No. 17-6479

In the Supreme Court of the United States

MARNE K. MITSKOG, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD, ET AL.

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

PETITIONER'S REPLY TO GOVERNMENT'S WAIVER

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[1] The government <u>chose</u> to file a waiver in lieu of an opposition brief. The rule governing opposition briefs allows 14 days for a reply, which makes this filing timely under the rules.

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REPLY BRIEF ARGUMENT:

PETITIONER'S REPLY TO THE GOVERNMENT'S RESPONSE AND THE GOVERNMENT'S WAIVER OF RIGHT TO DEFEND

I. The Doctrine of Unclean Hands Applies Here and Assumes Greater Significance Because This Matter Concerns the Public Interest

It's no surprise that the government has waived its right to respond, because what it has done is indefensible *and* the U.S. Department of Justice ("DOJ" or "Department") has unclean hands in this matter (within the meaning of federal law and this Court's precedent[2]), as it, too, collected, maintained, used, and disseminated Petitioner's protected communications in violation of federal law, as discussed below—*i.e.*, DOJ used and disseminated *the exact same set of e-mails referenced, excerpted, and quoted below (and used by the Federal Election Commission ("FEC") to unlawfully fire Petitioner and remove Petitioner from federal service (in retaliation for her protected disclosures, within the meaning of federal whistleblower law, and because FEC agency officials perceived her as a whistleblower, which is exactly what Petitioner is*)).

The Justice Department's hands are completely unclean on this issue, as Petitioner's protected communications were disseminated by e-mail both inside and outside that federal agency by DOJ agency employees in 2013, *as well as by the FEC in all of its termination efforts against Petitioner* (also in 2013). (The DOJ's effort was a clearly retaliatory effort to derail Petitioner's pending EEOC claim against DOJ, which is still pending, and an effort to protect Ravel from the consequences of her crimes (and the misconduct she engaged in) while at DOJ, because Petitioner's past whistleblowing efforts to the Office of Inspector General ("OIG") at DOJ included and involved a report of Ravel's (mis)conduct.[3]) (What DOJ did—*i.e.*, what the very same agency that was sanctioned by the court in *Gerlich v. Dep't of* Justice, 711 F.3d 161 (D.C. Cir. 2013) did—was to send (*i.e.*, "collect, use, and disseminate"[4]) and file those same protected communications of Petitioner (to Ravel) in an EEOC agency administrative proceeding in which they had no relevance—*zero* relevance—whatsoever, as the EEOC proceedings only

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2 *See Precision Instrument Mfg. Co. v. Automotive Co.*, 324 U.S. 806, 815 (1945).

3 Ravel was a Deputy Assistant Attorney General ("DAAG") at the Justice Department before becoming a state official in California (and subsequently nominated to the FEC in 2013). Under her supervision, DOJ (officials) committed crimes—*viz.*, federal contract procurement fraud, a felony, *inter alia*, to artificially enlarge the office budget through falsehoods to the government under a federal contract that was part of a federal government program. Petitioner reported this to the DOJ OIG in May 2011.

4 Subsection (a)(3) of the Privacy Act of 1974, 5 U.S.C. 552a, *Records Maintained on Individuals*, defines what it means to "maintain" records on an individual, and that includes "maintain, collect, use, or disseminate."

concerned events and agency misconduct that occurred in 2010 and 2011, before Petitioner left DOJ in 2011.)[5] That 2013 DOJ agency employee misconduct violated both subsection (e)(7) of the Privacy Act, as discussed below, as well as subsection (b) of the same act (which expressly covers communication and disclosure "to another agency"—here, the EEOC), as it was done without "the prior written consent" of Petitioner, which subsection (b) of the Privacy Act requires.[6]

Such (mis)conduct by the agency and its employees clearly violates the express terms of subsection (e)(7) of the Privacy Act (the "Act"), which specifically and clearly provides that an agency shall: "maintain no record *describing how any individual exercises rights guaranteed by the First Amendment*" unless "expressly authorized" or "pertinent to and within the scope of an authorized law enforcement activity," neither of which was present here. 5 U.S.C. 552a(e)(7) (emphases added). The Act further provides that, if knowing and willful, the conduct is criminal. *See* 5 U.S.C. 552a(i)(1),*Criminal Penalties* ("*Any* officer *or employee* of an agency who by virtue of his employment or official position, *has possession of*, or access to, agency records which contain *individually identifiable information*[7] *the disclosure of which is prohibited by this section*... and who knowing that disclosure of the specific material in *any* manner to *any person*

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5 Specifically, Stephen J. Buckingham and Jennie Kneedler, of the Justice Department's Civil Branch (Federal Programs Branch) at the time, collected, used, maintained, and disseminated Petitioner's Privacy Act (protected) communications to Ravel. The communications were protected within the meaning of 5 U.S.C. 552a(a)(3) and 5 U.S.C.552a(e)(7), *inter alia*, and then (unlawfully, in violation of federal law and precedent) these DOJ employees further disseminated them *after the court's ruling in Gerlich*, 711 F.3d 161, in a (failed, but blatantly retaliatory) effort to derail Petitioner's EEOC case and claims, a case which ultimately resulted in a default judgment sanction against the Department (on more than one count in), yet the case is still pending on appeal to the EEOC Office of Federal Operations ("EEOC OFO") (despite its origin back in 2011 and the subsequent default judgment ruling), which makes the Government very hostile to Petitioner (as well as an opponent in another forum in which it has already been sanctioned).

6 5 U.S.C. 552a, *Records Maintained on Individuals.*

7 Petitioner's e-mails were from her personal e-mail address, which included her full name (in the address), so they were individually identifiable within the meaning of the law.

or agency not entitled to receive it, *shall be* guilty of a misdemeanor and fined not more than $5,000." (emphases added)). And the D.C. Circuit Court of Appeals expressly affirmed and upheld subsection (e)(7) in March 2013,[8] <u>and its application to the very same agency (*i.e.*, DOJ) that possessed and distributed Petitioner's e-mails late in the summer of 2013</u>—in other words, months before DOJ used Petitioner's e-mails, a Circuit Court ruling occurred which put DOJ agency officials and employees on actual notice of the federal prohibition on such action prior *to engaging in exactly that conduct <u>later in the very same year</u>*. In short, the government has no response <u>because</u> it's covering up crimes at <u>two</u> agencies (and more). And so the Government's (*i.e.*, DOJ's) hands are very "unclean," within the meaning of federal law as a result.[9]

For ease of review and understanding, below is a critical timeline of some of the relevant events at the FEC.

TIMELINE:

1. On June 27, 2013, by way of e-mail, Petitioner was terminated (immediately) from the FEC by way of a letter notifying her of her "immediate separation from Federal service" based on her First Amendment- (and Privacy Act-) protected communications to (former DAAG) Ann Ravel[10] from Petitioner's personal e-mail address while off-duty (including Petitioner's expressed outrage, *inter alia*, at the "fraudulent diversion of [likely] hundreds of thousands of dollars designated under the Health Care Fraud and Abuse Control Program ('HCFAC') at DOJ under [Ravel's] watch while Deputy Assistant Attorney General," a statement which was included in her communication to Ravel and cited in that FEC termination

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8 *Gerlich*, 711 F.3d 161.

9 *See supra* n.2.

10 Ravel was a state employee in California at the time.

letter,[11] among other things, including Petitioner's representation to Ravel that "[t]his is about my First amendment right to speak truth to a public official about her official government misconduct as a Federal law enforcement official.") Both statements are quotes from Petitioner's First Amendment-protected e-mail communications to Ravel (while Ravel was a state employee in California), and both were cited in the (first, and immediately effective) FEC termination letter as a basis for Petitioner' termination from the agency, as was the following: "This is about [Petitioner's] right to speak truth to Federal injustice and Federal corruption, which is exactly what [Petitioner] [is] doing," and Petitioner's statement that "I am exercising my First Amendment right to call out a former, and soon to be again, Federal official on her misconduct." Each statement in Petitioner's e-mails, including these, was specifically used as the sole basis for terminating Petitioner from the FEC in June 2013, and several were quoted *verbatim* in that FEC termination letter signed by (then) FEC Chair Ellen Weintraub and (then) Vice Chairman Donald F. McGahn II, who is now serving as current White House Counsel. The letter was sent to Petitioner (a use and dissemination) by agency counsel Gregory R. Baker, and further disseminated to the President of the NTEU, Chapter 204, and a union member, by Baker, without Petitioner's prior knowledge or consent, despite the fact that they were plainly identified as having First Amendment protection on their face, and were *clearly* "sharp" and "caustic" attacks on a public official (on a matter of public concern, even) within the meaning of *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) and *Lane v. Franks*, 573 U.S. ____ (2014).[12]

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[11] And this excerpt, along with the rest of the e-mail, was then disseminated by the Justice Department in EEOC proceedings a month later, as well as within the agency, apparently (if not obviously), *even though that action clearly violates federal law*; in fact, DOJ even maintains a Privacy Act overview that clearly prohibits such conduct. *See* DOJ Overview of the Privacy Act of 1974, *available* at https://www.justice.gov/opcl/conditions-disclosure-third-parties (last accessed December 8, 2017). *See also supra* n.5. The Department's hands are very "unclean" with respect to these proceedings.

[12] The FEC argued below that Petitioner was a probationary employee (though agency records suggest otherwise); nevertheless, that argument must fail on First Amendment grounds. This Court has held that First

And this occurred in an agency—the FEC— that purports to know the First Amendment and First Amendment law, and have (litigation, even) expertise in that area, as well as in another agency—*viz.*, the federal Department of Justice, which had just been sanctioned by the Circuit Court in *Gerlich* for collecting and disseminating (and then destroying) such protected communications and activity in another federal employment matter.

2. Petitioner immediately appealed her immediate separation from public service inside the FEC (as per the terms of the agency's union contract), and was placed on administrative leave (*and not permitted to even enter the building*). (Then, the following month (*i.e.*, July 2013), Ravel (or someone at the FEC) (upon information and belief), as noted above, shared the *exact same* set of First Amendment- (and Privacy Act-) protected communications used to fire Petitioner from the FEC with one or more persons within the Justice Department, and the e-mails were then filed in EEOC proceedings before an administrative judge by DOJ attorneys in July of 2013 in a hostile and retaliatory act toward a whistleblower, which is why the Department's hands—the Government's hands—are so very unclean in this matter.[13]) After

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Amendment protection extends to even probationary employees, "even if the employee could be fired for any reason or no reason at all," because an employee is "entitled to reinstatement if she was fired for exercising her constitutional right to freedom of expression." *Rankin v. McPherson*, 483 U.S. 378, 383-84 (1987).

That was not the first time this Court recognized the power of the First Amendment in an employment termination context. In *Perry v. Sindermann*, 408 U.S. 593 (1972), a college professor was fired after criticizing the administration. There, the Court upheld the right to a hearing (over the termination) on procedural due process grounds *and* affirmed the power of the First Amendment in the context of employment decisions. Specifically, the *Perry* Court stated that the government

> may not deny a benefit to a person on a basis that infringes his [or her] constitutionally protected interest, *especially his [or her] interest in freedom of speech.* For if the government could deny a benefit to a person because of [her] constitutionally protected speech or associations, [her] exercise of those freedoms would be in effect *penalized and inhibited.* This would allow the government to 'produce a result which [it] could not command directly.' ... Such interference with constitutional rights is impermissible.

408 U.S. at 597 (internal citation omitted) (emphasis added); *see also Speiser v. Randall*, 357 U.S. 513 (1958) (holding that when a constitutionally-protected right like freedom of speech is implicated, procedural due process requires a hearing).

13 *See supra* n.5.

being placed on administrative leave, Petitioner then sent Gregory R. Baker, agency counsel, a written letter (and Privacy Act) notification by facsimile, on September 4, 2013, informing him and FEC agency officials that to use such communications was clearly unlawful under the Privacy Act (even citing and quoting the relevant sections of the law and precedent *in the letter*), and informing the agency and its counsel that to collect, maintain, or use them willfully (and with knowledge) was criminal under the Act (and citing subsection (i)(1) of the Act in the letter), *which at that point made the Agency's further use a (knowing and willful) crime.*

3. In response, *after* FEC agency counsel Baker *confirmed receipt of the letter* and notification: (1) **Petitioner's immediate separation from federal service was rescinded**; (2) **Donald McGahn resigned from the agency** (on or about Sept. 17, 2013, as reported by the *Washington Post*[14]); (3) **the first and immediate termination letter was "replaced,"[15] in writing, with a "Notice of Proposed Removal" (dated Sept. 18, 2013) (using the same unlawful basis)**; and (4) more termination-related communications occurred (unlawfully using Petitioner's protected disclosures, as discussed below, and other protected communications).

4. The new termination (notice) was issued on the same bases as the first (and immediate) termination letter, but with additional points—including Petitioner's proffer of testimony (about Ravel) to the U.S. Senate Committee on Rules & Administration (in September 2013) and other

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14 Reid Wilson, *Former FEC chairman Donald McGahn resigns from panel*, Washington Post, September 17, 2013, https://www.washingtonpost.com/politics/former-fec-chairman-donald-mcgahn-resigns-from-panel/2013/09/17/84ff1a88-1fca-11e3-94a2-6c66b668ea55_story.html?utm_term=.c893941adf44

15 The FEC specifically used the written term "replaced" to indicate that the Notice of Removal "replaced" the immediate termination letter (signed by Weintraub and McGahn) that had occurred prior to the written warning sent by Petitioner about adhering to the requirements of the Privacy Act and the consequences of violating it. But the Justice Department still hasn't prosecuted anyone, despite the fact that Petitioner filed the same warning in the EEOC proceedings after DOJ's flagrantly illegal use of the communications sent by Petitioner to Ravel while off-duty and at home (because its own hands are so unclean). Petitioner even cited the *Gerlich* case in the letter and court filing.

protected communications, including communications to the highest level agency lawyer (and Office of General Counsel ("OGC") supervisor) at the time, Gregory Baker of the FEC OGC. Complaints to a supervisor are "protected disclosures" within the meaning of the law. *See, e.g.*, *Nasuti v. Dep't of State*, 2014 MSPB 12, at p. 4, ¶ 6 (2014) (citing *Dilorenzo v. Dep't of Veterans Affairs*, 103 M.S. P.R. 506 ¶ 8 (2006)).

And subsection (e)(6) of the Privacy Act requires that an agency, "prior to disseminating any record about an individual to any person other than an agency, unless the dissemination is made pursuant to [a subsection not relevant here], make reasonable efforts to assure that such records are accurate, complete, timely, and relevant *for agency purposes*" (emphases added). And, subsection (e)(7), of course, provides that the agency shall "maintain no record describing how any individual exercises rights guaranteed by the First Amendment unless *expressly authorized* by statute *or by the individual about whom the record is maintained*" [or unless for authorized law enforcement activity neither relevant nor present here] (emphases added). There is no lawful purpose for an agency to collect and disseminate the private e-mails of an employee that constitute First Amendment-protected communication on these facts.

And subsection (i)(1) makes such (knowing and willful) conduct as the second termination letter of the FEC (and related subsequent communications, including a memorandum from Gregory Baker and the final termination communication), **criminal** misconduct. So, the Justice Department (not to mention the FEC, which also distributed the protected communications to the Merit Systems Protection Board) has unclean hands in this matter, to say the least. And this matter is clearly a matter of "public concern" within the meaning of this Court's holding in *Lane*, 573 U.S. ___, **as matters involving "fraud" on the government are clearly matters of "public concern" as the *Lane* Court frankly held** (in a matter concerning mail fraud and theft related to a program receiving federal funds). And Petitioner reported such fraud under the HCFAC program (through which the agency receives federal funds under a specific Congressional mandate) to the DOJ OIG in May 2011, as previously noted.

In addition, "speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment." *Lane*, 573 U.S. at ____. Petitioner gained her specific knowledge of misconduct (and fraud on the government under a procurement contract) at the Justice Department specifically <u>because</u> of her employment there at the time the fraud was occurring. Supreme Court precedent provides that when a suit "concerns the public interest as well as the private interests of the litigants, the 'clean hands' doctrine assumes greater significance, for if the [ ] court in such case properly applies the maxim to withhold its assistance, it not only prevents a wrongdoer from enjoying the fruits of his transgression, but averts an injury to the public." *Precision Instrument Mfg. Co.*, 324 U.S. at 815.

The conduct of the party <u>doesn't</u> have to be criminal to warrant application of the unclean hands doctrine. *See id.* This Court has held that "[a]ny willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient," and here the facts go much further: federal law—specifically, more than one provision of the Privacy Act—was violated by federal agency actors. *Id.*

The Court in *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 244-45 (1933), explained the clean hands doctrine as follows: "[T]hat whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle in his [or its] prior conduct, then the doors of the court will be shut against him [or it]," and "the court will refuse to interfere on his [or its] behalf" or "to acknowledge his [or its] right, or to award him [or it] any remedy."

To deny the petition is to effectively award the government a remedy it doesn't deserve because of its very unclean hands in the matter (and, in more than one agency). Under its own precedent, therefore, the Court must grant the petition and close "the doors of the court" to any defense by the government in this matter and these proceedings. *Id.*

II. The Court Should Grant the Petition And Also Grant Oral Argument For the Petitioner Because the Government WAIVED Its Right to Defend on the Merits

With the filing of the Government's waiver (of its right to defend the claims at issue), the Court is reminded of the Respondent Counsel's "obligation to the Court to point out *in the brief in opposition*, and ***not* later**, any perceived misstatement made in the petition." S. Ct. R. 15.2 (emphases added). And, that "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed **waived** *unless* called to the Court's attention *in the brief in opposition.*" *Id.* (emphases added). S. Ct. R. 15.3 further provides that "any brief in opposition shall be filed within 30 days after the case is placed on the docket, unless the time is extended..." (emphasis added). That time limit has passed, without the government making a request for an extension of time.

III. Under Rule 15.2, the Government's Obligation to Defend is in the Brief in Opposition (Due November 27, by Order of the Court) and "Not Later"

The Rules of this Court, as noted above, expressly provide that the time to challenge the argument of a petition is "in the brief in opposition" and "not later." S. Ct. R. 15.2. As noted above, (Respondent) Counsel are expressly "admonished that they have an obligation to the Court to point out *in the brief in opposition*, and ***not later***, any perceived misstatement made in the petition." *Id.* (emphases added). And, Respondent Counsel is also on notice that any objections [except jurisdiction] to any of the questions presented are deemed waived *unless called to the Court's attention in the brief in opposition. Id.* (emphases added).

By not filing a brief in opposition and by expressly waiving its right to file one, the government has simply (and legally) affirmed its agreement on all points of law (not to mention all claims and counts, including the facts and the questions presented) of Petitioner's Petition, and expressly and knowingly waived all defenses and opposition.

IV. The Burden is on the Government to Justify the Discharge, And a Hearing is Required Under This Court's Precedent And Federal Law

Consistent with federal whistleblower law, the burden is on the government (in this case, the employer agency), to prove a legitimate, non-retaliatory basis for the discharge. *See Whitmore v. Dep't of Labor*, 680 F.3d 1353 (Fed. Cir. 2012). This Court agrees. In *Rankin*, this Court clearly held that the burden is *on the government* to justify the discharge of an employee on "legitimate grounds." 483 U.S. at 389 (emphases added). The use of constitutionally-protected speech (collected, maintained, used, and disseminated *in violation of the Privacy Act*[16]) is *not* "legitimate grounds." *Perry*, 408 U.S. at 597; *Rankin*, 483 U.S. at 389.

As noted above (n.12), this Court specifically said in *Perry* that the government cannot discharge an employee on the basis of "[her] interest in freedom of speech.... Such interference with constitutional rights is impermissible." 408 U.S. at 597 (emphasis added) (internal citation omitted); *see also Speiser*, 357 U.S. 513 (holding that when a constitutionally-protected right like freedom of speech is implicated, procedural due process requires a hearing). And, here, the interest in a hearing is made even stronger by a *statutory* requirement. *See* 5 U.S.C. 7701(a).

In *Perry*, this Court said that the government:

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16 5 U.S.C. 552a(e)(7).

> may not deny a benefit to a person on a basis that infringes his [or her] constitutionally protected interest, *especially his [or her] interest in freedom of speech*. For if the government could deny a benefit to a person because of [her] constitutionally protected speech or associations, [her] exercise of those freedoms would be in effect *penalized and inhibited*. This would allow the government to 'produce a result which [it] could not command directly.' ... Such interference with constitutional rights is impermissible.

408 U.S. at 597 (emphases added). And, in *Speiser*, this Court confirmed the requirement of a hearing for procedural due process to be met.[17] 357 U.S. 513.

In short, consistent with this Court's precedent, and the Federal Circuit's federal whistleblower ruling in *Whitmore*, 680 F.3d 1353, both a hearing is required *and* there is a "burden shifting scheme, wherein the *agency* must *first* prove its case for removal by a preponderance of the evidence" (pin citation unavailable) (emphases added).

This is consistent with this Court's holding in *Rankin,* 483 U.S. at 389. As noted above, this Court has already said that the state bears the burden of *justifying the discharge on legitimate grounds*. *Rankin,* 483 U.S. at 389. And that the infringement of the constitutionally protected interest in freedom of speech is **not** a "legitimate" basis for a discharge. *Perry*, 408 U.S. at 597.

The government has declined to defend in this matter (and waived its right to do so), so summary judgment should be granted as discussed below as there is no material dispute of fact.

V. The Court Should Grant Summary Judgment For Petitioner, With or Without Oral Argument

There is no genuine or material dispute on the facts, because of the Government's Waiver, and because of it, there is also no longer a right to defend the government's position, so there is "no genuine issue as to any material fact," and Petitioner is "*entitled to a judgment as a matter of law*." *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) (emphasis added).

[17] As noted above, the case for a hearing in this context is made stronger by the existence of a federal statute requiring it. 5 U.S.C. 7701(a) unequivocally *requires* a hearing (providing, in relevant part, that "an appellant shall have the right ... [t]o a hearing for which a transcript will be kept.").

Unless summary judgment is automatically granted (on the papers), oral argument is necessary—and important—because this case involves matters of national importance, as the *White House Counsel's*[18] law license is at stake—and more. Petitioner therefore respectfully requests oral argument, so that she might answer any questions the Court may have or offer, even though the argument may—or should be—one-sided, as the government has waived its right to respond (or defend itself, even orally) and she is entitled to summary judgment (even after oral argument).

Conclusion

The petition should be granted, and summary judgment awarded to Petitioner (with or without oral argument) on all counts. *Celotex Corp.*, 477 U.S. 317.

Respectfully submitted: Dated: 12/11/2017

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