Interest of the Amici and Source of Authority to File

Amici are organizations each with a long history of occupational free speech advocacy. *Amici* are dedicated to the concept that "a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters." *Waters v. Churchill*, 511 U.S. 661, 674 (1994).

Public Employees for Environmental Responsibility ("PEER") is a national, nonprofit service organization dedicated to assisting federal, state and local resource professionals who fight to uphold environmental laws and ethics within their organizations. PEER protects public employees who protect our environment. PEER's headquarters is located in Washington, D.C. and PEER currently has eight field offices around the country. PEER believes that public employees are a unique force working for environmental protection. In the ever-changing tide of political leadership, these front-line employees stand as defenders of the public interest within their agencies and as the first line of defense against the exploitation and pollution of our environment. Their unmatched technical knowledge, long-term service and proven experiences make these professionals a credible voice for meaningful reform.

When such employees are retaliated against for speaking out, PEER provides free legal representation in whistleblower proceedings under the Whistleblower Protection Act, various federal environmental statutes and state

whistleblower laws. PEER also advocates for free speech rights and protections for scientific integrity for public employees.

Founded in 1981, the Project On Government Oversight ("POGO") is an independent nonprofit that investigates and exposes corruption and other misconduct in order to achieve a more effective, accountable, open and ethical federal government. POGO made its mark by looking into Pentagon waste, fraud, and abuse, spotlighting overspending, including on overpriced toilet seats ($640), coffee makers ($7,600), and other spare parts ($436 hammers). POGO's investigations have expanded to include national defense and homeland security concerns, government subservience to commercial interests, abuse in government contracting, excessive secrecy, and mismanagement of natural resources by federal agencies. POGO is often asked to testify at congressional hearings and to provide background information to Members of Congress, executive branch agencies, the Government Accountability Office ("GAO"), and Inspectors General. By applying internal and external pressure through the media, the public, elected officials, and other policymakers, POGO helps ensure that the federal government implements policies and programs in a manner that benefits all Americans. Additional information can be found at www.pogo.org.

In those efforts, POGO has worked with thousands of whistleblowers who have shed light on government misconduct and systemic problems that harm the

public. Recognizing the importance of the information provided by those government insiders, POGO has fought for stronger laws to ensure protection for whistleblowers who step forward for the common good. It has been POGO's experience that once one whistleblower discloses government abuse, many more insiders are willing to step forward and support POGO's efforts to analyze and bring attention to the problem.

Amici contend that the contribution of whistleblowers to uncovering and rectifying grave problems facing society at large cannot be overstated. Whistleblowers are employees who take an ethical stand against wrongdoing. They often do so at great risk to their careers, financial stability, and personal and familial relationships. Frequently, whistleblowers are courageous people of integrity who have observed and documented fraud, gross violations of law or health-threatening safety and environmental hazards. *Amici* advocate that society protect and applaud whistleblowers, because they are saving lives, preserving our health and safety and preserving vital fiscal resources. Conscientious employees who point out illegal or questionable practices should not be forced to choose between their jobs and their silence. The District Court's narrow construction of the scope of protected conduct under the WPA is contrary to the plain language of the Act, Congressional intent, and the public interest. Accordingly, *amici* are filing this brief urging the Court to reverse the District Court's decision.

Amici respectfully submit this brief to assist the Circuit Court in the resolution of this case. *Amici's* interest in the case is to ensure that whistleblowers enjoy the full protection of the WPA, which benefits the public at large.

Pursuant to Fed. R. App. P. 29 (a) and (b), *amici* are contemporaneously filing with this Court a motion for leave to file this brief.[1]

Summary of the Argument

Risking her distinguished career as the leading National Institutes of Health researcher on sickle cell disease, Dr. Bonds courageously disclosed and opposed the unlawful use of genetic material from African American infants without the consent of or knowledge of the infants' parents or guardians to create immortalized cell lines for a drug study. *See* Memorandum Op. of 8/17/09 ("Mem. Op.") at 5, Apx. at 2466. Following Dr. Bonds' disclosures, her superiors removed her as project officer (PO) of her studies and subjected her to a protracted investigation. Apx. at 2468-71. The investigation lasted six months and was conducted contrary to NIH guidelines governing such investigations. *Id.* at138-294, 648-40. Indeed, NIH did not document the purpose of the investigation, which investigation prompted the termination of Bonds' employment. *Id.* at 648, 1095, 1215.

[1] Appellant consents to the filing of this brief, but appellee does not consent.

Dr. Bonds' disclosures about the unlawful use of genetic material from the blood samples of infant participants in a clinical study are expressly protected under the WPA in that the WPA protects "*any* disclosure of information by an employee . . .which the employee . . . reasonably believes evidences (i) a violation of any law, rule, or regulation . . . . " 5 U.S.C. § 2302(b)(8)(A) (emphasis added). Appellee does not appear to contest Dr. Bond's position that the use of the genetic material without consent was unlawful, and indeed, the Office of Special Counsel concluded that "NIH officials have participated in the violation of federal law" by failing to destroyed the cell lines that were obtained from African Americans without consent. *See* Apx. at 458.

Yet the District Court dismissed Dr. Bonds' WPA claim by applying two judicially-created loopholes to the WPA that are expressly contrary to the plain meaning and purpose of the WPA. In particular, the District Court held that Dr. Bonds did not engage in protected conduct under the WPA because her disclosures "were made in the ordinary course of her job as project officer of the BABY HUG trial, a position that required her to oversee the day-to-day operations, supervise lead investigators including Dr. Ware, and bring any issues regarding the trial to senior NHLBI officials, *and* the disclosures were made to the supervisors with whom she disagreed." Mem. Op. At 54, JA 2515, (citing *Huffman v. Office of*

Personnel Mgmt., 263 F.3d 1341 (Fed. Cir. 2001) and *Hooven-Lewis v. Caldera*, 249 F.3d 259 (4th Cir. 2001)).

Both of these judicially-created loopholes – the *Huffman* "duty speech" loophole and the *Hooven-Lewis* exception for disclosures made directly to the wrongdoer, which purportedly do "not evidence an intent to disclose" wrongdoing to a higher authority,[2] are fundamentally flawed in that they are expressly contrary to the plain language and intent of the WPA. Moreover, these two judicially created exceptions threaten to eviscerate the protection that the WPA ostensibly provides to federal employee whistleblowers, thereby undermining the public interest in ensuring the free flow of information about government wrongdoing. Accordingly, this Court should not rely on the *Huffman* or *Hooven-Lewis* loopholes and should reverse the District Court's grant of summary judgment.

Argument

I. The Plain Language of the WPA Protects Employees Who Blow the Whistle Internally in the Course of Performing Their Job Duties

Statutory analysis begins with the plain language of the statute, "the language used by Congress." *Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979)). To best give effect to the intent of Congress, those words must be given their "ordinary

[2] *Hooven-Lewis*, 249 F.3d at 276.

meaning." *Am. Tobacco Co.*, 456 U.S. at 68 (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)); *see also United States v. Am. Trucking Ass'n*, 310 U.S. 534, 542 (1940). "By reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole," a court can determine whether a statute is plain and unambiguous. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). If the language is plain and "the statutory scheme is coherent and consistent," a court need not inquire further. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 240-41 (1989); *see also Chevron U.S.A. Inc. v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). Thus, where congressional intent is clear from the plain language of the statute, "the sole function of the courts is to enforce [the statute] according to its terms." *Ron Pair*, 489 U.S. at 241 (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)).

In this Court, statutory interpretation begins and ends with an examination of "the literal and plain language of the statute" where the language is unambiguous. *See Markovski v. Gonzales*, 486 F.3d 108, 110 (4th Cir. 2007). In discerning congressional intent, courts "must presume that a legislature says in a statute what it means and means in a statute what it says there." *See United States v. Pressley*, 359 F.3d 347, 349 (4th Cir. 2004) (noting this "first canon" of construction "is also

the last" when statutory language is unambiguous); *see also Scrimgeour v. IRS*, 149 F.3d 318, 327 (4th Cir. 1998) (judicial inquiry ends if "statutory language is unambiguous and the statutory scheme is coherent and consistent"); *Carbon Fuel Co. v. USX Corp.*, 100 F.3d 1124, 1133 (4th Cir. 1996) (holding that "[a]bsent explicit legislative intent to the contrary, the statute should be construed according to its plain and ordinary meaning.").

The plain text of the WPA does not exclude internal whistleblowing or disclosures made in the course of an employee performing her job duties:

> Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of (A) *any disclosure of information by an employee or applicant* which the employee or applicant reasonably believes evidences (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

5 U.S.C. § 2302(b)(8)(A) (emphasis added). If Congress had wished to condition an employee's protection upon whether the employee went above and beyond her normal job duties (the *Huffman* loophole) or whether the employee intended to disclose wrongdoing to an authority higher than her direct supervisor (the *Hooven-Lewis* exception), it surely could have added those exceptions to the WPA.

Applying the *Huffman* and *Hooven-Lewis* exceptions would violate two canons of statutory construction. First, requiring Dr. Bonds to meet two burdens that have no basis in the statutory text (demonstrating that she went above and beyond her job duties when she blew the whistle and proving that she blew the whistle to a managerial level higher than the supervisor involved in the wrongdoing) collides with the "presum[ption] that a legislature says in a statute what it means, and means what it says." *Conn. National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Moreover, by disregarding the word "any" in the statutory text, the *Huffman* and *Hooven-Lewis* exceptions violate the principle that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001)(quoting *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115 (1879)).

In addition, it is well established that the WPA is remedial legislation, intended to improve protections for federal employees. *Keefer v. Dep't of Agriculture*, 82 MSPR 687, 693 (1999). This Court should construe the WPA to effectuate that purpose, for Congress intended that "disclosures be encouraged." *Horton v. Dep't of the Navy*, 66 F.3d 279, 282-83 (Fed. Cir. 1995) (citing s. Rep. No. 413, 100th Cong., 2d Sess. 12-13 (1988)). As the plain language of the WPA protects Dr. Bonds' disclosure about the unlawful use of genetic material from

participants in a clinical drug study, the District Court's holding to the contrary must be reversed.

II. Excluding "Duty Speech" Whistleblowing is Contrary to Congressional Intent

If this Court were to find that there is any ambiguity in the statutory language protecting (emphasis added), it is appropriate to look to the legislative history. *See, e.g., Toibb v. Radloff*, 501 U.S. 157, 162, (1991) ("…although a court appropriately may refer to a statute's legislative history to resolve statutory ambiguity, there is no need to do so here [because the statute is not unclear]."); *United States v. Rast*, 293 F.3d 735, 737 (4th Cir. 2002) ("When…the language of a statute is unclear, [we] may look to the legislative history for guidance in interpreting the statute.")(quoting *United States v. Childness*, 104 F.3d 47, 53 (4th Cir. 1996)). Legislative history is not enough to "override the 'plain meaning' rule." *In re Sunterra Corp.*, 361 F.3d 257, 270 (4th Cir. 2004).

In amending the WPA in 1994 to cover "*any disclosure*," Congress specifically sought to ensure that protected conduct would be construed broadly and that courts would not read into the WPA a *Hooven-Lewis* or *Huffman* loophole:

> The Committee reaffirms the plain language of the Whistleblower Protection Act, which covers, by its terms, "any disclosure," of violations of law, gross mismanagement, a gross waste of funds, an

> abuse of authority, or a substantial and specific danger to public health or safety. The Committee stands by that language, as it explained in its 1988 report on the Whistleblower Protection Act. That report states: 'The Committee *intends that disclosures be encouraged*. The OSC, the Board and the courts *should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing*. For example, *it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue.'*

S. Rep. No. 103-358 (1994) at 10 (quoting S. Rep. No. 100-413 (1988) (citation omitted) (emphasis added)). Similarly, the House Report accompanying the 1994 amendments states:

> Perhaps *the most troubling precedents involve the Board's inability to understand that* '*any*' *means* '*any.*' The WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind. *The only restrictions are for classified information or material the release of which is specifically prohibited by statute.* Employees must disclose that type of information through confidential channels to maintain protection; otherwise there are no exceptions.

H. Rep. No. 103-769, at 18 (1994) (emphasis added).

As discussed *supra*, the *Huffman* and *Hooven-Lewis* exceptions to the WPA are fundamentally at odds with the plain meaning of the WPA and therefore this Court should not apply those judicially-created loopholes. Assuming there is any need to resort to legislative history, Congress could not have been clearer in expressing its intent in amending the WPA in 1994 to ensure that protected conduct would be construed broadly to facilitate the free flow of information about

government wrongdoing. Indeed, the legislative history specifically cautions against adopting a *Hooven-Lewis* loophole limiting disclosures to "certain employees." S. Rep. No. 103-358 (1994) at 10. Moreover, excluding disclosures made in the course of a federal employee performing her job duties would limit most whistleblower disclosures, thereby substantially restricting the flow of information about misconduct or government wrongdoing. As both the *Hooven-Lewis* and *Huffman* exceptions are contrary to Congressional intent, this Court should not apply those erroneous decisions.

III. Applying the *Huffman* and *Hooven-Lewis* Loopholes Substantially Undermines the Remedial Purpose of the WPA and the Public Interest

The case at bar concerns whether federal employees who risk their careers to expose wrongdoing are protected under the WPA or are instead left legally defenseless. Protection for "duty speech" is a prerequisite for the government to function effectively. Government employees are the indispensable early warning system to catch problems early enough to correct them, whether the consequences would be waste of taxpayer funds or unnecessary public health and safety threats, such as the explosion of an oil rig. "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions. And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matters."

Waters, 511 U.S. at 674. Carving out "duty speech" from the ambit of WPA protected conduct will discourage federal employees from disclosing wrongdoing, which will in turn deprive the government and the public of an opportunity whatever action is necessary to abate the wrongdoing or the public safety risk, thereby undermining the public interest.

A. Adopting the *Huffman* "Duty Speech" Loophole Undermines the Purpose of the WPA

The stated purpose of the WPA "is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government . . . ." 5 U.S.C. § 1201. If this Court adopts *Huffman*, employees acting in good faith who report wrongdoing in the course of performing their job duties would have no protection when they suffer reprisal. In the instant case, Dr. Bonds disclosed the unlawful (and repugnant act) of stealing and cloning genetic material from infants without authorization or consent. Exempting such a disclosure from the ambit of WPA protected conduct would deter employees from disclosing such wrongdoing in the future because they would be risking their livelihood by blowing the whistle without any protection from retaliation.

The rationale underlying *Huffman* is an abstraction that reveals a fundamental unawareness of the reality of whistleblowing in the workplace. According to the *Huffman* court, an employee blowing the whistle in the course of

performing his job duties "cannot be said to have risked his personal job security by merely performing his required duties." *Huffman*, 263 F.3d at 1351(citing *Willis v. Dep't. of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998)). *Huffman* assumes that a whistleblower who opposes his supervisor's wrongdoing will be greeted with gratitude by the wrongdoer. *Amici's* experience counseling and representing hundreds of federal employee whistleblowers reveals that the exact opposite scenario is the reality faced by whistleblowers. Exposing wrongdoing in the course of performing one's job duties poses a substantial risk of job retaliation because the wrongdoer often has a strong motive to conceal the wrongdoing or to avoid taking the corrective actions necessary to remedy the wrongdoing.[3]

Adopting the *Huffman* duty speech loophole would foster a code of silence among federal employees who learn of unlawful conduct in the course of performing their job duties. There can be little uncertainty that when employees cannot defend themselves against retaliation, they are more likely to remain "silent observers" of misconduct they uncover in carrying out their job duties. Therefore, exempting duty speech from the ambit of WPA protected conduct would cause federal employees to fear dismissal, demotion, retaliation or suspension in retaliation for speech necessary to perform their jobs properly. In the instant case,

[3] Employees do not need to do more than state the facts of a violation to "oppose" an unlawful practice. *Crawford v. Metro Gov't of Nashville and Davidson County*, 129 S. Ct. 846 (2009).

affirming the district court's dismissal of Dr. Bonds' WPA claim would discourage government medical researchers from disclosing unethical research practices, such as using samples from clinical study participants without their consent. Coerced silence could thwart the public's right to know information essential for democratic legitimacy in government actions. The consequences could be disastrous for silencing mandatory reports of dangerous products such as contaminated meat and poultry, environmental spills, nuclear safety violations or defective military equipment. Taxpayers could be defrauded billions of dollars, if government auditors are silenced from performing their duties.

B. Internal Disclosures, Including Disclosures to an Immediate Supervisor, Should Be Protected Under the WPA

The *Hooven-Lewis* loophole substantially undermines the WPA by removing from the ambit of protected conduct disclosures made up the chain of command, which encompasses the vast majority of disclosures. In particular, *Hooven-Lewis* requires a WPA plaintiff to demonstrate that her disclosure "evidence[s] an intent to raise an issue with a higher authority who is in a position to correct the alleged wrongdoing," which excludes from WPA protection disclosures made to the wrongdoer. *Hooven-Lewis*, 249 F.3d at 276. This judicially-created exception to WPA discourages employees from disclosing wrongdoing in that a disclosure to the wrongdoer would leave the concerned employee unprotected from retaliation, but also has the potential to create unnecessary disruption and friction in the

workplace by forcing concerned employees to "go over the head" of an immediate supervisor, which may result in the supervisor mistrusting and resenting the concerned subordinate. Lack of safe internal channels to disclose wrongdoing will drive employees into public disclosures that create management inefficiency due to unnecessary, broad-based public conflicts. Forcing employees to take otherwise "duty speech" out of the chain of command in order to assure WPA protection would institutionalize the maximum disruptive effect for agencies.

As the Third Circuit recognized in a leading case construing the whistleblower protection provision of a federal environmental whistleblower protection statute, excluding internal disclosures from whistleblower protection statutes results in inefficiency and inevitably delays the corrective actions necessary to remedy misconduct:

> Employees should not be discouraged from the normal route of pursuing internal remedies before going public with their good faith allegations. Indeed, *it is most appropriate, both in terms of efficiency and economics, as well as congenial with inherent corporate structure*, that employees notify management of their observations as to the corporation's failures before formal investigations and litigation are initiated, so as to facilitate prompt voluntary remediation and compliance with the Clean Water Act.

Passaic Valley Sewerage Com'rs v. U.S. Dept. of Labor, 992 F.2d 474, 478-79 (3rd Cir. 1993) (emphasis added). Similarly, a Connecticut district court judge

explained the pernicious effect of requiring concerned employees to disclose wrongdoing to outside authorities:

> A rule that would permit the employer to fire a whistleblower with impunity before the employee contacted the authorities would encourage employers promptly to discharge employees who bring complaints to their attention, and would give employees with complaints an incentive to bypass management and go directly to the authorities. This would deprive management of the opportunity to correct oversights straightaway, solve the problem by disciplining errant employees, or clear up a misunderstanding on the part of the whistleblower. The likely result of a contrary rule would be needless public investigations of matters best addressed internally in the first instance. Employers benefit from a system in which the employee reports suspected violations to the employer first.

Sullivan v. Massachusetts Mut. Life Ins. Co., 802 F.Supp. 716, 724-25 (D.Conn. 1992) (citing *Norris v. Lumbermen's Mut. Cas. Co.*, 881 F.2d 1144, 1153 (1st Cir.1989) (employer liable for discharge of employee because of his purely internal complaints of violations of Nuclear Regulatory Commission regulations)); *see also Marques v. Fitzgerald*, 99 F.3d 1, 6 (1st Cir. 1996)("We see no significant policy served by extending whistleblower protection only to those who carry a complaint beyond the institutional wall, denying it to the employee who seeks to improve operations from within the organization.") (construing Rhode Island Whistleblower's Act).

Finally, protecting internal disclosures made in the course of an employee performing her job duties will not impede managerial authority or insulate

employees from the consequence of poor job performance. For example, whistleblower protection for private employees who raise concerns pursuant to their job duties has been well-established under the environmental and nuclear whistleblower statutes administered by the Department of Labor for more than two decades. *See, e.g., Bassett v. Niagara Mohawk Power Co.*, 86-ERA-2 (Sec'y July 9, 1986) (the performance of quality assurance work for an employer covered by the Acts is *per se* protected activity); *Richter v. Baldwin Associates*, 84-ERA-9 to 12 (Sec'y Mar. 12, 1986); *Tyndall v. U.S. EPA*, 93-CAA-6 (ARB June 14, 1996) (job duties performed by investigator for the Inspector General of the U.S. EPA found to constitute protected activity); *Gutierrez v. Regents of the University of California*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Nov. 13, 2002), slip at 5 (raising safety and health issues at the LANL as part of his job as an internal assessor is covered activity).[4]

And courts that have carefully considered employer predictions about the possible consequences of protecting duty speech and internal disclosures under whistleblower protection statutes have rejected those concerns. In 1984, the Ninth Circuit held that internal complaints pursuant to job duties triggered protection under the ERA. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159

[4] These opinions are posted on the website of the Department of Labor Office of Administrative Law Judges, www.oalj.dol.gov. In addition, these opinions are attached to the back of the brief for the Court's convenience.

(9th Cir. 1984). Mackowiak, a quality control inspector at a nuclear power plant under construction, was employed by University Nuclear Systems Incorporated (UNSI), a subcontractor of Bechtel, itself a contractor with the Washington Public Power Supply System. The duties of quality control inspectors of nuclear power plants are governed by the regulations of the Nuclear Regulatory Commission. Mackowiak inspected work performed by UNSI employees to confirm conformance with federal specifications. If an inspector found an item of possible noncompliance, he was required to write a "Request for Information" to the quality assurance department. If an inspector found improper installation or construction, he was required to "red tag" the item in question and file a Non-Conformance Report. *Id.* at 1160-61.

As part of his inspector duties, Mackowiak repeatedly made a record of UNSI safety and quality violations. For example, over the course of a month and a half, he filed a Request for Information regarding possible falsification of documentation by UNSI personnel; he filed a Request for Information regarding access to the tool cribs; and he "red tagged" a tool crib. Shortly thereafter, Mackowiak was laid off. *Id.* The Ninth Circuit found that Mackowiak's internal complaints about safety and quality, undertaken as part of his quality control inspector duties, were protected under the ERA's whistleblower provisions. *Id.* at 1163. The Court explained that they were modeled on and served the same

purpose as the similar provisions of the Mine Health and Safety Act. Noting that internal safety complaints were covered under the MHSA, the Court reasoned that the rationale for coverage was even stronger in Mackowiak's case because quality control inspectors play such a crucial role in NRC oversight of nuclear plants:

> At times, the inspector may come into conflict with his employer by identifying problems that might cause added expense and delay. If the NRC's regulatory scheme is to function effectively, inspectors must be free from the threat of retaliatory discharge for identifying safety and quality problems.

Id. at 1163. Arguing against such protection, UNSI raised the specter of a collapse of managerial authority. The Ninth Circuit responded decisively:

> UNSI argues that the Secretary's ruling [finding internal, job-required disclosures covered under the statute] would require companies to retain "abrasive, insolent, and arrogant" quality control inspectors if they comply technically with the requirements of the job. Not so. The ruling simply forbids discrimination based on competent and aggressive inspection work. In other words, contractors regulated by §5851 *may not discharge quality control inspectors because they do their jobs too well.*

Id. (emphasis added). A year later, the Tenth Circuit approved the reasoning in *Mackowiak* and found that a quality assurance inspector who filed reports with his superiors detailing potential quality assurance problems was covered under the ERA's whistleblower provisions. *Kansas Gas & Electric Company v. Brock,* 780 F.2d 1505, 1513 (10th Cir. 1985). Recognizing the Fifth Circuit had reached a different result in *Brown & Root v. Donovan,* 747 F.2d 1029 (5th Cir. 1984), the

Court discounted the decision because it failed to adequately address the remedial purposes of whistleblower statutes and the consequent necessity for a broad construction. *Kansas Gas & Electric Company*, 780 F.2d at 1513.

In sum, carving out "duty speech" and disclosures up the chain of command from the ambit of WPA protected conduct creates gaping holes in the WPA that will deter federal employees from disclosing wrongdoing and threats to public health and safety, thereby undermining the remedial purpose of the WPA and the public interest.

CONCLUSION

In short, the District Court's finding that Dr. Bonds' disclosures are not protected under the WPA cannot be reconciled with the Act's plain language, legislative history or remedial purpose. Accordingly, the District Court's decision should be reversed.

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RULE 32(a)(7)(C) CERTIFICATE

I HEREBY CERTIFY that the foregoing Brief for *Amici Curiae* complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief is composed in a 14-point proportional typeface, Times New Roman. According to the word count feature in Microsoft Word, (exclusive of those parts permitted to be excluded under FRAP and the local rules of this court) the contents of the Brief is 5,043 words.

Respectfully submitted by:

_____/s/_____
Jason M. Zuckerman

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 28, 2010, I filed the Brief of *Amici Curiae* via CM/ECF and by June1, will cause two copies (eight to the Clerk) of the foregoing Brief of *Amici Curiae* to be served by U.S. mail service or express delivery, postage prepaid, upon:

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