No. 23-955

IN THE

Supreme Court of the United States

ROBERT M. MILLER,

Petitioner,

v.

MARTIN J. GRUENBERG, CHAIRMAN, FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent,

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the
District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 28, 2024

QUESTIONS PRESENTED

Petitioner prevailed in an adverse action appeal when MSPB ordered respondent to cancel his indefinite suspension. When respondent petitioned for review to the Board, Petitioner became entitled to interim relief pending the outcome of the Board's final order. 5 U.S.C. § 7701(b)(2). But MSPB never ordered respondent to provide interim relief, and respondent refused to provide it. Petitioner moved for interim relief, which the district court denied using the standards for a preliminary injunction. The questions presented are:

1. Does the district court in a *mixed case* review a motion for interim relief under the standards for a preliminary injunction, under 5 U.S.C. § 7703(c), or under the court's equitable powers?

2. Did Petitioner need to plead a specific claim for interim relief, or is that a subsidiary decision included in the review of the civil service claims?

3. Did the lower courts abuse their discretion by failing to construe the pleadings and papers of a *pro se* litigant liberally, and did they display favoritism toward federal defendants and antagonism toward a *pro se* litigant as to make fair judgment impossible?

4. Did the lower courts err in failing to order respondent to provide all monetary and non-monetary benefits Petitioner would have received but for the unlawful withholding of interim relief.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner, Robert M. Miller, is an employee of the Federal Deposit Insurance Corporation ("FDIC"). Miller is an individual, and thus there are no disclosures to be made by him pursuant to Supreme Court Rule 29.6.

Respondent is Martin J. Gruenberg, Chairman of the FDIC, a federal corporation as defined in 31 U.S.C. § 9101. This case is re-captioned from the district court case after Martin J. Gruenberg succeeded Jelena McWilliams as Chairman. Other defendants sued in the district court in their individual capacities are unaffected by this petition, and they need not respond.

RELATED PROCEEDINGS

The following proceedings are related to this case under Supreme Court Rule 14.1(b)(iii).

Miller v. McWilliams, 1:21-cv-03035-CJN (D.D.C)

Miller v. MSPB, 1:23-cv-15-CJN (D.D.C)

Miller v. Gruenberg, 1:23-cv-132-CJN (D.D.C)

In Re: Miller, 22-1232 (D.C. Cir.)

In Re: Miller, 23-5241 (D.C. Cir. Jan. 8, 2023)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Robert M. Miller, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit in *Miller v. Gruenberg,* 22-5256 (D.C. Cir, Sep. 25, 2023), affirmed the denial of a motion for interim relief in district court. App. 1.

The district court denied Miller's *Motion for Interim Relief, a Temporary Restraining Order, and Preliminary Injunction* in *Miller v. McWilliams,* 1:21-cv-03035-CJN (D.D.C. Aug. 24, 2022). App. 8

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 7701, Subsection (b)(2)(A), Title 5, United States Code, provides:

> If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision

> effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless— (i) the deciding official determines that the granting of such relief is not appropriate; or (ii) (I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and (II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

Section 7703, Title 5, United States Code, provides:

> (c) In any case filed in the United States Court of Appeals ...., the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found 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;
>
> except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

INTRODUCTION

While the facts and circumstances of this petition are complicated, the result is simple. Miller became a prevailing party in an MSPB appeal when the administrative judge ordered FDIC to cancel Miller's indefinite suspension. When FDIC petitioned the full Board for review, Miller became automatically entitled to interim relief pursuant to 5 U.S.C. § 7701(b)(2). This relief consisted of the relief ordered in the administrative judge's initial decision, to wit: cancellation of Miller's suspension.

But the administrative judge violated law and regulation by not including a statement on interim relief in her initial decision. Three layers of Board review failed to identify and correct the error. FDIC refused to grant interim relief absent an order from the Board. The Clerk of the Board refused to exercise its delegated authority to grant a *Motion for Interim Relief*. The district court denied a motion for interim relief by incorrectly applying the standards for a preliminary injunction instead of the proper standards in 5 U.S.C. § 7703(c) for *mixed cases* or the

inherent equitable powers of the court. Even if the standards for a preliminary injunction were correct, Miller easily satisfied them. The D.C. Circuit erroneously dismissed a petition for a writ of mandamus, which the court had jurisdiction to issue under the All Circuit Review Act. The D.C. Circuit also affirmed the denial of interim relief, erroneously relying on the preliminary injunction standards, relying on an argument FDIC made for the first time on appeal, and incorrectly holding Miller had to plead a specific claim for interim relief – a subsidiary Board decision subsumed by the adverse decision in the *mixed case* complaint itself. Both the district and circuit courts violated their own precedential authorities by not construing the pleadings and papers of a *pro se* litigant liberally. Miller's various papers adequately put FDIC on notice of his claim for interim relief.

The D.C. Circuit also erroneously held that FDIC's subsequent provision of back pay and its promise to provide relief was sufficient to deny the appeal. The court ignored the broad language of the interim relief statute providing that prevailing employees will receive all of the benefits as terms and conditions of employment. The D.C. Circuit erred in holding Miller was not entitled to the full panoply of monetary and non-monetary benefits he was unlawfully denied for nineteen months.

This case is ripe for immediate granting of the petition, vacating the lower courts' decisions, and remanding the case with instructions to issue a *nunc pro tunc* order to the FDIC to provide Miller all the

benefit of employment for a period equivalent to the period during which he was unlawfully denied those benefits. Such relief is well within the equitable powers of courts.

Congress has repeatedly said that whistleblowers serve the public interest and protecting them is a "paramount concern." Yet the MSPB and the *inside-the-beltway* courts have repeatedly denied these protections in a judicial version of "snitches get stiches." The MSPB, Federal Circuit, and now regional circuits have continued a 35-year campaign of denying whistleblower protections.

This court should grant certiorari in this case and stamp out lower court propensity to deny whistleblower protections, to treat *pro se* litigants as second-class advocates, and to condone obvious federal government malfeasance.

STATEMENT OF THE CASE

At all times relevant to this petition, Miller was a Senior Financial Economist, grade CG-14, for the FDIC in Washington, D.C.

On November 13, 2019 and January 9, 2020, Miller made protected whistleblower disclosures to, *inter alia*, FDIC Chairman Jelena McWilliams, General Counsel Nicholas Podsiadly, Inspector General Jay Lerner, U.S. Senators Mike Crapo and Ron Johnson, and a Wall Street Journal reporter. The disclosures described literally *hundreds* of felony crimes by FDIC officials, constitutional torts, sham

discrimination and harassment investigations, corruption of FDIC's grievance process, and discrimination against Miller's protected classes.

Immediately after Miller's disclosures, FDIC retaliated against him with unconstitutional searches of his workplace computer activities, a misconduct investigation, indefinite administrative leave, a directive for a psychiatric examination under threat of disciplinary action, a proposal for indefinite suspension, and an indefinite suspension.

FDIC's directive for psychiatric examination was purportedly predicated on "recent events" (i.e., Miller's protected disclosures) indicating that Miller was "mentally unstable" and "posed a threat to himself and others." FDIC's demands did not state the reasons for the examination, nor did they identify the information FDIC needed "to make an informed management decision." See 5 C.F.R. § 339. FDIC identified three agency-designated doctors to conduct the examination. FDIC permitted Miller to obtain medical information from his own doctor that would be considered "in addition" to the report of examination by the agency-designated doctor.

Miller objected to FDIC's choice of doctors, alleging that FDIC deliberately chose doctors who would be prejudiced by Miller's whistleblower and Title VII disclosures.

On April 10, 2020, the deciding official for the proposed indefinite suspension gave Miller "additional flexibility" to obtain medical information

solely from his own doctor. On June 2, 2020, Miller submitted to the deciding official a favorable report from his psychiatrist at the Washington D.C. Veterans Administrative Medical Center describing Miller's medical conditions, his treatment and compliance with treatment, and her prognosis. Miller's doctor expressly said that he was "safe and stable," and he did not pose a threat to himself or others.

The deciding official rejected the letter, demanding to ask Miller's doctor additional questions, to wit: whether the doctor changed her opinion after her May 27, 2020 appointment, and whether she changed her opinion after reading Miller's whistleblower disclosures and communications with management. Again, Miller objected that FDIC was attempting to prejudice the doctor against Miller with irrelevant and inflammatory information.

On June 15, 2020, Miller filed a discrimination and retaliation suit in the Eastern District of Virginia. *Miller v. McWilliams*, 1:20-cv-671 (Jul. 28, 2021); 21-2073 (4th Cir. Sep. 7, 2023); 23-843 (U.S. Sup. Ct. *pet. for cert.*) In that case, Miller sought injunctive relief to prevent his indefinite suspension because the Board had no sitting members who could grant a stay. The morning after the district court denied the injunction, FDIC indefinitely suspended Miller on August 5, 2020

On July 3, 2020, Miller filed his Individual Right of Action ("IRA") appeal to the MSPB after

exhausting his administrative remedies with the Office of the Special Counsel ("OSC").

On August 7, 2020, Miller filed his adverse action appeal to the MSPB challenging his indefinite suspension. The judge consolidated the two appeals.

On August 27, 2020, the deciding official reiterated his position that FDIC was only seeking answers to the two additional questions he asked on June 23, 2020.

On December 18, 2020, Miller and FDIC stipulated to the dismissal of the claim in EDVA seeking relief for retaliation for making protected Title VII disclosures that accompanied Miller's whistleblower disclosures.

On January 6, 2021, the MSPB administrative judge granted Miller's motion to amend his appeals to include affirmative defenses of Title VII discrimination and retaliation. This made Miller's appeals *mixed cases*.

On April 8, 2021, Miller provided FDIC with *exactly* the medical information it requested on April 10, 2020; June 23, 2020; and August 27, 2020. Still dissatisfied with the information, FDIC demanded that Miller undergo both a psychiatric and *physical* examination by an agency-designated doctor; Miller refused.

On May 5, 2021, more than 120 days had passed since raising his mixed case appeals without a final

decision from the Board. Thus, Miller could bring his mixed case to district court at any time, pursuant to the savings provision in 5 U.S.C. § 7702(e)(1).

On September 30, 2021 – more than five months after the hearing concluded – the administrative judge issued her initial decision. That decision denied Miller relief on his whistleblower reprisal appeal, erroneously claiming Miller did not make protected whistleblower disclosures. The initial decision also denied relief in Miller's adverse action appeal. While the judge concluded Miller engaged in protected whistleblower activities, the judge erroneously concluded FDIC met its heightened burden by clear and convincing evidence that it would have taken the same actions absent protected whistleblowing. However, the initial decision held that Miller satisfied all FDIC's demands for medical information on April 8, 2020, and she ordered FDIC to cancel Miller's suspension on that date.

The initial decision violated 5 U.S.C. § 7701(b)(2) and 5 C.F.R. § 1201.111(b)(4) by not including a statement on interim relief when Miller became a prevailing party. The Board expressly follows the standards of a "prevailing party" set forth in this Court's decision in *Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 603, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001).

On November 4, 2021, FDIC filed a petition for review ("PFR") seeking reversal of the administrative judge's order to cancel Miller's suspension. FDIC also

included a PFR of the individual right of action appeal, in which it prevailed. In an *ex parte* communication with FDIC, the Clerk of the Board encouraged FDIC to withdraw its petition with respect to the IRA appeal. At no time then or thereafter did FDIC determine that Miller's return to duty would be unduly disruptive. See 5 U.S.C. § 7701 (b)(2)(A)(ii)(II).

On December 3, 2021, Miller timely filed his mixed case complaint in federal district court seeking review of MSPB's civil service claims under the standards in 5 U.S.C. 7703(c), and *de novo* hearing of his Title VII claims.

On January 28, 2022, Miller contacted agency counsel seeking FDIC's voluntary compliance with the interim relief statute. The same day, Miller contacted the Clerk of the Board regarding FDIC's failure to provide interim relief and failure to submit a certificate of compliance.

On February 1, 2022, the Clerk of the Board responded to Miller's email saying, "A review of the initial decision did not reveal that the administrative judge ordered interim relief pursuant to 5 C.F.R. 1201.11. Section 1201.116, which you reference in your email, applied to circumstances in which interim relief was ordered in the initial decision and the appellant believes that the agency has not complied with the interim relief order."

On February 4, 2022, Miller noticed voluntary dismissal of his district court case in the belief that

the court lacked jurisdiction to hear his case because the MSPB's decision was not final.

On February 7, 2022, Plaintiff moved the Board for interim relief on the docket of FDIC's petition for review. ECF 39-1.

On February 9, 2022, FDIC responded to Miller's email with its position that "interim relief and certificates of compliance are only required when the AJ orders interim relief, which this AJ did not."

On February 12, 2022, Miller filed a petition to file an untimely petition for review. The Clerk of the Board denied the petition without regard to the fact Miller timely filed in the wrong forum and other factors in Miller's favor under Board precedent. In the denial, however, the Clerk of the Board inadvertently provided Miller information that the district court did, in fact, have jurisdiction for the *mixed case.*

On February 17, 2022, Miller filed a *Motion for Rule 60 Relief* in district court to restore his claims. ECF 9. The motion directly referenced MSPB's failure to provide for interim relief. ECF 9-10 at 2.

On March 12, 2022, Miller contacted the Clerk of the Board by email, requesting a favorable decision on his *Motion for Interim Relief* after FDIC failed to timely respond to it, thus conceding the motion.

On March 14, 2022, the Clerk of the Board responded that a Board quorum had been recently

restored, and that the Board would consider Miller's *Motion for Interim Relief* when it considered FDIC's PFR. If the Board did so, Miller would have been deprived of interim relief during the *entire* interim relief period.

On March 15, 2022, the Clerk of the Board responded saying, "Arguments concerning the status of interim relief will be considered by the Board as part of the petition for review process pursuant to 5 C.F.R. 1201.116." ECF 39.2.

FDIC did not enter an appearance in the district court case until April 12, 2022 after Miller served his complaint a second time. Responding to a motion to reset deadlines for FDIC's answer, FDIC claimed Miller improperly served the complaint, thus it was not previously required to respond. However, FDIC never raised a timely defense under Fed. R. Civ. P. 12(b)(5).

The district court vacated the voluntary dismissal after FDIC indicated it would not oppose the Rule 60 motion. *Minute Order 04/14/2022.* The parties briefed Miller's motion to reset deadlines from April 25, to May 5, 2022; the agency's motion to dismiss from May 27, to August 2, 2022, and a motion for Rule 11 sanctions from July 12—28, 2022.

On August 12, 2022, Miller filed a *Motion for Interim Relief, a Temporary Restraining Order, and a Preliminary Injunction.* ECF 39. The first part of the motion sought an order from the court to FDIC or MSPB to provide Miller interim relief to which he

was entitled as a matter of law. Miller argued in his motion and reply that the court must review the motion under the standards in 5 U.S.C. § 7703(c). The second part of the motion was for preliminary injunctive relief to order FDIC to provide three benefits Miller expected FDIC not to provide even if the court ordered interim relief: (1) remote access to FDIC's computer network, (2) to stay agency attempts to seek additional medical examinations; and (3) a stay on agency disciplinary actions based on the same facts underlying the indefinite suspension.

FDIC responded to the motion arguing that Miller failed to satisfy the standards for a preliminary injunction specified in *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22, 129 S.Ct. 365, 172 L.Ed.2d 249. ECF 45. FDIC argued Miller's motion was untimely filed months after the complaint. FDIC violated Rule 11 arguing that the court lacked jurisdiction over his IRA claim, which was not at all related to his entitlement to interim relief – a part of his adverse action appeal. ECF 45 at 9. FDIC violated Rule 11 again with false and frivolous arguments that Miller sought the same relief in the Eastern District of Virginia, and relief was barred by *res judicata*. ECF 45 at 9—10. Miller's motion in EDVA sought to *prevent* his indefinite suspension before it began. Miller's motion in the instant case sought to obtain interim relief he earned *on the merits* of his MSPB appeal and to which he was entitled as a matter of law. FDIC raised no defenses that Miller had not pleaded a specific claim for interim relief.

On September 5, 2022, the district court denied the motion, relying solely on the standards for preliminary relief; the court never mentioned the standards in 5 U.S.C. § 7703(c). ECF 47. The court held Miller satisfied none of the *Winter* factors. *Id.* Miller objected to the denial. ECF 48. The district court also held that Miller failed to show irreparable harm because his motion was filed eight months after his complaint despite the fact that the case was closed for two months and the parties briefed several other issues.

On September 6, 2022, Miller filed a petition for a writ of mandamus to the MSPB and FDIC to provide Miller interim relief. *In Re: Miller*, 22-1232 (D.C. Cir. Nov. 10, 2022). Miller amended his petition and moved to consolidate the petition with his interlocutory appeal, which was based on the same nucleus of facts. On November 10, 2022, the circuit court dismissed the mandamus petition, ostensibly for lack of jurisdiction, holding Miller must seek mandamus in district court. Doc. #1973187. The court ignored Miller's argument that the court had jurisdiction to hear an appeal from the docket of FDIC's petition for review to the Board under the All Circuits Review Act, Pub. L. 115-195, July 8, 2018.

On September 29, 2022, Miller timely noticed an interlocutory appeal of the relief denied. *Miller v. Gruenberg*, 22-5256 (D.C. Circuit). FDIC moved for summary affirmance, which Miller opposed and the court denied. The court appointed *amicus* to "present arguments in favor of appellant's position that

amicus determines are potentially meritorious." Doc. #1991382. The parties and *amicus* fully briefed the appeal. For the first time on appeal, FDIC argued that Miller did not raise a distinct claim for interim relief in his pleadings.

On January 3, 2023, Miller filed a complaint in the nature of mandamus in the same district, and the case was assigned to the same district court judge. *Miller v. MSPB,* 1:22-cv-15-CJN (D.D.C.). The U.S. Attorney for the District of Columbia represented *both* FDIC in one case and the MSPB in the other case. Counsel assigned to both cases argued in tandem that Miller was not entitled to interim relief. The district court denied a motion for a preliminary injunction in the nature of mandamus to order MSPB to order FDIC to grant interim relief.

On March 2, 2023, the Clerk of the Board attempted to force Miller to abandon his district court cases against FDIC and MSPB by treating his *Motion for Interim Relief* as an untimely cross-petition for review, which it would have denied for the same reasons it denied Miller's prior motion to file an untimely petition for review.

On May 16, 2023, the Board issued a *Final Order* on FDIC's petition for review. The Board held that Miller was entitled to interim relief by operation of the statute. *Miller v. FDIC*, MSPB No. DC-0752-20-0790-I-1. See also *Stewart v. Dep't of Trans.*, 2023 MSPB 18, ¶ 10.

FDIC attempted to moot the D.C. Circuit appeal by paying Miller back pay, but it had not completed payment of his retirement benefits, and it did not provide Miller other benefits as terms and conditions of employment for the nineteen months he was unlawfully denied interim relief. These benefits, Miller argued, included, *inter alia*, medical, dental, vision, and life insurance; payment of professional dues; education benefits; conference travel; promotion and detail opportunities; and remote access to FDIC's computer network so that Miller could enjoy all of his benefits.

The circuit court held oral arguments on August 28, 2023, but it did not permit Miller to make oral arguments himself. *Amicus* represented Miller's position, but he lacked information to respond to the panel's questions regarding relief Miller received, and he did not make all of the arguments Miller intended to make.

The court issued its *per curiam* judgment on September 25, 2023. Doc. #2018582. The circuit panel agreed that Miller was entitled to interim relief, but it considered FDIC's provision of back pay sufficient to decide the appeal, and it held that the district court judge did not abuse his discretion. The court presumed that "federal officers will adhere to the law as pronounced by the court." *Id.* at 2. The circuit court held that "the district court did not abuse its discretion in denying preliminary-injunctive relief based on a claim that was not presented in the case." *Id.* The circuit held that "Any claim to reinstatement was mooted by the Board's

final order. . . Miller cannot be retroactively reinstated. And Miller's other requests fall outside the scope of interim relief contemplated by the Act." *Id.* The court held that "To the extent Miller based his nonmonetary claims not on the Act but on the district court's general equitable powers, the argument was inadequately developed and therefore forfeited." *Id.*

Miller moved for panel rehearing and rehearing *en banc*, which the circuit court denied. App. 6—7.

Miller timely files this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. MILLER WAS INDISPUTABLY ENTITLED TO INTERIM RELIEF, BUT HE DID NOT RECEIVE IT.

As the Board, MSPB's attorneys, FDIC's attorneys, and the D.C. Circuit now all admit, Miller was indisputably entitled to interim relief commencing on September 30, 2021. Yet all these entities whose legal duties were to ensure Miller received that relief repeatedly stonewalled him in a monstrous game of judicial *Whac-a-Mole*, deliberately tormenting a *pro se* litigant and trying to drive him into bankruptcy, foreclosure, and loan default. Had Miller caused a loss to an insured financial institution, FDIC could have fired Miller. 12 C.F.R. § 336.5(a)(3)-(4) and 12 C.F.R. § 336.8. No matter who Miller asked, no matter how he asked it,

no matter how clear his right to such relief, everyone denied it for the entire duration of the interim relief period.

Only in conjunction with deciding a similar case on May 16, 2023 – nineteen months after Miller was entitled to interim relief – did the Board issue a decision that "Because interim relief was not explicitly addressed in the initial decision, the appellant became entitled to interim relief by operation of statute." *Final Order*, MSPB No. DC-0752-20-0790-I-1.

After the Board's final order, FDIC and MSPB[1] attempted to moot Petitioner's appeal and complaint by providing back pay from September 30, 2020 to May 16, 2023. Yet FDIC failed to provide adequate documentation supporting its back pay amount, Miller disputed the correct amount of back pay, and FDIC had yet to provide Miller all of the nonpecuniary benefits he should have received but for FDIC's unlawful withholding of interim relief.

The D.C. Circuit plainly erred that Miller's request for non-monetary relief was not contemplated in the statute. Interim relief shall consist of "the relief provided in [the initial decision] effective upon the making of the decision, and

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[1] Defendants McWilliams/FDIC and MSPB (mandamus action, *Miller v. MSPB*, 1:23-cv-15-CJN, D.D.C.) were both represented by the U.S. Attorney for the District of Columbia, and the parties were *obviously* teaming up to defeat Miller's entitlement to interim relief.

remaining in effect pending the outcome of any petition for review..." 5 U.S.C. § 7701(b)(2)(A). If, as here, the relief provides for an employee's return to the place of employment, the agency can prevent the return to duty if it determines "that the return or presence of such employee... is unduly disruptive to the work environment." *Id.* § (2)(A)(ii)(II). If the agency makes such a determination, "such employee shall receive pay, compensation, ***and all other benefits as terms and conditions of employment*** during the period pending the outcome of any petition for review." *Id.* § (b)(2)(B). [emphasis added]

In the instant case, the relief ordered by the administrative judge was cancellation of Miller's suspension effective April 8, 2021, and interim relief became operative on September 30, 2021 – the date of the initial decision. Thus, absent an "unduly disruptive" determination, FDIC should have returned Miller to duty no later than twenty days after the initial decision – October 20, 2021. FDIC never made an "unduly disruptive" determination.

The interim relief statute's commands to provide prevailing parties "the relief ordered in the initial decision" and "pay, compensation, and all other benefits as terms and conditions of employment" were ***intentionally*** broad. Congress explicitly stated:

> The interim relief statute was added as part of the Whistleblower Protection Act of 1989, Pub L. No. 101-12, § 6, 103 Stat. 16, 33-34 (1989). The Senate

> Report explained, 'This section is a change to current law in that under current law, employees are not granted any relief ordered by a regional office of the Board until they win at the full Board.' S. Rep. No. 100,413, at 35 (1988). Senator Pryor provided some clarification on this purpose: '[The Senate bill] provides interim relief to those whistleblowers who receive a favorable decision at the . . . MSPB, regional level. This ensures that an employee will not suffer undue hardship waiting for a final decision from the MSPB.' 134 Cong. Rec. 29,543 (1988) (statement of Sen. Pryor).

Coy v. Dep't of the Treasury, No. 2021-2098, at *8 (Fed. Cir. Aug. 9, 2022).

Miller's *Motion for Interim Relief* provided the court with all the information necessary for it to grant the requested relief. Miller proved that: (1) he was a prevailing party in an MSPB appeal; (2) the agency filed a petition for review to the Board; (3) Miller was entitled to interim relief as a matter of law.

The standards for a preliminary injunction simply do not apply to the relief Miller sought in his motion. "The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress

effective." *U.S. v. San Francisco*, 310 U.S. 16, 31 (1940).

"In order to justify the granting of an injunction under an express and unrestricted statutory authority, no balancing of equities is necessary and neither threatened irreparable injury nor lack of an adequate remedy at law need be shown. General equitable doctrines "do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective." *Brown v. Hecht Co.*, 137 F.2d 689, 692 (D.C. Cir. 1943).

"It is a well-established rule that where Congress expressly provides for injunctive relief to prevent violations of a statute, a plaintiff does not need to demonstrate irreparable harm to secure an injunction. In such situations, it is not the role of the courts to balance the equities between the parties. The controlling issue is whether Congress has already balanced the equities and has determined that, as a matter of public policy, an injunction should issue where the defendant is engaged in, or is about to engage in, any activity which the statute prohibits. The proper role of the courts is simply to determine whether a violation of the statute has or is about to occur. *In re: Sac & Fox Tribe of the Mississippi in Iowa / Meskwaki Casino Litigation*, 340 F.3d 749, 759 (8th Cir. 2003).

"Where a statute authorizes injunctive relief for its enforcement, plaintiffs need not plead and prove

irreparable injury." *Environmental Defense Fund, Inc. v. Lamphier*, 714 F.2d 331, 338 (4th Cir. 1983).

Interim relief was not *prospective* relief like that sought in a preliminary injunction. It was relief earned *on the merits* of an MSPB appeal to which Miller was entitled as a matter of law. The relief is *mandatory*, not discretionary as the D.C. Circuit held. Miller need not prove irreparable harm; the legislative history of the Act specifically states that ***any*** "undue hardship" to a prevailing party awaiting a decision on an agency's PFR is unacceptable.

Even if the standards of a preliminary injunction were correct, Miller proved certainty of success on the merits because he was entitled to interim relief as a matter of law. The harm was irreparable because the legislative history sought to prevent ***any*** "undue hardship." *Coy v. Dep't of the Treasury*, *supra*. Each day FDIC denied Miller interim relief was irreparable harm. Congress expressly said that whistleblowers "serve the public interest," and that protecting them is of "paramount consideration." Whistleblower Protection Act of 1989, Pub. L. 101-12 (1989), 103 Stat 16, Sec. 2. Thus, Miller easily satisfied the merged factors of public interest and balance of equities.

Miller's complaint seeking review of the adverse initial decision included not just the paramount decision of denying Miller relief, but every *subsidiary* decision throughout the proceedings. For example, the Federal Circuit remanded a case when the Board made an arbitrary decision denying discovery.

Whitman v. Dep't of the Army, 1:21-cv-03163 (Fed. Cir. Jun. 5, 2023).

The circuit court erred in deciding Miller failed to raise a specific claim for interim relief. Miller's *Motion for Rule 60 Relief* and *Motion for Interim Relief* pleaded sufficient facts that effectively amended his complaint. "Courts construe liberally the pleadings of a *pro se* litigant. *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), cited in *Artie Dufur v. United States Parole Comm'n*, 34 F.4th 1090, 1096 (D.C. Cir. 2022). "We have previously held that a district court errs in failing to consider a *pro se* litigant's complaint 'in light of' all filings, including filings responsive to a motion to dismiss. See *Richardson v. United States*, 193 F.3d 545, 548 (D.C. Cir. 1999)." *Brown v. Whole Foods Mkt. Grp., Inc.*, 789 F.3d 146, 152 (D.C. Cir. 2015). "[T]he district court should have considered the facts alleged in all of [the plaintiff's] pleadings" *Id.*

That is, the D.C. courts follow their own precedential decisions only when they feel like it, the very definition of arbitrary and capricious.

II. THE D.C. CIRCUIT'S JUDGMENT FAR DEPARTED FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS.

"Certiorari is appropriate when 'a United States court of appeals ... has so far departed from the accepted and usual course of judicial proceedings ...

as to call for an exercise of this Court's supervisory power.' Supreme Court Rule 10(a)." *Kalamazoo Cnty. Rd. Comm'n v. Deleon*, 135 S. Ct. 783 (2015).

To achieve a judgment against Miller, the circuit court had to dodge the interim relief statute, the Clerk of the Board's erroneous denial of Miller's *Motion for Interim Relief*, the statute's broad application to all benefits as terms and conditions of employment, and its own precedent regarding the liberal construction of *pro se* pleadings and effective amendment of complaints with supplemental filings. See *Estelle v. Gamble*, *Artie Dufur v. United States Parole Comm'n*, *Richardson v. United States*, *Brown v. Whole Foods Mkt. Grp., Inc.*, *supra*.

The D.C. Circuit erred that Miller was required to plead a specific claim for interim relief, which was properly before the courts when Miller brought his *mixed case* to district court to contest ***all*** of the administrative judge's adverse rulings. When the circuit court heard and accepted FDIC's argument that Miller had not pleaded a distinct claim for interim relief, the circuit court violated the basic rule of appeals that a court will not consider arguments made for the first time on appeal. "Arguments not made below are deemed waived, and, absent 'exceptional circumstances' not present here, 'it is not our practice to entertain issues first raised on appeal.'" *Roosevelt v. E.I. Du Pont de Nemours Co.*, 958 F.2d 416, 419 n. 5 (D.C. Cir. 1992)." *Marymount Hosp., Inc. v. Shalala*, 19 F.3d 658, 663 (D.C. Cir. 1994).

The circuit court was too clever by half saying that "Miller cannot be retroactively reinstated," while ignoring that the court ***could*** exercise its equitable powers to order FDIC to provide Miller with benefits unlawfully denied for a period of time equal to the interim relief period – nineteen months. "As we explained in *Milliken v. Bradley*, 433 U.S. 267, 281, ... Once invoked, `the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.'" *Hutto v. Finney*, 437 U.S. 678, 688 n.9 (1978), cited in *Brown v. Plata*, 563 U.S. 493, 538 (2011). "The Court, moreover, has broad discretion to fashion an appropriate remedy in equity. See, e.g., *Peyton v. DiMario,* 287 F.3d 1121, 1126 (D.C. Cir. 2002) ("A 'district court has wide discretion to award equitable relief.' " (quoting *Barbour v. Merrill*, 48 F.3d 1270, 1278 (D.C. Cir. 1995)))" *Pyramid Lake Paiute Tribe v. Burwell*, 70 F. Supp. 3d 534, 545 (D.D.C. 2014).

The final decision by the Board reversing the initial decision's order to cancel Miller's suspension did not moot the provision of those benefits denied. For a case to become moot, it must be "impossible for the court to grant `any effectual relief whatever.'" *Cody v. Cox*, 509 F.3d 606, 608 (D.C. Cir. 2007), citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895)).

It was certainly possible for the court to fashion substantial relief for Miller. During the entire

interim relief period, for example, Miller was unable to use FDIC funding for educational opportunities. FDIC recently denied Miller's request for funding of educational benefits because Miller was still indefinitely suspended. Despite Miller's continuing suspension, this is a clearcut example of a benefit that the court should have ordered FDIC to provide because it unlawfully denied Miller this benefit for nineteen months.

III. PROTECTING WHISTLEBLOWERS WITH INTERIM RELIEF IS EXCEPTIONALLY IMPORTANT

Congress has repeatedly and explicitly said that whistleblowers "serve the public interest" by bringing government malfeasance to light, and that protecting whistleblowers is a "paramount concern." WPA, 103 Stat. 16, Sec. 2. The Congressional reports associated with the interim relief statute expressly state the desire to protect prevailing whistleblowers from "undue hardship" during the lengthy pendency of Board review. *Coy v. Dep't of the Treasury*, *supra*.

Congress has amended the WPA twice to correct erroneous rulings by the MSPB and Federal Circuit depriving whistleblowers of relief, and it enacted three iterations of all-circuit review to expand review authority beyond the Federal Circuit with the intention of developing the law and creating circuit splits that this Court would be more inclined to hear.

In its report for the All Circuit Review Act, Pub. L. 115-195 (Congress lamented "both the MSPB and the Federal Circuit's interpretation of the

whistleblower protections implemented by and subsequent to the CSRA." H. Rep. 115-337, p. 2. The Senate report for the same law said:

> From October 1994 until WPEA's enactment in 2012, the Federal Circuit ruled favorably for Federal employee whistleblowers on only three out of 243 appeals considered. Between enactment of all-circuit review authority in WPEA in 2012 and March 11, 2018, the Federal Circuit heard 31 appeals of Federal employee whistleblowers and ruled favorably for the whistleblower in just one of those appeals. With all-circuit review authority, other circuits heard six appeals from Federal employee whistleblowers, ruling favorably for the whistleblower in two of those appeals. The other circuits' rulings under the all-circuit review authority demonstrate that there is no need for one court – the Federal Circuit – to specialize in whistleblower protection laws for Federal employees. [footnotes omitted]

Rather than develop the law with favorable rulings for whistleblowers as Congress intended, the D.C. courts have now joined the Federal Circuit in arbitrarily and capriciously denying protections to whistleblowers to which they are obviously entitled.

IV. THIS CASE PRESENTS AN ISSUE OF FIRST IMPRESSION THAT THIS COURT SHOULD RESOLVE

To the best of Miller's knowledge and belief, this case is the first to ever present circumstances where an MSPB decision partially favored both the appellant and the agency, the agency's petition for review went to the Board, and the appellant's petition for review went to district court. This apparently goes against this Court's holding that bifurcation of civil service and discrimination claims is disfavored. See *Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975 (2017); and *Kloeckner v. Solis*, 568 U.S. 41 (2012). The adverse effect of this bifurcation and MSPB's failure to provide a *pro se* litigant clear instructions tailored to his individual case was complete chaos in the courts and Board about jurisdiction, always and everywhere favoring the agency.

While not unique, this is also an important case where the Board and agency refused to provide a prevailing whistleblower with interim relief that Congress intended him to have during the lengthy pendency of Board review. The Board's decision on May 16, 2023 affirmed what Miller argued to the Clerk of the Board, the agency, and the district court in 2022. Yet they all colluded to deprive Miller of interim relief for the entire duration of Board review, and in granting *some* relief in the form of back pay, they all deprived Miller of every other benefit Miller would have enjoyed if FDIC canceled his suspension. Even after the Board's decision, nothing guarantees

that this situation won't happen again. The Board was nonresponsive to Miller's motion for interim relief. The district and circuit courts denied that relief. The circuit court issued no precedential ruling protecting prevailing appellants from the denial of interim relief.

The lower courts provided no stipulations of whether Miller is entitled to compensatory or consequential damages for the unlawful denial of interim relief, including all of the "undue hardship" Congress described in the history of the interim relief statute. *Coy v. Dep't of the Treasury*, *supra*.

The Board, FDIC, and the lower courts collaborated to frustrate Miller's indisputable right to relief. They will do so again in similar circumstances based on their multi-decade history of tormenting whistleblowers and *pro se* litigants. The D.C. Circuit's issuance of an unpublished decision not only attempts to dissuade this Court from granting this petition, it leaves unresolved important issues that district courts will face in future mixed case complaints.

Supervisory action by this Court is necessary to ensure that the MSPB, the D.C. Circuit, and all other circuit courts promptly enforce the interim relief statute and remedy all harm from violating that statute.

V. LOWER COURTS WERE BIASED AND PREJUDICED AGAINST A PRO SE LITIGANT AND WHISTLEBLOWER

In 2017, esteemed circuit court judge Richard Posner resigned from the Seventh Circuit bench citing the low regard his colleagues had for *pro se* litigants. "The basic thing is that most judges regard [*pro se* litigants] as kind of trash not worth the time of a federal judge." *ABA Journal*, Sep. 11, 2017.

In eight district court cases, fifteen appellate cases, and fifteen MSPB appeals, administrative and Article III judges have robbed Miller of justice. In every case, the facts and law favored providing Miller relief for literally *hundreds* of felony crimes, abuses of authority, constitutional torts, violations of Federal Rules of Civil Procedure, discrimination and retaliation by FDIC. Recent news reports reveal what Miller has been blowing the whistle about for thirteen years – that FDIC is a deeply corrupt government agency.[2, 3, 4, 5]

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[2] https://www.reuters.com/sustainability/boards-policy-regulation/us-fdic-announces-special-committee-review-allegations-sexual-harassment-2023-11-21/

[3] https://www.fdicoig.gov/sites/default/files/reports/2022-08/EVAL-20-006.pdf

[4] https://www.wsj.com/articles/fdic-6d9e8bf1

[5] https://www.wsj.com/finance/regulation/fdic-hires-independent-firm-to-conduct-assessment-into-alleged-harassment-and-discrimination-at-agency-a48baee0

In each case, judges made up false facts, ignored facts favoring Miller, misrepresented Miller's arguments, relied on inapposite authorities, misrepresented authorities, ignored favorable authorities, credited proven perjury, violated standards of review, and condoned literally *hundreds* of Rule 11 and Rule 37 violations by FDIC attorneys. See, e.g., *Miller v. McWilliams*, 23-843 (U.S. Sup. Ct. *pet. for cert.*) In the instant case, federal attorneys violated federal rules *dozens* of times. ECF 30, 41. The district court judge ignored incontrovertible evidence of rule violations, refusing to sanction government attorneys. ECF 65. The judge warned Miller against making further Rule 11 motions, giving FDIC a green light to lie as much as it wants.

The lower courts refused to take any of Miller's arguments seriously, no matter how well he argued his case and supported it with citations to law. After the dust settled, the Board, FDIC, MSPB, and the lower courts finally had to admit that the *pro se* litigant was right that he was entitled to interim relief as a matter of law. As Miller argued but both courts rejected, he was *certain* to prevail on the merits of the case with respect to interim relief.

Yet even after this realization, the lower courts *still refused* to provide Miller all of the relief to which he was entitled. The circuit court erroneously focused solely on back pay and not the entire panoply of "benefits as terms and conditions of employment" Miller would have received if FDIC canceled his suspension. After Miller put the circuit court on notice that FDIC had repeatedly denied him pay, and

benefits, and damages from a prior EEOC decision, the court invoked one of the most ridiculous precedential authorities in our legal system: the presumption that federal agencies and employees will faithfully perform their duties. FDIC's thirteen-year history of abusing Miller is a stark counterpoint.

The district court judge displayed profound favoritism of the federal defendants and antagonism against Miller throughout all three cases over which he presides. *Liteky v. United States*, 510 U.S. 540, 541 (1994). The judge let federal attorneys get away with literally dozens of false signings, frivolous legal arguments, and repeated attempts to prejudice the court with irrelevant, inflammatory information. Miller moved for the judge's withdrawal, ECF 78, which the court denied. ECF 89. The D.C. Circuit denied a petition for a writ of mandamus to order the district court judge to withdraw. *In Re: Miller*, 23-5241. Miller will, within the next month, present to this court a petition for a writ of mandamus to obtain an unbiased judge, potentially outside the circuit.

* * *

When enacting the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199 (2012) and various iterations of the All Circuit Review Act, Congress expressly scorned the MSPB and Federal Circuit for refusing to protect whistleblowers as Congress intended. Now, the other inside-the-beltway courts (D.C. and 4th Circuits) have

also treated whistleblowers with contempt in a judicial version of "snitches get stiches."

The Board, FDIC, and lower courts made up every excuse to deny Miller relief to which he was entitled as a matter of law to drive Miller into foreclosure, bankruptcy, and debt default. Under FDIC regulations, the agency can fire Miller for failure to pay just debts. See 12 C.F.R. § 336.4(a)(3)-(4); § 336.5(a)(3)—(4) and 12 C.F.R. § 336.8. The pleadings of the case itself demonstrate the administrative judge committed *dozens* of abuses of discretion.

It is long overdue for this Court to step into a whistleblower case and make it clear to every court in the nation that this Court will not tolerate contrived refusals to protect whistleblowers and *pro se* litigants.

CONCLUSION

For the foregoing reasons, this Court should grant the writ of certiorari, vacate the decisions of the lower courts, and remand this case to the lower courts with instructions to provide Miller all of the benefits he would have received but for FDIC's unlawful withholding of interim relief with a *nunc pro tunc* order.

Respectfully submitted:

EXECUTED ON:

February 28, 2024

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