No. 17-1098

In The
Supreme Court of the United States

JOHN C. PARKINSON,
Petitioner,

v.

DEPARTMENT OF JUSTICE,
Respondent.

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

BRIEF OF *AMICUS CURIAE* THE RUTHERFORD INSTITUTE IN SUPPORT OF THE PETITIONER, JOHN C. PARKINSON

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute (the "Institute") is an international civil liberties organization with its headquarters in Charlottesville, Virginia. Its President, John W. Whitehead, founded the Institute in 1982. The Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or violated, and in educating the public about constitutional and human rights issues.

The Institute is particularly interested in this case because the decision of the Federal Circuit threatens citizens' Fifth Amendment protection against the deprivation of life, liberty, and property without "due process." As Justice Frankfurter once explained, "The history of liberty has largely been the history of the observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347 (1943). Here, the procedural safeguards that the Federal Circuit declined to observe include the whistleblower protections that the Petitioner had a statutory right to raise as an affirmative defense to his firing as a federal employee. The loss of his

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[1] Counsel of record for all parties received notice at least ten days before the due date of the amicus curiae's intention to file this brief. The parties have consented to the filing of this brief in written communications. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

federal employment was a deprivation of a property interest. Because this deprivation occurred without the procedural safeguards of 5 U.S.C. § 7701(c)(2), including the right to raise a whistleblower affirmative defense, the Petitioner was denied due process. The Federal Circuit's decision to strip the Petitioner of whistleblower protection also deprived him of his First Amendment rights.

In short, the Petitioner was deprived of two of the most fundamental freedoms that every American citizen enjoys under the Bill of Rights. Correcting this miscarriage of justice is therefore critical to the Institute's mission.

PRELIMINARY STATEMENT

If not reversed, the Federal Circuit's decision will create precedent that is binding on the Merit Systems Protection Board ("MSPB") and that conflicts with the express provisions of the statute that the MSPB is charged with enforcing. The statute governs the MSPB's review of adverse employment decisions affecting veterans who are "preference-eligible" FBI employees.

The Federal Circuit's construction of the statute is contrary to its express provisions. When Congress enacted the statute, it expressly provided FBI employees who are veterans of the armed services with special rights to appeal adverse employment actions to the independent MSPB. Congress also provided such preferred employees the right to present affirmative defenses to the charges forming the basis of the adverse employment action, including any grounds that the action "was not made

in accordance with law." 5 U.S.C. § 7701(c)(2)(C). Because the statute expressly provides the right to present affirmative defenses, and because retaliating against whistleblowers is "not in accordance with law" (*see* 5 U.S.C. § 2303(a)), the decision below conflicts with the plain terms of the statute.

The decision below also fails to harmonize and give effect to all provisions of the statutory scheme. The Federal Circuit's construction eliminates the statutory right of preference-eligible FBI employees to present any affirmative defense showing that the adverse employment action was not in accordance with law. In contrast, the Petitioner's construction of the statute gives effect to every provision of the statutory scheme. It is therefore the correct construction under basic principles of statutory interpretation.

The Federal Circuit's erroneous interpretation of the statute also violates the Due Process Clause of the Fifth Amendment to the United States Constitution. As decisions of this Court and the Federal Circuit have held, and as the Chairman of the MSPB has expressly recognized in a written statement to the President and Congress, federal employment is a property right that cannot be taken away without due process. A fundamental aspect of due process is the right of a person to present evidence to defend against the taking of one's property. The categorical exclusion of the ability of preference-eligible FBI employees to present evidence of whistleblower retaliation violates this fundamental right.

The decision below also undermines the important public policy of encouraging federal employees to report fraud, waste, and abuse. If FBI employees such as the Petitioner are not protected from being fired or other adverse employment actions when they do report fraud, waste, or abuse, they will be discouraged from making such reports. "Blowing the whistle" to prevent government fraud, waste, and abuse is speech that is clearly protected by the First Amendment. Denying the Petitioner his right to show that the agency was punishing him for blowing the whistle on improper actions by fellow FBI employees is an additional constitutional violation that cries out for remedy by this Court.

ARGUMENT

I. THE DECISION BELOW IS PLAINLY CONTRARY TO THE TEXT OF THE STATUTE AND FAILS TO GIVE EFFECT TO ALL OF ITS PROVISIONS

The divided *en banc* Federal Circuit ruled that a preference-eligible FBI employee is categorically ineligible to raise an affirmative defense of whistleblower retaliation before the MSPB. That ruling was erroneous because Congress expressly provided that preference-eligible employees, including the Petitioner, are entitled to raise before the MSPB any affirmative defense showing that an adverse employment action "was not in accordance with law." 5 U.S.C. § 7701(c)(2)(C). Retaliation against whistleblowers is unquestionably "not in accordance with law." On its face, 5 U.S.C. § 2303(a) prohibits FBI officials who have authority to make personnel decisions from retaliating against whistleblowers. Preventing Petitioner from raising this defense violates Section 7701(c)(2)(C).

The Federal Circuit reached this erroneous conclusion by implying an exception to this right to raise a whistleblower retaliation defense from a different, distinct subsection of the statute. That subsection provides that the agency's adverse employment decision may not be sustained if it "was based on any prohibited personnel practice described in Section 2302(b)." 5 U.S.C. § 7701(c)(2)(B). But Section 2302(b) does not apply to FBI employees by operation of Section 2302(a). Instead, FBI employees—including those who are not preference-eligible employees—are provided the right to file an

administrative complaint with the FBI's Office of Inspector General or the Office of Professional Responsibility of the Department of Justice to raise affirmative challenges to whistleblower retaliation. *See* 5 U.S.C. § 2303(b). Accordingly, FBI employees—including those who are not preference-eligible employees—are not allowed to raise claims under Section 2303(a). Instead, they are allowed to raise affirmative claims of whistleblower retaliation only to the agency itself, under procedures established by regulations issued by the Department of Justice, with no right of appeal to a court. That procedure is entirely different than the right to raise an affirmative defense before the MSPB and appeal that decision to the Federal Circuit. This right is extended only to FBI employees who are preference-eligible. Thus, there are two wholly separate procedures that apply to different categories of FBI employees. If allowed to stand, the Federal Circuit's decision would effectively amend the statute by judicial fiat.

As enacted by Congress, the statutory scheme expressly provides certain rights to preference-eligible FBI employees that Congress chose not to provide to FBI employees who are not preference-eligible. These include the right of preference-eligible employees to appeal an adverse personnel action to the MSPB. Preference-eligible employees also have the right to raise any affirmative defense that the action is contrary to law, including the defense of whistleblower retaliation. There is no statutory exception to Section 7701(c)(2)(C) for preference-eligible FBI employees. As a result, the Federal Circuit's decision is plainly contrary to the express terms of the statute.

To be sure, the statutory scheme for FBI employees to raise whistleblower retaliation claims is complex. But what is clear is that Congress has provided an express statutory right for a preference-eligible employee to present an affirmative defense that he was retaliated against because of his whistleblowing. That express statutory right contains no statutory exception. It cannot be ignored. That is what the Federal Circuit effectively did by implying an exception to the right to raise a whistleblower defense contained in Section 7701(c)(2)(C) from a separate statutory provision—Section 7701(c)(2)(B)—which applies to a different group of federal employees, *i.e.*, those not excluded from Section 2302(b) by operation of Section 2302(a). As set forth in the Petition for *Certiorari*, that ruling flatly contradicts the text of the statute. *See* Pet. at 13-28.

The decision below also violates the rule of statutory interpretation that courts must construe the statutory scheme to give effect to all of its provisions "and fit, if possible, all parts [of a statute] into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959). Here, the Federal Circuit's construction fails because it does not give effect to Section 7701(c)(2)(C) for preference-eligible FBI employees. The correct construction is the one advanced by the Petitioner for the reasons explained in his Petition for *Certiorari*. *See* Pet. at 12-26. The Petitioner's construction gives effect to Section 7701(c)(2)(C) without doing violence to any other provisions of the statutory scheme. In other words, allowing preference-eligible FBI employees to raise an

affirmative defense of whistleblower retaliation before the MSPB under Section 7701(c)(2)(C) does not negate Section 7701(c)(2)(B), which allows any employee covered under Section 2302(b) to raise as an affirmative defense before the MSPB the grounds identified in Section 2302(b).

II. THE DECISION BELOW DEPRIVES THE PETITIONER OF DUE PROCESS

In addition to being wrong as a matter of statutory interpretation, the decision below—if allowed to stand—would violate the Due Process Clause of the Fifth Amendment to the United States Constitution. See decision below, dissenting opinion of Plager, J., Pet. App. at 19a; Pet. at 11. The Due Process Clause prohibits the federal government from depriving a person of "life, liberty or property without due process of law." U.S. CONST. AM. 5. It is well-settled that employees have a property right in their government jobs, of which they may not be deprived without due process. *See, e.g.*, *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 543 (1985) ("[T]he significance of the private interest in retaining employment cannot be gainsaid").

In a 2015 Report to the President and Congress by the MSPB entitled "What Is Due Process in Federal Civil Service Employment?" (the "MSPB Report"),[2] the Chairman of the MSPB wrote the following: "the Constitution requires that any system to remove a public employee for cause must

[2] The MSPB Report is available at https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1166935&version=1171499&application=ACROBAT.

include: (1) an opportunity – before removal – for the individual to know the charges and present a defense." MSPB Report, transmittal letter from Chairman Grundmann to the President, President of the Senate, and Speaker of the House. Chairman Grundmann confirmed:

> Due process is available for the Whistleblower …. Due process is a constitutional requirement and a small price to pay to ensure the American people receive a merit-based civil service rather than a corrupt spoils system.

Id. Notwithstanding the assurances of the MSPB's Chairman to the President and Congress that the due process rights of federal employees would be respected when they faced loss of employment, that did not happen here. The Petitioner was deprived of his statutory right to present the affirmative defense of whistleblower retaliation. Because of this failure, the MSPB violated the Petitioner's due process rights.

Due process includes the right to present evidence to contest the basis for the termination of federal termination. *See, e.g., Ward v. United States Postal Serv.*, 634 F.3d 1274, 1280 (Fed. Cir. 2011). The Federal Circuit has also held "[w]e must reverse a decision of the Board [*i.e.*, the MSPB] if it … is not in accordance with the requirements of the Due Process Clause of the Fifth Amendment or any other constitutional provision." *Ward*, 634 F.3d at 1278; *Blank v. Dep't of the Army*, 247 F.3d 1225, 1228 (Fed. Cir. 2001). This is true even if the Petitioner

may not have raised due process claims in the proceedings below. *Gandia v. United States Postal Serv.*, 556 F. App'x 945, 948 (Fed. Cir. 2014), citing *Sullivan v. Dep't of Navy*, 720 F.2d 1266, 1274 n.2 (Fed. Cir. 1983). By categorically denying the Petitioner his ability to present evidence that his termination was based on illegal whistleblower retaliation, the MSPB and Federal Circuit deprived the Petitioner of his property without due process of law.

The due process to which the Petitioner was entitled before being deprived of his property interest in federal employment is not limited by statutory or regulatory procedures, even if they are interpreted correctly. The ultimate determinant of the Petitioner's due process rights is the Constitution itself. In the seminal *Loudermill* case, the Court held:

> "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

Loudermill, 470 U.S. at 541 (*quoting Arnett v. Kennedy*, 416 U.S. 134, 167 (1974) (Powell, J., concurring in part and concurring in the result in part).

The right to present evidence affecting the outcome of the decision-making process where deprivation of a property right is at stake is perhaps the most important procedural safeguard. *Loudermill*, 470 U.S. at 546 ("The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement.") For example, in a leading due process case from the Federal Circuit challenging a decision of the MSPB, the court held that—if the decision maker has been exposed to information affecting the outcome of his decision-making process without the employee being told of the information and given the opportunity to present a defense against it—then the process is fundamentally flawed and will fail to meet the constitutional requirements of *Loudermill*. *Stone v. FDIC*, 179 F.3d 1368, 1377 (Fed. Cir. 1999). The *Stone* holding applies with equal force here. Like the employee in *Stone*, the Petitioner was denied the ability to respond to and present a defense against the charges made against him. Unless the Petitioner is allowed to present evidence of whistleblower retaliation, he cannot be deprived of the property interest in his government job.

It is no answer that all FBI employees, including non-preference-eligible employees, are provided an opportunity to make an administrative claim with the agency alleging affirmative claims of whistleblower retaliation. That process is fundamentally different than the procedure enacted by Congress. This procedure permits a preference-eligible employee to raise an affirmative defense of whistleblower retaliation to defend against adverse personnel action before the MSPB and to appeal that

decision to the Federal Circuit. Moreover, allowing only the agency to hear claims of its own retaliatory practices has proven to be illusory. In 2015, the U.S. Government Accounting Office (the "GAO") released its report on the FBI's handing of whistleblower retaliation complaints. Astoundingly, according to the GAO Report, in the history of the program, DOJ ruled in favor of whistleblowers only three times. Moreover, those complaints took between eight and ten years each to resolve. U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-112, WHISTLEBLOWER PROTECTION: ADDITIONAL ACTIONS NEEDED TO IMPROVE DOJ'S HANDLING OF FBI RETALIATION COMPLAINTS 12, 22-26 (2015).[3]

The GAO Report highlights the reasons that Congress provided that veterans may appeal adverse employment actions to an independent decision maker, the MSPB. Allowing the same agency that imposed the discipline to also be the sole avenue for challenging that decision is fraught with conflict. Congress allowed preference-eligible FBI employees the right to appeal instead to the MSPB as a benefit provided to veterans of the armed services. Congress specifically included in this right the ability to present a defense of whistleblower retaliation. By categorically depriving FBI employees who are veterans of this right, the decision below violates Petitioner's due process rights under the Fifth Amendment.

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[3] The GAO Report is available at https://www.gao.gov/assets/670/668055.pdf.

III. LONGSTANDING, INTERCONNECTED FEDERAL POLICIES UNDERLYING PREFERENCE-ELIGIBILITY AND WHISTLEBLOWER PROTECTION SUPPORT THE PETITIONER

Preference-eligibility for veterans finds its roots in the Veterans' Preference Act of 1944 (the "VPA"). *See generally* Veterans' Preference Act, ch. 287, 58 Stat. 387 (1944). The VPA was enacted before the end of the Second World War specifically to "give honorably discharged veterans, their widows, and the wives of disabled veterans, who themselves are not qualified, preference in employment where Federal funds are disbursed." *Id.* The VPA provided numerous employment protections to preference-eligible veterans. These included the right to appeal to the Civil Service Commission (the "CSC") any discharge, suspension longer than 30 days, furlough without pay, or reduction in rank or compensation. *Id.* at § 14. Much like the current MSPB, the CSC was charged with taking evidence and adjudicating any appeal with findings and a recommendation. *Id.*[4] Thus,

[4] Under the VPA as enacted in 1944, the CSC's findings and recommendation were submitted to the agency from which an appeal was taken, but there was no provision requiring that agency to abide by the CSC's decisions. *Id.* However, in 1948, the VPA was amended to require that agencies comply with the CSC's recommendations resulting from any appeal. *See* Veterans' Preference Act, Pub. L. No. 80-741, 62 Stat. 575 (1948) ("*Provided*, That any recommendation by the Civil Service Commission, submitted to an Federal agency, on the basis of the appeal of any preference eligible, employee, or former employee, shall be complied with by such agency.").

since as early as the time period Congress was preparing for the return of veterans after the Second World War, there has been a specific policy of providing federally employed veterans with the ability to seek review of adverse employment decisions outside the agency by which they are employed.

That policy was once again confirmed with the enactment of the Civil Service Reform Act of 1978 (the "CSRA") and the establishment of the MSPB as the successor to the CSC. *See* Reorganization Plan No. 2, 92 Stat. 3783 (1978) (redesignation of the CSC as the MSPB and of the Commissioners as Members of the Board); Exec. Order No. 12107, 44 Fed. Reg. 1055 (Jan. 3, 1978); Civil Service Reform Act, 92 Stat. 1111 (1978) (CSRA). As stated in the CSRA, "it is the policy of the United States that …" "Federal employees should receive appropriate protection through increasing the authority and powers of the [MSPB] in processing hearings and appeals affecting Federal employees." This policy explicitly included review of adverse employment decisions involving preference-eligible veterans.

This longstanding policy of preferential treatment includes the ability of preference-eligible FBI employees to raise whistleblower retaliation as an affirmative defense. In this regard, it is telling that the specific statute prohibiting whistleblower retaliation by the FBI and the procedural statute allowing that defense to be raised at the MSPB were codified together in the CSRA. *See* 92 Stat. 1117-1118 (codifying original version of 5 U.S.C. § 2303); *See* 92 Stat. 1138 (codifying 5 U.S.C. § 7701(c)(2)(C)). Congress' statement of legislative intent regarding

the purpose of the CSRA, coupled with the policies underlying these statutes that were passed by Congress together support the Petitioner's construction.

The construction of the statute affects only those FBI employees who are preference-eligible. The statutory prohibition against retaliation recognizes that whistleblowing by FBI employees is important to avoid waste, fraud, and abuse. To the extent that there may be any countervailing policy considerations, Congress has already resolved them—in favor of the statutory construction advanced by the Petitioner. Ever since enactment of the CSRA, Congress has intended that preference-eligible FBI employees have the special protections of which the MSPB has now deprived the Petitioner. By discouraging reporting by such individuals, the Federal Circuit has effectively eliminated a path for exposing problems with the agency that Congress intended.

IV. DEPRIVING THE PETITIONER OF HIS WHISTLEBLOWER RIGHTS ALSO VIOLATES THE FIRST AMENDMENT

This Court has declared that "citizens do not surrender their First Amendment rights by accepting public employment." *Lane v. Franks*, 134 S. Ct. 2369, 2374 (2014). Parkinson's whistleblowing is entitled to First Amendment protection. The analysis is laid out in *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). *Pickering* requires balancing "the interests of the [employee], as a citizen in commenting upon matters of public concern and the interest of the State, as an employer, in promoting

the efficiency of the public services it performs through its employees." *Id*. at 568.

Parkinson's whistleblowing is speech "as a citizen … commenting upon matters of public concern." The critical question in determining whether speech is "as a citizen" is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties. Whether speech is a matter of public concern turns on the "content, form, and context" of the speech. *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). Because whistleblowing is clearly a matter of public concern, the first *Pickering* factor weighs in favor of the Petitioner in this case.

The second *Pickering* factor requires consideration of the employer's interest. Here, there is neither argument nor evidence that Parkinson's disclosure was false or erroneous, or that he unnecessarily disclosed sensitive, confidential, or privileged information. The balance therefore tips decidedly in favor of protecting Petitioner's First Amendment rights as a whistleblower.

CONCLUSION

Before being fired as a federal employee, the Petitioner had the statutory right to present the affirmative defense that his employment was terminated because he was a whistleblower. By depriving him of this statutory right, the MSPB and the Federal Circuit alike deprived him of due process while also violating his right to free speech. The rule of law means nothing if federal agencies and courts can simply ignore laws with which they disagree.

The MSPB and the Federal Circuit should have enforced the law as written. Their failure to do so warrants review and reversal by the Court.

Respectfully submitted,

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