2015-3066

United States Court of Appeals for the Federal Circuit

JOHN C. PARKINSON,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Petition for Review from the Merit Systems Protection Board
Case No. SF-0752-13-0032-I-2

EN BANC BRIEF OF *AMICI CURIAE* NATIONAL WHISTLEBLOWER CENTER, MICHAEL GERMAN, ROBERT KOBUS, JANE TURNER AND DR. FREDRIC WHITEHURST IN SUPPORT OF PETITIONER

David K. Colapinto
Stephen M. Kohn
KOHN, KOHN & COLAPINTO, LLP
3233 P Street, N.W.
Washington, D.C. 20007-2756
Phone: (202) 342-6980
Email: dc@kkc.com
Email: sk@kkc.com

Attorneys for Amici Curiae

October 3, 2016

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

John C. Parkinson **v.** Department of Justice

Case No. 2015-3066

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☒ (amicus) ☐ (name of party)

National Whistleblower Center, Dr. Frederic Whitehurst, Michael German, Jane Turner, and Robert Kobus

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held Companies that own 10 % or more of stock in the party
National Whistleblower Center	N/A	None
Dr. Frederic Whitehurst	N/A	None
Michael German	N/A	None
Jane Turner	N/A	None
Robert Kobus	N/A	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:
David K. Colapinto and Stephen M. Kohn, Kohn, Kohn & Colapinto, LLP

October 3, 2016
Date

/s/ David K. Colapinto
Signature of counsel

Please Note: All questions must be answered

David K. Colapinto
Printed name of counsel

cc:

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes, Rules and Regulations:

Other Authorities:

STATEMENT OF *AMICI CURIAE*

The National Whistleblower Center, and four former FBI employees, Michael German, Robert Kobus, Jane Turner and Dr. Fredric Whitehurst, are submitting this brief of *amici curiae* in support of John Parkinson to address the question presented by the Court *en banc*. The Court has invited the views of *amici curiae*. *See Parkinson v. DOJ,* No. 2015-3066, 2016 U.S. App. LEXIS 14534 (Aug. 8, 2016). According to the Court's order, *amici curiae* "briefs may be filed without consent and leave of court…" *Id.*

The National Whistleblower Center ("NWC") is a nonprofit, non-partisan, tax-exempt, charitable organization dedicated to the protection of employee whistleblowers. Founded in 1988, the NWC is keenly aware of the issues facing employees of the Federal Bureau of Investigation ("FBI") who report misconduct, violations of laws, rules or regulations and abuse of authority. *See,* NWC Web Site at *www.whistleblowers.org*. Part of the NWC's core mission is to monitor major legal developments, and files amicus briefs in order to assist courts in understanding complex legal issues and important public polices raised in many whistleblower cases. Since 1990, the NWC has

participated before the U.S. Supreme Court and other courts as *amicus curiae* in numerous cases that directly impact the rights of whistleblowers. Persons assisted by the NWC have a direct interest in the outcome of this case. Several persons assisted by the NWC have been FBI employees who reported serious issues of FBI misconduct to appropriate government officials and to Congress, and two of the other individual *amici*, Jane Turner and Dr. Frederic Whitehurst, are former FBI agents who currently serve in leadership positions with the NWC.

Dr. Frederic Whitehurst, a Vietnam veteran, was employed by the FBI as a Supervisory Special Agent and was assigned to the FBI Laboratory as a chemist and leading examiner in the area of explosives residue analysis. While he worked at the FBI Lab, Dr. Whitehurst reported serious misconduct and other violations regarding the FBI Lab's forensic evidence in thousands of cases, including many of the high profile cases handled by the FBI in the 1990's such as the World Trade Center bombing and Oklahoma City bombing cases. At the time Dr. Whitehurst blew the whistle there were no DOJ whistleblower procedures or regulations in place to implement 5 U.S.C. § 2303. He filed a federal lawsuit alleging whistleblower retaliation in violation of

his First Amendment rights and the Privacy Act, and seeking, *inter alia,* an injunction to require the President to implement 5 U.S.C. § 2303(c) to provide whistleblower protection to FBI agents. Dr. Whitehurst's case exposed forensic fraud in the FBI crime lab and subjected it to outside oversight for the first time. After Dr. Whitehurst filed his federal lawsuit President William J. Clinton issued a presidential order to the Attorney General in 1997 to promulgate rules to implement 5 U.S.C. § 2303(c) for the first time. *See* Presidential Memorandum for Attorney General, 62 Fed. Reg. 23123 (Apr. 14, 1997). The Attorney General did not implement section 2303 until 28 C.F.R. Part 27 was approved in 1999. Dr. Whitehurst retired from the FBI in 1998 after settling his federal law suit. He is currently an attorney in private practice, has continued to advocate reform in the FBI's forensic practices as Executive Director of the Forensic Justice Project, and he currently serves as co-chair of the NWC's Board of Directors.

Michael German worked as a Special Agent at the FBI for 16 years. During his FBI career Mr. German twice successfully infiltrated terrorist organizations, recovered dozens of illegal firearms and explosive devices, resolved unsolved bombings, and prevented acts of

terrorism. He had an unblemished disciplinary record, a Medal of Valor from the Los Angeles Federal Bar Association, and a consistent record of superior performance appraisals. In August of 2002, Mr. German learned that during a counterterrorism investigation the FBI had made a recording illegally in violation of Title III wiretap regulations. *See* Hearing Before Subcommittee on National Security of the House Committee on Government Reform, "National Security Whistleblowers In the Post-September 11th Era: Lost in a Labyrinth and Facing Subtle Retaliation," 109 Cong. 2d. Sess., pp. 132-141 (Feb. 14, 2005). Mr. German raised these concerns through his chain of command at the FBI, and his complaint was passed from his Assistant Supervisor Agent in Charge to the Counterterrorism Division, to the Supervisory Agent in Charge of the FBI Tampa Division, to the FBI's Office of Professional Responsibility, to the Department of Justice ("DOJ") Inspector General, to the FBI Inspection Division. The Inspector General deferred to the FBI Inspection Division, which failed to conduct an adequate investigation, or attempt to remedy the ongoing retaliation Mr. German faced. *Id.,* p. 132-133. Instead, the FBI backdated and falsified documents to cover up these issues. *Id.* After exhausting internal

channels, in 2004, Mr. German reported the matter to Congress and resigned from the FBI in protest. *Id.* After his resignation, the DOJ Inspector General's investigation of Mr. German's whistleblower complaint pursuant to 5 U.S.C. § 2303 and 28 C.F.R. Part 27 finally began in earnest. *Id.* In 2005, more than 16 months after Mr. German's resignation, the DOJ Inspector General finally issued a report that verified many of Mr. German's allegations of serious misconduct, and found that the FBI had retaliated against him for reporting official misconduct. *Id.,* pp. 137-138. However, from there the Inspector General's findings of whistleblower retaliation were appealed by the FBI before the DOJ Office of Attorney Recruitment and Management ("OARM"). *Id.,* p. 140. Having already resigned from the FBI in protest, Mr. German chose not to pursue years more of costly and protracted litigation against the FBI to uphold the DOJ Inspector General's findings of retaliation.

Former FBI Special Agent Jane Turner worked for the FBI for 25 years between 1978 through October 2003. She led efforts to force the FBI to provide protection for child sex crime victims on the North Dakota Indian Reservations. In retaliation for exposing FBI failures

within its child crime program and for alleging gender discrimination, Ms. Turner was removed from her position. A federal jury vindicated Ms. Turner in a 2007 verdict in her Title VII discrimination case. While working at the FBI Minneapolis Field Office Ms. Turner also learned that FBI agents had stolen "souvenirs" from the 9/11 terrorist attack crime scene. Ms. Turner alleged she was subjected to retaliation and constructively discharged after reporting the thefts to the Department of Justice Inspector General. She subsequently filed a complaint of whistleblower reprisal pursuant to 5 U.S.C. § 2303 and 28 C.F.R. Part 27. After considering her administrative whistleblower complaint for more than a decade, the Department of Justice finally granted in part Ms. Turner's whistleblower complaint, finding that she was subject to retaliation, but denying her complaint of constructive discharge. *Turner v. DOJ,* 815 F.3d 1108, 1111 (8th Cir. 2016). Ms. Turner retired from the FBI and currently serves as co-chair of the NWC's Whistleblower Leadership Council.

Robert Kobus worked as a loyal and dedicated FBI employee for more than thirty-four years. When he retired from the FBI in 2016, he was the Operations Manager at the FBI New York Field Office. Mr.

Kobus is also a 9/11 family member having lost his only sibling, Deborah Kobus that day. He has received nominations for the FBI Directors and Federal Executive Board outstanding Supervisor of the year awards and numerous other awards during his career. However, that all changed as a result of Mr. Kobus making a protected whistleblower disclosure in October 2005 about abuse of leave. The severe acts of retaliation by the FBI, which included assigning Mr. Kobus to work alone on a deserted floor at the New York Field Office, caused Mr. Kobus and his family to endure years of humiliation and stress while it took approximately 10 years for the DOJ to process his whistleblower complaint pursuant to 5 U.S.C. § 2303 and 28 C.F.R. Part 27. While the DOJ Inspector General found in 2006 that Mr. Kobus had been subject to whistleblower reprisal by the FBI, the matter was appealed by the FBI to the DOJ OARM where the matter was litigated for nearly 10 years. In 2015, the DOJ OARM finally entered an order upholding the DOJ Inspector General's findings of whistleblower retaliation. *See* Carrie Johnson, "A Decade After Blowing The Whistle On The FBI, Vindication," National Public Radio (April 15, 2015) (http://www.npr.org/2015/04/15/398518857/9-years-after-blowing-the-

whistle-on-the-fbi-he-s-been-vindicated). Even as a former FBI employee, Mr. Kobus continues to seek reforms within the FBI to ensure no other employees are retaliated against for doing what they are required to do; report fraud, waste and abuse.

No counsel for a party authored this brief in whole or in part, and no party or a party's counsel and no person other than the *amici curiae*, their members, or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

ARGUMENT

I. THE PANEL'S CONCLUSION IS IN HARMONY WITH THE WPA's LANGUAGE AND STRUCTURE AND THE ATTORNEY GENERAL DOES NOT HAVE EXCLUSIVE AUTHORITY TO ENFORCE WHISTLEBLOWER REPRISAL CLAIMS.

The narrow question presented for *en banc* review is whether a veteran preference eligible FBI employee may raise an affirmative defense before the Merit Systems Protection Board ("MSPB") under 5 U.S.C. § 7701(c)(2)(C) because the adverse action is not in accordance with law, due to alleged whistleblower reprisal under 5 U.S.C. § 2303. The DOJ's main argument against permitting such an affirmative defense is that there is "no room to doubt that Congress intended to

exclude all FBI employees from MSPB review of whistleblower claims." Pet., p. 8.

However, DOJ's position is not supported by long-standing principles of statutory construction applied by the courts to interpret the various provisions of the Civil Service Reform Act ("CSRA"). *Lal v. MSPB,* 821 F.3d 1376, 1378-1379 (Fed. Cir. 2016); *Archuleta v. Hopper,* 786 F.3d 1340, 1347-1348 (Fed. Cir. 2015). In *Lal,* this Court noted that:

> It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 146 L. Ed. 2d 121 (2000) (quoting *Davis v. Michigan Dep't of the Treasury*, 489 U.S. 803, 809, 109 S. Ct. 1500, 103 L. Ed. 2d 891 (1989)). "A court must therefore interpret the statute 'as a symmetrical and coherent regulatory scheme,' and 'fit, if possible, all parts into an harmonious whole.'" *Id.* (internal citations omitted).

821 F.3d at 1378.

In reviewing the CSRA as a whole, there is no statutory exclusion that precludes a veteran preference eligible FBI employee from raising an affirmative defense before the MSPB under 5 U.S.C. § 7701(c)(2)(C) based on alleged violations of 5 U.S.C. § 2303. This Court must refrain from reading an exclusion into the statute where none exists. *Lal,* 821

F.3d at 1380-1381 (absent a specific exclusion or exemption the court will decline to imply one exists). *See also Archuleta,* 786 F.3d at 1348.

DOJ's focus on Congress' exclusion of FBI employees from the competitive service when it passed the CSRA in 1978 is not dispositive of the issue before the Court *en banc*. The DOJ's sole reliance on the 1978 legislative history from the CSRA's enactment does not resolve the real issue: whether preference-eligible FBI employees who have the same appeal rights to the MSPB as other employees in the competitive service can also raise an affirmative defense based on whistleblower reprisal.

Notably, in the 1978 version of the CSRA, when Congress excluded the FBI from coverage under 5 U.S.C. § 2302, it gave the President (not the Attorney General) in 5 U.S.C. § 2303(c) the authority to "provide for the enforcement of this section in a manner consistent with the provisions of section 1206 of this Title." *See* P.L. 95-454 (Oct. 13, 1978), 92 Stat. 1118. However, when Congress enacted the Whistleblower Protection Act ("WPA") amendments to the CSRA in

1989 the provisions of 5 U.S.C. § 1206 were expressly repealed.[1] Consequently, all of the floor statements from 1978 cited by DOJ (*see* Pet., pp. 10-11) pertain to those portions of the CSRA that were expressly repealed. Moreover, prior section 1206, which was referenced in the 1978 version of 5 U.S.C. § 2303(c), did not concern employee whistleblower appeals to the MSPB. In the 1978 version of the CSRA even employees in the competitive service were limited under prior section 1206 to filing complaints of whistleblower reprisal with the Special Counsel, and only the Special Counsel could request the MSPB to consider a whistleblower reprisal complaint.[2] Employees did not have an individual right of action to pursue a whistleblower complaint with the MSPB until the WPA was enacted in 1989. *See* 5 U.S.C. §§ 1214 and 1221.

---

[1] In 1989 Congress repealed 5 U.S.C. § 1206 by statute on April 10, 1989, P.L. 101-12, §3(a)(8), 103 Stat. 18. The 1978 version of section 1206 was replaced by a new section that requires the MSPB to submit an annual report to the President and Congress—a statutory change that does not support the DOJ's arguments before this Court *en banc*.

[2] P.L. 95-454, §1206(c)(1)(B) (Oct. 13, 1978), 92 Stat. 1127 ("If, after a reasonable period, the agency has not taken the corrective action recommended, the Special Counsel may request the Board to consider the matter.").

As the Panel Majority correctly noted, prior to the CSRA in 1978, "preference eligible veterans, including preference eligible FBI employees, already had the right to appeal their removal to the Civil Service Commission," and that right was not affected by enactment of the CSRA. *Parkinson v. DOJ,* 815 F.3d 757, 773-774 (Fed. Cir. 2016).

Significantly, when Congress amended the CSRA in 1989 Congress specifically limited the President's authority to enforce rights for FBI employees alleging whistleblower reprisal under 5 U.S.C. § 2303(c) "in a manner consistent with" the individual right of action provisions of sections 1214 and 1221. The 1989 amendments to section 2303(c) simply did not provide for an exclusion of rights to raise an affirmative defense under section 7701(c)(2)(C), and such an exclusion cannot be implied, particularly where Congress knew how to expressly exclude coverage under the CSRA. *Archuleta,* 786 F.3d at 1378, citing *United States v. Smith*, 499 U.S. 160, 167, 111 S. Ct. 1180 (1991) ("'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'") (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17, 100 S. Ct. 1905 (1980)); *Ventas, Inc. v.*

United States, 381 F.3d 1156, 1161 (Fed. Cir. 2004) ("Where Congress includes certain exceptions in a statute, the maxim *expressio unius est exclusio alterius* presumes that those are the only exceptions Congress intended.").

Even more significant is the WPA's express language stating that it "may not be construed to prohibit any employee … from seeking corrective action before" the MSPB "if such employee," like a veteran preference eligible FBI employee, "has the right to appeal directly to the Board under any law, rule, or regulation." 5 U.S.C. § 1221(b). Obviously, Congress only gave the President authority to enforce whistleblower rights for FBI employees to pursue the equivalent of an individual right of action under section 2303(c). Enforcement of rights under section 2303 was expressly limited by 5 U.S.C. § 1221(b), because Congress stated the President "shall" enforce section 2303 "in a manner consistent" with section 1221.[3] The only way to construe the CSRA in

[3] The DOJ issued final rules in 1999 after the President delegated his authority to enforce section 2303. *See* 62 Fed. Reg. 23123. Even the DOJ noted that authority was limited to implementing enforcement of whistleblower rights for FBI employees consistent with individual right of action appeals from the Special Counsel to the Board, and there was no mention that 28 C.F.R. Part 27 affected affirmative defenses raised by FBI veteran preference eligible employees. Specifically, DOJ stated:

context and to fit all parts of the statute into a harmonious whole is to interpret the President's enforcement authority under section 2303(c) as limited by section 1221(b). The enforcement of an individual right of action for whistleblower reprisal through the administrative scheme for FBI employees under 28 C.F.R. Part 27, still permits veteran preference eligible FBI employees to raise affirmative defenses based on whistleblower reprisal before the Board under 5 U.S.C. § 7701(c)(2)(C). An implied exclusion of rights for FBI veteran preference eligible

---

> Under sections 1214 and 1221 of title 5 of the United States Code, most federal employees who believe they have been subjected to a prohibited personnel practice, including reprisal for whistleblowing, may request an investigation by the Office of Special Counsel (OSC) (section 1214) or, in appropriate circumstances, pursue an individual right of action before the Merit Systems Protection Board (MSPB) (sections 1214(a)(3) and 1221). Although Congress expressly excluded the FBI from the scheme established by those provisions, see 5 U.S.C. 2302(a)(2)(C)(ii), section 2303(a) of title 5 contains a separate provision that prohibits reprisals against whistleblowers in the FBI. *Section 2303(b) directs the Attorney General to prescribe regulations to ensure that such reprisal not be taken, and section 2303(c) directs the President to provide for the enforcement of section 2303 "in a manner consistent with applicable provisions of section 1214 and 1221*."

64 Fed. Reg. 58782-83 (Nov. 1, 1999) (emphasis added).

employees to seek corrective action through an affirmative defense before the Board would conflict directly with 5 U.S.C. §1221(b).

Construing the CSRA as a whole and considering the whistleblower provisions in context with the rights afforded veteran preference eligible employees under the statute leads to one conclusion: FBI veteran preference eligible employees have the right to raise whistleblowing as an affirmative defense before the MSPB.

II. DENYING MR. PARKINSON A WHISTLEBLOWER REPRISAL AFFIRMATIVE DEFENSE WOULD DEPRIVE IMPORTANT SUBSTANTIVE RIGHTS FOR VETERANS, CREATE LENGTHY DELAYS, AND PRODUCE CONFLICTING RESULTS.

All executive branch employees, including FBI veteran preference and excepted service employees, are subject to Principles of Ethical Conduct, including the mandatory requirement to "disclose waste, fraud, abuse, and corruption to the appropriate authorities," Executive Order 12731 (1990), 57 Fed. Reg. 35006. All executive branch employees, including FBI employees have the right to be "protected against reprisal for the lawful disclosure of information" which the employee reasonably believes evidences "a violation of any law, rule or

regulation," among other things. 5 U.S.C. § 2301(b)(9). There is no exclusion of FBI employees from these requirements.

DOJ's bootstrapping a strained interpretation of 5 U.S.C. § 2303, which is unrelated to the statutory protections for veteran preference eligible employees, is a cynical ploy to deprive important rights afforded to veterans, such as the timely review of adverse actions and alleged whistleblower reprisal by the MSPB and judicial review. When one considers the severely flawed administrative mechanisms available to review whistleblower reprisal against FBI employees under section 2303 and 28 C.F.R. Part 27, such treatment is unacceptable to veterans who have a right to the full range of civil service protections afforded employees in the competitive service.

The U.S. Government Accountability Office ("GAO") undertook a comprehensive study of the DOJ's handling of FBI whistleblower retaliation complaints and found that DOJ's process to review complaints under 5 U.S.C. § 2303 and 28 C.F.R. Part 27 was plagued by prolonged delays and other deficiencies. In the history of the program, DOJ has ruled in favor of the whistleblower in only 3 cases and in each of those cases it took between 8 to 10.6 years to complete. *See* GAO

Report 15-112, "Whistleblower Protection, Additional Actions Needed to Improve DOJ's Handling of FBI Retaliation Complaints," pp. 12, 22-26, 45 (Jan. 2015). After studying all FBI employee whistleblower complaints filed with DOJ between 2009 and 2013, the GAO found that DOJ OARM adjudicated the merits of just 4 of 62 complaints. *Id.*

Each of the individual FBI employees who are *amici* took the mandatory reporting of misconduct and violations of law seriously. However, each of them suffered reprisals after raising significant violations that impacted the public and even though their whistleblower allegations were substantiated. When Dr. Whitehurst, who was a decorated veteran, reported to the DOJ Inspector General serious misconduct and violations of law in the FBI Lab, and then suffered severe whistleblower retaliation at the FBI in the 1990's, no regulations of any kind had been implemented to enforce the protections of section 2303. The hostility towards whistleblowers at the FBI and DOJ was so intense that there were no legal mechanisms in place to protect FBI employees against reprisal. When Mr. German filed his whistleblower complaints with the DOJ Inspector General it failed to protect him or properly investigate his allegations for years until after he resigned

from the FBI in protest and went to Congress to express concern about the lack of whistleblower protections at the FBI following 9/11. Even two of the *amici*, Ms. Turner and Mr. Kobus, who were two of the three successful whistleblower claimants before the DOJ that were mentioned by the GAO, suffered extreme reprisal and their respective cases took approximately 10 years or more to reach final resolution partially in their favor.

If veteran preference eligible FBI employees who are removed from employment appeal from the adverse action to the MSPB, but are forced to file their whistleblower complaint only with the DOJ pursuant to 28 C.F.R. Part 27, it will severely prejudice those veterans. That is not what Congress intended.

First, FBI veteran preference eligible employees will not have a right to litigate all affirmative defenses together with their appeal from the adverse action. Consequently, the MSPB will not be able to consider any defenses or mitigating factors from the employee's whistleblowing, which could change the entire outcome of how the trier of fact views the FBI's grounds for taking adverse action. Notably, the DOJ's argument that consideration of Mr. Parkinson's whistleblower

reprisal claim must be excluded altogether from the MSPB proceeding as an affirmative defense under section 2303 is contradicted by the Board's consideration of Mr. Parkinson's whistleblowing as a mitigating factor under *Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 305 (1981). *See Archuleta,* 786 F.3d at 1352. Not only is the MSPB required to consider Mr. Parkinson's whistleblowing defense as a mitigating factor under *Douglas,* it is undisputed that the MSPB record did, in fact, include evidence of whistleblower retaliation as a mitigating factor. *Parkinson,* 815 F.3d at 763-764. This completely undercuts the rationale advanced by DOJ to exclude the whistleblower reprisal affirmative defense under section 7701(c)(2)(C), because the evidence pertaining to that issue is already before the Board under *Douglas*.

Second, a veteran preference eligible FBI employee will have to litigate the issue of the removal or adverse action twice, in two different proceedings before the MSPB and DOJ, respectively, involving increased costs, and creating possible conflicts in results. Additionally, the employee will bear the risk that there could be a final decision in the MSPB case long before the conclusion of the DOJ whistleblower proceeding, calling into question whether the employee will risk issues

of collateral estoppel or res judicata, if the affirmative defense is litigated separately from the removal action.

Third, the extraordinary delay experienced by the *amici* and documented by the GAO in the DOJ's handling of FBI whistleblower complaints, taking up to 10 years or more, is not the kind of justice that Congress envisioned for veteran preference eligible employees who risked their lives serving our country during their military service. As noted by the GAO, under 5 U.S.C. §7701(i)(1), the MSPB is required to ensure that appeals are handled expeditiously and to provide the parties the date by which it intends to complete action on the matter. GAO Report 15-112, p. 26. By contrast, DOJ takes up to 10 years to decide cases, without providing parties with an estimate of when to expect a decision in these cases. *Id.,* pp. 22-25.

All of these reasons support Congressional intent to give veteran preference eligible FBI employees the right to raise the affirmative defense of whistleblower reprisal before the MSPB.

CONCLUSION

For the foregoing reasons, the Court should hold that a veteran preference eligible FBI employee who properly invoked the MSPB's jurisdiction in challenging a removal action is entitled to raise a claim of whistleblower reprisal as an affirmative defense to the adverse action.

Respectfully submitted,

/s/ David K. Colapinto
David K. Colapinto
Email: dc@kkc.com

/s/ Stephen M. Kohn
Stephen M. Kohn
Email: sk@kkc.com

KOHN, KOHN & COLAPINTO, LLP
3233 P Street, N.W.
Washington, D.C. 20007-2756
Phone: (202) 342-6980

Attorneys for *Amici Curiae*

October 3, 3016

United States Court of Appeals
for the Federal Circuit
Parkinson v DOJ, 2015-3066

CERTIFICATE OF SERVICE

I, Elissa Matias, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by KOHN, KOHN & COLAPINTO, LLP, attorneys for Amici Curiae to print this document. I am an employee of Counsel Press.

On **October 3, 2016,** counsel has authorized me to electronically file the foregoing **En Banc Brief for Amici Curiae in Support of Petitioner** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

TARA K. HOGAN, ESQ.
DEPARTMENT OF JUSTICE
Commercial Litigation
Branch, Civil Division
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Tel.: 202-616-2228
melissa.m.devine@usdoj.gov
Counsel for Respondent

Kathleen M. McClellan
Jesselyn A. Radack
Whistleblower and Source
Protection Program (WHISPeR)
ExposeFacts
910 17th Street NW Suite 800
Washington, D.C. 20006
(301) 351-2582
Kathleen@exposefacts.org
Jess@exposefacts.org

Two paper copies will also be mailed to the above principal counsel on this date. Any counsel for Amici Curiae, appearing at the time of this filing will be served only via the Court's CM/ECF email notice.

Also on this date, thirty paper copies will be filed with the Court via Express Mail.

October 3, 2016

/s/ Elissa Matias
Elissa Matias
Counsel Press

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B).

__X__ The brief contains 4,103 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii),or

____ The brief uses a monospaced typeface and contains ____ lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

__X__ The brief has been prepared in a proportionally spaced typeface using MS Word 2013 in a 14 point Century Schoolbook font or

____ The brief has been prepared in a monospaced typeface using _____in a ___ characters per inch_____ font.

October 3, 2016
Date

/s/ David K. Colapinto
David K. Colapinto
KOHN, KOHN & COLAPINTO, LLP
Attorneys for *Amici Curiae*