25-1404

United States Court of Appeals for the Federal Circuit

GARRET O'BOYLE,

Petitioner,

– v. –

DEPARTMENT OF JUSTICE,

Respondent.

On Appeal from the Merit Systems Protection Board
No. MSPB01, DC-0752-23-0132-I-1

BRIEF FOR PETITIONER

BENJAMIN P. SISNEY
NATHAN J. MOELKER
THE AMERICAN CENTER FOR LAW AND JUSTICE
[redacted]

JESSE R. BINNALL
BINNALL LAW GROUP
[redacted]

Counsel for Petitioner

JULY 3, 2025

CP COUNSEL PRESS (800) 4-APPEAL • (131103)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 25-1404

Short Case Caption O'Boyle v. DOJ

Filing Party/Entity Garret O'Boyle

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
4. Please do not duplicate entries within Section 5.
5. Counsel must file an amended Certificate of Interest within seven days after any information on this form changes. Fed. Cir. R. 47.4(c).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 07/3/2025

Signature: /s/ Jesse R. Binnall

Name: Jesse R. Binnall

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Garret O'Boyle		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Jay Alan Sekulow	Jordan Sekulow	Stuart J. Roth
Jane Serene Raskin	Liam R. Harrell	Abigail Southerland
Binnall Law Group	Matt M. Dummermuth	Shawn Flynn

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below) ☑ No ☐ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, Petitioner hereby certifies to this Court that he is unaware of any related cases within the meaning of the rule.

JURISDICTION

The Merit Systems Protection Board ("MSBP") 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 challenges. 5 U.S.C. § 7701(c)(2)(B) provides that the MSPB should not sustain a decision of an agency that was made "based on any 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."

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 the D.C. Circuit was filed August 11, 2023. On December 3, 2024, the United States Court of Appeals for the D.C. Circuit issued a decision determining that it lacked jurisdiction pursuant to the All Circuit Review Act, 5 U.S.C. § 7703(b)(1)(B), and transferred jurisdiction to this Court pursuant to 28

U.S.C. § 1631. In accordance with that mandate, this case was transferred to this Court and docketed on January 31, 2025.

This Court has jurisdiction over this petition pursuant to 5 U.S.C. § 7703, which vests appellate authority over all final decisions of the MSPB in the United States Court of Appeals for the Federal Circuit.

STATEMENT OF ISSUES FOR REVIEW

There are four closely related issues presented in this petition:

(1) Whether the MSPB erred by refusing to consider Petitioner Garret O'Boyle's claims of reprisal for protected whistleblower disclosures under the Whistleblower Protection Act;

(2) Whether prohibiting consideration of the merits of a security clearance decision, especially in the context of whistleblower retaliation, is constitutional under the First, Fifth, and Fourteenth Amendments;

(3) Whether the MSPB proved by preponderant evidence that it properly suspended O'Boyle based on the charge described in the Notice of Proposed Indefinite Suspension;

(4) Whether O'Boyle proved by preponderant evidence that the agency denied him due process.

STATEMENT OF THE CASE

The Federal Bureau of Investigation (FBI), a component of the United States Department of Justice (DOJ), suspended Petitioner O'Boyle's employment and security clearance because of improper whistleblower retaliation. This appeal began as a petition from the MSPB's decision that it lacked jurisdiction to consider that

retaliation and its failure to recognize that O'Boyle's due process rights were violated through the manner by which the FBI suspended him.

Garret O'Boyle is employed as an FBI Special Agent and is assigned to the FBI's Critical Incident Response Group. Appx2. He has served the FBI since 2018. Appx175. Before joining the FBI, O'Boyle was a police officer, and before that, from 2006 to 2012, he was an infantryman in the United States Army. Appx350. He was deployed to both Iraq and Afghanistan in support of both Operation Iraqi Freedom and Operation Enduring Freedom. *Id.* He served as a police officer from 2014 to 2017. *Id.*

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. Appx39. 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. *Id.* O'Boyle informed the interviewing agents that he made no unpermitted disclosures to the news media. *Id.* Instead, he explained that he made certain legally protected disclosures to Congress. *Id.* Any FBI information he had accessed had been accessed as part of his protected whistleblower disclosures. *Id.* At the conclusion of the interview, O'Boyle was given a letter from the FBI Security Division, dated September 23, 2022 (three days before the

interview), suspending his security clearance. Appx41. According to the letter, his clearance was suspended due to allegations that he "may have misused FBI information technology systems and records." *Id.* This letter did not identify the source or basis for the allegations. *Id.*

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. Appx43. 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." *Id.* Because his clearance had been suspended, the letter informed 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." *Id.*

After an internal FBI review, on November 3, 2022, the FBI issued its final decision indefinitely suspending O'Boyle based on the Security Division's decision suspending his security clearance. Appx45. 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. *Id.*

Petitioner O'Boyle received the final decision letter on November 4, 2022, and it was effective as of that date. Appx346. O'Boyle was permitted to use his accrued leave to toll the effective date of the indefinite suspension and did so. Appx4. Accordingly, his indefinite suspension without pay did not begin until January 1, 2023. Appx370. Since that time, O'Boyle has been without work or income, although 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. Appx4. Appeals to the MSPB are heard initially by a single administrative judge. O'Boyle's appeal argued "that the adverse personnel action against the appellant is reprisal for whistleblower activity." Appx39. 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* Appx11 ("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."); Appx6 (same).

The administrative judge conducted a prehearing teleconference. Appx4. 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?

Appx4-5. 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 O'Boyle's indefinite suspension. Appx1. 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 O'Boyle's suspension was improper as an act of whistleblower retaliation.

Appx6. 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 O'Boyle's constitutional rights, but rather, was limited to considering only whether the FBI followed specified statutory procedures for the suspension. *Id.* He concluded that those procedures were satisfied here. *Id.*

The judge's decision became final on June 30, 2023, as O'Boyle did not appeal to the full MSPB. O'Boyle petitioned to the United States Court of Appeals for the D.C. Circuit for review on August 11, 2023, pursuant to the All Circuit Review Act. On December 3, 2024, the D.C. Circuit issued a decision determining that it lacked jurisdiction pursuant to that Act, 5 U.S.C. § 7703(b)(1)(B), and transferring jurisdiction to this Court pursuant to 28 U.S.C. § 1631. In accord with that mandate, this case was transferred to this Court and docketed in this Court on January 31, 2025. The agency served the Certified List on O'Boyle's counsel on February 3, 2025.

SUMMARY OF ARGUMENT

Federal statutory law provides protection for whistleblowers, including at the FBI, and 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 position 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. Petitioner O'Boyle's First Amendment rights were violated by the retaliation he experienced, and his rights to due process were violated by the FBI's failure to properly provide him notice or to substantiate the actions taken against him.

First, the MSPB possessed 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 whistleblower retaliation in determining whether it properly suspended O'Boyle, and, accordingly, has waived 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." Under 5 U.S.C. § 7701, the MSPB has authority to adjudicate FBI employees' employment decisions and determine if they were made in retaliation for whistleblowing or were otherwise unlawful.

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. The statutory language in § 7701(c)(2)(B) instead allows FBI employees to raise whistleblower retaliation defenses at the MSPB. The phrase "practice described in § 2302" encompasses FBI whistleblower cases, as it uses broader language than "brought under" or "arising under," language that could have explicitly limited its application. An FBI employee may allege a practice "described in" 5 U.S.C. § 2302 to the same extent an employee governed by § 2302 may. Moreover, Section 7701(c)(2)(C) independently requires reversal of any agency action "not in accordance with law," which includes whistleblower retaliation against FBI employees as prohibited by § 2303.

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. The decision in *Parkinson v. DOJ*, 874 F.3d 710 (Fed. Cir. 2017), which previously had limited FBI employees' ability to raise whistleblower defenses, was statutorily overruled by Congress's amendment to § 2303, granting the MSPB jurisdiction over FBI whistleblower cases. *Parkinson* contradicted the plain statutory text, failed to address § 7701(c)(2)(C)'s requirements, disregarded the presumption in favor of constitutional remedies, and ignored the veterans canon requiring legislation to be liberally construed in veterans' favor. Depriving FBI veterans of whistleblower retaliation defenses denies them due process and undermines congressional intent to

protect those who report government misconduct. By amending § 2303, Congress overruled *Parkinson* and provided FBI whistleblowers crucial rights that include the right to raise claims like O'Boyle's to the MSPB.

Most importantly, the administrative judge erred by relying on *Department of the Navy v. Egan*, 484 U.S. 518 (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. But *Egan* did not hold that security clearances are *ipso facto* immune from all judicial review. And importantly, *Egan* 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, like, for example, the First Amendment whistleblower retaliation claim 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. *Brockmann v. Dep't of the Air Force*, 27 F.3d 544, 546 (Fed. Cir.

1994). The FBI's reading of *Egan* would render it in direct conflict with *Webster* and this Court's precedent, not to mention the Supreme Court's emphasis on the importance of constitutional rights. The FBI's position would make the FBI both defendant and judge of the employee's whistleblower claim without even basic constitutional checks. Instead, the MSPB, and subsequently, the courts have authority to adjudicate constitutional claims based on whistleblower reprisal, including when that reprisal occurred by revoking a security clearance.

Moreover, the FBI violated O'Boyle's due process rights by failing to provide adequate notice of the charges against him. When suspending O'Boyle, the FBI only vaguely referenced "recently learned allegations" without providing specific evidence or the basis for the investigation into his security clearance. Employees must receive sufficient information to make an informed reply before being placed on enforced leave, and O'Boyle was suspended for years without being provided that crucial information. Likewise, the FBI failed to prove by preponderant evidence that it properly suspended O'Boyle. O'Boyle's security clearance was suspended in retaliation for his protected whistleblowing disclosures to Congress regarding potential FBI misconduct. Federal law prohibits security clearance determinations made in retaliation for protected disclosures, and Petitioner O'Boyle's actions accessing FBI information were part of his legally protected whistleblowing

activities. By punishing him for those very activities, the FBI violated his First Amendment and statutory rights.

ARGUMENT

The MSPB and the courts have authority to redress violations of FBI agents' constitutional rights. Federal law and the First Amendment protect the right of government employees to report wrongdoing. When such employees experience retaliation for doing so, they may seek appropriate accountability. But the MSPB refused to consider O'Boyle's whistleblower retaliation defenses, and by doing so, violated his fundamental rights. Moreover, his suspension was inconsistent with his rights of due process; the FBI failed to provide sufficient notice of his alleged wrongdoing and failed to properly justify the actions it took against him.

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. The fundamental error committed by the MSPB here was its failure to recognize that, in the context of reviewing O'Boyle's whistleblower argument, it could and should have examined whether the suspension of his clearance occurred as a retaliatory violation of his constitutional rights. The MSPB's refusal to consider whether whistleblower retaliation was the reason for O'Boyle's security clearance

cannot properly rest upon *Department of the Navy v. Egan*, 484 U.S. 518 (1988). Instead, it was a violation of his constitutionally protected rights under the First, Fifth, and Fourteenth Amendments. It was a violation that was intensified by the FBI's failure to protect O'Boyle's due process rights.

Courts have 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, 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, 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. The MSPB failed to apply that mechanism properly and erred by concluding that O'Boyle's rights were not violated.

I. Standard of Review

The jurisdictional questions presented herein concerning the interpretation of 5 U.S.C. § 7701 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*. *Montanez v. MSPB*, Case 24-1938, 2025 U.S. App. LEXIS 5107, at *4 (Fed. Cir. 2025) ("Whether the [MSPB] has jurisdiction to adjudicate an appeal is a question of law, which we review de novo."); *see also Nova Grp./Tutor-Saliba v. United States,* 87 F.4th 1375, 1379 (Fed. Cir. 2023). Likewise, "[t]his court 'review[s] contentions that rights of due process have been violated *de novo*.'" *Apple Inc. v. Voip-Pal.com, Inc.*, 976 F.3d 1316, 1323 (Fed. Cir. 2020) (quoting *Adams v. Dep't of Just.*, 251 F.3d 170 (Fed. Cir. 2000)). A specific standard of review is applied to MSPB decisions: the Court may set aside a MSPB action only if the Court finds it to be "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c). Accordingly, a deferential standard is applied to the MSPB's factual determinations, but not its legal conclusions.

II. The MSPB is Not Barred from Considering the Whistleblower Claims of FBI Employees Under 5 U.S.C. § 7701.

Section 7701 expressly prohibits the MSPB from affirming an agency's decision if "the decision was based on any prohibited [whistleblower retaliation] personnel practice," 5 U.S.C. § 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 at the MSPB, banning them from showing that an adverse action taken against them was illegal retaliation. Instead, Congress gave each veteran the right to raise a set of affirmative defenses at the MSPB that, if proven, would exonerate that veteran, including an FBI employee.

FBI employees, unlike those governed by 5 U.S.C. § 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 if he is a veteran under 5 U.S.C § 7511(b)(8)—and should therefore be able to allege practices "described in" § 2302 before the MSPB. O'Boyle certainly should be able to allege that actions taken against him were not in accordance with law. If an employee is denied the chance to present this crucial defense, his right to due process has been cast aside, and the structure and text of the statute has been ignored.

A. 5 U.S.C. § 7701's Textual Structure and History Give Rights to FBI Employees at the MSPB.

Section 7701, read according to its natural, ordinary meaning, allows FBI whistleblowers to raise retaliation defenses at the MSPB. For FBI employees, just like any others, "[t]he Board has no discretion to affirm a penalty tainted by illegal reprisal, even if the agency's penalty might otherwise have been reasonable." *Siler v. EPA*, 908 F.3d 1291, 1298 (Fed. Cir. 2018).

1. 5 U.S.C.§ 7701(c)(2)(B) Applies on Its Face to FBI Employees.

First, take § 7701(c)(2)(B). That section says an agency's decision "may not be sustained" if it was "based on any prohibited personnel practice described in section 2302(b)." The words "practice described in" incorporates the *practices* of that other section, not the *limitations specific to claims* under that section. The "described in" language obviously differs 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. Instead, Congress used more general and inclusive language than it would have used had it intended to limit the provision to cases "arising under" § 2302. Indeed, Congress used wide and embracing language to encompass any "practice described in" § 2302. Congress would not have used such language to effectuate such a radical intent as discriminating against FBI veterans. *See Whitman v. Am. Trucking Ass'ns., Inc.,* 531 U.S. 457, 468 (2001)

("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions–it does not, one might say, hide elephants in mouseholes."). Nothing about the statute's text supports an assumption that the "described in" language of § 7701 means "brought under" or "brought pursuant to."

The plain language of "described in," when read in the context of the analogous language of the unique protections for FBI employees in 5 U.S.C. § 2303, indicates that § 7701 is not, in fact, merely limited to cases brought according to the specific parameters of § 2302. If an employee is an FBI employee, 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 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 parallel "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 Espinal-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."); *Torres v. Holder*, 764 F.3d 152, 157 (2d Cir. 2014) (noting that "described in" has a "broader standard"); *United States v. Castillo-Rivera*, 244 F.3d 1020, 1023 (9th Cir. 2001) (noting that "described in" is a looser standard). *Espinal-Andrades* explained: "Congress intended for the aggravated felonies 'described in' the pertinent federal statute to include crimes that are not 'defined in'—that is, precisely identical to—that federal statute." *Espinal-Andrades*, 777 F.3d at 168. 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.

In short, the "described in" language does not limit a statute's category to actions brought *under* the provision it references. Although the statutes analyzed in

Pennington and *Espinal-Andrades* are not identical to the one here, the *interpretive reasoning* is identical: "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.

Section 2303 parallels the language of § 2302 and borrows its definition of "personnel action" from 5 U.S.C. § 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. § 7701 is unmistakably designed to provide a defense not just in disciplinary actions against

employees covered by § 2302, but to the closely analogous, identically defined, whistleblowers 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.

This reasoning is confirmed by the text of 5 U.S.C. § 2302. The statute expressly defines whistleblower reprisal as the relevant prohibited personnel practice: "for the purpose of this title" – that is, the entire Title 5. 5 U.S.C. § 2302(a)(1). Congress was clear; while certain procedures in § 2302 are only available to certain employees, the statute's definitions of prohibited personnel practices apply beyond employees specifically governed by § 2302. Accordingly, an FBI employee can describe practices contained within that section.

If there was any doubt, the congressional history of the creation of the Civil Service Reform Act confirms that FBI whistleblowers were never intended to be excluded from the protections of the MSPB or to be denied crucial rights. The Senate Report on the Civil Service Reform Act explains:

> Subsection (a)(2) excludes from the coverage of the chapter a government corporation, the General Accounting Office, the Central Intelligence Agency, the Defense Intelligence Agency and the National Security Agency, and any agency or unit which the president finds is principally engaged in foreign intelligence or counterintelligence activities. In addition, an amendment adopted by the committee added

> the Federal Bureau of Investigation and individuals in the Drug Enforcement Agency at grade levels of gs-- 16 and above to the list of exclusions. **Such exclusions from this chapter are not intended to limit in any way any other obligation or responsibility imposed on these agencies, or on agency officials, by any other law, rule, or regulation**.

S. REP. NO. 95-969, at 19 (1978) (emphasis added). Congress enacted whistleblower protections in the Civil Service Reform Act and subsequent federal statutes so that government employees would not be subject to "harassment and abuse" for making whistleblowing disclosures. *Id.* at 8. The protections against whistleblower retaliation provided in those statutes are essential so that federal employees, who are well-positioned to hold the government accountable, can fulfill their duty to disclose misconduct in the Executive Branch. Nothing in the legislative history suggests that Congress intended to curtail rights already in existence, such as those available to preference eligible employees.

2. 5 U.S.C.§ 7701(c)(2)(C) Applies on Its Face to FBI Employees.

Even if not under the specific whistleblower provision, the MSPB must still hear a claim of whistleblower reprisal as an affirmative defense under 5 U.S.C. § 7701(c)(2)(C). That section broadly requires reversal of any agency action that is "not in accordance with law." 5 U.S.C. § 7701(c)(2)(C). Whistleblower retaliation against FBI employees violates federal law, particularly, 5 U.S.C. § 2303. Accordingly, the plain language of the law leaves no alternative but to require that

an affirmative defense of whistleblower retaliation should be available to preference-eligible FBI employees at the MSPB. For the MSPB to affirm a decision without investigating whether that decision was contrary to law is flatly violative of the statutory mandate and contrary to all principles of due process.

The Supreme Court has held that the statutory phrase "not in accordance with law" takes its plain meaning and refers to violations of other provisions of federal law. *See, e.g., FCC v. Nextwave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003) (the phrase "means, of course, *any* law, and not merely those laws that the agency itself is charged with administering"); *see also Dobson v. Comm'r*, 320 U.S. 489, 492-93 (1943); *Anniston Mfg. Co. v. Davis*, 301 U.S. 337, 346 (1937) (power to review decision "not in accordance with law" must therefore incorporate "the power to review all questions of general and statutory law and all constitutional questions."). Accordingly, an affirmative defense for a decision not being according to law must necessarily include and incorporate whistleblower retaliation against FBI employees.

The law requires that FBI employees "shall not" "take or fail to take a personnel action" with respect to another FBI employee "as a reprisal for a disclosure of information" by that employee. 5 U.S.C. § 2303(a). That prohibition against whistleblower retaliation applies when an FBI employee discloses information that

he or she "reasonably believes evidences" "any violation of any law, rule, or regulation," or certain kinds of agency "mismanagement." *Id.* Under the plain language of Section 2303(a), retaliation against FBI employees who make qualifying whistleblowing disclosures is "not in accordance with law." Accordingly, violations of Section 2303(a) plainly fall within the heart of what Congress expressly authorized employees to raise at the MSPB. On its face, nothing about Section 2303 purports to displace the explicit textual right to raise an affirmative defense that the agency's adverse employment decision is "not in accordance with law." *Id.* § 7701(c)(2)(C).

In a case like this one, Petitioner 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 straightforwardly has jurisdiction to consider Parkinson's contention that his removal was premised on whistleblower retaliation.

Parkinson, 874 F.3d at 722 (Linn, J., joined by Plager, J., dissenting)

B. Parkinson Has Been Statutorily Overruled

Congress can and does overrule decisions via statute. *See Guangdong Wireking Housewares & Hardware Co. v. United States,* 745 F.3d 1194, 1196 (Fed. Cir. 2014) (acknowledging that "Congress enacted new legislation that overruled" a Federal Circuit decision). Moreover, in *Texas American Oil Co. v. United States Department of Energy*, 44 F.3d 1557, 1561 (Fed. Cir. 1995) (en banc), this Court recognized that it does not follow otherwise precedential decisions that were "overruled by the court en banc, or by other controlling authority such as [an] intervening statutory change or Supreme Court decision." Here, an intervening statutory change has overruled *Parkinson*. Indeed, § 2303 has been revised specifically to grant the MSPB jurisdiction over FBI whistleblowers.

"Congress is presumed to know the law, particularly recent precedents that are directly applicable to the issue before it." *Hesse v. Dep't 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 rejected that premise to ensure that FBI employees could in fact bring claims 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). *Parkinson* construed a *prior* version of this statute 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. *Parkinson*'s central statutory holding is 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." *Parkinson*, 874 F.3d at 715. That holding Congress has now expressly rejected, choosing instead to provide an express right of appeal to the MSPB for FBI whistleblowers.

C. Even Aside from the Subsequent Statutory Amendment, Parkinson Was Wrongly Decided and Should be Overruled.

Congress has abrogated *Parkinson*, and thus there is no need for this Court to revisit that decision. But if this Court were somehow not so convinced, it bears mention that *Parkinson* was wrong on its own terms. *Parkinson* eviscerated a key affirmative defense for veterans employed by the FBI: whistleblower retaliation. Federal law prohibits the FBI from retaliating against employees who report fraud, waste, or other forms of government misconduct to certain agency officials. *See* 5

U.S.C. § 2303(a). By concluding—over two separate dissents—that preference-eligible FBI employees are not entitled to raise whistleblower retaliation as an affirmative defense in proceedings before the MSPB, *Parkinson* was and remains flatly irreconcilable with federal law. This Court should accordingly recognize that *Parkinson* was overruled by statute and, if not, the en banc Federal Circuit should overrule *Parkinson.*

First, as delineated above, the statutory text on its face indicates that FBI employees at the MSPB can and should be able to raise whistleblower retaliation as an affirmative defense. As the dissents in *Parkinson* explained, § 2303 (the statute for FBI employees) authorizes an FBI employee properly before the MSPB to allege a practice described in § 2302 just as much as an employee governed by § 2302 could. § 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 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 (Plager, J., joined by Linn, J., dissenting).

Parkinson failed to sufficiently address a key statutory provision, 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). As discussed above, this more general catch-all also clearly covers Petitioner O'Boyle's whistleblower defense. As Judge Plager emphasized, "[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 (Plager, J., joined by Linn, J., dissenting).

The plain meaning of the statutes demonstrates that *Parkinson* was erroneous. But, to the extent there is ambiguity in the interworking of the various statutes in play here, the interpretational tools also point toward allowing Petitioner O'Boyle's retaliation defense to be heard.

Parkinson failed to sufficiently address the presumption in favor of a constitutional remedy. Under its ruling:

> the FBI agency is both defendant and judge of the employee's whistleblower 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). The Supreme Court has regularly and

repeatedly noted "the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012) (quoting *Webster v. Doe*, 486 U.S. 592, 603 (1988)). The effect of *Parkinson* is to cut off FBI employees from any right to a remedy against retaliation. If Congress wished to deny FBI veterans their rights in such a comprehensive manner, it would have stated so clearly, not through ambiguity.

Parkinson also failed sufficiently to reckon with the veterans canon. 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). The Supreme Court has made clear that legislation must "be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977) (quoting *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)). That canon applies with full force to legislation in which "Congress has expressed special solicitude for the veterans' cause." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009); *see generally Boone v. Lightner*, 319 U.S. 561, 565 (1943). Here, *Parkinson* eviscerated a key protection Congress granted to veterans who are employed by the FBI, and it did so in spite of the plain statutory

text pointing in the opposite direction and in spite of the veterans canon, which applies to 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.

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 at the MSPB, 5 U.S.C. § 7701 provides protections for any federal employee, not merely those who 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 (Linn, J., joined by Plager, J., dissenting).

§ 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). To the extent there is an ambiguity, however, it should be construed in favor of the First Amendment rights of veterans. Instead, *Parkinson* invented an "implicit limitation of [the] explicit right" to raise an affirmative defense. *Parkinson*, 874 F.3d at 721 (Linn, J., joined by Plager, J., dissenting). As Judge Linn explained, "Congress unambiguously required the Board to vacate the Agency action, even if supported by substantial or preponderant evidence, where the Board concludes that the Agency action was . . . not in accordance with law." *Id.* at 722. Because "[i]t is undisputed that a decision to remove an FBI employee motivated by whistleblower retaliation is not in accordance with law under 5 U.S.C. § 2303," preference-eligible FBI employees must have an explicit right to raise whistleblower retaliation before the MSPB. *Id.*

Likewise, Judge Plager explained that the majority's decision resulted in a "basic denial of the right" of preference-eligible FBI employees "to make one's best case to the designated arbiter of one's fate." *Id.* at 721 (Plager, J., joined by Linn, J., dissenting). 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." *Id.* at 720. 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. *Id.* at 721. *Parkinson* 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." *Id*. (Plager, J., joined by Linn, J., dissenting) (quoting *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985)).

Parkinson ultimately means 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. This conclusion is irreconcilable with congressional intent or with the statute's meaning. *See Parkinson*, 874 F.3d at 719 (Plager, J., joined by Linn, J., dissenting).

Finally, *Parkinson* 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). *Parkinson* leaves FBI employees without any remedy when their constitutional rights are violated.

Congress created an explicit right for veterans employed by the FBI to have their employment claims adjudicated by the MSPB instead of the FBI. The *Parkinson* decision deprives veterans of a key affirmative defense in those proceedings, stacking the deck against those who have served our country once before and who seek to continue doing so by calling attention to fraud and other forms of misconduct in the federal government. "If this case is not a denial of due process by the Government, I am hard pressed to imagine one." *Parkinson v. DOJ*, 874 F.3d at 721 (Plager, J., joined by Linn, J., dissenting).

D. The FBI Has Waived the Ability to Contest the MSPB's Jurisdiction Over O'Boyle's Whistleblower Defense Under 5 U.S.C. § 7701.

In any event, 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 prehearing 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." Appx4-5. 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 defense. In fact, although the MSPB's order extensively discussed the effects of the *Egan* decision and rejected Petitioner O'Boyle's argument for whistleblower retaliation on that ground, it never addressed the DOJ's position that FBI agents cannot raise a whistleblower retaliation defense to the MSPB in an appeal of any adverse action, regardless of whether that action is based on a security clearance determination or not. The case central to this Court's consideration of this issue, *Parkinson v. DOJ*, 874 F.3d 710, 713 (Fed. Cir. 2017) (en banc), is never cited or addressed even 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. It did not.

The DOJ would now create a wall of separation between § 2302 and § 2303. In contrast, the decision below contains multiple references to § 2302, *see* Appx11, but does not discuss or ever reference § 2303. This is because there is *no* construction under which *Parkinson* fits on the prehearing list identified by the MSPB, and accordingly, the MSPB never had the opportunity to address *Parkinson*'s applicability.

Respondents are bound to preserve questions below in the MSPB, just 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); *see also 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 5 U.S.C. § 7701, 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 FBI's waiver of this argument cannot be avoided by claiming that the issue is jurisdictional, as the FBI does not dispute that the MSPB had authority to review Petitioner O'Boyle's case as a whole, nor does it dispute that this Court has authority to review the case: this Court has undoubted jurisdiction pursuant to 5 U.S.C. § 7703(a)(1), which provides that "[a]ny employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision." This issue about the scope of the MSPB's review does not go to whether it has jurisdiction over the case, but whether its authority includes allegations that "if true, would vitiate the agency's adverse action against him." *Parkinson*, 874 F.3d at 721 (Plager, J., joined by Linn, J., dissenting).

III. *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.

The MSPB refused to consider or even examine the evidence of Petitioner O'Boyle's central defense at the MSPB, that the employment action taken against him was an act of reprisal against him for his protected disclosures. 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. Appx6. 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 at 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.

By excluding even *constitutional whistleblowing* claims from the scope of his authority, the MSPB judge interpreted *Egan* far more broadly than the Supreme Court's actual holding. 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." Appx11. This decision is wrong. *Egan* does not apply to constitutional arguments, like the First Amendment whistleblower argument being advanced here. The Supreme Court has 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. Instead, under *Webster,* the courts and the MSPB are obligated to recognize and protect First Amendment rights.

Egan did not hold that security clearances are categorically immune from judicial or MSPB 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, the Supreme Court made clear in *Webster v. Doe*, 486 U.S. 592, 603 (1988), that constitutional claims based on federal agency misconduct 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. Webster*, decided less than a year after *Egan*, expressly held that constitutional claims *are* reviewable, even in the security clearance context:

> 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 this Agency . . . ." *Id.* at 595 (quoting Appendix). It is that decision, the individual suspension of a security clearance on national

security grounds, that the Supreme Court held *was* legally reviewable in the context of a constitutional claim. "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 FBI 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.* 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.* at 603. Accordingly, the CIA's denial of security clearances and ultimate termination of Webster was not immunized from judicial review on national security grounds.

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. If *Egan* and *Webster* are not read together in this manner, then 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. And under *Elgin v. Dep't of Treasury*, 567 U.S. 1, 9 (2012), there is only one avenue for the adjudication of that constitutional claim: the MSPB.

The FBI may counter that reviewing a constitutional claim concerning a security clearance decision inherently requires the review of the "substance" of that decision. But if that were so, then *Egan* would swallow up the later *Webster* decision, which makes no sense. Reconciling the two decisions, therefore, requires taking the route that many courts have taken, namely, recognizing that in the context of *constitutional* claims, such as First Amendment whistleblower retaliation claims here, *Webster* governs, and not *Egan*. *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."); *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.").

This Court has already acknowledged that *Egan* is not a categorical bar: *Webster* "rejected the government's argument that the National Security Act precluded judicial review of constitutional claims[.]" *Brockmann v. Department of the Air Force*, 27 F.3d 544, 546 (Fed. Cir. 1994). *Brockmann* distinguished *Webster* as to the particular facts of its case by concluding that "[t]he assertions made by Mr. Brockmann do not rise to the level of colorable constitutional claims that the Court contemplated in *Webster v. Doe*." *Id.* at 547. In other words, Brockman lost on pleading and facts. Nevertheless, this Court recognized that under *Webster*, constitutional claims are not barred by *Egan*.

In *United States Information Agency v. Krc*, the D.C. Circuit 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*, No. 1:18-cv-01822, 2020 U.S. Dist. LEXIS 5159, at *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."). As the Ninth Circuit has emphasized, although security clearance decisions are unreviewable on the substance, *Webster* "is dispositive on [the] question" of whether those decisions are reviewable for constitutional error. *Dubbs v. CIA*, 866 F.2d 1114, 1120 (9th Cir. 1989).

In short, the federal circuit courts have regularly and consistently 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); *Dubbs*, 866 F.2d at

1120-21 (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.[1]

[1] While Petitioner O'Boyle prevails under *Egan* and *Webster* for the reasons set forth in the text *supra*, it should be noted that *Egan*'s holding was suspect on

IV. The FBI violated O'Boyle's Due Process Rights.

"The essential requirements of due process . . . are notice and an opportunity to respond." *Cleveland Bd. of Educ.*, 470 U.S. at 546. As discussed above, if Petitioner O'Boyle is denied the chance to respond to the allegations that have been made against him, he has been denied his constitutional right to 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." *Id.* O'Boyle has been denied the "right to defend himself on the one ground that, under normal circumstances, if true, would vitiate the agency's adverse

---

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 therefore, including a security clearance decision if relevant, must also be reviewed and cannot be immunized from scrutiny.

Moreover, it is difficult to justify *Egan* 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, 34 (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."). Fortunately, the *Webster* decision made clear that constitutional claims may proceed regardless of *Egan*.

action against him." *Parkinson*, 874 F.3d at 721 (Plager, J., joined by Linn, J., dissenting).

Moreover, the FBI's failure to provide O'Boyle with sufficient and proper notice of the charges against him likewise constituted a violation of his due process rights.

A. The FBI's Process of Indefinite Suspensions is Inconsistent with Due Process.

A recent report from the DOJ Inspector General ("IG") underscored the FBI's categorical failure to comply with due process. OFFICE OF THE INSPECTOR GENERAL, No. 24-067, *Management Advisory Memorandum: Notification of concerns regarding the Department of Justice's Compliance with Whistleblower Protections for Employees with a Security Clearance* (May 9, 2024), https://oig.justice.gov/sites/default/files/reports/24-067.pdf. That report found the DOJ's procedures to address security clearances to be woefully deficient. It even concluded that DOJ components, including the FBI, have violated the statutes providing due process rights for their employees. For example, it concluded 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. That process is crucial to avoid exactly what happened to O'Boyle: administrative limbo that leaves employees without any possibility of a remedy.

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 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 were not, in fact, sufficient internal processes in place for O'Boyle's whistleblower claims and that the FBI process is inconsistent with the rights of due process as required by law. Any subsequent changes to FBI processes do not alter the fact that these deficient procedures were the procedures in place when O'Boyle was suspended, procedures that violated his rights and left him indefinitely suspended for years, without pay, and unable to work.

B. O'Boyle Was Not Provided Sufficient Notice of the Alleged Wrongdoing He Was Accused Of.

Federal law provides that "[a]n employee against whom an action is proposed is entitled to . . . at least 30 days' advance written notice . . . stating the specific reasons for the proposed action." 5 U.S.C. § 7513(b)(1). He is also entitled to "a written decision and the specific reasons therefor at the earliest practicable date." 5 U.S.C. § 7513(b)(4); *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (holding that

due process, at a minimum, requires that an employee being deprived of his property interest be given "the opportunity to be heard 'at a meaningful time and in a meaningful manner'") (citations omitted)).

Petitioner O'Boyle received a decision letter from the FBI on November 4, 2022, effective as of that date. Appx346. His indefinite suspension without pay began January 1, 2023. *See* Appx374, Appx4. Thus, despite technically remaining an FBI employee, Petitioner O'Boyle has been without FBI duties since September 26, 2022, and without pay since January 1, 2023. *See* Appx3-4. For *years* after the FBI suspended Petitioner O'Boyle, it failed to adjudicate his clearance at all, leaving him in an unpaid limbo during which he had no access to the basis for his clearance suspension. In the meantime, Petitioner O'Boyle spent two years without any explanation for the basis of security clearance revocation, without any explanation for what happened to him.

The FBI indefinitely suspended O'Boyle based upon alleged security concerns relating to Adjudicative Guideline K – Handling Protected Information, and Guideline M – Use of Information Technology of the National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position. Although O'Boyle was given this policy reference, he was given no evidence to support these allegations, and no

source or basis for the allegations against him. Instead, he was simply told that the FBI had learned of allegations that he "may have misused FBI information technology systems and records." Appx41. The "investigation" began in September of 2022.

In effect, the FBI has taken Petitioner O'Boyle's job, a federal position, without due process simply by couching its actions behind a bare claim that it was suspending his security clearance due to "recently learned of allegations," without any attempt initially to substantiate or provide a basis for that assertion. The FBI did not provide to O'Boyle when he was suspended a single piece of evidence that there is, or was, a basis for the investigation into his security clearance other than vague "learned of allegations." This failure to provide the basis for the allegations is fundamentally inconsistent with due process; he was not given the reason for the allegations against him, and accordingly, could not dispute them. He could not meaningfully defend himself against an allegation that indistinct.

The Supreme Court has held that due process, at a minimum, requires that an employee being deprived of his property interest be given "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333. To satisfy this requirement, an agency must notify the employee of the reason it suspended his clearance so that he does not have to guess as to the possible basis

for the action. *King v. Alston*, 75 F.3d 657, 662 (Fed. Cir. 1996) (an employee should not have to "guess whether the agency's action was based on disloyalty, unreliability, or other possible ground for suspension of access to classified information."). Thus, "[m]erely providing the employee with information that his access to classified information is being suspended, without more, does not provide the employee with sufficient information to make an informed reply to the agency before being placed on enforced leave." *Id.* If an agency fails to meaningfully comply with the requisite notice requirement, the suspension action will be deemed improper and reversed. *Cheney v. DOJ*, 479 F.3d 1343, 1353 (Fed. Cir. 2007).

This standard is directly available here. The Notice of Proposed Indefinite Suspension that O'Boyle was provided was insufficient as a matter of law because it failed to provide key information about the nature of the allegations against him. Petitioner O'Boyle was not told of the basis for the action or given any opportunity to review or respond to evidence against him or even at that time to know what that evidence was. Section 7513(b) entitles an employee to notice of the reasons for the suspension of his access to classified information. The September 23, 2022, Notice of Proposal to Indefinitely Suspend was therefore facially insufficient: it did not contain any particularized charges. A simple citation to a policy does not constitute

a proper explanation for the charges against someone, and that is all Petitioner O'Boyle was given, not the reasons for the charges.

Accordingly, Petitioner Boyle did not possess, during the consideration of his case at the MSPB, any information disclosing whether or not, or under which conditions, his actions allegedly created a security concern. He was not able to respond to the FBI's proposal to suspend him to rebut its reasoning. He simply had not been given notice of the basis or the source of the charges against him. As a result, the FBI did not provide Petitioner Boyle with meaningful notice and an opportunity to respond to the Proposal to Indefinitely Suspend, and his due process rights were violated. Likewise, the notification O'Boyle was provided from the Inspection Division, while it referenced false allegations about media disclosures, still only referenced an "allegation" against Petitioner O'Boyle without explanation of its source and basis, rendering a meaningful reply impossible. App. 41.

The purpose of notice is that it "provides the employee with an adequate opportunity to make a meaningful reply to the agency before being placed on enforced leave." *Alston*, 75 F.3d at 662. In other words, the agency must provide the specific reasons for its decision to suspend an employee's access to classified information so that the employee does not have to guess as to the possible basis for the action. Here, Petitioner O'Boyle was provided general references to policies and

allegations but was not given the basis for the charges against him. He accordingly had no opportunity to truly respond to and refute those allegations.

V. The FBI Failed to Prove by Preponderant Evidence That it Properly Suspended O'Boyle Based on the Charge Described in the Notice of Proposed Indefinite Suspension.

The fundamental problem with the FBI's suspension of Petitioner O'Boyle's employment is that it occurred based on an improper suspension of his security clearance. To properly review a suspension of employment, the reasons, therefore, must also be reviewed and cannot be immunized from scrutiny.

In June 2022, the FBI selected Petitioner O'Boyle for its Critical Incident Response Group in Virginia. Appx3. Accordingly, he and his family prepared to move permanently from Kansas to Virginia. Appx352. Meanwhile, the FBI opened an investigation into Petitioner O'Boyle by August 23, 2022. Appx345. In mid-August 2022, the O'Boyle family put all their belongings into storage to prepare for the move. Appx352. They also sold their Kansas home, moving into a temporary residence until their move. *Id.* On September 8, 2022, Petitioner O'Boyle and his wife welcomed a new baby into their family. Appx352. Both the Kansas City Field Office and his new National Surveillance Team were aware of this fact and allowed O'Boyle to go through the transfer process despite the pending (secret) investigation. In particular, Mr. Michael Schneider is the assistant director of the Human Resources Division with the FBI and the chief human resources officer for the organization.

Appx300. He acknowledged to the MSPB that he "had some limited knowledge related to some complications related to his move." Appx319.

On September 26, when Petitioner O'Boyle attempted to report to his new FBI duty station in Stafford, Virginia, he was ushered to a side office where he was met by two FBI agents and subjected to a surprise interview, without any prior notice. *See* Appx39, Appx10. He was asked about whether he had made any unauthorized disclosures. Appx11. O'Boyle explained to the agents that he had disclosed FBI information outside of the FBI, but only in legally and constitutionally protected disclosures to Congress. *Id.* He also affirmed that he had never provided FBI information or documents to any organization, journalistic or otherwise. *Id.* Nonetheless, his clearance was suspended based on unsourced and unsubstantiated allegations of unauthorized disclosures, allegations for which he was neither given the source nor the basis.

To sustain an action taken pursuant to Title 5, Chapter 75, the FBI must prove its charge by a preponderance of the evidence. 5 U.S.C. § 7701. Specifically, as a suspension is an adverse action, the law requires that the FBI bear the burden of proving that the action is being taken "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). 50 U.S.C. § 3341(j)(1)(A) prohibits the use of security clearance determinations "in retaliation" for disclosing "(i) a

violation of any Federal law, rule, or regulation; or (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" to a supervisor in the employee's chain of command.

Also, under § 3341(j)(1)(D), disclosures in conjunction with "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation" are protected. Disclosures to Congress are also protected under 5 U.S.C. § 2303(a)(1)(F). Furthermore, "nothing in [50 U.S.C. § 3341(j)(1)] shall be construed to authorize the withholding of information from Congress or the taking of any personnel action or clearance action against an employee who lawfully discloses information to Congress." 50 U.S.C. § 3341 (j)(2).

Petitioner O'Boyle made protected disclosures within the FBI and DOJ and to Congress. These disclosures all involved what reasonably appeared to be violations of law, rule, or regulation, abuse of authority, or gross mismanagement. His chain of command had knowledge of his protected activity and congressional testimony. He made very clear, at each instance, that his access to information was only for purposes of this legally protected whistleblowing. Yet, the FBI still revoked his clearance in reprisal for his protected disclosures.

Not only is the revocation of Petitioner O'Boyle's clearance in reprisal and retaliation for his protected disclosures, but his conduct also fails to meet the

standards warranting revocation under the standards cited in Adjudicative Guidelines K - Handling Protected Information, and M - Use of Information Technology. Petitioner O'Boyle was making protected disclosures to Congress about any information he accessed. Appx11. Thus, setting aside the retaliatory aspects of the revocation, the FBI's failure to consider Petitioner O'Boyle's disclosures to Congress is fatal to its revocation decision. O'Boyle never knowingly failed to cooperate with a security investigation, provided false information, or mishandled protected information, because his actions and access to information were necessary for his protected whistleblowing to Congress.

The FBI had no basis to revoke Petitioner O'Boyle's clearance under Guideline K, handling protected information, because Petitioner O'Boyle's access of FBI information was in his capacity as a whistleblower under law and regulation. Petitioner O'Boyle's access of FBI files identified by the FBI is not disqualifying under Guideline K, because he only did so as part of his protected whistleblowing. Petitioner O'Boyle was accessing, snipping, and copying files in order to make protected disclosures to Congress and his chain of command as described above. He made this clear in his testimony below: "I told them I had been whistleblowing to Congress and that I had not provided anything -- to the media." Appx342. FBI employees are protected when providing information that they reasonably believe is

evidence of government misconduct to various entities, including Congress and an employee's chain of command. That is exactly what Petitioner O'Boyle did. Accessing information for whistleblowing is not grounds for discipline, and O'Boyle was very clear, even to the initial investigators, that whistleblowing was the sole purpose of his access to any information. As discussed above, the notice Petitioner O'Boyle received did not identify any evidence to the contrary.

FBI Guideline M, Use of Information Technology of the National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position, does not prohibit whistleblowing either. The government argues that Petitioner O'Boyle's downloading and transportation of the same information used as the basis for his protected disclosures justifies revocation under Guideline M. For the same reasons, accessing that information as part of protected whistleblowing is not disqualifying under Guideline K, downloading and transporting it is not disqualifying under Guideline M. His efforts at protected whistleblowing provide him a discernible, protected job-related reason to download and transport the information for the purpose of his whistleblowing activities. There is no basis to revoke Petitioner O'Boyle's clearance under Guideline M.

The FBI has used Petitioner O'Boyle's actions, which were explicitly taken for purposes of his protected disclosures to Congress, as a basis to revoke his security clearance. The FBI has no legitimate basis to stop employees from making protected disclosures to Congress, let alone "adequate justification" to take such an extreme action as revocation of a security clearance (and suspension of the clearance and suspension from duty while an employee is in the middle of a transfer, depriving him and his family of their household goods for months). Accordingly, the FBI failed to justify its revocation of Petitioner O'Boyle's security clearance. Its conduct, suspending his clearance based on his whistleblowing activity, constitutes a violation of First Amendment rights.

CONCLUSION

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

Dated: July 3, 2025

Respectfully submitted,

/s/ *Jesse R. Binnall*
Jesse R. Binnall [redacted]
BINNALL LAW GROUP, PLLC
[redacted]

THE AMERICAN CENTER FOR LAW & JUSTICE
Benjamin P. Sisney [redacted]
Nathan J. Moelker [redacted]

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document has been prepared using a proportionally-spaced typeface and contains 12,777 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: July 3, 2025

Respectfully submitted,

/s/ *Jesse R. Binnall*
Jesse R. Binnall (Bar No. VA79292)

CERTIFICATE OF SERVICE

This is to certify that I have on this day, July 3, 2025, served all the parties in this case with this Brief for Petitioner 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*
Jesse R. Binnall (Bar No. VA79292)