No. 17-1434

In The

Supreme Court of the United States

JOSEPH P. CARSON,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICI CURIAE* THOMAS DEVINE ET AL. SUPPORTING PETITION FOR WRIT OF CERTIORARI

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IDENTITY OF PARTIES TO *AMICUS CURIAE* BRIEF AND THEIR INTEREST IN THE CASE[1]

Attorney Thomas Devine, lead party to this *amicus curiae* brief, is and, since 1980, has been Legal Director of the Government Accountability Project (GAP), America's foremost whistleblower protection advocacy organization. In that capacity, Mr. Devine has formally or informally helped over 7,000 government or corporate "whistleblowers." He testified in Congress over 50 times, authored friend of the court briefs in *fora* ranging from administrative boards to the U.S. Supreme Court, and served as an expert witness on the law of dissent. Devine has been a leader in successful campaigns to pass or defend 34 whistleblower laws or policies from the municipal to the international level. His interest as an *amicus* is to eliminate uncertainty about the duties and responsibilities of the U.S. Office of Special Counsel (OSC) and to determine if further legislative action is needed to protect whistleblowers.

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[1] The Solicitor General has granted blanket consent to *amicus curiae* briefs. Mr. Carson, Petitioner, has consented to the filing of this brief. All parties were provided timely notice of the intention to file. Party's counsel did not author this brief, in whole or part. Mr. Carson has been a financial supporter of some of the *amici* over the years, but did not make a monetary contribution or other funding to this brief's preparation or submission. Mr. Nolan, U.S. Supreme Court Bar member 82535, is serving pro bono as counsel to the *amici*. He served in the Office of Counsel to President Reagan in 1981, one year before that of Judge Roberts in 1982. His co-authored 2013 book published by Amazon, *Quest for Freedom – The Scots-Irish Presbyterian Rebellion for Political and Religious Freedom*, traces the etiology of the U.S. Constitution's Bill of Rights.

The *amicus curiae*, National Judicial Conduct and Disability Law Project, Inc. (NJCDLP), is a grassroots nonprofit, U.S. legal system reform advocate. Directly, and through its many banner groups, corresponding public interest programs, campaigns, and initiatives, NJCDLP has helped challenge every seriously questionable aspect of America's legal system. In fact, NJCDLP has taken the lead among non-governmental organizations in ensuring that America's legal system embodies the "deterrent effect" confirmed by the Centre for the Independence of Judges & Lawyers, International Commission of Jurists as necessary for U.S. court officers to respond effectively and consistently to human rights violations and abuses.

Both Mr. Devine and NJCDLP advocate for a trustworthy federal civil service where federal agencies, as required by law, embody the merit principles and are free of reprisal and other types of prohibited personnel practices (PPPs).[2] Devine and NJCDLP representatives interact with Congress regularly to advance these and/or related goals through its constitutional duties of oversight and lawmaking. Present *amici*, just as Congress, depend on appellate courts to comply with their responsibilities to issue precedential decisions when presented with novel questions of federal whistleblower protection law. We, just like Congress, have a clear interest in appellate courts being instructed to issue precedential decisions when

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[2] *See* 5 U.S.C. §1101 endnotes, citing Section 3.1 of Pub. L. No. 95-454, Civil Service Reform Act of 1978, §1204(a)(3), and §2301(c).

presented with novel questions about the rule of law protecting federal whistleblowers.

Since the passage of the landmark Civil Service Reform Act of 1978, Congress has repeatedly passed laws strengthening federal whistleblower protection. However, the U.S. Merit System Protection Board (MSPB) and some lower federal courts have undermined the express statutory will of Congress under 5 U.S.C. §2302. *See Department of Homeland Security v. MacLean*, 135 S.Ct. 913 (2015). Devine and NJCDLP accordingly file this *amicus curiae* brief in support of the Petitioner, Joseph P. Carson.

SUMMARY OF ARGUMENT

Under the U.S. Constitution, Congress conducts oversight of the federal civil service. It also passes laws including budgets for the agency – the U.S. Office of Special Counsel (OSC) – with the exclusive statutory mandate to protect federal agency employees from reprisal and to "act in (their) interests" in doing so.[3] When, as here, an appeals court does not follow its established criteria and issues a non-published, summary, decision in an appeal presenting novel questions about federal whistleblower protection law, then we, as Congress, do not get the feedback needed to evaluate

[3] *See* 5 U.S.C. §§1212(a)(1), 1214(a)(1)(A), and 1201 "notes" that codifies the "Congressional Statement of Finding and Purpose," §2 of Pub. L. No. 101-12. Federal Whistleblower Protection Act of 1989, §2(b)(2)(B).

whether lower courts are interpreting the law as intended or if a further legislative remedy is needed.

ARGUMENT

In straying from its established criteria and issuing a non-published, summary decision affirming two unpublished final decisions of the Merit Systems Protection Board in this case, despite the combined appeal presenting novel questions about federal whistleblower protection law, the Federal Circuit Court of Appeals improperly denies Congress and other interested parties the feedback needed to evaluate whether lower courts are interpreting relevant law as intended or if a further legislative remedy is needed.

The law in question, 5 U.S.C. §2302(a)(2)(A)(xii), makes "any other significant change in duties, responsibilities or working conditions," a "personnel action." This section was passed in 1994 to create a "catch-all" standard, different in kind from other personnel actions, in that it requires a "case-by-case" analysis of the perception or impact of agency's actions on other, similarly situated, employees to determine if a prohibited personnel action has occurred.[4]

This "catch-all" personnel action standard was created as a result of advocacy and Congressional

[4] *See Shivaee v. Dept. of Navy*, 74 M.S.P.R. 383, 388-89 (1997); H. Rpt. 103-769, page 9; S. Rpt. 103-769, page 14.

oversight that revealed gaps in existing whistleblower protection, including review of published decisions in whistleblower cases. Twenty-four (24) years later, this statutory provision still lacks a definitive appellate review as the Petitioner indicates. Such a review would have wide applicability, including to agencies outside the adjudicatory jurisdiction of the Merit Systems Protection Board.[5]

Despite this case presenting novel and important questions of federal whistleblower protection law, both at MSPB and the appellate level, neither cited precedent (none exists) nor is such predictable from sources. Since the petitioner is not employed by OSC, according to these non-precedential decisions, it can refuse or fail to comply with its non-discretionary statutory duties to process his whistleblower disclosures and/or investigate his whistleblower reprisal complaints without, in any circumstance, creating "any other significant change in his duties, responsibilities, or working conditions." *See* Pet (appendix) pages A4-5, 8-9 (¶4), 13-15 (¶¶13-14), 22-23 (¶3), 25-26 (¶¶7-8), 37-39, and 50-52.

To perform its oversight and legislative duties, Congress reviews the published decisions of the MSPB and Court of Appeals for the Federal Circuit. Non-published summary decisions involving novel questions of federal whistleblower law cases thwart Congress' ability to perform its Constitutional

[5] The FBI and Intelligence agencies listed at 5 U.S.C. §2302(a)(2)(C)(ii), separately include this personnel action in relevant law, regulation or presidential directive.

functions. Additionally, these non-precedential decisions are contrary to relevant rules at both MSPB and the Court of Appeals.[6]

By this Appeals Court's Internal Operating Procedure (IOP) 10, "Precedential/non precedential Opinions and Orders," at ¶2, "The purpose of a precedential disposition is to inform the federal bar and interested persons *other* than the parties." IOP 10 at ¶4 states the Court issues precedential decisions when a case meets one or more of the following criteria that either are present in this case and/or should have resulted because of it:

- An issue of first impression is treated.
- A new rule of law is established.
- A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved.
- A new interpretation of a Supreme Court decision, or of a statute, is set forth.

As the legislative history demonstrates, following the passage of the Civil Service Reform Act of 1978, Congress has – in 1989, 1994 and 2012 – passed laws that legislatively overturned specific precedential decisions of the MSPB and/or appellate court in federal

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[6] For MSPB, 5 CFR §1201.117(c), cited in footnote 1 on A6 and A20. For the Court of Appeals of the Federal Circuit, *see* Internal Operating Procedure 10, "Precedential/Nonprecedential Opinions and Orders," at http://www.cafc.uscourts.gov/sites/default/files/rules-of-practice/IOPs/IOPsMaster2.pdf.

whistleblower appeals, demonstrating the long-standing commitment of Congress to protecting federal agency employees from whistleblower reprisal.[7]

Five themes recur in this history of Congressional attention and oversight of the adequacy of federal whistleblower protection when reviewing the associated legislative history and statutory language of resultant legislation:

1. Federal whistleblowers play a vital role in protecting American health, safety, welfare, and security.[8]

2. OSC needs to be, and be perceived as a strong protector of federal agency employees from reprisal.[9]

3. OSC is not an adequate protector of federal agency whistleblowers.[10]

4. MSPB and the Court of Appeals for the Federal Circuit (as well as its predecessor) have frequently misinterpreted

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[7] For example, *see* S. Rpt. 100-413, pages 7-10; S. Rpt. 103-769, pages 7-9; H. Rpt. 103-769, pages 8, 17-19; H. Rpt. 112-508, pages 6- 8; and S. Rpt. 112-155, pages 1-12.

[8] For example, *see* H. Rpt. 103-769, page 12; S. Rpt. 112-155, pages 1-3; and H. Rpt. 115-268, pages 3-4 (citing previous legislative history, back to 1977).

[9] For example, *see* S. Rpt. 100-413, pages 7-10; S. Rpt. 103-358, pages 1-12; H. Rpt. 103-769, pages 15-17; H. Rpt. 112-508, pages 5-6; S. Rpt. 112-155, pages 3-4, 12-16; S. Rpt. 115-74, pages 1-10; and H. Rpt. 115-268, pages 1-11.

[10] For example, *see* S. Rpt. 100-413, pages 7-10; S. Rpt. 103-358, pages 1-4; and H. Rpt. 103-769, pages 15-17.

Congressional intent above their overly narrow published rulings, thwarting the first three Congressional objectives (*see* footnote 5).

5. Congressional attention to address and remedy the above is more than should be necessary.[11]

The case herein raises these recurring issues for mandatory U.S. Supreme Court clarification such as in *Department of Homeland Security v. MacLean*, Ibid. We seek a published decision to enable Congress to discharge its oversight and legislation functions.

CONCLUSION

So that Congress can perform its Constitutional duties of oversight and enacting legislation for federal whistleblower protection, we respectfully request the Supreme Court to vacate the current decision and remand the case with instructions to the appeals court to address whether Supreme Court precedent in *Burlington North. & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006), applies to determining whether a federal agency employee claiming reprisal has experienced

[11] For example, *see* S. Rpt. 103-358, pages 4-5; H. Rpt. 103-769, pages 8-9, 12-13; H. Rpt. 115-268, pages 6-11.

"any other significant change in duties, responsibilities, or working conditions."[12]

Respectfully submitted,

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[12] The *amici* pray the Supreme Court requests a response from the Solicitor General before disposing of this petition. While the *amici* understand that current or former members of Congress can join this brief, if the Court requests a response from the Solicitor General, they have reason to hope a significant number will do so. Additionally, OSC will possibly reconsider its decision not to file an *amicus curiae* brief at this stage. The Solicitor General may even file a brief of acquiescence.