No. 19-783

In The
Supreme Court of the United States

NATHAN VAN BUREN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit**

BRIEF FOR THE NATIONAL WHISTLEBLOWER CENTER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The National Whistleblower Center ("NWC") is a nonprofit, nonpartisan, tax-exempt organization dedicated to the protection of employees who lawfully report fraud or illegal conduct.[1] *See* www.whistleblowers.org. Since 1984, the NWC's directors have represented whistleblowers, taught law school courses on whistleblowing, and authored numerous books and articles on this subject – including the first-ever published legal treatise on whistleblower law. In 2016, the NWC was named a Grand Prize winner of the United States Agency for International Development's Wildlife Crime Tech Challenge for its innovative solution that harnesses the power of whistleblowers to combat wildlife crime.

As part of its core mission, the NWC files *amici* briefs to help courts understand complex issues raised in whistleblower cases. The NWC has participated before this Court as *amicus curiae* in *English v. General Electric*, 496 U.S. 72 (1990); *Haddle v. Garrison*, 525 U.S. 121 (1999); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Beck v. Prupis*, 529 U.S. 494 (2000); *EEOC v. Waffle House*, *Inc.*, 534 U.S. 279 (2002); *Doe v. Chao*, 540 U.S. 614 (2004);

[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief. The Petitioner has filed a letter with the clerk granting blanket consent to the filing of *amicus* briefs. Respondent's counsel of record provided to counsel for NWC written consent to file this *amicus* brief.

Lawson v. FMR LLC, 571 U.S. 429 (2014); *Lane v. Franks*, 573 U.S. 228 (2014); *Kellogg Brown & Root Services, Inc. v. United States ex rel. Carter*, 135 S. Ct. 1970 (2015); *Universal Health Svcs. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016); *State Farm Fire & Cas. Co. v. United States ex rel. Rigsby*, 137 S. Ct. 436 (2016); and *Digital Realty Trust, Inc. v. Somers*, 138 S. Ct. 767 (2018).

Persons assisted by the NWC have a direct interest in the outcome of this case. Whistleblowers who provide information to United States law enforcement agencies concerning possible federal crimes are facing retaliation by bad actors who are abusing the Computer Fraud and Abuse Act.

SUMMARY OF THE ARGUMENT

This case concerns the proper interpretation of the phrase to "exceed[] authorized access" under the Computer Fraud and Abuse Act ("CFAA"). 18 U.S.C. § 1030(a)(2). Employees are susceptible to civil actions by their employers if they violate this provision of the CFAA while using a work computer. *Id.* § 1030(g). A circuit split now exists on this issue with the Second, Fourth, and Ninth Circuits employing a narrow view and finding that an employee only "exceeds authorized access" when they access information on a work computer which they have no right to view for any purpose. *United States v. Valle*, 807 F.3d 508, 523-28 (2d Cir. 2015); *WEC Carolina Energy Sols. v. Miller*, 687 F.3d 199, 203-06 (4th Cir. 2012); *United States v. Nosal*, 676 F.3d 854, 863 (9th Cir. 2012) (*en banc*). In contrast, the

First, Fifth, Seventh, and Eleventh Circuits adopted a broad view and held that an employee "exceeds authorized access" when they have been granted access to information on a work computer for a certain purpose, but they use that information for another purpose. *United States v. Rodriquez*, 628 F.3d 1258, 1263-64 (11th Cir. 2010); *United States v. John*, 597 F.3d 263, 272 (5th Cir. 2010); *Int'l Airport Ctrs., L.L.C. v. Citrin*, 440 F.3d 418, 420-21 (7th Cir. 2006); *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577, 582-84 (1st Cir. 2001).

The Ninth Circuit has emphasized that the broad view of the CFAA would result in consequences "unintended by Congress." *Nosal*, 676 F.3d at 863. One of the most detrimental unintended consequences is that the broad view opens the door for retaliation against whistleblowers who provide evidence of criminal fraud and other criminal activity to United States law enforcement agencies. Under the broad view, this is the case even if the whistleblowers had rightful access to the evidence on their work computers, and their sole disclosure was to law enforcement to report crimes.

Such an interpretation directly contravenes with the Congressional scheme protecting disclosures to law enforcement, including the federal criminal obstruction of justice statute, 18 U.S.C. § 1513(e), which is implicated when whistleblowers provide evidence of possible crimes to federal law enforcement. The CFAA cannot be read so broadly as to immunize those who bring retaliatory lawsuits against federal informants and thereby obstruct justice. 18 U.S.C. § 1513(e). Such

retaliatory CFAA lawsuits, which should be deterred by § 1513(e), are already being brought by companies against whistleblowers. While Congress attempted to ensure the CFAA would not "cast[] a wide net over 'whistleblowers,' who disclose information they have gleaned" from a computer, whistleblowers have nevertheless been subjected to retaliatory lawsuits by bad actors under the CFAA. S. Rep. No. 99-432 at 8 (1986).

The judgment below should thus be reversed, or, alternatively, the Court should explicitly state that its ruling does not apply to situations involving the disclosure of information to the United States as evidence of criminal wrongdoing.

ARGUMENT

I. BROAD INTERPRETATION OF "EXCEEDS AUTHORIZED ACCESS" WOULD DEFEAT THE CONGRESSIONAL SCHEME ENCOURAGING EMPLOYEES TO REPORT CRIMINAL ACTIVITY

In 2002, Congress, as part of the Sarbanes-Oxley Act ("SOX"), amended the obstruction of justice statute and provided strict prohibitions against retaliation triggered by an employee's disclosure of potential crimes to federal law enforcement. SOX criminalized retaliation against persons "for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense." 18 U.S.C. § 1513(e).

Congress' whistleblower protection laws unquestionably protect and even incentivize the reporting of criminal activity to federal law enforcement. This Court in *Lawson v. FMR LLC*, 571 U.S. 429, 457 (2014) recognized the broad "breadth" of Congress' legislative actions designed to encourage reporting of corporate crimes, including enacting the criminal obstruction statute, 18 U.S.C. § 1513(e), as part of the effort to extend "protection(s)" to "comprehensively" cover "corporate whistleblowers." *Id.* at 457, n.18. Other federal laws also encourage whistleblower disclosures to federal law enforcement.[2]

A broad interpretation of the CFAA would undermine these strong legislative policies. Holding employees who are given lawful access to information on a company computer liable under the CFAA simply because they disclose evidence of federal crimes to law enforcement (which was in the computer data) would undermine and conflict with the clear policies behind § 1513(e). Such a result would eviscerate the Congressional scheme encouraging whistleblower disclosures to and cooperation with federal law enforcement. *Accord In re Quarles*, 158 U.S. 532, 536, 15 S. Ct. 959, 961 (1895) ("The right of a citizen informing of a violation of law . . . does not depend upon any of the Amendments to the Constitution, but arises out of the creation and establishment by the Constitution itself

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[2] As recently as February 2018, Congress added subsection (c) to § 7623 of the Internal Revenue Code to clarify that criminal fines constitute "collected proceeds" under the tax whistleblower law. 115 P.L. 123, 132 Stat. 64 § 41108.

of a national government, paramount and supreme within its sphere of action.").

The CFAA was enacted at the dawn of the internet era when Congress grew concerned about "the activities of so-called 'hackers' who have been able to access (trespass into) both private and public computer systems." H.R. Rep. No. 98-894, at 10 (1984). In the 1986 amendments to the CFAA, Congress specifically chose not to enact a "sweeping . . . Federal statute," and instead "prefer[red] instead to limit Federal jurisdiction over computer crime to those cases in which there is a compelling Federal interest." S. Rep. No. 99-432, at 4 (1986). And while it expanded the CFAA's scope to the Federal government's or financial institution's computers, it also attempted to refine the class of defendant to whom the CFAA should apply. Specifically, Congress "remove[d] from the sweep of the statute one of the murkier grounds of liability, under which a[n] . . . employee's access to computerized data might be legitimate in some circumstances, but criminal in other (not clearly distinguishable) circumstances." S. Rep. No. 99-432, at 2. Congress further attempted to ensure that the CFAA does not "cast[] a wide net over 'whistleblowers,' who disclose information they have gleaned" from a computer. *Id.* at 8.

CONCLUSION

The interplay between 18 U.S.C. § 1513(e) and the CFAA is not currently before the Court but the National Whistleblower Center, as an *amicus curiae*,

respectfully asks that the Court take it into consideration when drafting its ruling. An overbroad reading of "exceeds authorized access" could have a deleterious impact on § 1513(e) and its ability to curb criminal obstruction of justice.

Section 1513(e) was intended to provide comprehensive protection for employees who put their reputation and livelihoods on the line to support federal investigations and make the sort of whistleblower disclosures repeatedly incentivized by Congress. In construing the CFAA, this Court should be mindful of Congress' intent in enacting § 1513(e) and not rule so broadly as to consume it.

The judgment below should thus be reversed, or, alternatively, the Court should explicitly state that its ruling does not apply to situations involving the disclosure of information to United States law enforcement as evidence of criminal wrongdoing covered under § 1513(e).

Respectfully submitted,

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