**ORAL ARGUMENT NOT YET SCHEDULED**

No. 23-1216

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

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**

## BRIEF FOR PETITIONER

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## CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Petitioner certifies as follows:

### A. Parties and Amici

Petitioner is Garret O'Boyle, FBI Special Agent.

Respondent is the United States Department of Justice.

There are no intervenors or amici to date.

### B. Rulings Under Review

Petitioner seeks review, pursuant to 5 U.S.C. § 7703, of the MSPB's decision affirming the suspension of his security clearance on May 26, 2023. J.A. 368. The decision became final on June 30, 2023.

### C. Related Cases

The ruling under review has not previously been before this Court or any other court. Petitioner is not aware of any related cases within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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## GLOSSARY

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|---|---|
| DOJ | United States Department of Justice |
| FBI | Federal Bureau of Investigations |
| MSPB | Merit Systems Protection Board |

## JURISDICTION

The MSPB had jurisdiction over Garret O'Boyle's appeal of his suspension pursuant to 5 U.S.C. § 7701. It specifically had jurisdiction to review his whistleblower defense to the personnel actions he is challenging. 5 U.S.C. § 7701(c)(2)(B) provides that the MSPB should not sustain a decision of an agency made based on a "prohibited personnel practice described in section 2302(b)," the statutory provision describing the whistleblower protections of federal employees. In addition, 5 U.S.C. § 7701(c)(2)(C) provides that no agency decision should be sustained if it "was not in accordance with law."

This Court has jurisdiction to review the MSPB's resolution of Garret O'Boyle's whistleblower claim pursuant to the All Circuit Review Act, 5 U.S.C. § 7703(b)(1)(B), which provides that a party challenging a MSPB decision can petition to the Federal Circuit or to a "court of appeals of competent jurisdiction," as long as the petitioner raises no challenges to the MSPB's decision other than one based on whistleblower activity. Garret O'Boyle ("Petitioner O'Boyle") challenges the MSPB's decision specifically insofar as it resolved his

whistleblower arguments, and accordingly this statute provides a mechanism for him to petition to this Court.

The MSPB's decision was issued as a resolution of Petitioner O'Boyle's employment claims on May 26, 2023. The decision became final on June 30, 2023. The petition for review to this Court was filed August 11, 2023.

## STATEMENT OF ISSUES FOR REVIEW

There are two closely related issues presented in this petition:

> (1) Whether the Merit Systems Protection Board ("MSPB"), when adjudicating Petitioner O'Boyle's administrative appeal regarding the Federal Bureau of Investigation's indefinite suspension of Petitioner O'Boyle, erred by refusing to consider his claims of reprisal for protected whistleblower disclosures under the Whistleblower Protection Act.
>
> (2) Whether a prohibition of judicial or MSPB consideration of the merits of a security-clearance decision during a MSPB review of indefinite suspension, particularly in the context of whistleblower retaliation claims, is constitutional under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

## STATUTES AND REGULATIONS

Applicable statutes are contained in an addendum, bound with this brief.

## STATEMENT OF THE CASE

Petitioner O'Boyle argues that the FBI suspended his employment and security clearance because of improper whistleblower retaliation. This case is a petition from the MSPB's decision that it lacked jurisdiction to consider that argument.

Garret O'Boyle is employed as an FBI Special Agent assigned to the Critical Incidents Response Group (CIRG). J.A. 369. He has served the FBI since 2018. J.A. 304. Before joining the FBI, O'Boyle was a police officer for the Waukesha Police Department, and before that, from 2006 to 2012, he was an infantryman in the United States Army. J.A. 304. He was deployed to both Iraq and Afghanistan in support of Operation Iraqi Freedom and Operation Enduring Freedom. J.A. 304.

On September 26, 2022, Petitioner O'Boyle, who had been assigned to an FBI duty station in Kansas, reported to a new FBI duty station in Stafford, Virginia. J.A. 9. Upon arriving at his new duty station, Petitioner O'Boyle was subjected to a surprise interview during which he was incorrectly accused of improperly leaking FBI information to the media. J.A. 9. *See also* J.A. 296-97. O'Boyle informed the interviewing agents that he had made no unpermitted disclosures to the news media. J.A. 9. *See also* J.A. 296-97. Instead, he explained that he had made certain legally protected disclosures to Congress. J.A. 9. *See also* J.A. 296-97. At the conclusion of the interview, Petitioner O'Boyle was given a letter from the FBI Security Division, dated September 23, 2022, three days before the interview, suspending his security clearance. J.A. 9. According to the letter, his clearance was suspended due to allegations that he "may have misused FBI information technology systems and records." J.A. 11.

At the same time, Petitioner O'Boyle was handed a letter from the FBI's Human Resources Division notifying him of a "proposal" to indefinitely suspend him. That letter stated that "[i]t has been a longstanding, essential condition of employment that employees of the FBI be able to obtain and maintain a Top Secret security clearance." J.A. 13. Because his clearance had been suspended, the letter informed Petitioner O'Boyle that "your access to controlled FBI space is not permissible at this time. Since you will not be allowed access to FBI space, there are no duties for you to perform. Therefore, you do not meet an essential condition of employment." J.A. 13.

After internal FBI review, on November 3, 2022, the FBI issued its final decision indefinitely suspending Petitioner O'Boyle based on the Security Division's decision suspending his security clearance. J.A. 371, J.A. 15-16. The indefinite suspension was based on the same factors described in the security clearance decision above—that as an FBI employee it was impossible for O'Boyle to continue his employment at the FBI without an active security clearance. J.A. 15-16.

Petitioner O'Boyle received the final decision letter on November 4, 2022, and it was effective as of that date. J.A. 300. Petitioner O'Boyle was permitted to use his accrued leave to toll the effective date of the indefinite suspension and did so. J.A. 371. Accordingly, his indefinite suspension without pay did not begin

until January 1, 2023. J.A. 372. Since that time O'Boyle has been without employment or income although technically he remains an FBI employee.

In the interim, as a preference eligible veteran, he appealed his indefinite suspension to the MSPB on December 4, 2022. J.A. 4-9. His appeal argued "that the adverse personnel action against the appellant is reprisal for whistleblower activity." J.A. 9. The administrative judge repeatedly refused to consider this argument, relying not on 5 U.S.C. § 7701, but on *Department of the Navy v. Egan*, 484 U.S. 518, 530-31 (1988). *See* J.A. 478 n. 12 ("As I previously explained to the appellant (see AF, Tab 10 at 4-5), the U.S. Supreme Court, the Federal Circuit Court of Appeals, and the Board have made clear that the Board has no authority to adjudicate whether an agency's adverse action, which is premised on the suspension or revocation of a security clearance, constitutes impermissible discrimination or reprisal for protected activity."); J.A. 161 (same), J.A. 163 (same), J.A. 373 (same).

The administrative judge conducted a prehearing teleconference. J.A. 169. During that conference, at the agreement of all the parties, the judge concluded

> that the only material issues to be decided in this appeal, to the exclusion of all other issues are as follows: (1) 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, 2022?; (2) Did the appellant prove by preponderant evidence that the agency denied him due process based on his claim that

> the agency failed to provide him with sufficient notice of the grounds the agency relied upon to suspend his security clearance?; (3) Did the appellant prove by preponderant evidence that the agency committed a harmful procedural error because it (a) failed to comply with the procedures described in FBI Policy Directive, Indefinite Suspension, 0975D, §§ 6.3-6.4? and/or (b) failed to grant his request for additional paid leave under the Federal Employee Paid Leave Act (FEPLA) prior to effecting the suspension action?; (4) Did the agency prove by preponderant evidence that there is a nexus between the charge and the efficiency of the service?; and (5) Did the agency prove that it properly considered the relevant aggravating and mitigating circumstances pertaining to penalty and, if so, does the penalty imposed exceed the bounds of reasonableness?"

J.A. 189. The administrative judge indicated explicitly that these issues and only these issues were the subject of O'Boyle's appeal.

On May 26, 2023, following a hearing, the administrative judge issued his initial decision affirming the indefinite suspension. J.A. 368. His analysis of the first issue, whether the FBI "properly suspended" the appellant, relied on *Egan*, 484 U.S. at 530-31, for the proposition that the MSPB had no jurisdiction to consider whether the Petitioner O'Boyle's suspension was improper as an act of whistleblower retaliation. J.A. 378. The administrative judge determined that the scope of the MSPB's review of the security clearance decision could not include whether that suspension was a violation of Petitioner O'Boyle's constitutional rights, but rather was limited to considering only whether the FBI followed specified statutory procedures for the suspension. J.A. 378. He concluded that those procedures were satisfied here. J.A. 376.

The MSPB's decision was issued on May 26, 2023. J.A. 368. The decision became final on June 30, 2023, as Petitioner O'Boyle did not appeal to the full MSPB. O'Boyle petitioned to this Court for review on August 11, 2023, pursuant to the All Circuit Review Act.

On October 30, 2023, the Respondent DOJ moved to dismiss O'Boyle's petition, arguing that 5 U.S.C. § 7703 does not give this Court appellate jurisdiction over the petition, that 5 U.S.C. § 7701 does not give the MSPB jurisdiction over O'Boyle's whistleblower defense, and that *Egan*, 484 U.S. 518, barred O'Boyle's constitutional claims. After a timely response in opposition, on February 21, 2024, this Court entered a per curiam order, referring the Motion to Dismiss to the merits panel and directing the parties to address all issues presented in the Respondent's Motion to Dismiss in their merits briefs.

## SUMMARY OF ARGUMENT

Federal statutory law provides protection for whistleblowers, including at the FBI, and this Court's precedent recognizes that constitutional retaliation claims are cognizable where federal employees lose security clearances as retaliation for the exercise of their rights. Both law and precedent therefore require rejection of the FBI's contention that its employees can never argue to an agency or court that the adverse employment decisions they receive constitute reprisal for their constitutionally protected whistleblowing.

First, this Court has appellate jurisdiction to review the MSPB's resolution of Garret O'Boyle's whistleblower claim pursuant to 5 U.S.C. § 7703(b)(1)(B), which provides that a party challenging a MSPB decision can petition to a "court of appeals of competent jurisdiction," as long as the party's petition is based on whistleblower activity as "described in" 5 U.S.C. § 2302. The DOJ would import into 5 U.S.C. § 7703(b)(1)(B) a new requirement—one unsupported by precedent or statutory text—that this provision only applies to employees directly governed by 5 U.S.C. § 2302. Nothing in the statute supports this strained limitation; instead § 7703 is designed to provide a right of petition to any federal employee raising a whistleblower claim. Accordingly, the only court to address this question has acknowledged that § 7703 applies to FBI employees. Likewise, the legislative history surrounding the adoption of this provision repeatedly emphasizes Congress's intent to protect all whistleblowers, without any evidence for the limitation the FBI would import into the statute. Section 7703(b)(1)(B) means what it says. It includes the petitions of employees who have claims at the MSPB "described in" the relevant sections of § 2302, regardless of whether their specific employment is governed by § 2302. Congress intentionally designed § 7703(b)(1)(B) to provide a means for seeking review of *all* whistleblower claims, not just those brought by a narrow subset of federal employees.

Second, the MSPB had jurisdiction to review Petitioner O'Boyle's whistleblower defense under 5 U.S.C. § 7701. The DOJ failed to preserve as an issue before the MSPB its argument that the MSPB lacked statutory jurisdiction to consider this affirmative defense in determining whether it properly suspended Petitioner O'Boyle, and, accordingly, has waived the issue of the applicability of 5 U.S.C. § 7701. Regardless, by statute the MSPB is obligated not to sustain a decision of an agency based on a "prohibited personnel practice described in section 2302(b)," the statutory provision describing the whistleblower provisions of federal employees. It is likewise obligated not to sustain a decision if it "was not in accordance with law." Nothing about these requirements excludes FBI employees from their provisions and protections, as if adverse actions against them should be sustained even if contrary to law. In fact, Congress has made abundantly clear in 5 U.S.C. § 2303(d)(1) that FBI employees have a right to bring whistleblower cases to the MSPB. An FBI employee can allege a practice "described in" § 2302, under the provisions of § 2303, to the same extent an employee governed by § 2302 can. Moreover, the rule advocated by the DOJ, under which FBI employees can appeal to the MSPB but cannot argue that their suspension was wrongful, is fundamentally inconsistent with due process. The DOJ's position is that, regardless what whistleblowing activity may occur or what retaliation may happen, the FBI's decisions regarding whistleblower activity,

*whether related to the Egan issue or not*, are categorically immune from judicial review when an employee challenges the results of those decisions. This denial of judicial review is contrary to the fundamental principle in favor of the right to constitutional relief. The courts presume that justiciable constitutional rights are to be enforced through the courts, *see Davis v. Passman*, 442 U.S. 228, 242 (1979), because without enforcement, rights cannot truly exist. The DOJ's position that the statute implicitly bars judicial review of the claims of FBI whistleblowers cannot be reconciled with that presumption.

Most importantly, the administrative judge erred by relying on *Dep't of the Navy v. Egan*, 484 U.S. 518, 520 (1988), to hold that the MSPB has no authority to adjudicate whether an agency's adverse action constitutes impermissible discrimination or reprisal for protected activity. *Egan*'s limited holding was that the Board cannot review the "substance" of an underlying decision. It did not hold that security clearances are *ipso facto* immune from all judicial review. It did *not* address constitutional issues, which were not raised in that case. On the contrary, the Supreme Court made clear in *Webster v. Doe*, 486 U.S. 592, 603 (1988), that when a constitutional right is implicated, a security clearance decision is not immune from judicial review, and that violation of constitutional rights can subsequently be corrected. *Egan* must be read in conformity with *Webster*, which recognized a constitutional claim against a security clearance decision.

This Court has accordingly recognized that *Egan* did not foreclose constitutional claims, for example, the First Amendment whistleblower retaliation claim that Petitioner O'Boyle seeks to raise here. This Court, along with other Circuits, has acknowledged that *Egan* does not bar constitutional claims arising from the clearance process, *Nat'l Fed'n of Fed. Emps. v. Greenberg*, 983 F.2d 286, 290 (D.C. Cir. 1993). The FBI's reading of *Egan* would render it in direct conflict with *Webster* and this Court's precedents, not to mention the Supreme Court's emphasis on the importance of constitutional rights. *Egan* did not give to the Executive Branch unfettered discretion over security clearances. That would make the FBI both defendant and judge of the employee's whistleblower claim without even constitutional checks. The MSPB and subsequently the courts have authority to adjudicate constitutional claims based on whistleblower reprisal, even when that reprisal occurred in the form of revoking a security clearance.

## STANDING

Petitioner O'Boyle has standing to prosecute this petition as he seeks review of the MSPB's decision refusing to consider the whistleblower reprisal that resulted in the suspension of his security clearance and his employment.

## ARGUMENT

The FBI's retaliation against whistleblowers is not immunized from judicial review. The First Amendment protects the right of government employees

to report wrongdoing. When they are retaliated against for doing so, they possess a right to pursue accountability for that retaliation in court. Despite the Respondent's assertions to the contrary, this Court has jurisdiction in this case and authority to correct the MSPB's misapplication of the law. Under 5 U.S.C. § 7701 the MSPB has authority to adjudicate employment decisions of FBI employees and determine whether those decisions were justified, including by examining whether those decisions were made in retaliation for whistleblowing. FBI agents can then petition for review of those whistleblower decisions, through 5 U.S.C. § 7703, to courts of competent jurisdiction. The fundamental error committed by the MSPB here was its failure to recognize that, in the context of reviewing Petitioner O'Boyle's whistleblower argument, it could and should examine whether the suspension of his clearance occurred as a violation of his constitutional rights. For the MSPB to refuse to consider whether whistleblower retaliation was the reason for Petitioner O'Boyle's security clearance cannot properly rest upon *Dep't of the Navy v. Egan*, 484 U.S. 518, 520 (1988). Instead, it was a violation of his constitutionally protected rights under the First, Fifth, and Fourteenth Amendments.

## I. Standard of Review

The jurisdictional questions presented concerning the interpretation of 5 U.S.C. § 7701, 5 U.S.C. § 7703, and the application of *Egan*, 484 U.S. at 520, are

all legal questions of statutory interpretation that, like all such interpretive questions, are reviewed de novo. *See Meza v. Renaud*, 9 F.4th 930, 933 (D.C. Cir. 2021). "De novo means . . . a fresh, independent determination of 'the matter' at stake; the court's inquiry is not limited to or constricted by the administrative record, nor is any deference due the agency's conclusion." *Doe v. United States*, 821 F.2d 694, 697-98 (D.C. Cir. 1987).

## II. This Court has Appellate Jurisdiction to Review O'Boyle's Whistleblower Claim Pursuant to 5 U.S.C. § 7703(b)(1)(B).

This Court has jurisdiction to review Garret O'Boyle's petition pursuant to the All Circuit Review Act, 5 U.S.C. § 7703(b)(1)(B). Congress created § 7703(b)(1)(B) to allow whistleblower cases like this one—in contrast to ordinary appeals by federal employees which may be filed only in the Federal Circuit—to be filed in any "court of appeals of competent jurisdiction," as long as the petitioning party raises no challenges to the MSPB's decision other than an argument based on whistleblower activity. The All Circuit Review Act was first enacted in 2012 because of Congress's dissatisfaction with the manner in which the Federal Circuit has disposed of whistleblower cases. S. Rep. No. 112-155, at 1-2 (2012) ("Unfortunately, federal whistleblowers have seen their protections diminish in recent years, largely as a result of a series of decisions by the United States Court of Appeals for the Federal Circuit."); *see also Flynn v. United States*

*SEC*, 877 F.3d 200, 203 (4th Cir. 2017). Another committee report produced by the same Congress concluded, "the Federal Circuit has often times misinterpreted Congressional intent when it comes to whistleblowers." H.R. Rep. No. 112–508, at 6 (2012).

Section 7703(B)(1)(b) was originally enacted as a temporary right of petition set to expire after a brief trial period. In 2018, however, Congress made Section 7703(B)(1)(b) permanent. All Circuit Review Act of 2018, Pub. L. No. 115-195, § 2(a), (b), 132 Stat. 1510. It did so with the explicit intent to eliminate "the Federal Circuit's monopoly on whistleblower cases" and to accordingly "make[] it possible for more courts to hear these important issues and for the Supreme Court to consider provisions of the [Whistleblower Protection Act] in the event of a circuit split." H.R. Rep. No. 115-337, at 4 (2017). The House Committee Report emphasized that "Congress has repeatedly criticized both the MSPB and the Federal Circuit's interpretation of [] whistleblower protections" and has reversed MSPB and Federal Circuit actions by legislative amendments to the Whistleblower Protection Act. *Id.* It explained that the right of petition made available by Section 7703(B)(1)(b) is comprehensive and categorical for 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." *Id.* at 5.

Like the House Report, the Senate Report on the All Circuit Review Act explained that "Congress passed the Whistleblower Protection Enhancement Act (WPEA) to 'strengthen the rights of and protections for federal whistleblowers so that they can more effectively help root out waste, fraud, and abuse in the federal government.'" S. Rep. No. 115-229, at 1-2 (2017) (quoting S. Rep. No. 112–155, at 1 (2012)). The Senate emphasized that the right of petition was created in response to criticism of the federal circuit: "a 'split in the circuit' was intended to occur with all-circuit review authority, allowing courts to critically review each other's decisions on Federal employee whistleblower protection laws and increase accountability in their interpretations of the laws." *Id.* at 3. The Senate Report, like the House Report, described the right to petition as comprehensive, summarizing the act as making "permanent the authority to appeal MSPB final orders or final decisions regarding whistleblower complaints to any U.S. Court of Appeals of competent jurisdiction." *Id.* at 1.

Not once did the House or Senate Reports ever suggest that the All Circuit Review Act is in any way limited to only a subset of federal employees. Instead, 5 U.S.C. § 7703(b)(1)(B) allows petitions for review of whistleblower cases to be filed in any "court of appeals of competent jurisdiction," so long as it is a petition

based on whistleblower activity, namely, the whistleblower practices "described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)." This interpretation is also supported by the decision of the MSPB, which explicitly provided to Petitioner O'Boyle the option to seek review from any court of appeals of competent jurisdiction. J.A. 394.

Petitioner O'Boyle, therefore, petitions for review of the Board's failure to resolve his whistleblower claim and his petition to this Court is focused solely upon his argument that he was improperly suspended because his suspension was based on protected whistleblower activity. Accordingly, he is correctly proceeding pursuant to 5 U.S.C. § 7703(b)(1)(B).

Respondent has argued in its motion to dismiss that, by referencing "practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)," 5 U.S.C. § 7703(b)(1)(B) limits itself to MSPB determinations regarding employees governed by 5 U.S.C. § 2302, the general federal whistleblower statute, and does not apply to FBI agents who, while possessing the right to appeal their cases to the MSPB, are governed by the separate, parallel statute set forth in 5 U.S.C. § 2303.

This is the first appellate case in this Circuit in which this question regarding the application of 5 U.S.C. § 7703(b)(1)(B) to employees of the FBI has directly arisen. Previously, the Fifth Circuit noted 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 reflects the language of the statute and accords with congressional intent. As this Court has emphasized, "even dictum is accorded substantial weight." *Wagner v. FEC*, 717 F.3d 1007, 1015 (D.C. Cir. 2013).

Section 7703(b)(1)(B) allows a petition to proceed if it is based on a challenge to "the [b]oard's disposition of allegations of a prohibited personnel practice . . . described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)." *Coulibaly v. Merit Sys. Prot. Bd.*, 709 Fed. Appx 9, 10 (D.C. Cir. 2017). Thus, the statute provides a petition to a regional circuit, so long as an employee's argument is based on that employee's whistleblower conduct. *See Marcato v. United States Agency for Int'l Dev.*, 11 F.4th 781, 784 (D.C. Cir. 2021); *see also Coulibaly*, 709 Fed. Appx. at 10 ("Although convoluted, that provision in plainer English means the following as applied to this situation: When the Board decides whether it has authority to consider an alleged whistleblower claim *described in* 5 U.S.C. §§ 2302(b)(8) or 2302(b)(9)(A)(i), (B), (C), or (D), this Court has appellate jurisdiction over the Board's decision on that question.") (emphasis added). Under

this provision, "the regional circuits have had concurrent jurisdiction over petitions challenging only the disposition of whistleblower-retaliation claims." *Marcat*o, 11 F.4th at 784.

The Respondent's position here, that 5 U.S.C. § 7703(b)(1)(B) excludes FBI employee petitions, cannot be sustained. The text of the statute allows for petitions based on "practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D)." The words "practices described in" differ from language such as "brought under" or "arising under," language which would have explicitly limited the statute's reach to those employees governed by § 2302. Congress used more general and inclusive language than it would have used had it intended to limit jurisdiction to cases "arising under" § 2302. Instead, Congress used wide and embracing language to encompass all "practices described in" § 2302. Indeed, Congress would not have used such imprecise language to effectuate such a radical intent. *See e.g. Sackett v. Env't Prot. Agency*, 143 S. Ct. 1322, 677 (2023) ("We have often remarked that Congress does not 'hide elephants in mouseholes' by 'alter[ing] the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'") (quoting *Whitman v. Am. Trucking Ass'ns., Inc.,* 531 U.S. 457, 468 (2001)). Nothing about the statute's text supports an assumption that the "described in" language of § 7703 necessarily means "brought under" or "brought pursuant to." The plain language of "described in," when read in the context of

the analogous language of § 2303, clearly indicates that § 7703 is not, in fact, merely limited to cases brought according to the specific parameters of § 2302. Section 7703(b)(1)(B) means what it says. It provides a right to petition over practices "described in" the relevant sections of § 2302. If an employee is governed by § 2303, the wrongful conduct he is subjected to can nonetheless be "described in" § 2302.

Other courts have likewise emphasized that Congress uses "described in" to explicitly mean by statute something broad, not limited to a determination under a specific statute. *United States v. Pennington*, 78 F.4th 955, 965-66 (6th Cir. 2023). When analyzing sentencing guidelines that utilized "described in" language, the Sixth Circuit emphasized, "[t]he fact that some guidelines and guideline subsections apply only if a defendant has been convicted under a specific statute, while other guidelines apply whenever a defendant's conduct conforms to conduct *described in* a particular statute, reveals a desire to distinguish between convicted conduct and non-convicted conduct in sentencing." *Id.* at 966 (emphasis added). The court went on to explain that

> 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.

*Id.* (emphasis added). *See Espina-Andrades v. Holder*, 777 F.3d 163, 168 (4th Cir. 2015) (contrasting "described" with "defined" and emphasizing that "'described in' is the broader of the two terms."). Because of the inherently broad meaning of "described in," "[w]e must honor this intentional use of language and Congress's approval of this distinction." *Pennington*, 78 F.4th at 966.

This reading of 5 U.S.C. § 7703(b)(1)(B) is required by its surrounding context. Section 2303 parallels the language of § 2302 and borrows its definition of "personnel action" from § 2302(a)(2)(A)(i)-(x). An employee covered by the process enumerated in § 2303 still alleges wrongful conduct described in § 2302. Sections 2303 and 2302 unambiguously parallel one another and should be interpreted together. As they are like statutes, they should be interpreted alike under the canon of *in pari materia*. "[U]nder the *in pari materia* canon of statutory construction, statutes addressing the same subject matter generally should be read 'as if they were one law.'" *Wachovia Bank, N.A. v. Schmidt*, 546 U.S. 303, 315-16 (2006) (quoting *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972)). Interpreting §§ 2303 and 2302 together leads to a recognition that by referencing practices "described in" § 2302, rather than actions "brought under" § 2302, 5 U.S.C. § 7703(b)(1)(B) is unmistakably designed to apply not just to disciplinary actions against employees covered by § 2302, but to the closely analogous, identically defined, whistleblower actions covered by § 2303. Because the statute

refers to "practices described" in § 2302, rather than suggesting it only applies to "cases brought under" § 2302, it necessarily also applies to FBI employees, as § 2303(a) makes explicit that actions "described in" § 2302 are covered by § 2303.

Although the statutory language itself is clear, if there is any doubt, the narrow reading of the statute advocated for by the Respondent in its Motion to Dismiss is clearly contradictory to Congress's intent in creating the All Circuit Review Act. The history discussed above confirms that Congress intentionally designed § 7703(b)(1)(B) to provide a means for petitioning for review of *all* federal whistleblower claims to circuits beyond just the Federal Circuit, not just those brought by certain federal employees. There is no indication anywhere in the legislative history of any congressional intent to exclude FBI employees from these provisions. On the contrary, both the House and the Senate intended this right of appeal to apply to all federal employees. The House Report explicitly states that the right of petition is comprehensive: 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). The Senate Committee likewise summarized this provision as making "permanent the authority to appeal MSPB final orders or final decisions regarding whistleblower

complaints to any U.S. Court of Appeals of competent jurisdiction" S. Rep. No. 115-229, at 1 (2017).

Simply put, 5 U.S.C. § 7703(b)(1)(B) does exactly what it says; it allows all federal whistleblower employees to petition for review of their cases to any federal court of competent jurisdiction. Nothing in the text, context, or history of the statute could sustain limiting this provision to only a narrow subset of federal employees; by its terms it covers all whistleblowers.[1]

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[1] Should this Court nevertheless agree with Respondent's interpretation of 5 U.S.C. § 7703(b)(1)(B), Petitioner respectfully requests that his petition be transferred to the Federal Circuit, which possesses jurisdiction over all MSPB appeals. 28 U.S.C. § 1631 provides for the transfer of appeals to other courts in which the appeal could have been originally brought if the court determines that it lacks jurisdiction and if the transfer "is in the interest of justice." *Id*. In this case, the other provisions of § 7703 clearly allow for this matter to be brought to the Federal Circuit, and a transfer would be warranted.

The rule for transfer serves to "aid litigants who were confused about the proper forum for review." *Am. Beef Packers, Inc. v. Interstate Com. Comm'n*, 711 F.2d 388, 390 (D.C. Cir. 1983); *Pro. Managers' Ass'n v. United States*, 761 F.2d 740, 745 n. 5 (D.C. Cir. 1985) ("[T]ransfer seems completely warranted both in the interest of justice and because of the complexity and novelty of the jurisdictional provisions at issue. The alternative to transfer here is dismissal, which would work a significant hardship on appellant who would probably then be time barred from bringing an appeal to the Federal Circuit."); *Five Flags Pipe Line Co. v. DOT*, 854 F.2d 1438, 1442 (D.C. Cir. 1988) ("Given the unique circumstances of this case, and the understandable mistake that petitioners have made in seeking initial review in this court, we conclude that the fairest and most appropriate course is to avail ourselves of the procedure in section 1631.").

Lacking any binding precedent to the contrary and with the only available precedent being in his favor, Petitioner has proceeded reasonably to this Court,

## III. The MSPB is not barred from considering the whistleblower claims of FBI Employees.

This appeal concerns whether *Egan*, 484 U.S. 518, and its progeny barred the MSPB from considering Petitioner O'Boyle's whistleblower claim. However, Respondent raised in its Motion to Dismiss an entirely different jurisdictional argument against Garret O'Boyle's petition, arguing that the MSPB does not possess statutory jurisdiction to adjudicate his whistleblower retaliation defense, despite the fact that Section 2303 of the FBI Whistleblower Statute expressly provides for a right to appeal whistleblower reprisal actions to the MSPB, 5 U.S.C. § 2303(d)(1), and that 5 U.S.C. § 7701(c)(2)(B), the statutory provision describing the whistleblower provisions of federal employees, provides that the MSPB should not sustain a decision of an agency made based on a "prohibited personnel practice described in section 2302(b)." Further, 5 U.S.C. § 7701(c)(2)(C) provides that an agency decision should not be sustained if it "was not in accordance with

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based on the most plausible and textually sound interpretation of the statute. In light of the "complexity and novelty of the jurisdictional provisions at issue," *Pro. Managers' Ass'n*, 761 F.2d at 745 n. 5 (D.C. Cir. 1985), if the Court disagrees with Petitioner's interpretation of § 7703(b)(1)(B), the interests of justice are served by transferring the case to the Federal Circuit rather than denying him altogether his day in court. "[P]arsing the variety of statutes that could be invoked as applicable to a particular personnel problem is akin to predicting divine will by studying animal entrails, as was done by the Etruscans and Romans." *Parkinson v. DOJ*, 874 F.3d 710, 718 (Fed. 2017) (Plager, J., dissenting).

law." It is the FBI's position that, even apart from *Egan*, an FBI employee cannot raise a whistleblower defense when appealing an adverse employment decision. This position is unsupported by the statutory text and is inconsistent with the Constitution.

*A. The FBI Waived the Ability to Contest the MSPB's Jurisdiction over O'Boyle's Whistleblower Defense under 5 U.S.C. § 7701.*

First, 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. During the pre-hearing conference, the parties agreed to limit the MSPB proceeding to a 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). That list does not contain any assertion that the MSPB lacked jurisdiction over Petitioner O'Boyle's whistleblower retaliation defense. Accordingly, the decision below does not contain any discussion of 5 U.S.C. § 2303 or whether the MSPB lacked statutory jurisdiction over Petitioner O'Boyle's whistleblower claim. In fact, although, as discussed above, the MSPB's order extensively discussed the effects of the *Egan* decision and rejected Petitioner O'Boyle's claim on that ground; it never addressed the DOJ's new, categorical assertion that FBI agents cannot raise a whistleblower retaliation defense to the board in an appeal of any adverse action, regardless of whether it is based on a

security clearance determination or not. The case central to the DOJ's argument on this point, *Parkinson v. DOJ*, 874 F.3d 710, 713 (Fed. Cir. 2017) (en banc), is never cited or addressed once in the MSPB's decision below. No party, including the DOJ, should be permitted to "sandbag [] by withholding legal arguments for tactical reasons until they reach the courts of appeal." *USAir, Inc. v. DOT*, 969 F.2d 1256, 1260 (D.C. Cir. 1992). When Petitioner O'Boyle argued below that *Egan* did not bar his whistleblower retaliation defense, the DOJ could then have responded by arguing for the independent statutory theory it now advances, as an alternative to *Egan*, and made that issue one of the central questions for the MSPB to resolve.

Respondents are bound to preserve questions below in the MSPB, just as much as Petitioners are. *See Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979) ("[T]he appellee was of course free to defend its judgment on any ground *properly raised* below.") (emphasis added); *Bosley v. MSPB*, 162 F.3d 665, 668 (Fed. Cir. 1998) ("A *party* in an MSPB proceeding must raise an issue before the administrative judge if the issue is to be preserved for review in [] court.") (emphasis added). Should Respondent have wished to try to prevent the MSPB from even hearing Petitioner O'Boyle's whistleblower defense based on this statutory argument, it should have included that issue on the list of issues to be resolved by the tribunal below, but it

did not do so. The Respondent now argues that the MSPB should never have even reached *Egan*. It should have instead sought to dissuade the MSPB from doing so.

### *B. 5 U.S.C. § 7701 Means What It Says; It Allows Whistleblowing Employees To Argue That Adverse Actions Taken Against Them Constituted Improper Retaliation.*

Respondent argued in its Motion to Dismiss that FBI whistleblower decisions are entirely unreviewable, citing *Parkinson*, 874 F.3d at 713. But *Parkinson* construed a statute that is simply no longer the law. Indeed, § 2303 has been revised specifically to grant the MSPB jurisdiction over FBI whistleblowers. Congress has now expressly allowed for appeals from FBI whistleblower decisions by amending § 2303 to allow for appeals to the Board.

The new language of the statute reads:

> An employee of the Federal Bureau of Investigation who makes an allegation of a reprisal under regulations promulgated under this section may appeal a final determination or corrective action order by the Bureau under those regulations to the Merit Systems Protection Board pursuant to section 1221.

5 U.S.C. § 2303(d)(1). This emendation does not stand alone; it also guides the interpretation of 5 U.S.C. § 7701(c)(2)(B), which allows for whistleblowers like Petitioner O'Boyle to raise affirmative defenses based on whistleblowing, as he sought to do here. Specifically, the statute allows federal employees to argue that an adverse employment action taken against them "was based on any prohibited

personnel practice described in section 2302(b) of this title." 5 U.S.C. § 7701(c)(2)(B).

Nothing about § 7701 in any way suggests that it is limited to allow some federal employees to raise a whistleblower defense, but not FBI employees, yet the DOJ now argues that it is so limited. But, as discussed above, § 2303, the statute for FBI employees, relies on and is governed by the provisions of § 2302; an FBI employee can allege a practice described in § 2302, under the provisions of § 2303, just as much 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 an act of reprisal against a whistleblower.

*Parkinson*, 874 F.3d at 713, although a decision to the contrary, is not binding on this Court, is superseded by the recent amendments to § 2303, and is not an accurate interpretation of § 7701(c)(2)(B). Congress enacted the All Circuit Review Act specifically to enable the other circuits to hold the Federal Circuit accountable and correct its erroneous decisions. The reasoning of *Parkinson* did not depend on the text and meaning of § 7701; the court never addressed the meaning of "described in," for example. 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 statement is clearly no longer the law.

Congress has amended § 2303 to correct this issue in order to ensure that FBI employees *can*, in fact, appeal on whistleblower grounds to the MSPB. 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, has categorically rejected that holding. FBI Whistleblowers have a right like other employees to appeal to the MSPB and to raise whistleblower arguments. *Parkinson*'s application of its holding to 5 U.S.C. § 7701 is accordingly no longer good law and no longer a basis to exclude FBI employees from the ability to argue their whistleblower defenses at the MSPB.

Indeed, 5 U.S.C. § 7701(c)(2)(B) allows federal employees to raise a whistleblower defense for a practice "described in" § 2302. As with § 7703, the statute does not limit itself to only applying to employees explicitly governed by § 2302. Instead, 5 U.S.C. § 7701 simply recognizes the possibility of an affirmative defense "against the Government's argument for dismissal by providing evidence of a retaliatory government motive." *Parkinson v. DOJ*, 874 F.3d at 720 (Plager, J., joined by Linn, J., dissenting). Nothing about the statute suggests the incongruous idea that anyone 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. But the FBI's proposed interpretation is more than simply nonsensical; it is fundamentally inconsistent with constitutional principles of due process.

> "The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. . . . The tenured public employee is entitled to . . . an opportunity to present his side of the story." If this case is not a denial of due process by the Government, I am hard pressed to imagine one.

*Id.* (Plager, J., joined by Linn, J., dissenting) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)).

Even if not under the specific whistleblower provision, the Board may still 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). Now that Congress has ensured that FBI whistleblower actions can be brought to the MSPB, this more general catchall also clearly covers Petitioner O'Boyle. The law applicable to all federal employees includes a requirement that "Employees should be protected against reprisal for the lawful disclosure of information." 5 U.S.C. § 2301(9). "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)." *Parkinson*, 874 F.3d at 724 (Plager, J., joined by Linn, J., dissenting). 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. There is absolutely nothing in 5 U.S.C. § 7701(c)(2)(C) to exclude the FBI from its provisions or to suggest an FBI decision not in accord with the law should nonetheless be sustained.

In a case like this one, Garret O'Boyle's whistleblower argument is not somehow separate or free-standing from whether the action taken against him occurred properly. This is confirmed by 5 U.S.C. § 7701(c)(2)(C):

> [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.

*Parkinson*, 874 F.3d at 722 (Linn, J., dissenting). If there was any doubt, 5 U.S.C. § 2303(d)(1) now explicitly allows FBI employees to bring reprisal arguments to the MSPB. By adopting § 2303(d)(1), Congress necessarily rejected *Parkinson* and instead gave the courts explicit power to resolve FBI whistleblower cases.

The DOJ's argument to this Court should not be whitewashed. It argues that, no matter what whistleblowing activity may occur or what retaliation may happen, the FBI's decisions regarding whistleblower activity, *whether related to the Egan issue or not*, are categorically immune from judicial review when an employee challenges the very actions that resulted from that reprisal.

> [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).

This interpretation is in direct contradiction to an interpretative principle the Supreme Court has regularly emphasized, the presumption in favor of constitutional remedies. *Davis v. Passman*, 442 U.S. 228, 242 (1979) ("[W]e presume that justiciable constitutional rights are to be enforced through the courts.") The Supreme Court has made clear that rights must be enforceable "unless such rights are to become merely precatory." *Id.* If they are not, litigants "who allege that their own constitutional rights have been violated, and who at the same time have no effective means other than the judiciary to enforce these rights, must be able to invoke the existing jurisdiction of the courts for the protection of their justiciable constitutional rights." *Id.* This principle reflects the

"traditional presumption in favor of any appropriate relief for violation of a federal right." *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 73 (1992). The FBI's position that the whistleblower defenses of FBI employees are categorically unreviewable leaves FBI employees without any remedy when their constitutional rights are violated.

Even if there were ambiguity in the statutory mechanism describing defenses available at the MSPB in 5 U.S.C. § 7701(c)(2), when dealing with the rights of veterans, it is well-established that when a statute is ambiguous, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). This includes FBI employees who are veterans at the MSPB. *See Terry v. Principi*, 340 F.3d 1378, 1384 (Fed. Cir. 2003). Statutory provisions are not construed against veteran employees, and they are certainly not construed against veteran employees in such a way as to deny any possible relief for whistleblowing conduct. Such an interpretation of 5 U.S.C. § 7701(c)(2) turns language designed to protect federal employees into an attack upon their rights.

## IV. *Egan* Does Not Bar This Court or the MSPB from Considering the Constitutional Rights Implicated in Acts of Whistleblower Reprisal, Even When Considering Security Clearance Decisions.

By excluding even *constitutional whistleblowing* claims from the scope of his authority, the MSPB judge interpreted *Egan* far more broadly than the case's holding actually supports. The administrative judge claimed that *Egan* means

"that the Board has no authority to adjudicate whether an agency's adverse action, which is premised on the suspension or revocation of a security clearance, constitutes impermissible discrimination or reprisal for protected activity within the meaning of 5 U.S.C. § 2302(b)(8) or (b)(9). See *Egan*, 484 U.S. at 530-34." J.A. 378. This decision is wrong. As explained below, *Egan* does not apply to constitutional arguments, like the First Amendment whistleblower argument being advanced here. The Supreme Court and this Court have made that principle very clear. When a federal employee argues that an adverse action was an act of whistleblower reprisal, *Egan* does not foreclose that constitutional claim.

### *A.* Egan *Does Not Foreclose Constitutional Challenges to Actions Underlying Security Clearance Decisions.*

The MSPB concluded that *Egan* categorically barred the consideration of whistleblower claims in the context of security clearance decisions. But the Supreme Court in *Egan* instead explicitly addressed the "narrow question" of "whether the Merit Systems Protection Board [] has authority by statute to review the substance of an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse action." *Egan*, 484 U.S. at 520. *Egan* was limited to a holding that the MSPB cannot review the "substance" of an underlying decision. It did not hold that security clearances are categorically

immune from judicial review. It certainly did not address constitutional issues, which were not raised in that case.

If there was any doubt about whether *Egan* foreclosed constitutional claims like those based on First Amendment whistleblowing, 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, even if a security clearance issue was part of the underlying facts. The *Webster* Court held that constitutional claims were not foreclosed because "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Id.*

This holding was necessary "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.* Accordingly, the CIA's denial of security clearances and ultimate termination of Webster was not immune from judicial review on national security grounds. The Court held that the statutes did not preclude judicial review of "colorable constitutional claims arising out of the actions of the Director." *Id.*

*Egan* must be read in light of *Webster*, which held that constitutional claims in the security-clearance context are *not* necessarily barred 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 as a violation of constitutional rights, such as in an act of retaliation against a whistleblower.[2]

This Court's precedents faithfully apply this distinction. In the context of constitutional claims, this Court has repeatedly indicated that *Egan* did not foreclose constitutional claims, such as First Amendment whistleblower retaliation claims as here. *Doe v. Gates*, 981 F.2d 1316, 1321 (D.C. Cir. 1993) (equal protection); *National Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 290 (D.C. Cir. 1993) ("The government may have considerable leeway to determine what information it needs from employees holding security clearances and how to go about getting it. But a large measure of discretion gives rise to judicial deference, not immunity from judicial review of constitutional claims."); *Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999) ("[U]nder *Egan* an adverse employment action based on denial or revocation of a security clearance is not actionable under Title VII. We emphasize that our holding is limited to Title VII discrimination actions and does not apply to actions alleging deprivation of constitutional rights.").

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[2] If *Egan* and *Webster* are not read together in this manner, then, under the FBI's theory, the FBI would have the unreviewable and unappealable discretion to revoke the security clearances of FBI employees for any number of protected reasons including but not limited to race, religion, or national origin in violation of the Constitution's right to equal protection.

In *United States Information Agency v. Krc*, this Court cautioned that "judicial authority to consider the constitutional claims resulting from agency personnel decisions" is of "critical importance" because "those constitutional claims may well be the only check on agency actions that determine a person's career." 905 F.2d 389, 400 (D.C. 1990); *see Stillman v. DOD*, 209 F. Supp. 2d 185, 208 (D.D.C. 2002) ("[E]ven if the President has great discretion pursuant to Article II of the Constitution to determine who has access to classified information, *Egan* says nothing about what happens when an exercise of that discretion conflicts with another provision of the Constitution."); *Garcia v. Pompeo*, 2020 U.S. Dist. LEXIS 5159, *25 (D.D.C. 2020) ("*Egan* does not stand in the way of a well-pleaded constitutional claim that, as here, would appear to have record support. *Egan* therefore does not forbid consideration of Plaintiff's First Amendment claim.").

Other circuits have also recognized that *Egan* does not foreclose constitutional claims and arguments. "Since *Egan*, the Supreme Court and several courts of appeals have held the federal courts have jurisdiction to review constitutional claims arising from the clearance revocation process." *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996); *see 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."); *Dubbs v. CIA*, 866 F.2d 1114, 1120-21 (9th Cir. 1989) (affirming the district court's ruling that it had no jurisdiction under the Administrative Procedure Act to review the CIA's denial of a security clearance, but remanding for the district court to consider the claim that the CIA unconstitutionally discriminated against homosexuals in making security clearance determinations.); *El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176, 183-85 (3d Cir. 2010) (holding that the court had jurisdiction to review plaintiff's claims that an agency violated his constitutional rights in the process of revoking his security clearance); *Reinbold v. Evers*, 187 F.3d 348, 358 (4th Cir. 1999) ("We have, however, stated that, despite *Egan*'s admonition restraining judicial review, it is arguable that we could review an agency's security clearance decision in the limited circumstance where the agency's security clearance decision violated an individual's constitutional rights."); *Jamil v. Secretary, Dep't of Defense*, 910 F.2d 1203, 1209 (4th Cir. 1990) ("If Jamil had been dismissed because of his national origin, then, despite *Egan*'s admonition restraining court review, it is arguable that he might have a valid claim of denial of his constitutional rights to equal protection and to be free of discrimination because of national origin.").

Any other conclusion would conflict with *Webster*, which expressly recognized a constitutional challenge to a security clearance decision.[3]

*B. Petitioner O'Boyle Preserved the* Egan *Issue.*

The DOJ argued in its Motion to Dismiss that Petitioner O'Boyle failed to preserve the central issue raised in his appeal, whether under *Egan* the MSPB

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[3] If this Court affirms the MSPB's judgment, Petitioner O'Boyle intends to seek Supreme Court review, and in that Court to argue, not just that *Egan* is no bar here, but that in the alternative the Supreme Court should reconsider *Egan*. If *Egan* is so broadly interpreted so as to bar even constitutional claims, its holding would conflict with *Webster* and the presumption of a right to a constitutional remedy, necessitating the Supreme Court's correction.

While Petitioner O'Boyle prevails under *Egan* for the reasons set forth in the text, it should be noted that *Egan*'s holding was erroneous on textual grounds. Although the statutes enumerating what cases can be brought to the MSPB, 5 U.S.C. §§ 7501-7515, do not include security clearances directly, nothing in the text of the statute prevents courts from reviewing a security clearance decision when that security clearance decision is the basis for an action that does provide jurisdiction for review, such as a suspension. To properly review a suspension, the reasons therefor, including a security clearance decision if relevant, must also be reviewed and cannot be immunized from scrutiny.

Moreover, *Egan* cannot be justified on public policy grounds, as there is "no necessity for this Court to rewrite the civil service statutes in the name of national security." 484 U.S. at 534 (White, J., dissenting). *Egan* failed to apply the fundamental principle that constructions that would immunize rights violations from judicial review should be avoided. *Egan* relied on a policy in favor of national security, to the utter neglect of complementary, stronger policies in favor of constitutional rights. *See Holder v. Humanitarian Law Project*, 561 U.S. 1, 20 (2010) ("Our precedents, old and new, make clear that concerns of national security and foreign relations do not warrant abdication of the judicial role. We do not defer to the Government's reading of the First Amendment, even when such interests are at stake.").

could have considered Petitioner O'Boyle's claims of reprisal for protected whistleblower disclosures that resulted in the FBI's indefinite suspension of his employment.

Petitioner O'Boyle did, in fact, preserve the 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 and that those issues were the only material issues to be decided in the Petitioner's appeal. J.A. 189 (agreeing that those issues were "the only material issues to be decided in this appeal, **to the exclusion of all other issues."**) (emphasis in original). The question of whistleblower reprisal was in fact included in that list as one of those very issues: "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).

By arguing that his suspension occurred for improper reasons – namely, whistleblower reprisal – Petitioner O'Boyle is not trying to raise some novel, independent claim. Rather, his contention is that the agency did not "properly" suspend him because it suspended him for his whistleblower activity. This is clearly within the scope of the pre-hearing agreement. And if there were any doubt, the MSPB's final decision repeatedly indicates that it is addressing the whistleblower retaliation issue as part of its ruling, by refusing to rule on the

merits of that claim. J.A. 378 ("[T]he Board has no authority to adjudicate whether an agency's adverse action, which is premised on the suspension or revocation of a security clearance, constitutes impermissible discrimination or reprisal for protected activity within the meaning of 5 U.S.C. § 2302(b)(8) or (b)(9).").

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. J.A. 373. The MSPB expressly took a position on *Egan* and its applicability to the question of whether Petitioner O'Boyle was properly suspended. It did so because whistleblowing activity was at the center of Petitioner O'Boyle's claim below, just as it is the center of his appeal now. The MSPB was unambiguous. It refused to hear or rule on this critical question, citing *Egan* and its progeny as applied by the MSPB as its basis. This determination is what the Petitioner now appeals.

In response the DOJ argued in support of the Motion to Dismiss that the whistleblower retaliation claim was not preserved because it contends that was not explicitly treated by the MSPB as an affirmative defense. 5 U.S.C. § 7701(c)(2)(B) envisages that a claim of whistleblower retaliation should be raised affirmatively, after the agency proves its case by a preponderance of evidence. But the MSPB considered, and rejected, O'Boyle's argument explicitly in the context of an affirmative defense. J.A. 378 (citing *Putnam v. Department*

*of Homeland Security*, 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 MSPB considered and rejected Garret O'Boyle's affirmative defense that his security clearance was revoked for improper reasons, thus denying him the chance to prove, let alone raise, a claim of whistleblower retaliation.

This Court has emphasized in other contexts that "issue preservation is unnecessary 'when the agency has in fact considered the issue.'" *Finnbin, LLC v. Consumer Prod. Safety Comm'n*, 45 F.4th 127, 132 (D.C. 2022) (quoting *NRDC, Inc. v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) (en banc)). The record here is unambiguous; the MSPB considered and rejected Petitioner O'Boyle's whistleblower argument on the ground that *Egan* purportedly barred it from considering the issue. It thereby failed to recognize that *Egan*'s holding does not apply to claims based on constitutional rights.

## CONCLUSION

For the foregoing reasons, this Court should reverse the MSPB's decision.

Dated: April 3, 2024

Respectfully submitted,

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** Not Admitted to Practice Before this Court*

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