No. _____

In The
Supreme Court of the United States

MICHAEL S. PECK, PH.D,
Petitioner,

V.

U.S. DEPARTMENT OF LABOR,
ADMINISTRATIVE REVIEW BOARD; AND
MARTY WALSH, U.S. SECRETARY OF LABOR,
Respondents.

LAWRENCE CRISCIONE,
Petitioner,

V.

U.S. NUCLEAR REGULATORY COMMISSION,
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

NED MILTENBERG
Counsel of Record
LAW OFFICES OF NED MILTENBERG AND
GOVERNMENT ACCOUNTABILITY PROJECT
5410 Mohican Road — Suite 200
Bethesda, MD 20816
202-656-4490
NedMiltenberg@gmail.com
Counsel for Petitioners

Counsel Continued Inside Cover

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

JOHN M. CLIFFORD
BILLIE P. GARDE
CLIFFORD & GARDE, LLP
815 Black Lives Matter Plaza, NW — Suite 4082
Washington, DC 20006
202-280-6115

JOHN A. KOLAR
GOVERNMENT ACCOUNTABILITY PROJECT
1612 K Street, NW — Suite 1100
Washington, DC 20006
202-457-0034

Counsel for Petitioners

QUESTION PRESENTED

In 2005, Congress amended the Energy Reorganization Act of 1974 ("ERA") to expressly include the Nuclear Regulatory Commission ("NRC") as an employer which could be sued for retaliatory discrimination against whistleblowing employees.

Did the Fourth Circuit err in holding Congress had not waived sovereign immunity, even though Congress had enacted and then carefully amended a substantive statutory provision that unequivocally authorizes whistleblowing employees of the NRC to sue the sovereign for retaliation?

RELATED PROCEEDINGS

United States District Court for the District of Maryland: *Criscione v. U.S. Nuclear Regulatory Commission*, No. PWG 19-cv-2087 — judgment entered on October 6, 2020.

United States Court of Appeals for the Fourth Circuit: *Criscione v. U.S. Nuclear Regulatory Commission*, No. 20-2320 — judgment entered on May 3, 2021.

United States Court of Appeals for the Fourth Circuit: *Criscione v. U.S. Nuclear Regulatory Commission*, No. 20-2320 — rehearing and rehearing *en banc* denied on July 2, 2021.

United States Court of Appeals for the Fourth Circuit: *Peck v. U.S. Department of Labor, et al.,* No. 20-1154 — judgment, as amended, entered on June 21, 2021.

United States Court of Appeals for the Fourth Circuit: *Peck v. U.S. Department of Labor, et al.,* No. 20-1154 — rehearing and rehearing *en banc* denied on July 13, 2021.

TABLE OF CONTENTS

Documents related to Lawrence Criscione v. United States Nuclear Regulatory Commission:

TABLE OF AUTHORITIES

Cases

Statutes and Rules

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Undersigned Counsel of Record for the Petitioners in both above-capitioned cases respectfully petitions on their behalf for a writ of certiorari to review the judgments of the United States Court of Appeals for the Fourth Circuit in these cases.

Pursuant to this Court's Rule 12.4, undersigned Counsel of Record is filing a "single petition for a writ of certiorari" because the "judgments … sought to be reviewed" are from "the same court and involve identical or closely related questions." Sup. Ct. R. 12.4.

RELEVANT ORDERS AND OPINIONS

In *Peck v. U.S. Department of Labor,* the final order and opinion of the Fourth Circuit entering judgment, dated June 21, 2021, is reported at 996 F.3d 224 (4th Cir. 2021), *as amended* (June 21, 2021). It is reprinted in the attached Appendix at A1-A17.

In *Peck,* the Fourth Circuit's initial (and superseded) judgment of April 30, 2021, is not reported in the Federal Reporter, published, or available on Westlaw or Lexis. It is reprinted at A18.

In *Peck,* the Fourth Circuit's order of June 21, 2021, amending its judgment of April 30, 2021, is not reported, published, or available on Westlaw or Lexis. It is reprinted at A19.

In *Peck,* the Fourth Circuit's order of July 13, 2021, denying rehearing and rehearing *en banc* is not reported, published, or available on Westlaw or Lexis. It is reprinted at A20.

In *Criscione v. U.S. Nuclear Regulatory Commission,* the order and opinion of the U.S.

District Court for the District of Maryland entering judgment is reported at 493 F. Supp. 3d 423 (D. Md. Oct. 6, 2020). It is reprinted at A25-A43.

In *Criscione,* the Fourth Circuit's order of December 11, 2020, placing its consideration of and rulings on *Criscione* "in abeyance pending a decision … in *Peck*" is not reported, published, or available on Westlaw or Lexis. It is reprinted at A24.

In *Criscione,* the Fourth Circuit entered an order in that case on May 3, 2021, stating that "[i]n light of our rejection in *Peck* of the identical issue presented by this appeal, we summarily affirm the district court's dismissal of Criscione's whistleblower-retaliation action against the NRC." (A22). That order is not reported, published, or available on Westlaw or Lexis. It is reprinted at A21-A22.

In Criscione, the Fourth Circuit entered its judgment of summary affirmance in that case on May 3, 2021. That judgment is not reported, published, or available on Westlaw or Lexis. It is reprinted at A23.

In *Criscione,* the Fourth Circuit entered an order on July 2, 2021, denying rehearing and rehearing *en banc*. That order is not reported, published, or available on Westlaw or Lexis. It is reprinted at A24.

JURISDICTION

The Fourth Circuit entered its amended judgment in *Peck v. U.S. Department of Labor* on June 21, 2021. Petitioner Michael S. Peck, Ph.D. ("Dr. Peck") timely sought panel rehearing and rehearing *en banc*, which the Fourth Circuit denied on July 13, 2021.

The Fourth Circuit entered its judgment in *Criscione v. U.S. Nuclear Regulatory Commission* on

May 3, 2021. Petitioner Lawrence Criscione ("Mr. Criscione") timely sought panel rehearing and rehearing *en banc*, which the Fourth Circuit denied on July 2, 2021.

This Court has jurisdiction in both cases under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant "Employee Protection" provision, 42 U.S.C. § 5851, of the Energy Reorganization Act of 1974 ("ERA"), as amended by the Energy Policy Act of 2005 ("EPA"), 42 U.S.C. 5801 *et seq*., is reprinted at A47-A53.

STATEMENT

Petitioner Michael Peck, Ph.D., is a professional engineer, with a Ph.D. in Nuclear Engineering. He started his employment for Respondent Nuclear Regulatory Commission ("NRC") in 2000, working as a nuclear engineer at all relevant times thereafter. From 2007 to 2012, he served as the NRC's Senior Resident Inspector at the Diablo Canyon Nuclear Power Plant in California.

At various times in 2015 and 2016, in the aftermath of nuclear disasters (and near disasters) at various nuclear power plants around the globe, including in 2011 at the Fukushima Nuclear Power Plant in Japan and in 2013 at the Diablo Canyon Plant, Dr. Peck voluntarily provided truthful, accurate, and embarrassing testimony and disclosures about the health and safety risks to the public from poorly analyzed seismic risks at the Diablo Canyon Plant, to Congress and the NRC's Office of Inspector General ("OIG"). His NRC superiors were well-aware of his testimony and disclosures.

After Dr. Peck provided his disclosures and testimony he applied for different, better, and higher-paying positions within the NRC. The NRC denied each of his applications, each time choosing to promote a less-qualified applicant instead.

In 2017, Dr. Peck filed a retaliation complaint with the Occupational Safety and Health Administration ("OSHA"), part of the Department of Labor ("DOL"), pursuant to Section 211 of the Energy Reorganization Act of 1974 ("ERA), 42 U.S.C. 5801 *et seq.*, *as amended by* Act of Nov. 6, 1978, Pub. L. No. 95-601, 92 Stat. 2947, *and* the Energy Policy Act of 2005 ("EPA"), a section in which Congress had added the NRC as an "employer" to the list of entities that are prohibited from retaliating against their employees.

The NRC moved OSHA to dismiss on the ground that in enacting and amending the ERA Congress had not unequivocally waived sovereign immunity. OSHA agreed and dismissed Dr. Peck's complaint, a decision which a DOL Administrative Law Judge ("ALJ") then affirmed. Dr. Peck appealed that ruling to the DOL's Appellate Review Board ("ARB"), which affirmed the ALJ.

Dr. Peck then timely noticed and pursued an appeal of the ARB's decision to the Fourth Circuit court pursuant to 42 U.S.C. § 5851(c).

Petitioner Lawrence Criscione sued his employer, the NRC, in the U.S. District Court for the District of Maryland on July 16, 2019, alleging whistleblower retaliation by the NRC in violation of ERA Section 211.

Mr. Criscione began working for the NRC in 2009 as a nuclear Reliability and Risk Engineer. In that

job, he was central to fulfilling the NRC's mandate which, as its website explains, is "to ensure the safe use of radioactive materials [in] … commercial nuclear power plants … through licensing, inspection and enforcement of [NRC] requirements." NRC, *About NRC,* https://www.nrc.gov/about-nrc.html (last viewed Nov. 23, 2021).

Shortly after he began working for the NRC, Mr. Criscione discovered numerous safety-related problems at civilian nuclear power plants he worked at and monitored. Between 2010 and 2012, he repeatedly warned NRC officials, Congress, and the public about practices at those plants that violated NRC safety regulations. His NRC superiors knew Mr. Criscione had made those whistleblowing disclosures, ignored their substance, and engaged in punitive and discriminatory employment retaliation against him for making them, specifically by reprimanding him, denying him job promotions and transfers he deserved, and by attempting to gag his speech to Congress and the public.

In 2014, Mr. Criscione sought relief from this retaliation by availing himself of the DOL's administrative remedies and thus filed a complaint with OSHA.

The NRC moved OSHA to dismiss Mr. Criscione's complaint for lack of subject matter jurisdiction, asserting that the ERA contains no waiver of sovereign immunity with regard to claims brought against the NRC for the complained-of retaliation. OSHA granted the NRC's motion and dismissed Mr. Criscione's complaint in May 2017. A DOL Administrative Law Judge affirmed OSHA's decision in June 2018. The ARB affirmed that ruling on March 22, 2019, so as to allow Mr. Criscione, having

exhausted his administrative remedies, to pursue his claims in federal court.

After Mr. Criscione filed his complaint in federal court the NRC moved that court to dismiss his complaint for lack of subject matter jurisdiction, reiterating its contention that the ERA contains no waiver of United States sovereign immunity. The district court granted that motion and dismissed Mr. Criscione's complaint after concluding the ERA lacks an unequivocal waiver of sovereign immunity.

Mr. Criscione thereafter timely noted and pursued his appeal to the Fourth Circuit.

REASONS FOR GRANTING THE PETITION

There are few "absolute … principles" in the law. *King v. Burwell*, 576 U.S. 473, 502 (2015) (Scalia, J., joined by Thomas, and Alito, JJ., dissenting).

The Fourth Circuit violated all three in concluding that Congress' 2005 amendment to the ERA was unnecessary, redundant, and inoperative surplusage and, consequently, that NRC whistleblowing employees like the Petitioners have no right to be restored to their privileges of employment after suffering retaliatory employment discrimination by the NRC.

First, Article III courts must "defer to legislative judgment as to the wisdom and necessity … of a particular measure." *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 23 (1977), and must not "sit as a super legislature to weigh the wisdom of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 729-32 (1963). The Fourth Circuit violated this fundamental principle by rejecting Congress' very careful and very specific addition of the NRC to the class of employers

barred from retaliatory discrimination against whistleblowing employees of the NRC.

Second, "[w]hen Congress amends legislation, courts must 'presume [Congress] intends [the amendment] to have real and substantial effect.'" *Ross v. Blake*, 578 U.S. 632, 642 (2016) (citation omitted). The Fourth Circuit ignored this vital principle by choosing no effect to Congress' amendment to the ERA.

Finally, "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. [1 Cranch] 137, 162 (1803). The Fourth Circuit abridged this elemental principle by leaving NRC whistleblowing employees without the remedy Congress added in 2005 against the NRC; indeed, leaving them no better off than if Congress had not amended the ERA on their behalf at all.

These principles are so fundamental that they apply to remedies against the sovereign. To be sure, it is well settled that "a waiver of sovereign immunity 'will be strictly construed, in terms of its scope, in favor of the sovereign.'" *Sossamon v. Texas*, 563 U.S. 277, 285 (2011) (quoting *Lane v. Peña*, 518 U.S. 187, 192 (1996)). Similarly, it is an equally "longstanding rule that a waiver of sovereign immunity must be expressly and unequivocally stated in the text of the relevant statute." *Id.*, 563 U.S. at 290. See *Lane,* 518 U.S. at 192 (citing *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95 1980)).

Significantly, however, this Court has admonished that this strict construction/unequivocal waiver canon does not apply to substantive statutory

provisions that establish one's rights against the government. See, *e.g.*, *Gomez-Perez v. Potter*, 553 U.S. 474, 491 (2008); *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003). In other words, plaintiffs are not required to surmount the onerous strict construction canon twice in a suit against the government. As Justice Cardozo observed, "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld," so the Court is "not to add to its rigor by refinement of construction where consent has been announced." *Anderson v. Hayes Constr. Co.*, 153 N.E. 28, 29-30 (N.Y. 1926); *United States v. Aetna Cas. & Surety Co.*, 338 U.S. 366, 383 (1949) (quoting *Anderson*); *United States v. Mitchell*, 463 U.S. 206, 218-19 (1983).

Although, simply stated, lower courts have struggled with these principles, the government repeatedly, and reflexively, seeks refuge in the canon when fighting claims on the merits.

The Fourth Circuit's opinion in *Peck* exemplifies this struggle. Thus, the concluding section of that opinion begins as follows:

> Safety at nuclear facilities is of paramount importance. Violations of safety protocols there can have catastrophic consequences. Accidents at Three Mile Island and Chernobyl are evidence enough of that. The magnitude of those accidents explains, in part, why the nuclear industry is so heavily regulated. Whistleblower protections can help prevent such tragedies by allowing engineers, scientists, and others working at facilities to report safety violations without fear of reprisal. No person should lose their job or

> have their career progression stalled for following the appropriate procedures for safety reporting.

A16-A17 (emphasis added).

The Fourth Circuit's sympathies for the "career progression stalled" of Dr. Peck's and Mr. Criscione was commendable and its suggestion about what Congress should and "can" do, *i.e.,* "add protections in the form of a private right of action against the NRC itself," *id.* at A17—is appreciated. Nevertheless, although the Fourth Circuit's sympathies and suggestion were sound, its analysis of the statute Congress already had amended to protect nuclear whistleblowers like the petitioners here was flawed and its ultimate conclusion was mistaken.

In the Fourth Circuit's eyes, "waiving sovereign immunity is a legislative … prerogative" and Congress simply "ha[d] not exercised that prerogative here." *Id.* at A17.

In reaching that conclusion, the Fourth Circuit ignored this Court's repeated guidance about how statutes should be construed, *i.e.*, by focusing first and last on the legislature's purpose, particularly ignored this Court's repeated admonitions that it "ha[s] never required that Congress use magic words" of any kind to waive sovereign immunity. *FAA v. Cooper*, 566 U.S. 284, 291 (2012) (emphasis added).[1]

---

[1] The Court has similarly "admoni[shed] that waiver of sovereign immunity is accomplished not by 'a ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying

Thus, instead of incanting "magic words" and "ritualistic formula[e]," in sovereign immunity cases the only thing that is "require[d] is that the scope of Congress' waiver be clearly discernable from the statutory text in light of traditional interpretive tools." *Id.*[2]

The following analysis of the text of the "statutory text" in this case—the "Employment Protection" provision of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5851, as amended (2005)—"in light of traditional interpretive tools," *FAA v. Cooper,* 566 U.S. at 291, demonstrates that the Fourth Circuit's conclusion and judgment were manifestly wrong.

This Court's intervention is urgently needed. The Court should grant certiorari and say what should have been obvious: the ERA's Employee Protection provision unequivocally authorizes whistleblowing employees of the Nuclear Regulatory Commission ("NRC"), like the petitioners here, to sue the NRC for retaliatory employment discrimination under the administrative remedial scheme for nuclear whistleblowers. At minimum, the Court should summarily reverse the decisions below and direct the

---

congressional policy." *Fran. Tax Bd. of Calif. v. U.S. Postal Serv.*, 467 U.S. 512, 521 (1984) (emphasis added).

[2] Thus, courts should not regard themselves as "self-constituted guardian[s] of the Treasury [and] import immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955) (Frankfurter, J.). Moreover, ""[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."" *United States v. Williams*, 514 U.S. 527, 541 (1995) (Scalia, J., concurring) (quoting *Aetna Casualty,* 338 U.S. at 383 (quoting *Anderson,* 153 N.E. at 29-30).

Fourth Circuit to conduct a proper sovereign immunity analysis, *i.e.*, one that respects and uses rather than disdains the traditional tools for interpreting statutes.

Because the decisions below should not be allowed to stand, this Court should either grant certiorari in this case or summarily reverse the Fourth Circuit's decision below.

I. CONGRESS AUTHORIZED NRC EMPLOYEES LIKE DR. PECK AND MR. CRISCIONE TO SUE THE NRC FOR LEGAL AND EQUITABLE RELIEF UPON PROOF THAT THE NRC VIOLATED THE EMPLOYEE'S STATUTORY RIGHT TO BE FREE FROM DISCRIMINATORY TREATMENT IN RETALIATION FOR ENGAGING IN LEGALLY PROTECTED ACTIVITIES

In 2005, Congress amended the ERA in order to expressly add the NRC to the roster of employers that Congress, through the ERA, prohibits from "discriminat[ing]" against their employees in retaliation for making protected disclosures about nuclear safety. In this case, the Fourth Circuit erroneously held that whistleblower complaints by NRC employees against the NRC for retaliation have no basis in law. In so holding, the Fourth Circuit effectively concluded that Congress' 2005 amendment was inoperative surplusage.

A. Analyzing the ERA and Its Amendments in Accordance with the "Standard" and "Traditional Tools" of Interpretation Shows that Congress Intended to Authorize NRC Employees to Sue the NRC for Retaliation for Making Disclosures

1. The "Standard" and "Traditional Tools" of Statutory Interpretation Are Necessary to Discern Congress' Purpose

An analysis of the ERA and its 2005 amendment—using "'all the standard tools of interpretation,'" which 'include[e] consideration of [a statute's] 'text, structure, [and] history,'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019))—demonstrates the Fourth Circuit erred in concluding that Congress' 2005 amendment was meaningless surplusage.

Construing the ERA, and doing so properly, is crucial to determining if the Fourth Circuit's holdings were wrong. As this Court recently reiterated: "'[i]t is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019).

> A reasonable statutory interpretation must account for both the specific context in which ... language is used and the broader context of the statute as a whole. And beyond context and structure, the Court often looks to history [and] purpose to divine the meaning of language.

Id. (citations and quotation marks omitted).

Of all these considerations, and in all kinds of cases, "'the purpose of Congress is the ultimate touchstone.'" *Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 136 S. Ct. 1288, 1297 (2016) (citations omitted).[3]

2. The ERA's "Paramount Purpose" is the Protection of Employees Who Report Nuclear Safety Violations

The ERA is a "remedial" statute,[4] whose "paramount' purpose [i]s the protection of employees," which it aims to achieve by "encourag[ing] employees to report safety violations [in the nuclear industry] and provid[ing] a mechanism for protecting them against retaliation for doing so." *English v. Gen'l Elec. Co.*, 496 U.S. 72, 83, 82 (1990).

A proper understanding of the ERA's overall "remedial" nature and "paramount purpose" is important to construing the meaning and scope of the ERA's individual provisions (specifically including the amendments Congress made to the ERA in 1992 and 2005 in order to expressly

---

[3] "In the interpretation of statutes, the function of the courts … is to construe the language so as to give effect to the intent of Congress." *United States v. American Trucking Assns., Inc.,* 310 U.S. 534, 542 (1940). Thus, the "basic rule … is to first seek the legislative intention, and to effectuate it." *Webster v. Reproductive Health Serv.,* 492 U.S. 490, 515 (1989).

[4] See *Sanders v. Energy Northwest,* 812 F.3d 1193, 1197 (9th Cir. 2016) (the ERA "serves a broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality"). See also *Doyle v. Dept. of Labor*, 285 F.3d 243, 255 (3d Cir. 2002); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985).

guarantee "Employee Protection," § 5851) because, "[t]he overarching purpose of the [ERA]—the protection of whistleblowers—militates against an interpretation that would make anti-retaliation actions more difficult to maintain." *Blackburn v. Reich*, 79 F.3d 1375, 1378 (4th Cir. 1996).[5]

Understanding the ERA's purpose is critical, particularly because "even the most basic general principles of statutory construction," such as the sovereign immunity canon of construction the Fourth Circuit relied to the exclusion of all other tools of construction, see A6-A9, A12-A16, "must yield to clear contrary evidence of legislative intent," *Passenger Corp. v. Passengers Assn.*, 414 U.S. 453, 458 (1974), or to the statute's purpose and "whole context." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228 (2008) See *Utility Air Regulatory Group v. EPA,* 573 U.S. 302, 320 (2014).

3. The ERA's Text, Structure, and History Also Are Consistent with Decisions Holding the NRC Liable for Legal and Equitable Relief for Violating the Rights of NRC Employees' Rights

The text, structure, and history of the ERA and its 2005 amendments clearly illuminate Congress' purpose in enacting that statute and broadening its protective scope through those amendments.

---

[5] Other Circuits agree. See *Tamosaitis v. URS Inc.*, 781 F.3d 468, 482 (9th Cir. 2015); *Conn. Light & Power Co. v. Dept. of Labor*, 85 F.3d 89, 94 (2d Cir. 1996); *Bechtel Constr. Co. v. Dept. of Labor*, 50 F.3d 926, 932–33 (11th Cir. 1995).

Conversely, "a narrow interpretation of the [ERA's] employee protection provisions would frustrate the intent of Congress." *Doyle,* 285 F.3d at 255. See *Brock,* 780 F.2d at 1512.

Auspiciously, the ERA's structure is easy to sketch. The ERA has seven key sections and sub-sections.

One provision, sub-section (a)(1)—which is titled "Discrimination against Employee"—provides:

> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee

engaged in one of six types of protected conduct listed in § 5851(a)(1). These protected activities, enumerated as § 5851(a)(1) sub-sections "A" through "F"—include such things as "(A) notif[ying] his employer of an alleged [nuclear safety] violation …," or "(C) testif[ying] before Congress …." (As noted above, the petitioners' complaints alleged that they both "notified" NRC officials and "testified" before Congress about safety violations at nuclear power plants).

A second provision, § 5851(a)(2), lists seven classes of "employer[s]," including the NRC, which are prohibited from engaging in one of the kinds of "discrimination against employee" described in § 5851(a)(1). As discussed below, when Congress enacted the ERA in 1978, § 5851(a)(2) listed only five classes of "employer[s]"—"A" through "E". Congress twice amended § 5851(a)(2), in 1992 and 2005 respectively, to add "F" and "G," covering "the Department of Energy" and "the [Nuclear Regulatory] Commission."

A third provision, § 5851(b)(1), provides in full:

> Any employee who believes that he has been discharged or otherwise discriminated against by any <u>person</u> in violation of subsection (a) of

> this section may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint, the Commission, and the Department of Energy.

(Emphasis added).

A fourth provision, § 5851(b)(2)(A), prescribes "how the Secretary shall conduct an investigation of the violation alleged in the complaint."

A fifth provision, § 5851(b)(2)(B), describes the kinds of relief an employer must provide to an employee—including "reinstate[ment] [of] the complainant to his former position … and privileges of his employment"—"[i]f … the Secretary determines that a violation of subsection (a) of this section has occurred." (Emphasis added).

A sixth provision, § 5851(b)(3)(D), establishes the standard of proof an "employer" must satisfy to prevail against an employee's complaint. This section says, in full: "Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior."

Finally, a seventh, "jurisdiction[al]," provision, § 5851(d), states:

> Whenever a person has failed to comply with an order issued under subsection (b)(2) of this section, the Secretary may file a civil action in

> the United States district court for the district in which the violation was found to occur to enforce such order. In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages.

Section 5851(b) is crucial to § 5851's entire remedial scheme because it ties together, in one paragraph:

- the identification of "employers" whose discrimination triggers their liability under the ERA;
- the "complaint" by an "employee";
- the Secretary's "investigat[ion]" of an employer's alleged "violation" of the employee's rights;
- the "clear-and-convincing" standard of proof an "employer" must satisfy to avoid liability; and
- the legal and equitable remedies the Secretary shall order if an employee proves an employer violated his or her rights under the ERA, including "reinstat[ing] … privileges of his employment."

When § 5851 is viewed "holistically," as it should be, *Gundy,* 139 S. Ct. at 2126, it is plain that Congress regarded "person" and "employer" as synonymous and functionally interchangeable terms. The Fourth Circuit, however, effectively said these words are not interchangeable, that "person" is an "ambiguous" term, one which might plausibly mean

someone or something besides an employee's employer. This led the Fourth Circuit to conclude that in the context of the ERA the terms "employee" and "person" are not synonymous and interchangeable, a conclusion that is plainly incorrect as a matter of law.

B. The Fourth Circuit's Interpretation of the ERA Defies Logic

The Fourth Circuit's interpretation of the ERA is contrary to the plain language of the statutory text and, even more, to common sense.

Why would Congress provide employees with a remedy against someone other than their employer in a statute that, *English,* 496 U.S. at 82-83, had concluded, Congress crafted for the sole and unmistakable purpose of protecting employees who make protected disclosures from retaliation by their employer? If Congress had intended to protect employees against discrimination perpetrated by some "persons" besides their "employer," it easily could have identified or described these other "persons" in § 5851(a)(1), where it identified entities that are prohibited from discriminating against employees. Congress did not do so.

Having taken pains to enumerate seven classes of "employers" in § 5851(a)(2)(A)-(G), Congress surely could have described what kind of non-employer entities constituted "persons." But Congress did no such thing. Instead, in 2005, Congress expressly added the NRC to the list of "employers" who are covered by the ERA's bar on retaliatory discrimination. Section 5851(a)(1) says only that

> No employer may discharge any employee or otherwise discriminate against any employee

> with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)

(Emphasis added.)

Employees who are authorized to sue pursuant to the ERA's complaint provision, § 5851(b)(1), are employed by employers who are barred from discriminating against any employee who engages in an activity listed in its protected activities sections, § 5851(a)(1)-(2). If the Secretary determines that a violation has occurred, the Secretary may order legal and equitable remedies against the "person" who violated an employee's rights, including reinstatement, back pay, compensatory damages, and restoration of the employee's "privileges of employment." (Emphasis added).

Importantly, the only "person" with the power to "discharge" an "employee" is that employee's employer. Likewise, the only "person" with the power to "reinstate" an employee is that employee's employer. Equally important, the only "person" with the power to restore or otherwise affect an employee's "privileges of employment" is that employee's employer.

Finally, and along the same lines, the only persons who are expressly entitled to an affirmative defense under § 5851(b)(3)(D) are employers because they—and they alone—are persons subject to liability under § 5851.

In sum, who could a "person" be besides an "employer"?

For all these reasons, and contrary to the Fourth Circuit's decision, it is utterly implausible that

"person[s]" are not "employer[s]" in the context of the ERA.

C. Congress's 1992 and 2005 Amendments to the ERA Compel the Conclusion that Congress Waived Sovereign Immunity in Order to Subject the NRC to Liability if it Violated its Employees' Whistleblower Rights.

Congress materially amended these provisions, and the ERA overall, only twice since 1978. Both times Congress expanded the class of employers subject to statutory penalties for whistleblower retaliation under § 5851(b)(2), unless "the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior." § 5851(b)(3)(D).

As originally enacted in 1978, § 5851(a)(2)'s roster of employers who are prohibited from retaliatory discrimination listed only three classes. Department of Energy ("DOE") contractors were not among these three, a fact made clear in 1991 when the Fourth Circuit upheld the dismissal of an ERA complaint filed by an employee of a DOE contractor on the ground that § 5851 "protects only employees of NRC licensees and their contractors and not employees of DOE contractors." *Adams v. Dole*, 927 F.2d 771, 778 (4th Cir. 1991).

Congress plugged the hole *Adams* had uncovered by enacting the Energy Policy Act of 1992, 16 U.S.C. § 2601 *et seq*. and 42 U.S.C. § 13201 *et seq*., which effectively countermanded *Adams'* holding by expressly adding "a contractor or subcontractor of the" DOE to the roster of "employers" prohibited

from retaliating against whistleblowing employees. § 5851(a)(2)(D).

Like "DOE contractors," the NRC also was not included amongst the three "employers" on § 5851's original, *i.e.,* 1978 list of employers. This fact became obvious—and problematic—in 2002 when OSHA dismissed an NRC contractor's ERA complaint on the ground that the ERA did not protect NRC employees (or the employees of NRC contractors because the NRC was not listed on § 5851(a)(2). *Bath v. NRC,* ARB No. 2002-0041, ALJ No. 2001-ERA-00041 (ARB Sept. 29, 2003).

As Congress did immediately after *Adams* had pronounced that § 5851(a)(2) did not cover DOE employees, Congress took speedy steps to fix what the *Bath* decision had identified as a similar problematic omission in § 5851(a)(2). Thus, on April 7, 2003, shortly after the initial ALJ decision in *Bath*, the Chair of the House Subcommittee on Energy and Air Quality, Rep. Joe Barton (R. Tex.), introduced the "Energy Policy Act of 2003," H.R. 1644 (108th Cong. 2003), which expressly added the NRC to § 5851(a)(2)'s list of employers under the ERA.

The following day, the Chair of the full House Committee on Energy and Commerce, Rep. W.J. "Billy" Tauzin (R. La.), submitted a Report on proposed H.R. 1644, explaining that the proposed bill's "Whistleblower Protection" provision "expands the definition of employer under section 211(a)(2) of the [ERA] to include all DOE and NRC Federal employees, and all contractor and subcontractor employees of DOE and NRC." H. Rept. 108-65--Part 1, at p. 160 (108th Cong. 2003). That Report

explained that "[i]t is intended that this provision would cover acts of retaliation regardless of whether … the source of retaliation comes from a government or contractor …." *Id.*

Although Congress failed to pass the proposed legislation in 2003, it enacted an identical amendment to § 5851 in 2005, and for the same purpose, this time as P.L. 109-58, 119 Stat. 594. Section 629 of that Public Law amended the ERA § 5851's "Definition of Employer," 42 U.S.C. § 5851(a)(2), by adding, at the end, the following: "(E) a contractor or subcontractor of the [Nuclear Regulatory] Commission; "(F) the Commission," *i.e.,* the NRC; and "(G) the Department of Energy."

In short, before the 2005 amendment was enacted, the NRC was not subject to, and NRC employees like the petitioners here were not protected by, the ERA. After that amendment became law, NRC employees became covered in the same way and to the same extent that all other employees of § 5851(a)(2) employers are covered.

1. Congress' 2005 Amendment to the ERA Unambiguously Shows the NRC is Subject to Suit for Violating the Whistleblowing Rights of NRC Employees

In amending § 5851(a)(2)(F), Congress added "the Commission," *i.e.,* the NRC, to § 5851(a)(2), as an "employer" prohibited from "discriminat[ing] against employees" under § 5851(a). The two words, "the Commission," that Congress added to § 5851 in 2005 through § 5851(a)(2)(F), have a plain meaning and an unambiguous import. These words express Congress unequivocal intent to prohibit "the

Commission," *i.e.,* the NRC, from discriminating against its employees in retaliation for their protected activities in disclosing nuclear safety risks to the public.

II. THE FOURTH CIRCUIT ERRED IN HOLDING THE ERA IS TOO "AMBIGUOUS" TO BE ENFORCED BY NRC EMPLOYEES

The Fourth Circuit first justifies its decision to dismiss Dr. Peck's complaint by asserting that, in the abstract, the relationship between the words "employer" and "person" is, at best, ambiguous. The Fourth Circuit posits this ostensible ambiguity is dispositive in this case because the Dictionary Act, 1 U.S.C. § 1, generally excludes the federal government as a person and because of "a general presumption that the word 'person' does not include the sovereign." 996 F.3rd at 231 (citations omitted).

The Fourth Circuit fails to appreciate that both elements of this part of its sovereign immunity argument—(a) the "general presumption" that a federal agency is not a person, and (b) the Dictionary Act's longstanding omission of the Government from its definition of a "person"—not only is rebuttable, in theory, but completely rebutted in this case by an analysis of the ERA's text, structure, statutory history, and purpose (as Petitioners demonstrated above).

A. The Dictionary Act Does Not Shield the NRC from Liability

Ironically, the Fourth Circuit ignores the plain words of the Dictionary Act, which vitiate its application to these cases. The Dictionary Act does not say the Federal Government can never be

construed as a "person." To be sure, the Dictionary Act omits the Government from among the eight types of natural and artificial persons that are "include[d]" in its definition of "person," a definition courts are instructed to use "[i]n determining the meaning of any Act of Congress." 1 U.S.C. §1.

Significantly, however, the Dictionary Act's very first line clarifies that the Act's exclusion of the Government from the definition of a "person" is not absolute. Rather, the Act explicitly explains that its omission of the Government from definition of a "person" is binding "unless the context indicates otherwise." This Court recently highlighted the importance of this express caveat to the Dictionary Act. See *Return Mail, Inc. v. U.S.P.S.*, 139 S. Ct. 1853, 1862 (2019).

Consequently, and contrary to the Fourth Circuit, the Dictionary Act's built-in "unless context" exception means that the "general presumption" the Fourth Circuit relies upon—the presumption "that 'person' does not include the sovereign,' and thus excludes a federal agency" like the NRC—"is not a "'hard and fast rule of exclusion,'" *Return Mail,* 139 S. Ct at 1861-62 (emphasis added; citations omitted), and certainly is not a dispositive rule. See *United States v. Cooper Corp.*, 312 U. S. 600, 604–605 (1941).

Indeed, as this Court explained two years ago (and as Petitioners detail below), a court may disregard both the "longstanding presumption" and the Dictionary Act merely "upon some affirmative showing of statutory intent to the contrary." *Return Mail,* 139 S. Ct at 1862 (emphasis added; citing *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U. S. 765, 781 (2000)).

B. The 2005 Amendment's Specific Inclusion of the NRC Overcomes the Dictionary Act's General Exclusion

Return Mail and *Vermont Agency* are consistent with what this Court has long said about what might be labeled as "the government-never-can-be-a-person presumption" (and the Dictionary Act's omission of the Government among its definition of a "person"), which is that presumption may be overcome whenever "'[t]he purpose, the subject matter, the context, [or] the legislative history ... indicate an intent' " to include the Government. *Int'l Primate Protection League v. Admin. of Tulane Educ. Fund*, 500 U.S. 72, 83 (1991) (quoting *Cooper*, 312 U.S. at 605).

In these cases, the "context[ual]" factors that abound in the ERA and § 5851 provide much more than "some affirmative showing of statutory intent to the contrary"; instead, the ERA's and § 5851's "context[ual]" factors provide a substantial affirmative showing that Congress, through its 2005 amendment to § 5851 aimed to have courts treat the NRC as a "person."

1. Congress's 2005 Inclusion of the NRC Was Unambiguous

Although the Fourth Circuit insists that Congress' failure to define "employers" as "persons" and vice versa renders § 5851(b)(1) too ambiguous to be sensibly construed and reliably enforced and although the Fourth Circuit further insists that "persons" might mean some entities besides "employers," the Fourth Circuit never says or even hypothesizes who, besides "employers," the ERA might cover. As discussed above, the ERA's frequent

use of person and employer interchangeably shows that although Congress might have been even more precise in minimizing its use of synonyms, no reasonable reader could be confused about Congress' intent and purpose in its 2005 amendment to § 5851(a)(1), which, through § 5851(a)(1)(E), expressly added "the Commission" to the list of employers who are prohibited from retaliatory discrimination against their employees under the ERA.

2. Congress Commonly "Express[es] the Same Ideas in Different Words."

The fact that the Fourth Circuit finds § 5851(b)'s garden-variety use of interchangeable words—specifically "person" for "employer"—is unacceptably "ambiguous" says more about that court than about Congress. Thus, from the Republic's founding until now, Congress often has "express[ed] the same ideas in different words," *Curran v. Arkansas*, 56 [15 How.] U.S. 304, 310 (1853), *i.e.,* through interchangeable words and synonyms, and courts have long accepted this practice. See, *e.g.*, *Wise v. Withers,* 7 [3 Cranch] U.S. 331, 336 (1806) (per Marshall, C.J.); *CSX Transp., Inc. v. Ala. Dept. of Revenue,* 562 U.S. 277, 284 n.6 (2011).

As Justice Scalia explained, "[t]hough one might wish it were otherwise, drafters more than rarely use the same word to denote different concepts ...." Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS, ch. 25, *Presumption of Consistent Usage,* 170 (2012). As 200 years of case law, from *Wise* (in 1806) to *CSX Transp.* (in 2011) illustrates, the converse also is true. Here, as demonstrated above, § 5851(b)(1)'s words and "context" provide much more than "some

affirmative showing" of Congress' intent that courts construe "persons" and "employer" the same way. Instead, the context of § 5851 and the ERA make clear that Congress used "person" and "employer" interchangeably. Moreover, even if the Fourth Circuit correctly "conclude[d]" that § 5851(b) was indecipherably ambiguous "because it is susceptible to more than one reasonable interpretation," *Maharaj v. Stubbs & Perdue, P.A. (In re Maharaj),* 681 F.3d 558, 568 (4th Cir. 2012), the Fourth Circuit had no choice but to seek and honor an "'interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.'" *Comm'r of Internal Revenue v. Engle*, 464 U.S. 206, 217 (1984) (citations omitted). As the *Kisor* Court admonished:

> before concluding that a rule [or statute] is genuinely ambiguous, a court must exhaust all the "traditional tools" of construction. … That means a court cannot wave the ambiguity flag just because it found the regulation or [statute] impenetrable on first read. Agency regulations [or Congressional enactments] can sometimes make the eyes glaze over. But hard interpretive conundrums, even relating to complex rules, can often be solved. … To make that effort, a court must "carefully consider[]" the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on.

139 S. Ct. at 2415 (emphasis added; citations omitted).

Although the Fourth Circuit acknowledged that it was required to use the traditional interpretive tools and to give words their "'ordinary meaning,'" the Court of Appeals barely skimmed over § 5851's text and structure and never actually "considered"—let alone "carefully considered"—§ 5851's "history and purpose." *Kisor*, 139 S. Ct. at 2415. Instead, the Fourth Circuit, like the federal agency that was the defendant in *Kisor*, "wave[d] the ambiguity flag." *Id.*

This was the Fourth Circuit's mistake, not Congress'.

3. The Fourth Circuit's Decision Improperly Attempts to Override Congressional Intent by Rendering the Words Congress Carefully Chose to be Utterly Superfluous and Ineffective

The Fourth Circuit's conclusion that the word "person" is too ambiguous to equate to "employers" contravenes two of most important maxims of statutory construction: "[t]he presumption against ineffectiveness" and "[t]he canon against surplusage."

The "presumption against ineffectiveness" reflects "the idea that Congress presumably does not enact useless laws." *United States v. Castleman*, 572 U.S. 157, 178 (2014) (Scalia, J., concurring). See *United States v. Hayes*, 555 U.S. 415, 427 (2009).

The canon against surplusage encompasses a similar interpretative instruction, specifically that courts should "give effect, if possible, to every word Congress used." *Nat'l Ass'n of Mfrs. v. Dept. of Defense*, 138 S. Ct. 617, 632 (2018). As Justice Scalia explained:

> the canon against superfluity follows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness, and the presumption against ineffectiveness ensures that a text's manifest purpose is furthered, not hindered.

Scalia & Garner, READING LAW, ch. 4, *Presumption Against Ineffectiveness* 63.

As Justice Scalia additionally stressed regarding the use of synonyms, courts should be ever-mindful of the real-world consequences of a decision that renders a statute's key—even if "synonym[ous]"—provisions useless and unenforceable surplusage: "if forced to choose between (1) assuming Congress enacted text that serves no purpose at all, … and (3) assuming Congress employed synonyms to express a single idea, the last is obviously the least evil." *Hamilton v. Lanning*, 560 U.S. 505, 529 (2010) (Scalia, J., dissenting).

C. This Court's 2008 Decision in *Gomez-Perez v. Potter* Points to the Conclusion that Congress Waived Sovereign Immunity Regarding the NRC

This Court's 2008 decision in *Gomez-Perez* provides a paradigmatic example of how courts should aim to understand—and effectuate—Congress' purpose in the sovereignty immunity context.

Gomez-Perez held the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.,* "unequivocally waives sovereign immunity

for a claim brought by '[a]ny person aggrieved' to remedy a violation of § 633a." 553 U.S. at 491. (Emphasis added).

What makes *Gomez-Perez* helpful for this case were the few and simple terms this Court said completely satisfied its "strict[]" standard for sovereign immunity waivers, 553 U.S. at 491, terms that are functionally identical to the terms Congress employed in crafting § 5851(b)(4). According to *Gomez-Perez*, the relevant language in ADEA, § 633a(c), constitutes an "unequivocal[] waive[r]" of sovereign immunity, 553 U.S. at 491, merely says:

> Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

Id. (quoting ADEA, 29 U.S.C. § 633a(c)).

In this case, ERA § 5851(b)(4) similarly says:

> If the Secretary [of Labor] has not issued a final decision within 1 year after the filing of a complaint under paragraph (1), and there is no showing that such delay is due to the bad faith of the person seeking relief under this paragraph, such person may bring an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

42 U.S.C. § 5851(b)(4).

Tellingly, *Gomez-Perez* held that ADEA § 633a(c) waives sovereign immunity even though it does not say an "aggrieved person may bring an action for … relief" against the United States (or against any

federal department, agency, instrumentality, or facility) or anything similar. *Gomez-Perez* clearly stands for the principle that a waiver does not need to say anything so specific.

Like the NRC in this case, the federal government, as the defendant in *Gomez-Perez*, insisted that every statutory provision related to the waiver in question—or, more precisely, every statutory provision that explains which classes of persons can sue a federal agency (because of the waiver) and every statutory provision that explains which federal agencies are subject to suit (because of the waiver)—must meet the "same high hurdle" of clarity in the form of certain magic words expressly stating that the federal government may be an object of the suit. 553 U.S. at 491.

Unlike the Fourth Circuit in this case, this Court in *Gomez-Perez* rejected that argument, stating:

> [the government defendant] is of course correct that "[a] waiver of … sovereign immunity must be unequivocally expressed in statutory text" and "will be strictly construed, in terms of its scope, in favor of the sovereign." But this rule of construction is satisfied here. Subsection (c) of [ADEA] § 633a unequivocally waives sovereign immunity for a claim brought by "[a]ny person aggrieved" to remedy a violation of § 633a. Unlike § 633a**(c)**, § 633a**(a)** is not a waiver of sovereign immunity; it is a substantive provision outlawing "discrimination." That the waiver in § 633a**(c)** applies to § 633a**(a)** claims does not mean that § 633a**(a)** must surmount the same high hurdle as § 633a**(c)**. [Thus,] where one statutory provision unequivocally provides for

> a waiver of sovereign immunity to enforce a separate [substantive] statutory provision, that latter provision "'need not ... be construed in the manner appropriate to waivers of sovereign immunity.'"

553 U.S. at 491 (citing *White Mountain Apache Tribe*, 537 U.S. at 472-73).

Given the overlapping, hand-in-glove nature of the ADEA's substantive/prohibitory and the ADEA's waiver/jurisdictional provisions it is not surprising that the Equal Employment Opportunity Commission ("EEOC"), the agency charged with adjudicating ADEA claims by federal employees against federal agencies, has consistently recognized that the NRC is subject to suit and damages under the ADEA.[6]

D. Other Recent Decisions by this Court Provide Additional Support in Favor of Construing the ERA's 2005 Amendment as a Waiver of Sovereign Immunity

The precedents *Gomez-Perez* relied on in explaining which standard courts should employ in evaluating which kinds or classes of persons Congress permitted to sue to seek remedies for discrimination—and which federal departments and agencies Congress allowed to be held liable in court for workplace discrimination—demonstrate that the

---

[6] See, *e.g., Edgardo D. v. NRC*, EEOC Docket No. 0120172572, 2019 WL 1011577, at *7 (E.E.O.C. Feb. 12, 2019); *Joseph D v. NRC*, EEOC Docket No. 0120180036, 2018 WL 1109739, at *2 (E.E.O.C. Feb. 13, 2018); *Harris v. NRC,* EEOC Docket No. 0120120178, 2013 WL 1182289, at *9 (E.E.O.C. Mar. 15, 2013).

test courts should use for these purposes is far less stringent than the "unequivocally expressed" standard that must be satisfied to establish waiver itself.

Thus, in 2003, *White Mountain Apache* instructed that:

> a statute creates a right capable of grounding a claim within the waiver of sovereign immunity if, but only if, it "can fairly be interpreted as mandating compensation … for the damage sustained. This "fair interpretation" rule demands a showing demonstrably lower than the standard for the initial waiver of sovereign immunity. "Because the Tucker Act supplies a waiver of immunity for claims of this nature, the separate statutes and regulations need not provide a second waiver of sovereign immunity [for the remedy], nor need they be construed in the manner appropriate to waivers of sovereign immunity. It is enough, then, that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages. While the premise to a Tucker Act claim will not be "lightly inferred," a fair inference will do.

537 U.S. at 472-73 (2003) (brackets and emphasis added; internal citations omitted).

Gomez-Perez, White Mountain Apache, and their progeny teach three lessons. *First*, while a "canon" can be useful tiebreaker, *Kisor,* 139 S. Ct. at 2430 (Gorsuch, J., joined by Thomas, Alito, & Kavanaugh, JJ., concurring), the sovereign immunity canon is "just that—a canon of construction," a mere "tool for

interpreting the law," and one which "we have never held that it displaces the other traditional tools." *Richlin Security Service Co. v. Chertoff,* 553 U.S. 571, 589 (2008). See *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (canons "are not mandatory rules," but are "guides that 'need not be conclusive.").

Second, multiple statutory provisions may bear on the primary question of whether Congress has waived immunity and on secondary questions regarding who may sue and whom may be sued. *Gomez-Perez*, 553 U.S. at 491.

Third and finally, Congress does not need to waive immunity twice with mirror provisions for prohibitions and remedies. Because substantive provisions and waiver/liability/remedy provisions should be read *in pari materia,* different provisions may be examined under disparate levels of scrutiny: while core provisions related to waiver must "unequivocally express" the right to seek redress, provisions regarding who may sue and whom may be sued must be tested under a far less stringent "fair interpretation"-"fair inference" standard. *White Mountain Apache,* 537 U.S. at 472-73.

The Fourth Circuit's decision in these cases was wrong because that court completely ignored each of these three precepts.

III. THE FOURTH CIRCUIT ERRED IN CONCLUDING THE ERA PROVIDES WHISTLEBLOWING EMPLOYEES WITH REAL AND EFFECTIVE REMEDIES TO NRC EMPLOYEES, "JUST NOT THE REMEDY THE PETITIONER[S] WANT."

The Fourth Circuit finally posited two reasons why Dr. Peck's argument "that our finding no waiver of sovereign immunity makes the addition of the NRC to the substantive section a useless and merely symbolic amendment" fails "[a]s a matter of both law and logic" and why effective remedies actually "accompany the statute's protection, … just … not the remed[ies] the petitioner[s] want[]." A17.

Neither of those two reasons defy scrutiny.

First, the Fourth Circuit hypothesized that because "Congress can create a private right with no private remedy without enacting a nullity," A16 (citations omitted), Congress' amendments to the ERA are not ineffective surplusage because unspecified "Federal agencies may enforce the right." A17 (citation omitted). This argument fails because federal agencies lack jurisdiction to enforce rights unless specifically authorized to do so. Indeed, the Court's opinion on this score begs the question: which "federal agencies," of the hundreds that exist, has the authority to "enforce" the ERA against the NRC on behalf of an aggrieved whistleblower like Dr. Peck.

Second, the Fourth Circuit imagined that the ERA amendments are not ineffective surplusage because "[t]he NRC has an Inspector General who could use the prohibition as a basis for internal discipline against or even termination of supervisors

who violate the whistleblower protections." A17. This argument fails because the most the NRC's IG can do is to recommend that offending supervisors be disciplined. The NRC IG cannot effect—or even urge—the crucial relief Congress provided in the ERA: "reinstat[ing] the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment." 42 U.S.C. § 5851(b)(2)(ii).

Because Congress is presumed to know that each of these two alternative forms of relief existed before it decided to amend the ERA, the fact that Congress amended the ERA despite this knowledge demonstrates that Congress thought amending the ERA was necessary and wise and not redundant or superfluous.[7] In this light, the Fourth Circuit's decision is an affront to the separation of powers because Article III courts must "defer to legislative judgment as to the wisdom and necessity … of a particular measure," *U.S. Trust,* 431 U.S. at 23, and must refuse to sit as a "super legislature to weigh the wisdom of legislation." *Ferguson,* 372 U.S. at 729-32. [8]

Such deference is particularly important when Congress amends a statute, because amendments implicate one of the few "absolute … interpretative principles" in the law. *King,* 576 U.S. at 502 (Scalia,

---

[7] As noted above, this Court "presume[es] … "Congress does not enact useless laws." *Castleman*, 572 U.S. at 178 (Scalia, J., concurring). See *United States v. Hayes*, 555 U.S. 415, 427 (2009).

[8] See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 487 (1955).

J., joined by Thomas, and Alito, JJ., dissenting). There are two reasons why.

First, "the canon against surplusage is strongest when an interpretation would render superfluous" not merely a word or phrase of a statute but another section "of the same statutory scheme," *Marx v. Gen'l Revenue Corp.*, 568 U.S. 371, 386 (2013) (emphasis added). This is particularly important when, as here, the companion section "occupies so pivotal a place in the statutory scheme." *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Second, the canon against surplusage is stronger still when a court is not merely construing a statute whose distinct provisions and sections were enacted simultaneously but when Congress subsequently adds a new section through a statutory amendment. "When Congress amends legislation, courts must 'presume [Congress] intends [the amendment] to have real and substantial effect.'" *Ross*, 578 U.S. at 642 (emphasis added; quoting *Stone v. INS*, 514 U.S. 386, 397 (1995)). Therefore, "courts must construe statute to give effect, if possible, to every provision," especially those provisions added when "Congress … amend[s] a statute." *Stone*, 514 U.S. at 397 (emphasis added). *United States v. Quality Stores, Inc.*, 572 U.S. 141, 148-49 (2014).

For these reasons, giving full effect to a substantive statutory amendment is not a suggestion: it is a command. The Fourth Circuit ignored this command and "instead acted as though the amendment … had not taken place." *Ross,* 136 S. Ct. at 1858.

CONCLUSION

The Fourth Circuit grossly erred, as a matter of law, in concluding that Congress had not waived the sovereign immunity of the NRC from suit by its employees under the Employee Protection provision, 42 U.S. § 5851, of the Energy Reorganization Act of 1974, as amended in 2005, 42 U.S.C. § 5801 *et seq*., where, as here, the agency retaliated against two of its own whistleblowing employees for trying to protect the public from the dangers of nuclear power.

The Fourth Circuit's decisions to construe the ERA as insuperably unambiguous does worse than transform Congress' 2005 amendment into meaningless surplusage. In so doing, it also deprives NRC employees of the remedies and the means of deterrence Congress unquestionably intended them to have. In so doing, the Fourth Circuit's decisions transforms the ERA's guarantees into "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

The Court should not permit the Fourth Circuit's deeply misguided decisions to stand. For the reasons set forth above, Petitioners Michael S. Peck, Ph.D., and Lawrence Criscione request that this Court either grant certiorari or summarily reverse the decision below.

Respectfully submitted,

/s/ *Ned Miltenberg*
NED MILTENBERG
Counsel of Record
LAW OFFICES OF NED MILTENBERG
AND GOVERNMENT ACCOUNTABILITY PROJECT

5410 Mohican Road — Suite 200
Bethesda, MD 20816
202-656-4490
NedMiltenberg@gmail.com

JOHN M. CLIFFORD
BILLIE P. GARDE
CLIFFORD & GARDE, LLP
815 Black Lives Matter Plaza, NW
Suite 4082
Washington, DC 20006
202-912-5000

JOHN A. KOLAR
GOVERNMENT ACCOUNTABILITY PROJECT
1612 K Street, NW — Suite 1100
Washington, DC 20006
202-457-0034

Counsel for Petitioners

Washington, DC
November 29, 2021