No. 25-373

IN THE

Supreme Court of the United States

KIM ANNE FARRINGTON,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

Respondent.

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

BRIEF OF *AMICI CURIAE* SENATORS CHARLES GRASSLEY AND RON WYDEN, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, PROJECT ON GOVERNMENT OVERSIGHT, AND WHISTLEBLOWERS OF AMERICA IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF U.S. SENATORS CHARLES GRASSLEY AND RON WYDEN, PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY, PROJECT ON GOVERNMENT OVERSIGHT, AND WHISTLEBLOWERS OF AMERICA[1]

Individual *amici curiae* are United States Senator Ron Wyden of Oregon, and United States Senator Charles E. Grassley of Iowa.

Senator Charles E. Grassley is the Chair of the bipartisan U.S. Senate Whistleblower Protection Caucus. He co-authored the legislation and burdens of proof in the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16.(WPA) He was also an original co-sponsor and leader for passage of the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465. In more than thirty years legislating for effective whistleblower protection laws and programs, Senator Grassley has cultivated a unique expertise in what makes whistleblowing work and the invaluable role that whistleblowers play in protecting taxpayers and investors alike. Senator Grassley thus has a strong interest in ensuring that the Court interprets the WPA in accordance with the plain text and congressional intent.

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1. Pursuant to Rule 37.6, *amici* state that no monetary contributions were accepted for the preparation or submission of this *amici curiae* brief from anyone other than the *amici*, their, their members, or counsel. Undersigned counsel authored this brief in its entirety and notified counsel for all parties of his intention to file this *amici curiae* brief on October 16, 2025, which is more than the 10 days before the October 30, 2025, deadline as required by Rule 37.2.

Senator Ron Wyden serves as Vice-Chairman of the bipartisan U.S. Senate Whistleblower Protection Caucus. He was the original sponsor of legislation in the House of Representatives that ultimately became the Energy Reorganization Act whistleblower amendments for protection of nuclear workers, 42 U.S.C. §5851—the precedential private-sector whistleblower protection statute. H.R. 3941, as introduced in 1991 and ultimately enacted, incorporated the two-part test at issue in this proceeding. Senator Wyden also co-sponsored with Senator Grassley the resolution for National Whistleblower Appreciation Day and co-sponsored the COVID-19 Whistleblower Protection Act.

Senators Wyden and Grassley are longtime advocates for whistleblowers in the public and private sectors. They both urge the Court to grant *certiorari* to correct a growing misinterpretation of the WPA's language that threatens to undermine its critical role in enabling federal employees to disclose fraud and other misconduct.

Public Employees for Environmental Responsibility (PEER) is a national non-profit, public interest organization. PEER advocates on behalf of public employees in environmental fields such as public land management, pollution control, toxic chemicals, wildlife protection, and historic preservation. PEER represents federal employees in whistleblower proceedings under the Whistleblower Protection Act, as amended, before the Merit Systems Protection Board and federal courts. PEER also engages in advocacy for strong whistleblower protections generally.

Founded in 1981, the Project On Government Oversight (POGO) is a non-partisan independent watchdog that investigates and exposes waste, corruption, abuse

of power, and when the government fails to serve the public or silences those who report wrongdoing. POGO champions reforms to achieve a more effective, ethical, and accountable federal government that safeguards constitutional principles. Working with whistleblowers for such purposes is an integral part of POGO's mission, and ensuring strong whistleblower protections is one of its core policy priorities. POGO helped to lead efforts to pass and strengthen the Whistleblower Protection Enhancement Act ("WPEA"), testifying about the legislation before Congress, lobbying for the strongest possible whistleblower provisions, urging the public to take action, and organizing critical support. The organization supports whistleblower protection laws, which were created to protect the public interest, and they should not be eviscerated.

Whistleblowers of America (WoA) is a non-profit that provides voluntary trauma informed peer support services to whistleblowers to prevent suicide and address other mental health challenges. Whistleblowers suffering from retaliation can heal when they connect to someone who understands their plight.

Amici are concerned that the MSPB decision here seriously undermines protections for whistleblowers by greatly expanding the category of employees subject to the requirement to show that an adverse action was taken in reprisal for a disclosure, beyond those whose function is to regularly investigate and disclose wrongdoing, as directed by Congress. The decision also imposes an improperly high standard of proof on whistleblowers to show such reprisal, a burden whose impact would cancel the government's reverse burden of proof.

Amici are also concerned that the Federal Circuit's use of a summary affirmance that provides no explanation of its reasons falls short of the requirement of Due Process and frustrates the goal of Congress to advance whistleblower law through the "informed peer review process which holds all circuit judges accountable. . . . [As appeals courts disagree with each other,] courts either reconsider prior decisions and/or the case is heard by the Supreme Court, which resolves the dispute." Quoting S. Rep. 112-155, p. 11, 2012 U.S.C.C.A.N. 589 (April 19, 2012).

SUMMARY OF ARGUMENT

In *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 3931 (2015), this Court protected a federal air marshal when he disclosed information to the media about an agency plan to suspend travel due to budget constraints, explaining that, "Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks."

The Whistleblower Protection Act (WPA) reflects the "public interest in having free and unhindered debate on matters of public importance – the core value of the Free Speech Clause of the First Amendment[.]" *Pickering v. Board of Education*, 391 U.S. 563, 573 (1968); see also, *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) ("The dictates of sound judgment are reinforced by the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing. See, *e.g.*, 5 U. S. C. §2302(b)(8) [the WPA]").

In 2012 and 2017, Congress amended the WPA to permit "all circuits" to review decisions of the Merit

Systems Protection Board (MSPB) in WPA cases. It did so explicitly to subject Federal Circuit decisions to "peer review" by other circuits. The Federal Circuit's affirmance of the MSPB decision below frustrates this goal by using a single word, "Affirmed," instead of explaining its reasons for denying relief to Farrington.

The decision below is more troubling when Farrington and *amici* urged the Federal Circuit to reject the Agency's claim that Farrington's disclosures to the National Transportation Safety Board (NTSB) were part of her job duties as described in the Agency's job description. Amendments to the WPA specifically required that the speech at issue had to be a "principal" and "regular[]" duty before subjecting the whistleblower to a higher causation standard. The MSPB correctly quoted the current standard[2] but then failed to make a finding that Farrington's "principal job function" was "to regularly investigate and disclose wrongdoing." Instead, it cited to the Agency's official job description. Pet. 8a. In *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006), this Court cautioned against using the employer's job description to determine the scope of duties because "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform[.]"

Amici ask this Court to grant *certiorari* to require the Federal Circuit to explain its reasons why the Agency need not establish that the disclosure at issue is of the type which the employer has regularly required the employee to make.

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2. Pet. 7A, quoting 5 U.S.C. § 2302(f)(2).

Additionally, *amici* urge this Court to require federal courts to use the contributing factor test for a *prima facie* case, as well as clear and convincing evidence for the agency's affirmative defense of independent justification. Without any explanation, the Federal Circuit ignored—and effectively jettisoned—the WPA burden of proof cornerstones on both matters. In doing so, the Federal Circuit violated numerous, longstanding principles of statutory construction by rendering those tests irrelevant. Left undisturbed, the decisions below will discourage federal employees from speaking out about aviation safety or any other compliance issue or danger to public health.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S PRACTICE OF AFFIRMING MSPB DECISIONS WITHOUT STATING THE COURT'S REASONS UNDERCUTS THE CONGRESSIONAL PURPOSE OF THE ALL-CIRCUIT REVIEW ACT.

The petition for *certiorari* adequately explains how the Federal Circuit's one word opinion ("Affirmed") impermissibly abdicates the judiciary's constitutional role in deciding the law.

Amici raise a separate concern that the Federal Circuit too frequent use of affirmances without explanation deprives whistleblowers of the "informed peer review process" Congress required through the 2012 All-Circuit Review Act (ACRA) and the 2017 All-Circuit Review Extension Act (ACREA).

Congress enacted the 2012 Whistleblower Protection Enhancement Act (WPEA) because:

> Despite the clear legislative history and the plain language of the 1994 amendments, the Federal Circuit and the MSPB have continued to undermine the WPA's intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected under the WPA. S. 743 makes clear, once and for all, that Congress intends to protect "any disclosure" of certain types of wrongdoing in order to encourage such disclosures. It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward.

S.Rep. 112-155, pp. 4-5, 2012 U.S.C.C.A.N. 589 (April 19, 2012).

Congress included the ACRA as part of the WPEA, 5 U.S.C. § 7703 (128 Stat. 1894; H.R. 4197; Pub.L. 113–170), by adding 5 U.S.C. § 7703(b)(1)(B):

> A petition to review a final order … of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8) ... shall be filed in the United States Court of Appeals for the Federal Circuit **or any court of appeals of competent jurisdiction**.

Id. (emphasis added).

Congress explained its reason for this addition as follows:

> Restricting appeals to one judicial circuit undermines the basic principle of appellate review applicable to all other whistleblower laws. That principle is based on an informed peer review process which holds all circuit judges accountable. . . . [As appeals courts disagree with each other,] courts either reconsider prior decisions and/or the case is heard by the Supreme Court, which resolves the dispute.
>
> By segregating federal employee whistleblowers into one judicial circuit, the WPA avoids this peer review process. In the Federal Circuit no other judges critically review the decisions of the Court, no "split in the circuits" can ever occur, and thus federal employees are denied the most important single procedure which holds appeals court judges reviewable and accountable. A "split in the circuits" is the primary method in which the U.S. Supreme Court reviews wrongly decided appeals court decisions.

S.Rep. 112-155 at 11 (quoting attorney Stephen Kohn, Chair of the National Whistleblowers Center).[3] When the

3. "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill ...." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (citation omitted).

Federal Circuit refuses to show its work and explain its reasons for its decisions, it utterly frustrates the peer review process. Other circuits are unable to critique the Federal Circuit's reasoning.

If ACREA can work as intended, then the other Circuits will critique the Federal Circuit's decisions and give the Federal Circuit a basis to reconsider holdings that constrict the ability of whistleblowers to get relief. When this peer review process is frustrated, resort to this Court becomes more necessary.

Amici urge this Court to grant *certiorari* to reverse the Federal Circuit's one-word opinion and require it to decide Farrington's substantial concerns about the shortcomings in the MSPB's Final Order.

II. THE WPA EXCEPTION FOR DUTY-SPEECH WHISTLEBLOWERS SHOULD BE CONSTRUED NARROWLY TO FURTHER THE ACT'S REMEDIAL PURPOSE.

The Federal Circuit, like its sister Circuits, has long recognized that "the WPA is remedial legislation." *Nasuti v. Merit Sys. Prot. Bd.*, 376 F. App'x 29, 34 (Fed. Cir. 2010). *See also, e.g., Mount v. Dep't of Homeland Sec.*, 937 F.3d 37, 47 (1st Cir. 2019); *Grisham v. United States*, 103 F.3d 24, 26 (5th Cir. 1997).[4] Few canons of construction are more venerable than the injunction that remedial statutes must be construed liberally to the benefit of the class Congress intended to protect or advance. This critical

4. *Cf. Dep't of Homeland Sec. v. MacLean, supra,* 574 U.S. 383, 3931 (2015); *Garcetti v. Ceballos, supra,* 547 U.S. at 425.

principle applies here because, as this Court explained, unanimously, on the eve of the Civil War, "a remedial statute … **must be** construed liberally to accomplish its object. It not only enables the courts of the United States, but it **enjoins it upon them as a duty**, to disregard the niceties of form … and to give judgment according as the right of the cause." *Parks v. Turner*, 53 U.S. 39, 46 (1851) (emphasis added).[5]

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5. *See also, Household Credit Servs., Inc. v. Pfennig,* 541 U.S. 232, 237 (2004) ("a remedial statute … **must be** liberally interpreted.") (emphasis added; citation omitted); *J. W. Bateson Co. v. U.S. ex rel. Bd. of Trustees of National Automatic Sprinkler Indus. Pension Fund,* 434 U.S. 586, 594, (1978) (courts have "an **obligation** to construe" a remedial act "liberal[ly] … in order properly to effectuate the Congressional intent.") (citation omitted; emphasis added); *White v. Cotzhausen*, 129 U.S. 329, 34 (1889) (a remedial provision "must be liberally construed; that is, construed 'largely and beneficially, so as to suppress the mischief and advance the remedy.'"). *See also Tcherepnin v. Knight,* 389 U.S. 332, 336 (1967); *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve"); *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 393 (2015); *Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *Fleischmann Const. Co. v. U.S., to Use of Forsberg*, 270 U.S. 349, 360 (1926). *See also Pitsker v. Off. of Pers. Mgmt.*, 234 F.3d 1378, 1381 (Fed. Cir. 2000) ("[W]e must 'find that 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.'" (Quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957)); *NLRB v. Scrivener*, 405 US 117, 121-26 (1972); *English v. General Elec. Co.*, 496 U.S. 72 (1990) (to "encourage" employees to report safety violations and protect their reporting activity).

These principles apply to whistleblower protection statutes as much as any other. *See Dep't of Homeland Sec. v. MacLean,* 574 U.S. 383, 393 (2015) (rejecting interpretation that "could defeat the purpose of the whistleblower statute"); *Rainey v. Merit Sys. Prot. Bd.*, 824 F.3d 1359, 1361 (Fed. Cir. 2016); *Nasuti v. Merit Sys. Prot. Bd.*, 376 F. App'x 29, 33-34 (Fed. Cir. 2010).[6]

In *Willis v. Department of Agriculture*, 141 F. 3d 1139, 1143 (Fed. Cir. 1998),[7] the Federal Circuit denied protection for disclosures made pursuant to job duties the agency specifically assigned to all employees, not personal initiatives by a single employee, as here. In 2012, the WPEA reversed the *Willis* holding by adding 5 U.S.C. § 2302(f)(2). S. Rep. 112-155, 2012 U.S.C.C.A.N. 589, 593 (2012), p. 5. However, Congress also required duty-speech whistleblowers to show that the agency acted "in reprisal for the disclosure[.]" "This provision is intended to strike the balance of protecting disclosures made in the normal course of duties but imposing a **slightly higher** burden to show that the personnel action was made for the actual purpose of retaliating against the auditor for having made

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6. *See Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985) ("Narrow" or "hypertechnical" interpretations are to be avoided as undermining Congressional purposes.); *Passaic Valley Sewerage Comm. v. Dep't of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993).

7. The Board's current scope of duty speech – activity permitted by a job description from information learned on the job – is far broader than the *Willis* loophole Congress overturned. Willis' disclosure was in legal assessments required as part of his normal duties, not a personal initiative supported by a generality in a job description. 141 F.3d at 1144.

a protected whistleblower disclosure." S. Rep. 112-155, p. 6. (emphasis added)

In 2017, Congress clarified the scope of employees subject to this "slightly higher burden" by adding the requirement that "the principal job function" of the disclosing employee "is to regularly investigate and disclose wrongdoing[.]" Consistent with this Court's holding in *Lane v. Franks*, 573 U.S. 228, 238 (2014), this amendment clarifies that the "duty speech" category is limited to those few employees for whom the employer has specifically commissioned making disclosures about wrongdoing by coworkers or superiors. Few employees are actually required by their employer to report their boss's misconduct.[8]

In *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006), this Court cautioned against using the employer's job description to determine the scope of duties because "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform[.]" Employers must establish that the disclosure at issue is the type for which the employer has regularly required the employee to make.

The MSPB utterly failed to perform this analysis of Farrington's duty by instead relying on general duties the Agency placed in her job description. Pet. 8a. The Board never made an explicit finding of Farrington's "principal job function." As she did not work for any Inspector

8. Unlike the Board, this Court explained that it is not relevant whether the employee learned of misconduct on the job. *Lane v. Franks*, 573 U.S. at 238.

General or other internal compliance program, she was not in the group described in *Garcetti* or 5 U.S.C. § 2302(f)(2). The Federal Circuit erred as a matter of law in affirming the MSPB's Final Order and did serious damage to the remedial goal of encouraging federal employees to disclose evidence of wrongdoing.

Particularly in the area of aviation safety, the protection for employee disclosures to the NTSB should be as wide as possible. The elevated standard for duty-speech whistleblowers must be limited to those employees whom the Agency actually commissions to interface with the NTSB on a regular and normal basis. Farrington is not such an employee, and denying her protection will discourage other federal employees from making critical disclosures about aviation safety to the NTSB.

III. FOR EMPLOYEES SUBJECT TO THE DUTY-SPEECH EXCEPTION, THE WPA REQUIRES THAT THEY SHOW RETALIATION MOTIVATED ADVERSE TREATMENT, AS A CONTRIBUTING FACTOR, AND THEN REQUIRES THE AGENCY TO PROVE ITS DEFENSE BY CLEAR AND CONVINCING EVIDENCE.

The result of the MSPB's flawed decision is that Farrington was deprived of the modern whistleblower causation standards in which she only needed to show that her protected disclosures were a "contributing factor" before the Agency would be required to prove by "clear and convincing evidence" that it would have taken the exact same action without the protected activity. 5 U.S.C. § 1221(e). Instead, the MSPB required Farrington

to prove the ultimate conclusion – that the Agency acted "with an improper retaliatory motive." Cert. Pet. p. 6a.

This Court specifically rejected any requirement to prove "retaliatory intent" under the same causation requirement as expressed in the Sarbanes-Oxley Act (SOX). *Murray v. UBS Sec., LLC*, 601 U.S. 23, 32 (2024) ("[T]he provision's mandatory burden-shifting framework cannot be squared with such a requirement. While a whistleblower bringing a [18 U.S.C.] § 1514A claim must prove that his protected activity was a contributing factor in the unfavorable personnel action, he need not also prove that his employer acted with 'retaliatory intent.'").

Congress made clear that it intended the "in reprisal for" standard in 5 U.S.C. § 2302(f)(2) to be only "slightly higher" than the normal causation standard for WPA claims. S. Rep. 112-155, p. 6. As "in reprisal for" specifically references the employer's motivation, the logical standard would be the motivating factor standard that is familiar from its use in Title VII discrimination cases. 42 U.S.C. § 2000e–2(m) ("when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.").

The normal causation standard for federal whistleblowers is to show that the protected activity was a "contributing factor" in the adverse action 5 U.S.C. § 1221(e)(1). Thereafter, the agency can prevail only with "clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. § 1221(e)(2).

While 5 U.S.C. § 2302(f)(2) slightly elevates the *prima facie* showing for duty-speech whistleblowers, it does nothing to erase the contributing factor test or alter the Agency's subsequent burden to establish that it would have taken the exact same action without the protected activity. The Board's standard ignores not only statutory language but also the Federal Circuit's precedent and longstanding general doctrines for remedial employment statutes. Prior to passage of the Whistleblower Protection Act of 1989, all plaintiffs had to prove reprisal, not just causation. In *Warren v. Dep't of Army*, 804 F.2d 654, 657 (Fed. Cir. 1986), the court explained that the employee's burden to prove some retaliatory motive does not negate the employer's burden to prove reliance on independent, non-retaliatory grounds, either for the Civil Service Reform Act or EEO employment discrimination laws. In *Kwan v. Andalex,* 737 F.3d 834, 845 (2nd Cir. 2013), the Second Circuit explained that even for Title VII's far more difficult "but for" test, "the *prima facie* case requires only a *de minimis* showing."[9]

Contradicting this deeply rooted doctrine, the Board required whistleblowers to prove the ultimate conclusion of retaliation just to have a *prima facie* case. That renders superfluous the statute's provisions for an affirmative defense. If the employee proves the ultimate burden as part of their *prima facie* case, the employee wins. If the

9. The "knowledge timing" test should be dispositive to prove whistleblowing was a contributing factor for retaliatory actions against Ms. Farrington, as the agency began planning to remove her within months of conceding her concerns should and would be investigated by independent experts. Even without the WPA's statutory language in §1221(e)(1), *Kwan* accepted and used the knowledge-timing test to find a *prima facie* case. 734 F.3d at 845.

employee fails to prove the ultimate burden at that stage, the employee loses. Either way, the statutory affirmative defense is superfluous.

This is a fundamental error that the Federal Circuit should be required to address. One of the "most basic of interpretative canons" posits that a "statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citing *Hibbs v. Winn*, 542 U.S. 88, 101 (2004)). "The rule against superfluities complements the principle that courts are to interpret the words of a statute in context." *Hibbs,* 542 U.S. at 101 (citation omitted)

Notably, "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx v. Gen'l Revenue Corp.*, 568 U.S. 371, 386 (2013) (per Thomas, J.; internal quotation marks omitted; citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011) (per Alito, J.)). This is particularly important where, as here, the companion section "occupies so pivotal a place in the statutory scheme." *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

As the Federal Circuit succinctly summarized in *Spruill v. Merit Systems Protection Board,* 978 F.2d 679, 690 (Fed. Cir. 1992), "Unless Congress makes it evident that one provision is intended to subsume another parallel provision, we construe the statute to give meaning to each part." There is not a scintilla of authority that Congress intended to cancel the contributing factor test or the reverse burden of proof when it "slightly raised"

the burden for a *prima facie* case by a duty-speech whistleblower.

The MSPB erred as a matter of law in requiring Farrington to prove an ultimate retaliatory motive instead of just a contributing, motivating factor, and thereafter in refusing to hold the Agency to duty to prove its defense with clear and convincing evidence. Pet. 14 and 13a.

CONCLUSION

Amici ask this Court to grant this petition and reverse the decision of the Federal Circuit.

Respectfully submitted,

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