Mendelsohn*, 552 U.S. 379, 380-82 (2008);

National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002) (Title VII does not bar an employee from citing prior acts as background evidence in support of a timely EEO claim, even if no complaint was filed over the prior acts).

A motive to retaliate can give rise to a claim even if there was *no* protected activity. *See Heffernan v. City of Paterson*, 578 U.S. __, 136 S. Ct. 1412, 1418 (2016) ("When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action . . . even if, as here, the employer makes a factual mistake about the employee's behavior."). Events that take place before an act's effective date are certainly relevant to the employer's motive for the adverse action taken after the effective date if the act is unlawful. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

The beneficiaries of whistleblower protections are generally employees whose actions aid the government's enforcement of laws designed to protect the public. *See English v. General Elec. Co.*, 496 U.S. 72, 82-83 (1990) ("paramount" purpose of § 210 of Energy Reorganization Act, 42 U.S.C. § 5851, which "encourages employees to report safety violations" at nuclear plants, "was the protection of employees"). The point of whistleblower legislation is not to define *when* protected activity occurs, but rather it is to prevent the employer from taking adverse actions based on this activity. An employer who punishes an employee after the legislation becomes law is fully subject to the legal

restrictions and should not escape liability simply because the conduct being punished took place prior to enactment. The timing of the protected activity does not make an employers' actions lawful. The principle that retroactivity is measured by the employer's conduct, not the employee's, was emphatically restated by the Court in *Landgraf v. USI Film Prod.*, 511 U.S. 244, 265 (1994), which concerned the retroactivity of amendments to Title VII of the plaintiffs. The Court cited the ""principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place" for its holding that the amendments applied only to the employer's actions following enactment. *Id.*, quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855 (1990). In the case at Bar, the challenged conduct – Petitioner's termination – occurred after enactment of the NDAA.

As the Court noted in *Connick v. Myers*, 461 U.S. 138 (1983), public employers should, "as a matter of good judgment," be "receptive to constructive criticism offered by their employees." *Id.* at 149. The dictates of sound judgment are reinforced by the powerful network of legislative enactments – such as whistleblower protection laws and labor codes – available to those who seek to expose wrongdoing. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

II. A JURY CAN FIND THAT IT IS REASONABLE FOR A WHISTLEBLOWER TO BELIEVE THAT AN EMPLOYER'S IN-HOUSE ATTORNEY IS A "MANAGEMENT OFFICIAL" UNDER THE NDAA.

Under the NDAA, employees are protected from adverse actions if they report information they reasonably believe is evidence of violations of law, rule, or regulations; or is a gross mismanagement of a Federal contract or grant. 41 U.S.C. § 4712(a). Such disclosures are protected under the Act if they are made to a "management official or other employee of the contractor, subcontractor, grantee, or subgrantee who has the responsibility to investigate, discover, or address misconduct." § 4712(a)(2)(G).

In 2016, after NDAA's enactment, Pritchard reported information under the whistleblower provisions to MWAA's CEO, its VP for HR, a Board official, Tony Griffin, and to Bruce Heppen, an in-house attorney who handled compliance and whistleblower matters. Whether Pritchard's belief that these individuals were responsible to address the misconduct cited in his disclosures was "reasonable" is typically for the jury to decide. *Hana Financial, Inc. v. Hana Bank,* 574 U.S. 418, 422-423 (2015).

Despite the law's clarity on this point, the lower courts held that Pritchard's 2016 disclosures to in-house attorney Heppen were not protected by 41 U.S.C. § 417(a)(2)(G). This is untenable: Heppen in fact handled compliance and whistleblower issues for MWAA. Pritchard also reported the information to

Griffin, who was a Board member of MWAA, and the CEO and Vice President of Human Resources. These officials clearly possessed the "responsibility to investigate, discover, or address misconduct." *Id*.

Pritchard was given no training as to who the employees of MWAA were who were given "the responsibility to investigate, discover, or address misconduct." 41 U.S.C. § 4712(a)(2)(G). Even MWAA's CEO did not know who was MWAA's compliance officer.

To not inform employees of who should be provided information of legal violations or company malfeasance, and then to attack an employee's choice to go to in-house counsel or a Board member is inconsistent with NDAA's remedial purpose.

III. WHETHER THE LOWER COURT'S FAILURE TO ADDRESS A LEGAL ISSUE RAISED BY A PARTY SHOULD RESULT IN REVERSAL OF SUMMARY JUDGMENT.

A. REQUIRING THE LOWER COURTS TO ADDRESS LEGAL ARGUMENTS RAISED BY A PARTY IS OF NATIONAL SIGNIFICANCE.

Federal Rule of Civil Procedure 37(e) states that a party must preserve documents and electronically stored information (ESI) when it reasonably anticipates litigation. FRCP 37(e). A formal written letter by a potential plaintiff's counsel clearly triggers the preservation obligation. *Sampson v. City of Cambridge, Md.,* 251 F.R.D. 172, 181 (D. Md. 2008).

On January 11, 2017, Pritchard's counsel notified Morris Kletzkin, attorney for MWAA, that MWAA possessed relevant and irreplaceable information in Pritchard's former office and as a result, a litigation hold was necessary. On January 13, 2017, Kletzkin refused to implement the litigation hold. MWAA destroyed Pritchard's files that were in his former office despite reasonably being aware that litigation with Pritchard was likely. This was clearly spoliation. *See Graff v. Baja Marine Corp.*, 310 App'x 298, 301 (11th Cir. 2009) ("Spoliation is the destruction or significant alteration of evidence, or the failure to preserve property for another's use in pending or reasonably foreseeable litigation.").

A fact finder "may be permitted to draw an adverse inference from the failure of a party to preserve evidence within his exclusive control." *Homes v. Amerex Rent-A-Car*, 710 A. 2d 846, 849 (D.C. 1998). Adverse inferences are available at the summary judgment phase. *Gerlich v. United States Dept. of Justice*, 711 F.3d 161, 170-71 (D.C. Cir. 2013). An adverse inference alone can prevent summary judgment against a plaintiff. *Thaqi v. Wal-Mart Stores East, LP*, 2014 U.S. Dist. LEXIS 45107 (E.D.N.Y. Mar. 31, 2014).

This Court has clearly stated the general inference to be drawn in this type of situation finding that when "[t]he production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse." *Interstate Circuit v. United States,* 306 U.S. 208, 226 (1939). *See also,* James H. Chadbourn, *II Wigmore on Evidence,* at 192 (Little, Brown, & Co., Boston, 1979). ("The

nonproduction of evidence that would naturally have been produced by an honest and therefore fearless claimant permits the inference that its *tenor is unfavorable to a party's cause."* (Emphasis in original)).

Despite this, the lower courts did not even address the argument raised by Pritchard. The court cannot just ignore the issue when it is appropriately raised. There is a national interest for all parties to have courts address issues that are properly raised before them. To allow a lower court to ignore an issue raised before it destroys the public persona of our judicial system as a fair and independent interpreter of the law.

CONCLUSION

Petitioner, Kenneth Pritchard, prays that this Court grant this petition and reverse the decision of the Fourth Circuit.

Respectfully submitted,

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