No. ________

In the Supreme Court of the United States

ERIC KATZ,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent,

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Circuit erred in denying the request for a rehearing *en banc*, given that Eric Katz suffered through a hostile work environment and was punished for being a whistleblower by the Department of Justice, which evidence was completely ignored by the Administrative Judge of the Merit Systems Protection Board and then upheld by the Federal Circuit?

2. Whether the Federal Circuit erred in denying the request for a rehearing *en banc*, given that the Department of Justice retaliated against Eric Katz for his complaints, which evidence was completely ignored by the Administrative Judge of the Merit Systems Protection Board and then upheld by the Federal Circuit?

RELATED PROCEEDINGS

United States Merits Systems Protection Board:

Eric J. Katz v. *Department of Justice*, No. DC-1221-20-0079-W-2 (Nov. 15, 2021) (initial decision)

United States Court of Appeals (Fed. Cir.):

Eric J. Katz v. *Department of Justice*, No. 22-1473 (June 6, 2024) (MSPB decision affirmed)

Eric J. Katz v. *Department of Justice*, No. 22-1473 (November 19, 2024) (en banc rehearing denied)

TABLE OF CONTENTS

Questions Presented i

Related Proceedings ii

Table of Contents iii

Table of Authorities vi

Opinions Below 1

Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 3

Summary of Reasons for Granting the Petition 10

I. The Decision Below Conflicts with Established Precedent Governing Whistleblower Protections and Evidentiary Standards 10

II. The Case Raises Important Questions About the Scope of Whistleblower Protections and ADA Accommodations 10

III. The Federal Circuit's Summary Affirmance Violates Due Process and Undermines Public Confidence in the Whistleblower Protection Framework 10

Reasons for Granting the Petition 10

I. The Court Should Reverse the Ruling of the MSPB Because Katz Proved That He Suffered Through a Hostile Work Environment and He was Punished for being a Whistleblower, but Such Evidence was Ignored by the Administrative Judge and Upheld Without Opinion by the Federal Circuit 12

Witness Credibility 13

Hostile Working Environment 16

The Carr Factors 16

II. The Court Should Reverse the Ruling of the MSPB because the DEA Retaliated Against Katz for His Complaints, Which Evidence was Ignored by the Administrative Judge 21

III. The Federal Circuit's Summary Affirmance Violates Due Process and Undermines Public Confidence in the Whistleblower Protection Framework 25

Conclusion 26

Appendix

Appendix A

Judgment [Not Precedential], United States Court of Appeals for the Federal Circuit, *Eric J. Katz* v. *Department of Justice,*
No. 22-1473 (June 6, 2024) App-1

Appendix B

Order [Not Precedential], United States Court of Appeals for the Federal Circuit, *Eric J. Katz* v. *Department of Justice,*
No. 22-1473 (Nov. 19, 2024) App-3

Appendix C

Initial Decision, United States Merits Systems Protection Board, *Eric J. Katz* v. *Department of Justice,*
No. DC-1221-20-0079-W-2
(Nov. 15, 2021) App-5

TABLE OF AUTHORITIES

Cases

Carr v. *Soc. Sec. Admin.*,
185 F.3d 1318 (Fed. Cir. 1999) 13

Clark County Sch. Dist. v. *Breeden,*
532 U.S. 268 (2001) 23

Dollar v. *Shoney's, Inc.*,
981 F. Supp. 1417 (N.D.Ala. 1997) 23

Hillen v. *Dep't of Army*,
35 M.S.P.B. 453 (M.S.P.B. 1987) 15

Hopkins v. *Baltimore Gas and Electric, Co.*,
77 F.3d 745 (4th Cir. 1996) 21

Jackson v. *Veterans Admin.*,
768 F.2d 1325 (Fed. Cir. 1985) 15

Miller v. *Dep't of Just.*,
842 F.3d 1252 (Fed. Cir. 2016) 11, 16-19

Muldrow v. *City of St. Louis*,
144 S.Ct. 967 (2024) 11, 21

Whitmore v. *Dep't of Lab.*,
680 F.3d 1353 (Fed. Cir. 2012) 11, 13

Statutes

5 U.S.C. § 1221 .... 1-3, 13

18 U.S.C. § 207 7

18 U.S.C. § 216 7

28 U.S.C. § 1254 1

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OPINIONS BELOW

The Federal Circuit's judgement is reproduced in the Appendix at App.1-2. The Merits Systems Protection Board's initial decision is reproduced in the Appendix at App.5-104.

JURISDICTION

The Federal Circuit's judgment was entered on June 6, 2024. The Federal Circuit denied rehearing on November 19, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provision pertinent to this case is subsections (a) and (e)(1) of § 1221 in Chapter 12 of title 5, United States Code, as amended by § 3 of the Whistleblower Protection Act of 1989:

> (a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), seek corrective

(b) action from the Merit Systems Protection Board.

(e)

(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure or protected activity described under section 2302(b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure or protected activity was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure or protected activity; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if, after a finding that a protected disclosure was a contributing factor, the agency demonstrates by clear and

> convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

5 U.S.C. § 1221 (a), (e)(1)

STATEMENT OF THE CASE

The questions presented in this petition strike at the heart of the fundamental protections for federal employees under the Whistleblower Protection Act ("WPA") and the Americans with Disabilities Act ("ADA"). The decision below not only disregards established precedent but also undermines Congress's clear intent to protect employees who report wrongdoing and seek reasonable accommodations. This Court's intervention is necessary to ensure that whistleblowers, particularly those serving the public interest in sensitive roles, are not punished for exposing misconduct or seeking lawful accommodations for their disabilities.

This case arises from the appeal under the case of *Katz* v. *Department of Justice*, pending before the MSPB, from a troubling pattern of retaliatory and discriminatory actions by the Department of Justice, which, rather than protecting whistleblower rights, engaged in a campaign of retribution against Petitioner Eric Katz. Katz, a decorated DEA Special Agent and whistleblower, faced professional ostracism, the dismantling of his groundbreaking program, and violations of his ADA accommodations

— all in retaliation for his disclosures of contract fraud and other misconduct. Despite presenting overwhelming evidence of retaliation and pretext, the MSPB and the Federal Circuit summarily dismissed his claims, failing to engage in the rigorous analysis required under this Court's precedent.

While serving as a DEA Special Agent, Katz conceived, developed, and managed the Cellular Abductor Tracking System ("CATS") Program, aimed at responding to abductions using advanced technology and data analytics.

In 2017, Katz was diagnosed with a brain tumor, which required specialized treatment. Doctors recommended care at Duke University in North Carolina due to the tumor's specifics. Recognized as a disability under the ADA, Katz requested and was granted a transfer to North Carolina, with occasional remote work, as a medical accommodation. The CATS Program was moved to Ft. Bragg, North Carolina, co-located with the Army Ground Intelligence Surveillance Activity.

Katz's supervisor, Ferdinand "Andy" Large, supported the program and had no concerns about Katz's management. After Large retired in July 2018, Homer "Chip" McBrayer briefly supervised Katz until November, when Luke McGuire began. During this period, Katz's second-line supervisor was Michael DellaCorte, the Deputy Chief of Operations, reporting to Gregory Cherundolo, Chief of Operations. Katz initially raised concerns internally

to his supervisor Ferdinand Large about DellaCorte awarding contracts to his personal friends and former bosses, Large advised he sent these concerns up the chain of command, shortly thereafter Katz and his program were then placed under intense scrutiny including an attempt to transfer Katz, which was thwarted by the medical accommodation.

As Staff Coordinator, Katz supervised two contract employees, Thomas Bordonaro and Jenna Guerra, both military veterans and experienced government contractors. Bordonaro managed the program from Stafford, Virginia, while Guerra focused on analytics at Ft. Bragg. They worked under Katz's supervision for several years until February 1, 2019, when Contracting Officer Mina Hunter alleged, based on a single email, that they were exceeding their contract scope. Katz, Bordonaro, Guerra, and McBrayer (McBrayer had the same qualifications as Hunter) all testified that their work was within the contract's scope, which allowed liaison with other government agencies.

On February 1, 2019, Katz called McGuire to clarify the issue, but McGuire refused to discuss it by phone. Instead, McGuire removed Katz as Task Monitor and replaced him with McBrayer. The agency provided no specific evidence or documentation showing how the contractors exceeded their scope, relying solely on Hunter's email. McGuire admitted he had not reviewed the contract language before removing Katz from his duties.

On February 1, 2019, McGuire ordered Bordonaro and Guerra to stop all work, which Katz communicated to them, and they complied. In response to the accusation of exceeding contract scope, Bordonaro emailed McGuire on February 6, 2019, explaining that his activities were approved by McGuire's supervisor, DellaCorte. Despite this clarification, McGuire contacted David Dongilli at Compass and demanded Bordonaro's termination. During the MSPB hearing, McGuire denied making this demand, but a sworn affidavit from Compass's CEO confirmed that McGuire had indeed requested Bordonaro's firing. This inconsistency exposed McGuire's lack of candor, further undermining his credibility. Bordonaro was fired just days after defending Katz's management of the CATS Program.

On February 27, 2019, after contractor Ed Wezain resigned and disclosed that the CATS Program was being relocated to Virginia without Katz's knowledge, Katz emailed McGuire asking about his future since his medical condition prevented relocation. McGuire ignored Katz's inquiry, avoiding any direct response about the planned move.

On March 5, 2019, Katz emailed McGuire, alleging potential contract fraud, retaliation against Guerra and Bordonaro, and asked about his duty to report concerns to the Office of the Inspector General ("OIG"). McGuire responded, saying he needed two weeks to address the issue, but never responded. Instead, on March 6, 2019, McGuire arranged an unannounced visit to the Ft. Bragg office, set for March 14, coinciding with Wezain's last day.

McGuire did not inform Katz of the visit, and Katz, working remotely under his medical accommodation, was not there. McGuire and Hunter traveled to North Carolina and met with Wezain. Claiming security issues despite the site being in a Top Secret facility, they took all DEA computer equipment, including Wezain and Guerra's. Guerra, working offsite that day, resigned after her equipment was seized, citing a hostile work environment and bias against Katz.

This site visit was planned just one day after Katz raised concerns about contract fraud and reporting to the OIG. If proven, Katz's allegations could lead to serious consequences, including potential federal law violations punishable by imprisonment under 18 U.S. Code §§ 207 and 216.

From March 15 to July 21, 2019, Katz was stripped of all job duties, and in April, he was officially informed that the CATS Program was being moved to DEA Headquarters in Arlington, Virginia. On March 26, Katz was interviewed by OPR about contract violations, EEO complaints, and retaliation claims. On April 4, he met with the DOJ OIG about the CATS contract. By April 17, Katz accused McGuire and DellaCorte of retaliating against him for whistleblowing.

Katz continued to face retaliatory actions. On May 15, he reported to the OIG that the DEA was forcing him into an improper fitness-for-duty exam. On May 22, he filed an OSC complaint alleging reprisal. On June 15, he informed OSC and OIG that

the DEA violated the law by relying on a nurse's evaluation that contradicted recommendations from three surgeons at Duke and Stanford regarding his medical condition and accommodations.

On July 21, 2019, Katz was reassigned by Cherundolo to the Raleigh DEA office to work in the Confidential Source Section. In December 2019, he was further reassigned by the DEA Career Board back to DEA Headquarters to a lesser position, where he had already served for seven years, underscoring the ongoing animus against him.

After Katz made protected disclosures, all the contractors he supervised were either terminated or resigned, and McGuire removed his responsibilities, leaving him with no work for months. Despite this, McGuire required Katz to send daily emails reporting tasks he had no ability to perform. Katz was also prohibited from communicating with the new employees running the CATS Program, even though they requested his assistance. Ultimately, the Agency shut down the CATS Program.

Katz argued that his relocation from North Carolina was a punitive response to his whistleblowing and requests for medical accommodations. During the MSPB hearing, the Administrative Judge ("AJ") determined that Katz experienced five personnel actions: (1) his September 2017 selection for a position in Charlotte, North Carolina ("Charlotte Position"); (2) March 2019 emails indicating significant changes to his duties and working conditions; (3) a July 12, 2019

reassignment to the Confidential Source Unit in Raleigh ("CS Reassignment"); (4) a July 21, 2019 temporary duty assignment in Raleigh; and (5) a December 13, 2019 involuntary reassignment to DEA Headquarters approved by the Career Board.

Although the April 2019 transfer of the CATS Program back to DEA Headquarters significantly changed Katz's working conditions, the AJ ruled that it did not qualify as a "personnel action" under the WPA. Regarding the September 2017 Charlotte position, the AJ found that Katz "... failed to establish that his whistleblowing was a contributing factor to his selection for the Charlotte Position in September 2017."

Regarding the remaining personnel actions, the AJ found that Katz "... established by preponderant evidence that DellaCorte and McGuire were aware of his whistleblowing prior to those events..." as indicated by his March 5, 2019 email. The AJ also concluded that McGuire, DellaCorte, and Cherundolo were all "...involved in or otherwise set in motion..." Katz's July and December 2019 reassignments and related actions, making Katz's protected disclosures a contributing factor in these personnel decisions.

However, the AJ ultimately ruled that the Agency provided clear and convincing evidence that it would have taken the same actions even without Katz's whistleblowing.

Katz appealed this ruling, but on June 6, 2024, the Federal Circuit affirmed the decision without explanation under Fed. Cir. R. 36. Petition for a rehearing *en banc* was subsequently denied on November 19, 2024.

SUMMARY OF REASONS FOR GRANTING THE PETITION

I. The Decision Below Conflicts with Established Precedent Governing Whistleblower Protections and Evidentiary Standards

II. The Case Raises Important Questions About the Scope of Whistleblower Protections and ADA Accommodations

III. The Federal Circuit's Summary Affirmance Violates Due Process and Undermines Public Confidence in the Whistleblower Protection Framework

REASONS FOR GRANTING THE PETITION

This Court should hear this case for three independent reasons.

First, the MSPB and the Federal Circuit improperly shifted the burden of proof under the WPA by requiring Katz to prove retaliation beyond a reasonable doubt, a standard far exceeding the statutory "preponderance of the evidence" threshold established in *Whitmore* v. *Dep't of Labor*, 680 F.3d

1353 (Fed. Cir. 2012). The agency's failure to provide clear and convincing evidence of independent causation, as required under *Miller* v. *Dep't of Justice*, 842 F.3d 1252 (Fed. Cir. 2016), was ignored without explanation by the AJ and subsequently rubber-stamped by the Federal Circuit under Rule 36. This departure from precedent creates an urgent need for this Court's review.

Second, this case exemplifies the challenges whistleblowers and disabled employees face in seeking justice within the federal employment system. The DEA's actions, including stripping Katz of his responsibilities, relocating his program without consultation, and subjecting him to adverse actions in close temporal proximity to his disclosures, constitute a clear pattern of retaliation. Moreover, the agency's disregard for Katz's ADA-protected accommodations sets a dangerous precedent that could erode disability rights in federal employment. As this Court recently reaffirmed in *Muldrow* v. *City of St. Louis*, 144 S.Ct. 967 (2024), even marginal adverse actions may suffice to establish retaliation claims, a principle that was ignored in the decision below.

Third, the Federal Circuit's use of a Rule 36 summary affirmance in this case denies meaningful judicial review and contradicts Congress's intent to provide robust protections for whistleblowers. By failing to address material inconsistencies in the MSPB's findings, the Federal Circuit eroded accountability within the administrative process,

sending a chilling message to federal employees contemplating disclosures of fraud, waste, or abuse.

I. THE COURT SHOULD REVERSE THE RULING OF THE MSPB BECAUSE KATZ PROVED THAT HE SUFFERED THROUGH A HOSTILE WORK ENVIRONMENT AND HE WAS PUNISHED FOR BEING A WHISTLEBLOWER, BUT SUCH EVIDENCE WAS IGNORED BY THE ADMINISTRATIVE JUDGE AND UPHELD WITHOUT OPINION BY THE FEDERAL CIRCUIT

Katz faced retaliation as a whistleblower after filing complaints with the Agency. He was stripped of his duties and reassigned, violating both the law and his medical accommodations. Although Katz presented evidence of retaliation and a hostile work environment, the AJ ignored it. When Katz appealed, the Federal Circuit affirmed the decision without explanation, and then the court refused a hearing *en banc* to examine the evidence in this case. This case needed to be thoroughly examined, with a proper analysis of the facts, but the MSPB and the courts failed to do so. Therefore, this Petition should be granted at this time, as this case deserves review.

Under the Whistleblower Protection Act ("WPA"), a petitioner must show, by a preponderance of the evidence, that (1) they made a protected disclosure or activity; (2) there was a personnel

action authorized for relief under the WPA; and (3) their protected disclosure or activity was a contributing factor in the personnel action. *See* 5 U.S.C. § 1221(e)(1). Once a petitioner makes such a showing, the agency must prove by clear and convincing evidence that is would have taken "'the same personnel action in the absence of such disclosure.'" *Whitmore* v. *Dep't of Lab.*, 680 F.3d 1353, 1367 (Fed. Cir. 2012), quoting 5 U.S.C. § 1221(e)(2).

In this case, the AJ discussed the factors articulated in *Carr* v. *Soc. Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). Those factors include (1) the strength of the agency's evidence to support its personnel action; (2) the existence and strength of any motivation to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *See Carr, supra,* at 1323. The AJ's decision here never addressed significant witness testimony under these factors. It was harmful error for the AJ never to address these factors, and it is reversible error for the Federal Circuit to affirm the decision without explanation. This Court should grant review of these decisions.

Witness Credibility

The AJ's findings largely rely on hearing testimony from McGuire, without addressing multiple witnesses that contradicted McGuire's

statements or McGuire's inability to explain his own actions. Though they were contract workers, Guerra and Bordonaro both praised Katz's management of the Program. They each worked on the Program for more than five years. Katz's prior supervisor, Large, stated of Katz: "He was a stand-up agent, very hardworking." Katz's interim supervisor, McBrayer, also testified that Katz's handling of the Program was excellent and contradicted McGuire's testimony. The AJ did not address their credibility or address their hearing testimony concerning these matters at all. Thus, the AJ failed to address evidence that fairly detracted from evidence supporting her findings and failed to consider the evidence as a whole. Rather, the AJ simply believed McGuire's version of events after finding him credible. This failure constitutes harmful error.

In evaluating witness credibility involving conflicting facts, the Board should have considered details of the conflicting evidence and examine the discrepancies:

> To resolve credibility issues, an administrative judge must first identify the factual questions in dispute; second, summarize all of the evidence on each disputed question of fact; third, state which version he or she believes; and, fourth, explain in detail why the chosen version was more credible than the other version or versions of the event. Numerous factors, which will be considered in more detail below, must be considered in making and explaining a credibility determination. These

> include: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.

Hillen v. *Dep't of Army*, 35 M.S.P.B. 453, 458 (M.S.P.B. 1987); *see also Jackson* v. *Veterans Admin.*, 768 F.2d 1325 (Fed. Cir. 1985) (holding that failure to consider witness credibility or dismissing contradictory evidence without explanation constitutes reversible error).

Here, the AJ simply never addressed the witness credibility of Guerra, Bordonaro, McBrayer or the sworn affidavit from the CEO of Compass Strategies concerning their testimony about circumstances around Bordonaro's termination. This testimony directly contradicted McGuire's testimony about his decisions and actions, which cannot be resolved without analysis under the relevant caselaw. The AJ never addressed witness credibility, and the Federal Circuit then affirmed the decision, without specifying why such decision was upheld. The Federal Circuit then refused a rehearing *en banc*, further exacerbating these wrongful holdings. The AJ erred for failing to address the credibility, and the Federal Circuit erred for upholding such decision. This Court should review.

Hostile Working Environment

The AJ failed to consider evidence related to the working conditions at the DEA, which supported Katz's claims of retaliation under the WPA. Despite this evidence, the AJ concluded that Katz's situation did not amount to a hostile work environment. Testimony from three witnesses, including one who was fired due to McGuire's actions, clearly indicated a hostile environment and that Katz was being targeted. Yet, the AJ's decision ignored this critical testimony. This all amounted to harmful error.

From March to July 2019, McGuire removed Katz from managing the CATS Program, leaving him without any duties. As a Staff Coordinator with no staff, McGuire made no effort to find him work and waited two months before reaching out for temporary tasks. Katz testified that during this time, he watched training videos and listened to podcasts. The Agency did not challenge this, nor did McGuire explain what Katz was supposed to be doing. Despite this, the AJ found Katz was teleworking and not in a hostile environment. The record evidence, however, clearly shows otherwise.

The Carr Factors

In *Miller* v. *Dep't of Just.*, 842 F.3d 1252 (Fed. Cir. 2016), this Court considered a whistleblower employee who alleged gross waste of funds, was later idled for months without any work, and reassigned without explanation over a period of years. *Miller* at

1256. There, as here, the employee established a prima facie case of whistleblower retaliation, shifting the burden to the agency to show independent causation of the personnel actions taken against the employee. *Id.* at 1257. In *Miller,* the Federal Circuit reversed a finding by the Board that the agency carried its burden, and stated the Board had taken a needlessly dismissive and narrow view of the *Carr* factors. *Id.* at 1262-3. The same result should have occurred here, for similar reasons.

In evaluating *Carr* factor one, the strength of the agency's evidence, the AJ erred in holding that the DEA could justify removing Katz from the CATS Program, removing him of his responsibilities, and then transferring the Program to Virginia. Because DEA Headquarters was located in a higher cost area, moving the contract increased its labor costs and left Katz without any duties to perform, despite his years of service and his medical accommodation. Yet, despite this evidence, the AJ found that the first *Carr* factor was supported by strong evidence presented by the Agency.

As to *Carr* factor two, the existence of any motivation to retaliate, the motivation to retaliate against Katz was clear, but was ignored by the AJ. The AJ found that while DellaCorte and McGuire did have a desire to retaliate against Katz, the AJ found it was a weak desire. The AJ held as such, despite Dellacorte's direct involvement in getting contract awards to his former professional mentors and Katz's exposure of such awards. While this may be the AJ's view of the testimony, it is belied by the

inconsistencies between their testimony minimizing their involvement in Katz's personnel actions, including his transfer and reassignments. In other words, though DellaCorte and McGuire each denied playing a role in the decision to transfer Katz, Cherundolo testified that he based his decision purely on what McGuire had found out about Katz, his performance, and the on-site visit to the Ft. Bragg office. Both McGuire and Dellacorte deny being involved in this decision and Cherundolo testified they were in his office constantly requesting the transfer. It is difficult to identify an innocent explanation as to why McGuire and DellaCorte would deny their involvement in the decision in this way, and the denial certainly undermines their credibility. Yet the AJ neither took these facts into account, nor did she explain why she did not. Therefore, there was motivation for the retaliation, but such evidence was not properly considered by the AJ.

As to *Carr* factor three, similar actions against employees who are not whistleblowers, the Agency failed to present any evidence for this factor at all. In *Miller*, this Court held that weak evidence in support for agency action (factor one), only "some" evidence in support of factor two, and no evidence under factor three meant the agency had failed to carry its burden of proving independent causation. *Miller* at 1263. Thus, even though the agency is not required to provide evidence under all three *Carr* factors, its failure to present evidence on the third factor could be held against the agency. *Id.* This Court noted that weak evidence in support of the first two factors,

along with no evidence under factor three can doom an agency's attempt at showing independent causation. *Id.* Specifically, this Court noted:

> The Government bears the risk associated with having no evidence on record for this factor. For while we have indicated that "the absence of any evidence relating to *Carr* factor three can effectively remove that factor from the analysis," we further explained that the Government's failure to produce evidence on this factor "may be at the agency's peril" considering the Government's advantage in accessing this type of evidence.

Miller v. *Dep't of Just., supra*, 842 F.3d at 1262, quoting *Whitmore*, at 1374.

In this case, the AJ found "strong" evidence in support of the personnel actions it took against Katz (*Carr* factor one). When viewed as a whole, however, the evidence is mixed that the personnel actions had adequate justification, aside from McGuire's own subjective testimony that was contradicted by several other witnesses. Failure to address, consider, or evaluate these material contradictions was harmful error under both *Miller* and *Whitmore*. Thus, the AJ erred in holding that the Agency was justified in its actions against Katz, and the Federal Circuit erred in affirming that decision, all without any explanation. This Court should grant review in order to evaluate the AJ's decision, examine the record, and provide a reasonable interpretation of the actions of the Agency against Katz, as Katz was

subject to a hostile work environment in violation of his status as a whistleblower.

This case holds significant implications for the treatment of individuals with disabilities and whistleblowers in the workplace, both within and outside the federal government. The Department of Justice, tasked with enforcing laws that protect workers with disabilities and those who report misconduct, must be held to the highest standard in its own employment practices. This case underscores a troubling paradox: the very agency responsible for upholding the rights of disabled individuals and protecting whistleblowers appears to be among the worst offenders of those rights.

The outcome of this case will impact not only Mr. Katz but also countless other employees who may be similarly situated. A ruling in favor of the Defendant could set a dangerous precedent, allowing any employer to circumvent established procedures to protect those who expose wrongdoing from any retaliation, undermining the protections that Congress intended. This broader impact is particularly alarming, given the DOJ's role as the enforcement arm of the federal government for whistleblowers, especially since Defendant could be seen as an egregious violator of these rights. This could result in significant barriers to employment, reduced job performance, and even job loss. Moreover, the fear of retaliation for reporting misconduct could deter whistleblowers from coming forward, allowing unethical and illegal practices to go unchecked. This Court's intervention will send a clear message that

violations will not be tolerated and that the rights of whistleblowers must be upheld.

II. THE COURT SHOULD REVERSE THE RULING OF THE MSPB BECAUSE THE DEA RETALIATED AGAINST KATZ FOR HIS COMPLAINTS, WHICH EVIDENCE WAS IGNORED BY THE ADMINISTRATIVE JUDGE

Katz made a prima facie case for a claim for retaliation and argues that the DEA failed to demonstrate a legitimate reason for taking the actions that it did. This Court should review the case, now that the request to hearing the case *en banc* was denied, as the judgment of the AJ should never have been affirmed.

In order to establish a prima facie case for Retaliation, a plaintiff must show: 1) that plaintiff engaged in a protected activity; 2) that the employer took adverse action against the plaintiff; and 3) that the adverse action is causally linked to the protected activity. *See Hopkins* v. *Baltimore Gas and Electric, Co.*, 77 F.3d 745, 754 (4th Cir. 1996). Recently this Court stated in *Muldrow* v. *City of St. Louis*, 144 S.Ct. 967 (2024) that a plaintiff does not need to show a "significant" harm in the adverse employment action. The Court stated that a plaintiff "need show only some injury respecting her employment terms or conditions. The transfer must have left her worse off, but need not have left her significantly so." *Id.* at 977. Thus, Katz was only

required to show that the action taken against him in retaliation left him "worse off," but he does not need to show that he was significantly so. Katz clearly has established that he was "worse off" with having reduced responsibilities, having the CATS Program taken away from him, and having to transfer to Virginia, away from his doctors in North Carolina. Thus, pursuant to *Muldrow*, Katz established a prima facie case for Retaliation, and this Court should review.

In this case, the Agency took an adverse action towards Katz in retaliation for his whistleblower complaint. Katz performed brilliantly on the CATS Program until he began raising concerns about the actions of DellaCorte, who replaced a highly qualified federal contractor, Cherokee Nation, with a small company, Compass, whose only suitability appears to be that it was populated by former DEA personnel who Dellacorte had worked for or with previously. Compass, the record shows, so lacked independent qualifications to oversee that Program that they merely rehired, at greater cost to the taxpayer, the exact same personnel who had worked for Cherokee Nation. The DEA's "concerns" with Katz's performance only emerged after he reported these actions. This suspicious timing casts doubt on the legitimacy of the DEA's actions. For each retaliatory act, or claimed justification for action by the Agency, Katz presented compelling, if not overwhelming, evidence that he was singled out for punishment. Bordonaro, Guerra, and McBrayer all testified that McGuire and DellaCorte's explanations for scrutinizing Katz, removing his tasks, and

reassigning him, with full knowledge of his particular link to North Carolina due to medical conditions, was driven by retaliatory animus. Yet the testimony of Agency supervisory officials, federal contractors, and co-workers was deemed unpersuasive to the AJ, who uncritically accepted incredulous explanations for conduct by the Agency that were nowhere supported by any contemporaneous document. The AJ distorted the evidentiary burden in this whistleblower case from one where the Agency needed to establish its actions by clear and convincing evidence, to one where Katz needed to prove his claims virtually beyond a reasonable doubt.

The AJ failed to consider the cumulative impact of the DEA's actions. Even if individually defensible, the harassment, scrutiny, duty restrictions, accommodation revocation, and involuntary transfer suggest retaliation. The DEA claimed the transfer was unrelated to Katz's complaints, but this came from employees involved in the contracts Katz had reported. Katz argued these reasons were pretextual, but the AJ chose to accept the DEA's explanations, ignoring the contradictory facts. The move of the CATS Program occurred at the same time as Katz was making these complaints. "Close temporal proximity gives rise to an inference of causal connectivity." *Dollar* v. *Shoney's, Inc.*, 981 F. Supp. 1417, 1420 (N.D.Ala. 1997); *see also Clark County Sch. Dist.* v. *Breeden*, 532 U.S. 268, 273 (2001) ("The cases that accept mere temporal proximity between an employer's knowledge of protected activity and an adverse

employment action as sufficient evidence of causality to establish a prima facie case uniformly hold that the temporal proximity must be 'very close'."). Here, the AJ ignored this close temporal proximity, which was very close in time. All of these activities were occurring at the same time. Katz has shown that the adverse action taken against him was in sufficient temporal proximity to making his complaints. The AJ erred in holding otherwise, and the Federal Circuit erred in affirming that decision without explanation. This Court should review, following the denial of the rehearing *en banc*, as this case has broad impact for Mr. Katz, as well as those similarly situated. As argued previously, the Department of Justice, tasked with enforcing laws that protect workers who report misconduct, must be held to the highest standard in its own employment practices. This case underscores a troubling paradox: the very agency responsible for upholding the rights of individuals and protecting whistleblowers appears to be among the worst offenders of those rights. Thus, the AJ erred in holding otherwise, and this Court must review, due to the broad impact this case could have for whistleblowers across the country.

Therefore, in viewing the evidence in the light most favorable to Mr. Katz, the MSPB erred in ruling against Mr. Katz, and the Federal circuit erred in upholding that ruling and denying the rehearing *en banc*. This Court should now review that ruling.

III. THE FEDERAL CIRCUIT'S SUMMARY AFFIRMANCE VIOLATES DUE PROCESS AND UNDERMINES PUBLIC CONFIDENCE IN THE WHISTLEBLOWER PROTECTION FRAMEWORK

The Federal Circuit's use of a Rule 36 summary affirmance in this case denies meaningful judicial review and contradicts Congress's intent to provide robust protections for whistleblowers. By failing to address material inconsistencies in the MSPB's findings, the Federal Circuit eroded accountability within the administrative process, sending a chilling message to federal employees contemplating disclosures of fraud, waste, or abuse. The MSPB and the Federal Circuit violated Katz's procedural due process rights because the AJ failed to provide a reasoned explanation for ignoring material evidence and testimony. This lack of analysis undermines the fairness of the hearing process. Thus, because the AJ failed to consider all of the evidence, rather than simply believing one witness, and failed to provide an explanation for ignoring such evidence, Petitioner's right to due process was violated, and this Court should review, based upon the constitutional impact it may have in the protection of individual rights.

The DEA's actions in this case targeted Petitioner in a way that undermined his medical accommodations and punished him after he reported illegal actions. Petitioner was supposed to be among the people that should have been protected, especially by an arm of the Federal Government. The

DEA, however, ignored the whistleblower protections and ignored medical accommodations, all to punish Mr. Katz for reporting such behavior. There is clearly a discriminatory and retaliatory animus performed by the DEA, and the MSPB ignored such animus when it chose to ignore evidence and ignore Petitioner's due process rights. This Court should review this decision to ensure that Petitioner is treated fairly, despite his medical accommodation and despite his status as a whistleblower, as this Court should be highly concerned with individual rights. Thus, this Court should not review the ruling.

CONCLUSION

This case presents an ideal vehicle for this Court to reaffirm the vital protections enshrined in the Whistleblower Protection Act and the Americans with Disabilities Act, ensuring that federal employees who report misconduct are not met with retribution or subjected to systemic bias. The decisions by the lower tribunals undermines these statutory protections, leaving a significant gap in accountability and threatening the public interest. This Court should grant certiorari to correct these errors, clarify the proper evidentiary standards under the WPA, and safeguard the rights of whistleblowers and disabled employees across the federal workforce.

WHEREFORE, this Court should grant certiorari.

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