

In the Supreme Court of the United
States

MARNE K. MITSKOG, PETITIONER

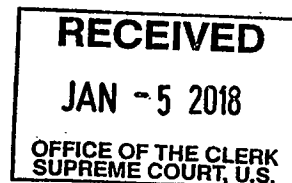
v.

MERIT SYSTEMS PROTECTION BOARD, ET AL.

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

SUPPLEMENTAL APPENDIX OF PETITIONER

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SUPPLEMENTAL APPENDIX:

CONCISE SUMMARY OF QUESTIONS PRESENTEDⁱ

1. Federal law provides that federal agencies generally cannot maintain, use, or disseminate the First Amendment-protected communications of individuals. *See* The Privacy Act of 1974, 5 U.S.C. 552a(e)(7), *Records Maintained on Individuals*. The District of Columbia Circuit Court of Appeals clearly and vigorously upheld this law in *Gerlich v. Dep't of Justice*, 711 F.3d 161 (D.C. Cir. 2013), in the context of federal employment decisions at a federal agency, by expressly holding that “[t]he Privacy Act generally prohibits government agencies from maintaining records describing how an individual exercises First Amendment Rights.” *Id.* (citing *Gerlich v. Dep't of Justice*, 828 F. Supp. 2d 282, 287 (D.D.C. 2011)) (emphasis added); *see* 5 U.S.C. 552a(e)(7). The Federal Circuit *completely disregarded it below*. Petitioner, a public employee (at the time), was discharged for making First Amendment-protected communications to a state official (who was her former supervisor at a federal agency) and to others (including a current agency supervisor and a Congressional Committee representative). The question, then, is whether federal agencies need to follow unambiguous federal law (*viz.*, the Privacy Act) in the making federal employment decisions because a Circuit split now exists.
2. A related question then is whether *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964) and other First Amendment precedent of this Court is still good law, given the ruling below. The rule set forth by this Court in *Watts v. United States*, 394 U.S. 705 (1969), is that even “political hyperbole” is protected speech. Such speech may even include “vehement, caustic, and sometimes unpleasantly sharp attacks on government *and public officials*.” *Id.* (citing *New York Times v. Sullivan*, 376 U.S. at 270). And this Court went

even further in protecting an employee's speech (from being used as a basis for discharge) in *Rankin v. McPherson*, 483 U.S. 378 (1987). Here, the speech also has "special value," because, as this Court found in *Lane v. Franks*, 573 U.S. ____ (2014), "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" (emphases added) (pin citation unavailable). Petitioner gained her knowledge of the first public official's misconduct through her prior employment at the Justice Department, where the public official served as a supervisor in the Civil Division at the time. And gained knowledge of her (current) supervisor's misconduct (under the Privacy Act and federal whistleblower law) while in his agency's employ.

3. When the plain language (and unambiguous) text of a statute explicitly requires something very specific (in this case, a hearing), the question is whether an administrative agency or a federal court has the right to disregard it—and then whether the error is fatal or harmful within the meaning of federal law. *See, e.g., Turner v. U.S.P.S.*, 85 M.S. P.R. 565 (2000). A federal statute— 5 U.S.C. 7701(a)—requires a hearing in this context, and also provides for the right to counsel, so a related question (raised on the text of the statute, but not argued below) is whether a civil "*Gideon*" right exists under that statute, as Congress so plainly seemed to intend by the plain and unambiguous language of the text. *See Gideon v. Wainwright*, 372 U.S. 335 (1963) (finding an implied right to counsel at governmental expense for those who cannot afford counsel on their own). Here, though the issue was not raised below, the plain text of the statute requires counsel (for the appellant). A related question is also whether an

adjudicatory agency can cut back on a right specifically granted by Congress (as was done here by regulation and ruling).

4. Supreme Court Rule 10 provides that this Court has supervisory power, so the question is at what point does that power arise, and whether it is triggered when federal law and precedent are ignored (including statutory language and Circuit, as well as Supreme Court, precedent)? As discussed above (in Question 3), are administrative agencies and lower courts free to ignore the rulings of this Court *as well as to ignore the mandates of federal law when mandatory language is used*? See, e.g., 5 U.S.C. 7703(c)(2) (requiring that the ruling be “in accordance with law”); see also 5 U.S.C. 706(2)(A) (requiring the same). This ruling (below) violated, *inter alia*, the hearing requirement set forth by law (as discussed above) as well as more than one provision of the Privacy Act, 5 U.S.C. 552a. The ruling below was also “[o]btained without procedures required by law... or regulation.” Here, a hearing was required under both 5 U.S.C. 7701(a) and 5 C.F.R. 1201.24(d), *Right to a hearing* (providing that, “[u]nder 5 U.S.C. 7701, an appellant has a right to a hearing.”) (emphasis added). See 5 U.S.C. 7703(c)(2). And federal law—viz., 5 U.S.C. 706(2)(D) providing for judicial review—provides that “the reviewing court shall... hold unlawful and set aside agency action, findings, and conclusions found to be... *without observance of procedure required by law*.” (emphasis added). “Shall” is mandatory language. See also 5 U.S.C. 706(2)(B) (requiring that agency action, findings, and conclusions “contrary to constitutional right, power, privilege, or immunity” shall be held “unlawful and set aside”). Here the First Amendment right of the employee Petitioner was not only infringed, but decimated by her firing. See *New York Times v. Sullivan*, *Lane*, and *Terminello v. Chicago*, 334 U.S. 4 (1949), as well as *Pickering v.*
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Board of Education, which holds that even “the threat of dismissal from public employment is a potent means of inhibiting speech.” 391 U.S. 563, 574 (1968). Yet the public employee here was fired solely for her protected speech (to a public official who had served as a former supervisor, to a current supervisor named Greg Baker who was a public official, and to the U.S. Senate Committee on Rules and Administration).

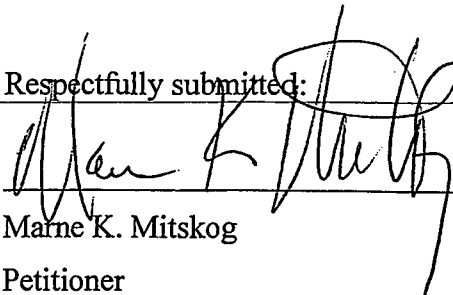
5. A related (but less compelling) question is presented on these facts—*viz.*, whether Rule 35(a)(1)(1) is mandatory or discretionary for federal appellate courts “to secure or maintain uniformity of the court’s decisions,” as that appellate court’s ruling in *Whitmore v. Dep’t of Labor*, 680 F.3d 1353 (Fed. Cir. 2012) was plainly ignored below.
6. So the question is also raised whether *Whitmore* is still good law (after the ruling below). *Whitmore* directly addresses the order and burden of proof in whistleblower cases, and addresses the sufficiency of the government’s evidence in its claimed basis for terminating a whistleblower. *Whitmore*, consistent with federal law (and regulation), also requires a hearing. And *Whitmore* is consistent with this Court’s precedent in *Perry v. Sindermann*, 408 U.S. 593 (1972), and *Rankin v. McPherson*, 483 U.S. 378 (1987) (both cases put the burden on the government to *prove* a “legitimate” basis for discharge), as well as this Court’s ruling in *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)).
7. In addition, the question of whether the “perceived” whistleblower doctrine can be ignored by the adjudicatory agency (despite being raised and briefed below), and whether that constitutes harmful or fatal error, as well as the question of whether it was fatal or harmful error for the federal appellate court to then make a finding not in evidence (on

that very issue) is raised on these facts. The rule in *King v. Dep't of Army*, 2011 MSPB 83 (2011) is that when an agency official (as here) "believed the appellant to be 'a dangerous proponent of a view that could prove embarrassing – possibly evidencing mismanagement and abuse of discretion,'" the employee "who is perceived as a whistleblower is still entitled to the protections of the Whistleblower Protection Act (WPA)." *Id.* at p.5, p.4. And that act has now been made even stronger by the enactment of the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199 (including, for example, even greater damages awards). Fatal error warrants a hearing, and harmful error warrants reversal. *See, e.g., Turner*, 85 M.S.P.R. 565. Although moot (because no factual finding on the issue was made by the trier of fact), the question of whether exhaustion of an agency perception, which is what the perceived whistleblower doctrine is, is even warranted is also fairly raised here.

8. Although no opportunity was given to argue the issue below, the question of how and why the party known as the original respondent (*i.e.*, the Federal Election Commission) was substituted here, as noted in footnote 2 of the Petition, is raised as well as the reasonableness of that alleged basis for the substitution and ruling.

Respectfully submitted:

Dated:


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