ORAL ARGUMENT NOT YET SCHEDULED

No. 23-1216

In the United States Court of Appeals for the District of Columbia Circuit

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Garret O'Boyle,

Petitioner,

v.

United States Department of Justice,

Respondent.

On Appeal from the Merits Systems Protection Board, MSPB-DC-0752-23-0132-I-1

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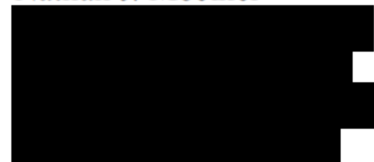

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GLOSSARY

CSRA	Civil Service Reform Act
DOJ	United States Department of Justice
FBI	Federal Bureau of Investigations
MSPB	Merit Systems Protection Board

SUMMARY OF ARGUMENT

The law does not leave FBI whistleblowers without recourse. Federal statutory law provides a means for FBI whistleblowers to raise whistleblower claims and the Supreme Court has recognized that retaliation claims are cognizable where federal employees lose security clearances in violation of their constitutional rights. Congress has never excluded FBI employees from seeking the enforcement of their constitutional rights. Instead, it has provided the means for FBI employees to bring whistleblowing claims to the MSPB and this Court.

5 U.S.C. § 7701 allows the MSPB to review whistleblower claims "described in" 5 U.S.C. § 2302, and 5 U.S.C. § 7703 gives this Court appellate authority over the same claims, including the whistleblower claim that O'Boyle has advanced. "Described in" is explicitly broader than "governed by" or "proceeding according to." As other courts have emphasized in similar contexts, "described in" is on its face broad language, not limited to those who proceed according to the specific procedures in § 2302. Congress expressly designed the

right to raise a whistleblower claim as a categorical defense available to all federal employees before the MSPB. If such a defense is not available, an employee could be disciplined and unable to explain to the MSPB why that discipline was wrongful. Although *Parkinson v. DOJ*, 874 F.3d 710 (Fed. Cir. 2017) (en banc), is a decision to the contrary as to § 7701, *Parkinson* preceded the recent statutory amendment to 5 U.S.C. § 2303 that undercut its reasoning. *Parkinson* also failed to properly address the meaning of "described in," and failed to reckon with the basic presumption in favor of a constitutional remedy.

Department of the Navy v. Egan, 484 U.S. 518 (1988), does not bar constitutional challenges to security clearance decisions. On the contrary, the Supreme Court in *Webster v. Doe*, 486 U.S. 592, 603 (1988), made clear that such an individual challenge may proceed, as the courts have authority to address constitutional violations and, even in the context of security clearances, must ensure that the constitutional rights of federal employees are respected.

ARGUMENT

When the First Amendment rights of government employees are violated, Article III courts are not "outside nonexpert bod[ies.]" Resp. Br. 51 (quoting *Dep't of the Navy v. Egan*, 484 U.S. 518, 529 (1988)). No, they are vested with the constitutional responsibility to protect the First Amendment. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 229 (1973) ("It is the duty of courts to be watchful

for the constitutional rights of the citizen, and against any stealthy encroachments thereon."). The Constitution and the rights it protects must be enforced by all three branches of Government, and national security concerns do not justify setting those rights aside. *Hamdi v. Rumsfeld*, 542 U.S. 507, 527, 536 (2004) (plurality opinion) ("Whatever power the United States Constitution envisions for the Executive . . . it most assuredly envisions a role for all three branches when individual liberties are at stake."); *Boumediene v. Bush*, 553 U.S. 723, 798 (2008) ("Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law"). The legal structure whereby veteran FBI employees can appeal adverse employment decisions, 5 U.S.C. § 7701 and § 7703, does not treat those employees as second-class citizens, unable to seek redress for constitutional violations, but expressly gives them a mechanism to challenge whistleblower reprisal.

I. 5 U.S.C. § 7703(b)(1)(B) Means What It Says; It Gives This Court Appellate Jurisdiction over Garret O'Boyle's Whistleblower Appeal.

The All Circuit Review Act, 5 U.S.C. § 7703(b)(1)(B), explicitly vests this Court with authority to review practices "described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)." This statute does exactly what it says; if a federal employee has an adverse employment action adjudicated by the MSPB, that federal whistleblower employee can petition for review of his case to this

Court, or any federal circuit court. Nothing in § 7703 excludes FBI employees from being able to use this provision to bring cases to this Court or prevents them from alleging that they experienced a practice "described in" § 2302. The statute's plain language enables any employee who has a case adjudicated at the MSPB to bring a whistleblower case to this Court.

The DOJ included in its brief a chart of its view of whistleblower protections. Resp. Br. 13. For clarity to the Court, Petitioner has prepared a parallel chart:

Agencies Covered By § 2302	The FBI Covered by § 2303
Appeal rights to the MSPB under § 7701; affirmative defense for whistleblower retaliation protections in §§ 7701(c)(2)(B) and (C).	No appeal rights to the MSPB under § 7701 unless preference-eligible veteran; if at the MSPB, affirmative defense for whistleblower retaliation protections in §§ 7701(c)(2)(B) and (C).
Appeal rights to this Court under § 7703(b)(1)(B).	If at the MSPB, appeal rights to this Court under § 7703(b)(1)(B).
Individual right of action under § 1221, to enforce whistleblower retaliation protections in § 2302(b), subject to first filing claim with the Office of Special Counsel.	*Before December 23, 2022*: No Individual right of action for FBI employees. *After December 23, 2022*: Individual right of action under § 1221, to enforce whistleblower retaliation protections in § 2303, subject to first filing claim with the Department of Justice.

As all parties to this case recognize, the specific procedures of § 2302 do not apply to FBI employees. FBI employees, unlike those governed by § 2302, do not automatically have a right to go to the MSPB. But an FBI employee *does* have

a right to go to the MSPB as a veteran under 5 U.S.C § 7511(b)(8)—and should be able to allege practices "described in" § 2302 before the MSPB.

As other courts have emphasized, "described in" is a broad term carefully chosen and unique from "governed by" or "defined by." *See United States v. Pennington*, 78 F.4th 955, 966 (6th Cir. 2023) ("Congress's decision to approve some guidelines in a manner that supplies a specific base-offense level any time a defendant's conduct overlaps with the conduct *described in* a criminal statute, while other guidelines supply a base-offense level only if a defendant has been convicted of violating a specific statute, constitutes a purposeful distinction that we cannot ignore. We must honor this intentional use of language and Congress's approval of this distinction.") (emphasis added); *see Espina-Andrades v. Holder*, 777 F.3d 163, 168 (4th Cir. 2015).[1]

In short, the "described in" language does not limit the category to actions brought *under* the provision it references. Although the statute analyzed in *Pennington* is not identical to the one here, the *interpretive reasoning* is identical:

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[1] The DOJ responds to the Sixth Circuit here by pointing out that its decision is not binding on this Court, a truism, and by asserting, without further explanation, that the case is "inherently inapposite" simply because Congress also used a different alternative term in those statutes. Resp. Br. 29. Neither argument addresses that court's careful linguistic analysis of the term "described in." Meanwhile, the DOJ simply ignores the Fourth Circuit decision in *Espina-Andrades*.

"described in" is a broad term not limited to circumstances where a party officially proceeds under the referenced statute. In *Pennington*, someone not convicted under a specific statute could still be punished according to a guideline applicable to conduct "described in" that statute. Likewise, here, someone not technically governed by § 2302 can still allege practices "described in" that statute.

The only past decision to address this issue merits substantial weight. The Fifth Circuit concluded, in a case involving an FBI employee, "[w]here a covered employee complains that a personnel action was retaliation for good-faith whistleblowing, he may petition for review of an MSPB order in 'any court of appeals of competent jurisdiction,' including the Federal Circuit." *Zummer v. Sallet*, 37 F.4th 996, 1004 (5th Cir. 2022) (quoting 5 U.S.C. § 7703(b)(1)(B)). The Fifth Circuit's discussion was not "passing shorthand." Resp. Br. 29. The basic issue presented to the court was to determine where subject matter jurisdiction existed for the review of an FBI agent's whistleblower claims. The court concluded that the CSRA required that the claims of an FBI whistleblower proceed through the processes available at the MSPB, including through an appeal pursuant to the All Circuit Review Act to a court of competent jurisdiction. The court's statement was no throwaway. Rather, it was a careful part of its analysis.

The DOJ focuses its argument against jurisdiction on the distinctions between how FBI employees and other government employees may challenge

whistleblower retaliation actions. But that difference is manifested in whether employees have appellate rights at all; only certain FBI employees, such as O'Boyle as a preference-eligible veteran, have a right to bring cases to the MSPB under 5 U.S.C § 7511(b)(8).

Unlike employees at other agencies, only a subset of FBI employees have a right to appeal employment decisions to the MSPB, a subset that includes Garrett O'Boyle. But the inference that the DOJ draws from that distinction—that FBI employees that are eligible for the MSPB process can never be in situations "described in" § 2302(b)—appears nowhere in the statutory scheme. 5 U.S.C. § 7701 contains no such exclusion; it contains no provision referencing the FBI employees that come before it pursuant to 5 U.S.C § 7511(b)(8) or suggesting that those employees cannot raise a whistleblower defense. Likewise, § 7703 contains no indication that FBI employees cannot take advantage of the appeal rights delineated there.

Congress has repeatedly avoided limiting § 7701 or § 7703 to allowing only cases brought "under" § 2302 to raise a whistleblower defense. Instead, in every relevant statute, Congress has chosen to expressly use the identical "described in"

language it repeated in section 7703(b)(1)(B).[2] Congress's language is broad, requiring the MSPB not to uphold an employment action if "the decision was based on any prohibited personnel practice described in section 2302(b) . . ." § 7701(c)(2)(B).

The DOJ's primary argument for excluding O'Boyle from § 7703 is its assumption that he is likewise excluded from § 7701. *See* Resp. Br. 28. But that argument assumes the very point in dispute. Later in its brief, it then argues that O'Boyle is excluded from § 7701, because of its contention that he is excluded from § 7703. Resp. Br. 43-44. This circular reasoning proves nothing and ultimately misses the fact that Congress repeatedly chose to use the broad language "described in" for the MSPB.

As to the narrow subset of FBI employees who can go to the MSPB, there is simply no textual reason to exclude those employees from any of these provisions, when they allege a practice "described in" § 2302. Congress set up two parallel procedures in § 2302 and § 2303. There is no inherent reason why an FBI employee, having proceeded according to the procedures available to him, cannot in some future proceeding allege a practice described in § 2302.

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[2] The DOJ concedes as much. "Throughout the CSRA Congress consistently used the identical 'described in' language it repeated in section 7703(b)(1)(B)." Resp. Br. 28.

The DOJ argues that the recent emendations to 5 U.S.C. § 2303 would have been unnecessary if an FBI employee can allege conduct described in § 2302. Resp. Br. 31. This argument completely misses the effect of the changes to § 2303. Until Congress's recent changes to § 2303, *non-veteran* FBI employees could not go to the MSPB at all. Section 2303 delineates the procedure available to FBI employees in the first instance, and the recent amendments change what appellate processes are available to non-veteran employees. The issue presented here is fundamentally different; the issue here is instead what arguments FBI employees can make when they are properly at the MSPB, for example, like O'Boyle as a veteran.

Congress has set up a robust system providing different mechanisms for federal employees, depending on their agency, to go to the MSPB. But once they are before the MSPB, 5 U.S.C. § 7701 and § 7703 provide protections for any federal employee, not merely those proceeded through the § 2302 route. As Judge Linn explained in response to the same argument of the FBI:

> If § 7701(c)(2)(B) explicitly excluded FBI employees from raising an affirmative defense of whistleblower retaliation, then the majority's argument might be more convincing. Here, however, the FBI's exclusion is in § 2302(b)(8). There is no basis to conclude that Congress intended the FBI's exclusion from § 2302(b) as an affirmative restriction on the availability of affirmative defenses at the Board described in § 7701(c)(2), rather than as a restriction on statutes that rely on the criteria of § 2302(b) to establish jurisdiction,

> such as the right of review in 5 U.S.C. § 1214(a)(3) and the independent right of action in 5 U.S.C. § 1221.

Parkinson v. DOJ, 874 F.3d 710, 724 (Fed. Cir. 2017) (Linn, J., dissenting).

The plain language of the statute is clear, and further confirmed by Congress's express purpose behind enacting the All Circuit Review Act to provide protections to all Federal employees before the MSPB. The House Committee Report emphasized that Section 7703(B)(1)(b) provides a right to *all federal whistleblowers*: it "allows *any* petitioner to appeal to any court of appeals of competent jurisdiction so long as the appeal raises no challenge to a Merit Systems Protection Board decision other than its disposition of reprisal allegations." H.R. Rep. No. 115-337, at 5 (2017) (emphasis added).[3] Any means any.

Congress expressly designed this provision to do exactly what it says: provide a means for whistleblowers to avoid its "displeasure with how the Federal Circuit handled whistleblower cases." *Flynn v. United States SEC*, 877 F.3d 200,

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[3] The DOJ faults Petitioner for discussing this legislative context, arguing that O'Boyle "begins his analysis with legislative history instead of the text of the statute itself, an approach the Supreme Court has described as 'inappropriate[]' and 'a relic from a bygone era of statutory construction.'" Resp. Br. 32 (quoting *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (quotation marks omitted)). This is ironic. The first 12 substantive pages of the DOJ's brief consists of its view of the legislative background to this case. Resp. Br. 4-16. The plain language of the statute is clear; it allows all whistleblower employees to appeal to courts of competent jurisdiction. That plain reading is further confirmed by this legislative history, which is appropriately discussed in this context.

203 (4th Cir. 2017). The legislative history DOJ cites, Resp. Br. 33, references the separate procedures applicable in the first instance to FBI employees. But none of those other reports preclude FBI whistleblowers that are before the MSPB from arguing whistleblower reprisal.

The DOJ concludes its argument on § 7703 by emphasizing, "Congress conditioned regional circuit jurisdiction by specific cross-reference to sections 2302(b)(8) and 2302(b)(9)(A)(i), (B), (C), or (D)." Resp. Br. 34. The DOJ is certainly right that Congress included a "cross-reference." But what Congress did not do is create any express condition. O'Boyle's procedural whistleblower protections lie in § 2303, not § 2302. But nothing in § 7703(b)(1)(B) suggests that in his properly brought case as an FBI veteran, he cannot challenge practices "described" in § 2302. The text of the statute allows for petitions to this Court based on "practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)." The plain language "described in" clearly indicates that § 7703 is not, in fact, limited to employees who proceed initially *under* the procedures in § 2302, but applies equally to any federal employee who alleges a practice "described in" that statute.

II. The MSPB Is Required To Enforce Whistleblower Protections, Even For FBI Employees Who Have Their Security Clearance Suspended.

5 U.S.C. § 7701 expressly prohibits the MSPB from affirming an agency's decision if "the decision was based on any prohibited [whistleblower] personnel practice," § 7701(c)(2)(B), or "the decision was not in accordance with law." § 7701(c)(2)(C). This language does not *sub silentio* exclude FBI employees from relying on these provisions. Instead, an FBI employee is entitled to demonstrate that his suspension violated his constitutional rights.

A. The FBI's Waiver Argument Ignores The Prehearing Conference.

The DOJ has not preserved its ability to argue that the MSPB lacked any statutory authority under 5 U.S.C. § 7701 to consider Petitioner O'Boyle's whistleblower defenses. In attempting to avoid any waiver issue, the DOJ has highlighted submissions it made in its narrative response to the MSPB. This argument misses the fact (a fact otherwise very significant to the FBI's briefing) that, during the pre-hearing conference, the parties agreed to limit the MSPB proceeding to a narrower, specified list of "the only material issues to be decided in this appeal, **to the exclusion of all other issues**." J.A. 189 (emphasis in original). Critically, that list contains *no* assertion that the MSPB lacked statutory jurisdiction over Petitioner O'Boyle's whistleblower retaliation defense. Accordingly, the decision below does not contain any discussion of or ruling

concerning § 2303 or its statutory authority to address O'Boyle's whistleblowing defense.

The DOJ would now create a wall of separation between § 2302 and § 2303. Resp. Br. 32 (arguing for "[t]he existence of these two separate statutes, a separation that Congress has . . . maintained for over 40 years"). In contrast, the decision below contains multiple references to § 2302, *see* J.A. 378 n. 12, but does not discuss or ever reference § 2303. This is because there is *no* construction under which the FBI's argument fits on the prehearing list identified by the MSPB. In fact, the DOJ does not attempt to identify such a construction; it does not even claim in its brief that the MSPB's list of issues to be considered in some way included the availability of O'Boyle's whistleblower claim.

B. 5 U.S.C. § 7701 Allows Federal Whistleblowing Employees To Argue That Adverse Actions Taken Against Them Constituted Improper Retaliation.

The DOJ argues that FBI whistleblower decisions are entirely unreviewable when an FBI employee is before the MSPB under 5 U.S.C. § 7701, citing *Parkinson*, 874 F.3d at 713. *Parkinson* does not bind this Court and should not be followed. As O'Boyle explained in his principal brief, *Parkinson* construed and relied on a prior version of § 2303 that is simply no longer the law. That court never addressed or discussed in detail the meaning of "described in" in § 7701. Instead, the court's interpretation of § 7701 relied on its conclusion that § 2303

does not allow FBI whistleblowers to go to the MSPB at all. "Under § 2303, FBI employees, unlike employees covered under § 2302(b)(8), do not have the right to bring claims of whistleblower reprisal directly to the Board." *Id.* at 714. That construction of § 2303 was the basis for the court's conclusion, a conclusion that Congress has now expressly rejected, choosing instead to provide an express right of appeal to FBI whistleblowers.

Those additions to §2303(d) directly responded to *Parkinson*'s repeated, emphatic presumption at the heart of its argument that Congress intended to exclude FBI employees from having any right to bring cases to the Board. The court's holding in *Parkinson* was "that § 2303 establishes a separate and independent whistleblower scheme for FBI employees, which does not provide for review at the Board or in this court." *Id.* at 715. Congress, by amending § 2303, categorically rejected that holding.

Further, the DOJ does not even address, much less refute, the dissents in *Parkinson*. Those dissents reached the same conclusion O'Boyle advocates, namely, that § 2303 (the statute for FBI employees) authorizes an FBI employee properly before the MSPB to allege a practice described in § 2302 to the same extent as an employee governed by § 2302 could. As was the case regarding § 7703, § 7701 by its terms and context clearly allows *all* federal employees with a right to bring their employment action to the MSPB to argue that that action

constituted whistleblower reprisal. Nothing about the statute suggests the incongruous idea that one would have a right to appeal to the MSPB in theory but not a "right to defend himself on the one ground that, under normal circumstances, if true, would vitiate the agency's adverse action against him." *Id.* at 721 (Plager, J., joined by Linn, J., dissenting).

The DOJ makes no attempt to address the presumption in favor of a constitutional remedy that lay at the center of the dissents' arguments.

> [T]he FBI agency is both defendant and judge of the employee's whistle-blower claim of unfair treatment. Some observers might argue that, even if well intentioned in order to limit public disclosure of FBI methods, such a system is an offense to basic principles of due process and governmental authority toward people whose only sin may be that they have chosen to work for the Government.

Parkinson, 874 F.3d at 719 (Plager, J., joined by Linn, J., dissenting); *see also Davis v. Passman*, 442 U.S. 228, 242 (1979). Congress has expressly authorized this Court to depart from the erroneous decisions of the Federal Circuit. *See Flynn*, 877 F.3d at 203.

Beyond the specific whistleblower provision, the MSPB may also hear a claim of whistleblower reprisal as an affirmative defense under 5 U.S.C. § 7701(c)(2)(C). That section requires reversal of any agency action that is "not in accordance with law." 5 U.S.C. § 7701(c)(2)(C). This more general catchall also covers Petitioner O'Boyle's whistleblower defense. Petitioner's initial brief

highlighted Judge Plager's argument on this point, particularly his emphasis that "[t]here is no basis to conclude that Congress intended the FBI's exclusion from § 2302(b) as an affirmative restriction on the availability of affirmative defenses at the Board described in § 7701(c)(2)." *Parkinson*, 874 F.3d at 724 (Linn, J., dissenting).

> [T]he whistleblower retaliation determination is part and parcel of the determination at the heart of the Board's jurisdiction. The Board's review authority over adverse employment action taken against a preference eligible FBI employee is explicit, as is the Congressional intent that an action taken against such an employee may not be sustained if based on a violation of law. Because an adverse employment action against an FBI employee based on whistleblower retaliation is a violation of law, 5 U.S.C. § 2303, the Board straight-forwardly has jurisdiction to consider Parkinson's contention that his removal was premised on whistleblower retaliation.

Id. at 722. The applicable law governing the FBI and constraining its employment decisions includes a requirement not to engage in reprisal against its employees for constitutionally protected disclosures. The DOJ's brief contains no analysis of § 7701(c)(2)(C) and no attempt to address or respond to the dissents in *Parkinson* on this point.

"Congress is presumed to know the law, particularly recent precedents that are directly applicable to the issue before it." *Hesse v. Department of State*, 217 F.3d 1372, 1380 (Fed. Cir. 2000) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696-99 (1979)). Shortly after *Parkinson* asserted that "[u]nder § 2303, FBI

employees, unlike employees covered under § 2302(b)(8), do not have the right to bring claims of whistleblower reprisal directly to the Board[,]" 874 F.3d at 714, Congress explicitly refuted that premise to ensure that FBI employees could in fact bring claims to the Board. Congress also made sure that other circuits would have a chance to correct the Federal Circuit. *Parkinson* is not "good law," as Congress expressly rejected its basic premise.

Garret O'Boyle is not bringing a direct individual action pursuant to § 1221, nor relying on the provision in § 2303(d) directly as a retroactive provision. He is appealing an adverse decision under §§ 7701 and 7703. But § 2303(d)'s amendments to the whistleblower statute have import beyond simply those proceedings. It reflects Congress's protection of FBI whistleblowers in a way that undermines and defeats the reasoning of *Parkinson*.[4] By adopting § 2303(d)(1), Congress necessarily rejected *Parkinson* and instead gave the courts explicit power to resolve FBI whistleblower cases.

Finally, the DOJ argues that the veterans canon applies only to veteran benefits statutes and not to a statute applicable to both veterans and non-veterans.

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[4] When it comes to veterans like O'Boyle, the amendment did not grant "for the first time, the substantive right to seek MSPB review of their whistleblower claims." Resp. Br. 10. Rather, it reflected and further articulated, on procedural grounds, a right veterans like O'Boyle already possess.

Resp. Br. 46. There are two problems with this argument. First, the legal distinction at issue in this case is, in fact, specific to veterans. Only O'Boyle and those veterans like him face this problem, as they are the FBI employees rendered able to proceed before the MSPB pursuant to 5 U.S.C § 7511(b)(8). Other FBI employees could never raise the issue.

Second, *Rudisill v. McDonough*, 144 S. Ct. 945, 947 (2024),[5] is not to the contrary. The DOJ cites only the concurrence and dissent from the case. In contrast, the majority of the Court expressed no doubt about the importance of the veterans canon, emphasizing that "[i]f the statute were ambiguous, the proveteran canon would favor Rudisill, but the statute is clear, so we resolve this case based on statutory text alone." *Id.* at 958.

Here, likewise, § 7701 unambiguously gives all federal employees the right to an affirmative defense based on whistleblowing, whether specifically as "described in" §2302 or more generally by arguing that an adverse action was not "in accordance with law." 5 U.S.C. § 7701(c)(2)(C). But to the extent there is an ambiguity, it should be construed in favor of the First Amendment rights of veterans.

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[5] Decided between the filing of Petitioner's Initial Brief and the filing of Defendants' Response.

III. *Webster* Requires This Court And The MSPB To Protect Constitutional Rights, Even When Security Clearance Decisions Are Implicated.

Egan does not apply to constitutional arguments like the First Amendment whistleblower argument advanced here. The Supreme Court and this Court have made that principle clear. When a federal employee argues that an adverse action was an act of whistleblower reprisal, *Egan* does not foreclose that constitutional claim. Instead, under *Webster* the courts are obligated to recognize and protect First Amendment rights.

A. Webster *Requires Courts To Consider Constitutional Challenges, Even In The Context Of Security Clearances.*

The DOJ failed to meaningfully address the cases Petitioner cited at length in his opening brief, Pet. Br. 34-38, that recognized in detail the possibility of constitutional claims in the security clearance context. Most crucially, in *Webster v. Doe*, 486 U.S. 592, 603 (1988), the Supreme Court made clear that constitutional claims based on federal agency conduct are not foreclosed from legal challenge, regardless of the fact that a security clearance was suspended. *Webster*, decided less than a year after *Egan*, expressly held that constitutional claims *are* reviewable, even in the security clearance context. The DOJ never addresses the language or reasoning of *Webster*, but it is dispositive here.

In fact, the DOJ contends that retaliation claims can never be adjudicated in cases involving security clearances because the only way the intelligence agency can respond is to defend its security decision. Reasoning from the principle that the MSPB cannot review the substance of a security clearance decision, it argues that "Mr. O'Boyle has identified no case—and we are aware of none—where the MSPB or a court second-guessed the agency's judgment as to whether access to classified information by a particular individual would be 'clearly consistent' with the interests of the national security[.]" Resp. Br. 49-50. But that is *precisely* what the Supreme Court did in *Webster*:

> Petitioner [CIA] also contends that even if respondent has raised a colorable constitutional claim arising out of his discharge, Congress in the interest of national security may deny the courts the authority to decide the claim and to order respondent's reinstatement if the claim is upheld. For the reasons previously stated, we do not think Congress meant to impose such restrictions when it enacted § 102(c) of the NSA.

Webster, 486 U.S. at 604. In *Webster*, the Director of the CIA had "'deemed it necessary and advisable in the interests of the United States to terminate [respondent's] employment with [the] Agency.'" *Id.* at 595 (quoting App. 37). It is that decision, the individual suspension of a security clearance on national security grounds, that the Supreme Court held *was* legally reviewable. "Nothing in § 102(c) persuades us that Congress meant to preclude consideration of colorable constitutional claims arising out of the actions of the Director pursuant

to that section; we believe that a constitutional claim *based on an individual discharge* may be reviewed by the District Court." *Id.* at 603-04 (emphasis added).

The CIA in *Webster* made the same argument the DOJ makes here, arguing that "rummaging around" in its affairs would be "to the detriment of national security." *Id.* at 604. The Supreme Court *rejected* this argument, explaining that the courts could balance this interest with "respondent's need for access to proof which would support a colorable constitutional claim." *Id.* In other words, in *Webster*, the Supreme Court "second-guessed the agency's judgment as to whether access to classified information by a particular individual," Resp. Br. 50, was constitutionally appropriate. Accordingly, the DOJ is arguing against *Webster* itself. At the least, *Webster* did the very thing the FBI claims no court has ever done. If the DOJ is correct that reviewing a constitutional claim concerning a security clearance decision inherently requires the review of the "substance" of that decision, then *Webster* immediately overruled *Egan*.

The only possible alternative to reading *Webster* as a rejection of *Egan in toto* is to take the route this Court and others have taken, recognizing that in the context of *constitutional* claims, such as First Amendment whistleblower retaliation claims here, *Webster*, and not *Egan*, applies. *See Nat'l Fed'n of Fed. Emps. v. Greenberg,* 983 F.2d 286, 289-90 (D.C. Cir. 1993); *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996); *Dubuque v. Boeing Co.*, 917 F.3d 666, 667 (8th

Cir. 2019); *Dorfmont v. Brown*, 913 F.2d 1399, 1404 (9th Cir. 1990) ("[F]ederal courts may entertain colorable constitutional challenges to security clearance decisions."). The DOJ ignores these cases.

Instead, the DOJ highlights the burden shifting framework that courts use to address whistleblower claims. The specifics of that framework or its application would be premature to address here, as O'Boyle has not yet had any opportunity to present to a factfinder the evidence that would support his case and counter the factual assertions the DOJ makes here. But precedent from this Court makes clear that this framework does not provide automatic victory to the DOJ in security clearance decisions. For example, in its decision affirmed in *Webster*, this Court held "that if the Director had dismissed Doe under § 102(c) because of a CIA blanket policy against hiring homosexuals, then the CIA would have to explain how the policy conforms to the statutory mandate that the policy be 'necessary or advisable in the interests of the United States.'" *Doe v. Gates*, 981 F.2d 1316, 1319 (D.C. Cir 1993) (quoting *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C. Cir. 1986) *aff'd in part and rev'd in part sub. nom., Webster v. Doe*, 486 U.S. 592 (1988)).

By the DOJ's reasoning, the FBI would have the unreviewable and unappealable discretion to suspend or revoke the security clearances of FBI employees for *any* reason, protected or not. It could even articulate an official

policy refusing to grant clearances to women, Christians, or some other group contained in a protected class. Even if the FBI had such a policy, by the DOJ's reasoning, to review whether a member of a protected group had rightly been denied a clearance, "the board would have no choice to but to delve into the FBI's national security concerns," Resp. Br. 48, in analyzing that exclusionary policy. And according to the DOJ, there are no judicially discoverable standards for reviewing such conduct. This is plainly not the law under *Webster* and the cases cited above.

The DOJ's argument is an attack on *Webster*. This Court should instead follow *Webster* and recognize that Congress did not bar review of constitutional claims relating to security clearances. *Egan* must be read in light of *Webster*, which held that constitutional claims in the security-clearance realm are *not* barred wholesale from judicial review. Under *Egan* and *Webster*, then, a security clearance decision cannot be challenged on the "substance," *i.e.*, the interests of national security, but can be challenged if it was made in violation of constitutional rights. Any other conclusion would contradict *Webster*.[6]

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[6] The DOJ critiques the use of *Webster* as it did not directly involve the MSPB. But the Supreme Court made clear that the MSPB is the only judicial avenue available to federal employees, including for constitutional claims related to employment. *Elgin v. Dep't of the Treasury*, 567 U.S. 1, 5, 12, 19 (2012). These constitutional issues are raised here or not at all.

Finally, the DOJ argues that the "procedures within the intelligence community," Resp. Br. 51, are sufficient to provide protections to O'Boyle's constitutional rights. This is not an adequate response. "[T]he First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010).

Moreover, a recent report from the DOJ Inspector General (IG) further undercuts the DOJ's "trust us" argument.[7] That report found the DOJ's procedures to address security clearances are woefully deficient. It even concluded that these DOJ components, including the FBI, are violating the statutes. For example, it found that the DOJ "does not have a process in place that enables employees claiming retaliation, to the extent practicable, to retain employment status pending a security clearance review, as required by Section 3341." *Id.* at 2.

The IG also specifically addressed the FBI: "The FBI, like the Department, does not have a process that allows employees whose security clearance has been suspended for more than 1 year to file a retaliation complaint." *Id.* at 3. This lack

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[7] Management Advisory Memorandum from Michael E. Horowitz, Inspector Gen., Dep't of Just. Off. of the Inspector Gen., to Lisa Monaco, Deputy Att'y Gen., Dep't of Just. (May 9, 2024) (Attached to this Reply).

of an appeal process is "retaliatory," *id.,* and continuing government employment "becomes untenable, and therefore inconsistent with the intent of the statute, when indefinite suspensions without pay last for lengthy periods with no upward limit on how long the security investigation and suspension without pay can last." *Id.* at 3 n. 5. This IG Report demonstrates that there are not, in fact, sufficient internal processes in place for O'Boyle's whistleblower claims. In fact, the very provisions that the DOJ relies on to make its arguments here, 50 U.S.C. § 3341 and Security Executive Agent Directive 9, *are the provisions the IG found to be insufficiently implemented by the DOJ*. *Id.* at 3 ("[E]xisting DOJ practice is inconsistent with the intent of Section 3341.").

B. Petitioner O'Boyle Sufficiently Preserved His Constitutional Argument.

Petitioner O'Boyle has demonstrated that he did, in fact, preserve the whistleblower issue he seeks to raise in this appeal. In the pre-hearing conference order, the parties agreed to a limitation of O'Boyle's case to specific, key issues. The question of whistleblower reprisal was in fact included in that list as one of those very issues, as part of the question: "Did the agency prove by preponderant evidence that it *properly* suspended the appellant based on the charge described in the Notice of Proposed Indefinite Suspension dated September 23, 2023?" J.A. 189 (emphasis added). The DOJ would cast doubt on whether the question of proper suspension included the whistleblower defense, but the MSPB's final

decision made clear that it did. The very first paragraph of the MSPB's ruling on whether the agency "properly suspended the appellant" cited the *Egan* decision and upon that basis determined that the suspension was proper, rejecting the whistleblower argument. J.A. 373. In other words, the MSPB indicated that it was addressing the whistleblower retaliation issue that O'Boyle had raised as part of its ruling on whether the agency "properly suspended the appellant." J.A. 373.

The DOJ seeks to distinguish the issue whether a suspension is proper from the issue whether an affirmative defense can be made to that suspension. Such a strained reading of "properly" is not in accordance with the statute or the MSPB's reading here. An agency that suspends an employee in violation of law has not properly suspended that employee. "[A] decision to remove an FBI employee motivated by whistleblower retaliation is not in accordance with law." *Parkinson*, 874 F.3d at 722 (Linn, J., dissenting). Moreover, the MSPB expressly addressed and rejected O'Boyle's argument in the context of an affirmative defense. J.A. 378 (citing *Putnam v. Dep't of Homeland Sec.*, 121 M.S.P.R. 532, ¶ 18 (2014) (The Board "is precluded from reviewing allegations of prohibited discrimination and reprisal when such *affirmative defenses* relate to the revocation of a security clearance") (emphasis added)).

The principle underlying preservation rules is keeping "a litigant from 'sandbagging' the court—remaining silent about his objection and belatedly

raising the error only if the case does not conclude in his favor." *Puckett v. United States*, 556 U.S. 129, 134 (2009). Here, the MSPB expressly took a position on *Egan* and its applicability to the question whether Petitioner O'Boyle was properly suspended. Upon that basis, it refused to consider O'Boyle's whistleblowing claim. O'Boyle engaged in no "pointed silence." Resp. Br. 40. He repeatedly sought to attack the MSPB's reliance on *Egan* and had his attempt to do so repeatedly rebuffed by the MSPB. J.A. 378 n. 12 ("As I previously explained to the appellant . . ."); *see also* J.A. 9 (O'Boyle's appeal to the MSPB, alleging that action was taken against him because he made protected whistleblower disclosures).

In any event, an issue is preserved when the record indicates that an agency below did in fact consider the relevant issue. *Finnbin, LLC v. Consumer Prod. Safety Comm'n*, 45 F.4th 127, 132 n.1 (D.C. 2022). "This court has excused the exhaustion requirements for a particular issue when the agency has in fact considered the issue." *Nat. Res. Def. Council, Inc. v. U.S. EPA*, 824 F.2d 1146, 1151 (D.C. 1987) (en banc) (citing cases). The DOJ concedes that the MSPB had the opportunity to address, and did in fact address, as a result of O'Boyle's argument, the *Egan* issue O'Boyle now raises. That should be sufficient to overcome any preservation issue.

CONCLUSION

This Court should reverse the MSPB's decision.

Respectfully submitted,

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Dated: June 7, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have on this day, June 7, 2024, served all the parties in this case with this Brief for Appellant in accordance with the notice of electronic filing ("ECF"), which was generated as a result of electronic filing in this Court.

Respectfully submitted,

/s/Jesse R. Binnall
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