2015-3066

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOHN C. PARKINSON,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Petition For Review Of A Decision From The Merit Systems Protection Board
Case No. SF-0752-13-0032-I-2

SUPPLEMENTAL *EN BANC* BRIEF OF RESPONDENT DEPARTMENT OF JUSTICE

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October 26, 2016

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of the United States Court of Appeals for the Federal Circuit, counsel for respondent respectfully states that she is not aware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Counsel for respondent is not aware of any other case currently pending before this Court or any other Court that may affect or be directly affected by this Court's decision in this appeal.

STATEMENT OF THE ISSUE

Whether a preference eligible employee of the Federal Bureau of Investigation challenging an adverse employment action before the Merit Systems Protection Board under 5 U.S.C. § 7513(d) may raise whistleblower reprisal in violation of 5 U.S.C. § 2303 as an affirmative defense under 5 U.S.C. § 7701(c)(2)(C).

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

For purposes of this supplemental brief, we limit our statement of the case to the facts relevant to the question presented by the Court in its August 8, 2016 *en banc* order. A comprehensive statement of the facts may be found in our merits brief at pp. 3-30.

I. The Civil Service Reform Act Creates The Merit Systems Protection Board And Provides For The Adjudication Of Whistleblower Claims

The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 111, "prescribes in great detail the protections and remedies applicable to" adverse actions taken against certain Federal employees. *United States v. Fausto*, 484 U.S. 439, 443 (1988). Of relevance to the issue presented in this appeal, the CSRA accomplished two things.

First, the CSRA created the Merit Systems Protection Board (board or MSPB), the successor to the Civil Service Commission. CSRA authorized certain Federal employees to appeal certain adverse actions, such as removals, to the board. *See generally* 5 U.S.C. §§ 7501; 7513.

Most FBI employees are not authorized to appeal adverse actions to the board. 5 U.S.C. § 7511(b)(8). But Congress authorized FBI employees with at least one year of service who are eligible for a veterans preference to appeal such actions to the board. 5 U.S.C. § 7511(a)(1)(B); (b)(8).

Congress provided that employees covered by the CSRA may raise three affirmative defenses to an adverse action. 5 U.S.C. § 7701(c)(2). The board may not sustain an adverse action if the employee:

> (A) Shows harmful error in the application of the agency's procedures in arriving at such decision;
> (B) Shows that the decision was based on any personnel practice described in [5 U.S.C. §] 2302(b); or
> (C) Shows that the decision was not in accordance with law.

5 U.S.C § 7701(c)(2).

CSRA's second relevant accomplishment was to establish core protections for Government whistleblowers. For the first time, Congress defined a "prohibited personnel practice." 5 U.S.C. § 2302(b). Section 2302(b)(8) prohibits supervisors from taking personnel actions in reprisal for an employee's lawful disclosure of information that the employee or applicant reasonably believes evidences: (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

The CSRA initially situated the Office of Special Counsel within the board. Pub. L. No. 95-454 §§ 1201; 1204. The Office of Special Counsel was authorized to receive and investigate allegations of prohibited personnel practices and to recommend corrective action. *Id*. §§ 1206(a)(1); (c)(1)(A). If an agency declined to take the recommended action, the Special Counsel could request that the MSPB consider the matter, and the MSPB was granted the power to order agencies to take

corrective action. *Id*. § 1206(c)(1)(B).

Since its enactment in 1978, however, section 2302's whistleblower protections have not covered all Federal employees. Instead, section 2302 applies "with respect to an employee in[] … a covered position in an *agency*[.]" 5 U.S.C. § 2302(a)(2)(A) (emphasis added). The FBI is expressly excluded from the definition of the term "agency." *Id.* § 2302(a)(2)(C)(ii) ("agency'. . . does not include. . . the Federal Bureau of Investigation.").

Congress addressed "prohibited personnel practices in the Federal Bureau of Investigation" in a separate provision of the CSRA. 5 U.S.C. § 2303. Section 2303(a) specifically prohibits an FBI employee from "tak[ing] or fail[ing] to take a personnel action" in reprisal for whistleblowing.

Congress directed the Attorney General to "prescribe regulations to ensure" that retaliation against whistleblowers does not occur, and directed the President to "provide for the enforcement of this section in a manner consistent with applicable provisions of [former 5 U.S.C. 1206, now §§ 1214 and 1221.]" *Id.* § 2303(b)-(c). The President's enforcement duties under section 2303(c) were subsequently delegated to the Attorney General. *See Memorandum, Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978*, 62 Fed. Reg. 23,123 (Apr. 14, 1997). Pursuant to this authority, the

Department of Justice adopted a final rule under which FBI employees may make protected disclosures. *Whistleblower Protection For Federal Bureau of Investigation Employees*, 64 Fed. Reg. 58,782 (Dep't of Justice Nov. 1, 1999) (adopting, as a final rule, 28 C.F.R. §§ 27.1-27.6). Whistleblower claims by FBI employees are investigated by the Inspector General or Office of Professional Responsibility (OPR) and adjudicated by the Office of Attorney Recruitment and Management (OARM) or the Attorney General. *See* 28 C.F.R. §§ 27.1 – 27.6. Thus, the Department of Justice has developed an enforcement and adjudication structure that is internal to the Department of Justice.

II. Subsequent Legislation, Including The Whistleblower Protection Act of 1989, Enhances OSC's Authority, But Does Not Alter The Exclusive Means For Enforcement Of FBI Employees' Whistleblower Rights

Perceiving the OSC to be ineffectual in acting on behalf of whistleblowers, Congress passed the Whistleblower Protection Act of 1989, Pub. L. No. 101-12. OSC became an independent body, separate from the MSPB, and Congress enhanced OSC's authority to investigate whistleblower claims. Further, individuals who had exhausted their administrative remedies before the OSC were newly authorized to file individual right of action claims before the board. 5 U.S.C. § 1221(a). Congress, however, made no substantive changes to the whistleblower rights of FBI employees, embodied in 5 U.S.C. § 2303.

In 2012, Congress enacted the Whistleblower Protection Enhancement Act, Pub. L. No. 112-199, 126 Stat. 1465 (WPEA). The WPEA expanded the board's jurisdiction to entertain individual right of action appeals by whistleblowers seeking corrective action for a prohibited personnel practice described in 5 U.S.C. § 2302(b)(9). *See* 5 U.S.C. § 1214(a)(3). Congress again made no substantive changes to 5 U.S.C. § 2303, the provision governing prohibited personnel practices at the FBI.

III. Mr. Parkinson's Removal From Federal Service

Until he was removed from Federal service, Mr. Parkinson served as a Special Agent and was a preference-eligible veteran. The FBI removed Mr. Parkinson from FBI service based on misconduct. A115. Specifically, the FBI decision-maker concluded that Mr. Parkinson lacked candor under oath and obstructed an investigatory process. A112-114.

Mr. Parkinson appealed his removal to the Merit Systems Protection Board. He attempted to raise two affirmative defenses: a violation of the Uniformed Services Employment and Reemployment Act, 38 U.S.C. § 4301, *et seq.*, (USERRA) and whistleblower retaliation.

The administrative judge dismissed both defenses, relying on *Van Lancker v. Department of Justice*, 119 M.S.P.R. 514 (2013). The judge held that "an FBI

employee cannot raise an affirmative defense of whistleblower retaliation … because there is a separate statute specifically providing intra-agency whistleblower protections for FBI employees, [and] Congress intended to preclude the [b]oard from adjudicating whistleblowing claims involving FBI employees in any form." A200. The judge extended the same reasoning to Mr. Parkinson's USERRA affirmative defense, determining that, in 38 U.S.C. § 4324, Congress specifically excluded the FBI from the list of agencies against whom a USERRA complaint may be filed at the board. On the merits, the administrative judge sustained the removal. A20-24; A27-29.

The board affirmed the initial decision, including the dismissal of Mr. Parkinson's affirmative defenses. A36. The board held that FBI employees are excluded from bringing a whistleblower retaliation claim to the MSPB, regardless of whether the claim is advanced as an affirmative defense. A47-48. As it did in *Van Lancker*, the board held that "Congress did not authorize the [b]oard to hear whistleblower claims by FBI employees" who are covered by 5 U.S.C. § 2303, and the board may not hear claims under section 2303. A48. Instead, FBI employees' whistleblower claims are to be resolved through procedures established pursuant to section 2303. Vice Chairman Wagner dissented, and would have permitted Mr. Parkinson to present his whistleblower reprisal defense. A53-54.

IV. A Divided Panel Of This Court Reverses The Board's Decision, Including The Board's Determination Concerning Its Authority To Entertain Mr. Parkinson's Affirmative Defense Of Whistleblower Reprisal

A panel of this Court reversed, vacated, and remanded the board's determination for further proceedings. *Parkinson v. Dep't of Justice*, 815 F.3d 757 (Fed. Cir. 2016). As relevant here, in a split decision, the panel majority held that a preference-eligible FBI employee may raise an affirmative defense of whistleblower reprisal. *Id*. at 770-774. Although it acknowledged that 5 U.S.C. § 2302 expressly exempts the FBI from individual right of action appeals brought pursuant to 5 U.S.C. § 1221 and premised on protected whistleblowing activity, the majority nonetheless held that whistleblower reprisal may be raised as an affirmative defense under 5 U.S.C. § 7701(c)(2)(C). *Id*. at 771. That statute permits the board to reverse adverse actions that are "not in accordance with law."

The majority distinguished preference-eligible FBI employees from other FBI employees because 5 U.S.C. § 7511(b)(8) authorizes preference-eligible FBI employees to appeal adverse actions to the board. *Id*. at 771. According to the panel majority, Congress intended to grant preference-eligible FBI employees the same MSPB appeal rights – including available affirmative defenses – available to all other employees with appeal rights. *Id*.

As to Mr. Parkinson's other affirmative defense, the Court unanimously agreed with the board that a USERRA violation may not be raised by an FBI employee as an affirmative defense because USERRA "manifest[s] a clear Congressional will to withhold all judicial review of USERRA violations for FBI agents." *Id*. at 775.

Judge Taranto dissented from the majority's holding that section 7701 authorizes FBI employees to raise whistleblower reprisal as an affirmative defense. *Id.* at 777-80. Instead, the dissent "would read § 2303 as sufficiently embodying a determination by Congress, the President, and the Attorney General that § 2303 claims of FBI reprisal for whistleblower disclosures made to the Attorney General (the only disclosures protected by § 2303) are outside the [b]oard's jurisdiction and within the full and final control of the Attorney General." *Id.* at 777. The dissent relied on the principle that a "sufficiently specific remedial regime can displace an otherwise- available general remedy whose application would impair policies evidenct in the specific remedial provisions." *Id.* at 777-78 (citing, *e.g.*, *United States v. Bormes*, 133 S. Ct. 12, 18 (2012)). The dissent explained that:

> To apply § 7701(c)(2)(C)'s general, catchall 'not in accordance with law' provision would be to impair the determination – strongly suggested by the congressional actions and statements, and made explicit by the President and the Attorney General – that resolution of such issues should be confined to the Department of

> Justice, which is the only recipient of disclosures protected from reprisal in the first place.

Id. at 780. The majority rejected the dissent's analysis, reasoning that the principle did not apply "where judicial review is already clearly available[ ]" through sections 7701 and 7703. *Id.* at 774.

Finally, the dissent explained that the majority's reading of the law "does not eliminate either a general concern about outside-the-Department interference in FBI whistleblower-reprisal matters or a specific concern about the potential leaking of sensitive law-enforcement or intelligence information." *Id*. at 780 (citation omitted).

In a portion of the decision not at issue here, the court also unanimously sustained the FBI's obstruction charge, but held that the FBI had not proved its lack of candor charge. *Id*. at 765-68. The panel remanded the case for the board to determine the appropriate penalty. *Id*. at 777.

On August 8, 2016, this Court granted the Department of Justice's petition for rehearing *en banc* and vacated the panel decision.

SUMMARY OF ARGUMENT

In the CSRA and WPA, Congress struck a careful balance: encouraging whistleblowing while protecting sensitive information. That balance is maintained through an interpretation of 5 U.S.C. § 2303 and § 7701(c)(2)(C) that permits the

Department of Justice, not the board, to consider whistleblower reprisal allegations by FBI employees.

To effect this careful balance, Congress established a comprehensive and separate system for the adjudication and enforcement of whistleblower reprisal allegations by FBI employees. This remedy is outlined in 5 U.S.C. § 2303(b)-(c), and the Department of Justice has implemented it through regulation. This Presidentially-created process mandates that violations of 5 U.S.C. § 2303(a) be "shown" to the Department of Justice, not to the board or any court.

Congress' intent to provide FBI employees with a different mechanism for the adjudication and enforcement of whistleblower reprisal claims is evidenced in at least two ways. First, the language and structure of the CSRA as a whole plainly preclude the board from reviewing whistleblower reprisal claims by FBI employees. Congress defined "prohibited personnel practices" differently for FBI employees than most other civil servants. In identifying prohibited personnel practices as an affirmative defense in 5 U.S.C. § 7701(c)(2), Congress referred specifically to 5 U.S.C. § 2302(b), but not to 5 U.S.C. § 2303.

Second, the legislative history strongly suggests that Congress intended FBI whistleblower reprisal claims to be handled exclusively within the Department of Justice. No evidence suggests that Congress intended preference-eligible FBI

employees to be permitted to sidestep the internal review and enforcement mechanism in favor of board review. Mr. Parkinson's interpretation fails to directly confront this legislative history.

Section 7701(c)(2)(C), which provides that an adverse action cannot be sustained if the employee demonstrates that the action was not in accordance with law, is not an exception to the general prohibition against the board's consideration of whistleblower reprisal claims by FBI employees. Mr. Parkinsons' reading of 5 U.S.C. § 7701(c)(2)(C) ignores the clear prohibitions against adjudication of FBI whistleblower complaints outside of the internal administrative process found elsewhere in the CSRA.

ARGUMENT

I. Congress Enacted A Separate And Exclusive Procedure For The Adjudication And Enforcement Of Whistleblower Reprisal Claims By FBI Employees

Although 5 U.S.C. § 2302(b)(8) protects most Federal employees from whistleblower reprisal, Congress has exempted the FBI from "the requirements of Section 2302(b)(8)(A) entirely." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 923-24 (2015). Instead, Congress enacted an exclusive, agency-specific procedure for addressing FBI employees' whistleblower reprisal claims: 5 U.S.C. § 2303.

The Supreme Court has repeatedly acknowledged and affirmed Congress' intent to limit Federal employees to the remedies that CSRA explicitly provides. *Elgin v. Dep't of Treasury*, 132 S. Ct. 2126, 2133 (2012); *Fausto*, 484 U.S. at 445. Congress did so here by providing a specific and exclusive venue for all FBI whistleblower matters. Section 7701(c)(2)(C) cannot be used to circumvent that exclusive venue.

A. Allegations Of Violations Of 5 U.S.C. § 2303 Are To Be Adjudicated And Enforced Exclusively By The Department of Justice

The text and structure of CSRA demonstrate that FBI whistleblower reprisal allegations are not within the board's review jurisdiction, even when raised in adverse action appeals brought by the FBI's preference-eligible employees. First, Congress set forth two separate and distinct provisions for prohibited personnel practices: sections 2302 and 2303. Congress expressly carved the FBI out of the definition of an "agency" for purposes of section 2302 coverage. 5 U.S.C. § 2302(a)(2)(C)(ii)(I). Thus, there is no dispute that, while many other Federal employees may affirmatively seek corrective action from the board if they believe that their agency has retaliated against them for engaging in whistleblower activity, FBI employees have no right to do so. *See* 5 U.S.C. § 1221(a) (authorizing employees to seek corrective action from the Office of Special Counsel "with

respect to any personnel action taken . . . as a result of a prohibited personnel practice in section 2302(b)(8)").

Instead of allowing FBI employees to bring causes of action before the board, Congress addressed "prohibited personnel practices in the Federal Bureau of Investigation" in section 2303. In that section, Congress restricts the manner in which FBI employees may allege whistleblower reprisal to reports directed to "the Attorney General (or an employee designated by the Attorney General for such purpose)." 5 U.S.C. § 2303(a). And Congress specifically stated that "[t]he President shall provide for the enforcement of this section in a manner consistent with applicable provisions of [5 U.S.C. §§ 1214 and 1221]." *Id*. § 2303(c).

By placing resolution of whistleblower allegations in the hands of the Department of Justice, Congress intended to shield sensitive FBI information from outside interference. In enacting section 2303, Congress was concerned that providing FBI and other intelligence community employees with unrestricted whistleblower rights would lead to the public dissemination of national security information, and could impair the country's ability to carry out its law enforcement and intelligence operations. *See* 124 Cong. Rec. 27,591 (daily ed. Aug. 24, 1978) (statement of Sen. Thurmond) ("the threat of other and numerous 'Pentagon Papers' situations would increase if CIA, FBI and other national security-related

employees were covered by civil service laws and regulations.")

Conference Committee discussions and materials demonstrate that, in crafting the CSRA and the WPA, Congress was concerned about protecting the FBI from MSPB and court interference in whistleblower matters. Further, the purpose of section 2303 was to effectuate a "compromise" among legislators who wished to exempt the FBI from the WPA provisions, but still require the Department of Justice to establish an internal mechanism for protection against whistleblower reprisal.

The Conference Committee's 1978 Joint Explanatory Statement explained that the power to enforce whistleblower rights would be granted to the President, rather than the board:

> The conference substitute excludes the FBI from coverage of the prohibited personnel practices, except that matters pertaining to protection against reprisals for disclosure of certain information described in section 2302(b)(8) would be processed under special procedures similar to those provided in the House bill. The President, rather than the Special Counsel and the Merit Board, would have responsibility for enforcing [section 2302(b)(8)] with respect to the FBI under section 2303.

124 Cong. Rec. 33,763 (daily ed. Oct. 5, 1978) (Joint Explanatory Statement of the House Committee on Conference); *see also* 124 Cong. Rec. 28,698-700 (daily ed. Sept. 11, 1978) (statements of Reps. Collins, Udall, and Derwinski); *id*. at 28,770

(statements of Reps. Collins and Udall); *id*. at 28,801 (statement of Rep. Schroeder); *see also* 124 Cong. Rec. 25,724 (daily ed. Aug. 11, 1978) (statement of Rep. Collins) (advocating for FBI exemption from CSRA provisions).

Mr. Parkinson and the *amici* diminish the importance of the concerns identified by Congress and fail to confront the implicit exception their interpretation creates. Pet. Suppl. Br. at 19-20. Mr. Parkinson correctly observes that, in his case, no disclosure of sensitive or classified information to the board would have been required. Pet. Suppl. Br. at 20. Mr. Parkinson further alleges that the board and the courts are equipped to handle and protect sensitive or classified information. Regardless of the board's or the Court's capability, however, Congress' policy concern remains that whistleblower claims involving intelligence agencies like the FBI may involve "sensitive information" not amenable to adjudication by outside entities. *Whistleblower Protection For FBI Employees*, 64 Fed. Reg. at 58,783-85; 28 C.F.R. part 27; 124 Cong. Rec. 28,770 (1978) (Statement of Representative Udall)). That concern is not alleviated when the claimant is a preference-eligible veteran.

Were the board to entertain FBI whistleblower reprisal claims, the board would receive the contents of whistleblower disclosures, contrary to Congress' intent that the Department of Justice be the sole recipient of such disclosures. The

board would be required to evaluate whether the employee made a protected disclosure that he reasonably believed evidenced a violation of any law, rule, or regulation; mismanagement; a gross waste of funds; an abuse of authority, or a substantial and specific danger to public health or safety. Such a determination requires the board to engage in specific and intensive fact finding. *See Herman v. Dep't of Justice*, 193 F.3d 1375, 1382 (Fed. Cir. 1999) ("The determination of whether an employee has a reasonable belief that a law, rule, or regulation was violated turns on the facts of the particular case"). This is precisely the type of outside disclosure that Congress sought to avoid by enacting 5 U.S.C. § 2303. It is also precisely the type of investigation for which the Department of Justice is best equipped.[1]

B. The Same Concerns Would Be Implicated If Allegations Of Violations Of 5 U.S.C. § 2303 Were To Be Adjudicated By The Board As an Affirmative Defense Under 5 U.S.C. § 7701(c)(2)(C)

Mr. Parkinson suggests that although Congress took pains to ensure that affirmative causes of action for whistleblower reprisal were heard by the Department of Justice, and not the board, FBI employees with veterans preference

[1] Notably, even the statutes governing the Office of Special Counsel recognize the Department of Justice's important role in whistleblower investigations. For example, when, in the course of its own investigation, OSC uncovers evidence of a criminal violation, it is required to refer the matter to the Attorney General. 5 U.S.C. § 1213(d)(5)(D); (f).

are entitled to have their whistleblower claims heard by the board, so long as they are raised as affirmative defenses in response to an agency's effort to justify an adverse employment action. But in addition to making clear that whistleblower claims by FBI employees should be subject to a separate administrative process, Congress specifically addressed the issue of which whistleblower claims could be cognizable as affirmative defenses in actions before the board.

When it set forth affirmative defenses, Congress specifically identified "prohibited personnel practice [as] described in [5 U.S.C.] section 2302(b)." 5 U.S.C. § 7701(C)(2)(b). Congress did not refer to prohibited personnel practices as described in 5 U.S.C. § 2303(a). A negative inference should be drawn from Congress' decision to list prohibited personnel practices as defined by section 2302(b), but not section 2303(a), as an affirmative defense:

> If Congress intended to provide FBI preference eligible employees broader protections, such as the ability to bring whistleblower retaliation claims before the Board, it could have done so either by extending the coverage of 2302 or by refraining from referencing section 2302(b) exclusively in section 7701(c)(2)(B). Congress did neither.

Van Lancker, 119 M.S.P.R. at 517-18.

In 1989, when it created an individual right of action, Congress explicitly confirmed that employees of agencies covered by section 2302's whistleblower protections retained the right to raise whistleblower reprisal claims as an

affirmative defense to an adverse action under section 7701(c)(2)(B). 5 U.S.C. § 1221(b). But, again, Congress did not cite to section 2303(a), the parallel provision defining prohibited personnel practices for FBI employees.

"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Springer v. Adkins*, 525 F.3d 1363, 1369 (Fed. Cir. 2006) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Through section 1221(b), Congress intended to make clear that its creation of an individual right of action did not disturb any preexisting right to raise affirmative defenses in a direct appeal to the board. It cannot be read as providing the board with review jurisdiction over whistleblower reprisal allegations by FBI preference-eligibles, where the board did not previously entertain such claims. Nonetheless, Mr. Parkinson argues that, because section 1221(b) is referenced in the FBI whistleblower statute, 5 U.S.C. § 2303(c), Congress intended for the board to review whistleblower reprisal allegations by FBI preference-eligibles. Pet. Suppl. Br. at 17; NWC Amic. Br. at 14-15. This reading should be rejected for two reasons.

First, section 1221(b) provides that, if an employee has the right to seek direct board review of an adverse action, the employee need not exhaust administrative remedies by "seeking corrective action from the Special Counsel." Because FBI employees are precluded from seeking corrective action from the Special Counsel, 5 U.S.C. § 2302(a)(2)(C), section 1221(b) does not speak in any way to the adjudication and enforcement of the whistleblower reprisal protections for FBI employees.

Second, 5 U.S.C. § 2303's reference to 5 U.S.C. §§ 1214 and 1221 does not incorporate an affirmative defense of whistleblower reprisal into section 2303. Congress did not "direct" that those statutes be "incorporated" into section 2303. Pet. Suppl. Br. at 17; *see also* NWC Amic. Br. at 15. Rather, Congress required the President to provide for the enforcement of section 2303 in a "manner *consistent with applicable provisions* of section 1214 and 1221." 5 U.S.C. § 2303(c) (emphasis added). That is, Congress intended that the President's enforcement of whistleblower protection to be harmonious with – but not necessarily equivalent to – those provided in sections 1214 and 1221. And Congress further limited the consistency of the President's enforcement to "applicable provisions." In other words, sections 1214 and 1221 simply provide guidance to the President in implementing the separate FBI whistleblower

scheme.[2]

Moreover, Congress did not override its specific determination about the appropriate forum for whistleblower claims through general language in section 7701(c)(2)(C) providing that the board may not sustain an adverse action if the employee "shows that the decision is not in accordance with law." This catch-all "not in accordance with law" provision should not be read to override or overlap more specific provisions of the statute. *Handy v. United States Postal Service*, 754 F.2d 335 (Fed. Cir. 1985) (rejecting use of section 7701(c)(2)(C) to raise an affirmative defense of procedural error, because harmful procedural error was covered by section 7701(c)(2)(A)). If all affirmative defenses were covered by a

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[2] Because the statute is silent as to which provisions of sections 1214 and 1221 were "applicable provisions," Congress left those decisions to the President, as delegated to the Attorney General. Several provisions of the promulgated regulations are consistent with 5 U.S.C. §§ 1214 and 1221. For example, several provisions of 28 C.F.R. § 27.3, governing "Investigations," are consistent with 5 U.S.C. § 1214, the statute governing OSC investigations. *Compare* 28 C.F.R. § 27.3(a)(1) *with* 5 U.S.C. § 1214(a)(1)(A); 28 C.F.R. § 27.3(c) with 5 U.S.C. § 1214(a)(1)(B); 28 C.F.R. § 27.3(e) *with* 5 U.S.C. § 1214(a)(1)(C). But there is nothing in 28 C.F.R. § 27.3 that is consistent with 5 U.S.C. § 1214(a)(1)(C), which requires an employee to exhaust administrative remedies with the OSC prior to filing an individual right of action with the board. Similarly, many provisions of 28 C.F.R. § 27.4 ("Corrective action") are consistent with 5 U.S.C. § 1221 ("Individual right of action"). But there is no provision of 28 C.F.R. § 27.4 that is consistent with 5 U.S.C. § 1221(b).

"not in accordance with law" provision, there would have been no need for Congress to describe specific prohibitions of law in subsections 7701(c)(2)(A) or 7701(c)(2)(B). Statutes "should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant . . . ." *Corley v. United States*, 556 U.S. 303, 314 (2009) (citation omitted).

Subsection (c)(2)(C)'s "not in accordance with law" provision is best construed to address circumstances different from those expressly addressed by the neighboring statutory provisions. *See, e.g.*, *McCollum v. NCUA*, 417 F.3d 1332 (Fed. Cir. 2005) (finding adverse action was "not in accordance with law" because no one at agency with authority took action to remove employee); *Anderson v. USPS*, 24 M.S.P.R. 488 (1984), *aff'd*, 776 F.2d 1060 (Fed. Cir. 1985) (table) (finding that it was "not in accordance with law" for agency to take two adverse actions based on the same misconduct).

Because whistleblower protections are explicitly addressed in the immediately preceding provision, section 7701(c)(2)(C)'s "not in accordance with law" language cannot be interpreted to address whistleblower protection by implication. Consequently, section 7701(c)(2)(C) cannot be read to authorize preference-eligible FBI employees to bypass Congress's statutory framework for adjudication and enforcement of FBI whistleblower claims. To permit the board to

adjudicate those claims through a general "not in accordance with law" provision would fail to give full effect to this specific and comprehensive remedial scheme set aside for FBI employees.

Congress' intent to direct all FBI whistleblower actions to the Department of Justice is discernable from the statutory scheme. "In a variety of contexts the [Supreme] Court has held that a precisely drawn, detailed statute preempts more general remedies." *Brown v. General Services Admin.*, 425 U.S. 820, 834-35 (1976) (citing four cases where the Supreme Court applied specific statutes rather than facially applicable general statutes); *see also Morales v. Trans World Airlines, Inc*., 504 U.S. 374, 385 (1992) (holding that a "general 'remedies' savings clause cannot be allowed to supersede the specific substantive preemption provision" in the Airline Deregulation Act). This canon has particular force where Congress has "deliberately targeted specific problems with specific solutions." *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (citation omitted).

The specific controls the general even when the two are not in express conflict. Consequently, even if 5 U.S.C. § 7701(c)(2)(C), standing alone, could be read to permit the board to adjudicate a violation of section 2303 as "not in accordance with law," the overall statutory scheme, as well as congressional intent

to shield FBI from outside interference into whistleblower claims, strongly suggest that the board is not the correct venue for these claims.

In sum, Mr. Parkinson cannot use 5 U.S.C. § 7701(c)(2)(C) to "show[]" the MSPB that an adverse action was not in accordance with 5 U.S.C. § 2303's prohibition against whistleblower reprisal. Pet. Suppl. Br. at 18. Congress has concluded that Mr. Parkinson must direct such a showing to the Department of Justice.

C. Mr. Parkinson's Preference-Eligible Status Does Not Alter The Comprehensive Scheme Congress Has Established

Mr. Parkinson's arguments rest on his status as a preference-eligible veteran with the right to appeal adverse actions to the board pursuant to 5 U.S.C. § 7701. Any right to appeal an adverse action to the board, however, is cabined by the scope of the board's jurisdiction, which is not plenary. *Garcia v. Dep't of Homeland Security*, 437 F.3d 1322, 1327 (Fed. Cir. 2006) (*en banc*); *Meeker v. Merit Systems Prot. Bd.*, 319 F.3d 1368, 1374 (Fed. Cir. 2003) (rejecting argument that section 7701(c)(2)(C) authorized the board to entertain any legal challenge to an employment practice). Preference-eligible status provides an entitlement to review of adverse employment actions by the board, but it does not overcome or alter the comprehensive remedial scheme Congress established. Under that scheme, whistleblower reprisal claims are to be investigated, and whistleblower

rights enforced, exclusively within the Department of Justice.

Mr. Parkinson argues that the legislative history reflects "congressional intent to preserve MSPB appeal rights for FBI preference eligible veterans." Pet. Suppl. Br. at 12; *see also* NWC Amic. Br. at 12. But there is no dispute that Mr. Parkinson, as a preference-eligible veteran, is entitled to review before the MSPB; here, the board, and this Court exercised their respective jurisdictions to resolve Mr. Parkinson's challenges to the basis for the removal. *See Parkinson*, 815 F.3d at 765-68. The relevant question is the scope of that review. The panel unanimously agreed that review did not extend to rights under USERRA, illustrating that the intent to provide FBI preference-eligible employees some MSPB appeal rights does not end the inquiry. *Parkinson*, 815 F.3d at 775-76.

Although Congress intended to preserve the "status quo" with respect to preference-eligibles' right to challenge an adverse action, Pet. Suppl. Br. at 11, Mr. Parkinson points to no evidence suggesting that, prior to the enactment of CSRA, that right included raising whistleblower reprisal as an affirmative defense.

Prior to the enactment of CSRA, preference-eligibles enjoyed the right to appeal an adverse action to the Civil Service Commission. 5 U.S.C. § 7701 (1966). The "status quo" that Congress sought to preserve did not include the right to raise a prohibited personnel practice as a defense to an adverse action because

the concept of a prohibited personnel practice itself did not exist prior to CSRA. *See* Pet. Suppl. Br. at 11.

Indeed, at the time CSRA was enacted, Congress was aware that the status quo for FBI employees involved internal resolution of whistleblowing allegations: "In our FBI present system, as far as the investigation of what they call the whistle-blowers is concerned, the present setup within the FBI involves four different places where they can go." 124 Cong. Rec. 28,699 (Sept. 11, 1978) (statement of Rep. Collins).

Mr. Parkinson's position rests on the view that the plain terms of section 7701 "provide all employees with appeal rights the same rights." Pet. Suppl. Br. at 13 (citing *Butler v. U.S. Postal Service*, 10 M.S.P.R. 45, 48 (1982)). But this view cannot be reconciled with the analysis above, and, in any event, the board reasonably distinguished the cases he relies upon. In *Butler*, the board held that it could entertain, as an affirmative defense, a race-discrimination claim by a preference-eligible Postal Service employee. *Id*. The board held that, although Postal Service employees are exempt from 5 U.S.C. § 2302, they can raise allegations of a prohibited personnel practice under § 2302(b) as an affirmative defense. *Id*. The board later extended this reasoning to whistleblower claims by Postal employees. *Mack v. U.S. Postal Service*, 48 M.S.P.R. 617, 621 (1991).

But as the board subsequently recognized, a critical difference exists between the separate avenues of redress for FBI employees and Postal Service employees. *Van Lancker*, 119 M.S.P.R. at 518 (distinguishing *Butler*). With respect to Postal Service employees, Congress was silent on the issue of whistleblower protection. In 5 U.S.C. § 2303, however, Congress explicitly set out a separate scheme for resolution of FBI whistleblower claims. Whatever the force of the principle enunciated in *Butler* as a general matter, that principle does not apply to whistleblower claims by FBI employees who are expressly excluded from 5 U.S.C. § 2302 and provided an alternative statutory remedy in section 2303. *Id*.

Taking a similar tack, National Whistleblower Center argues that exceptions may not be read, or implied, into CSRA. NWC Amic. Br. at 9-10 (citing *Archuleta v. Hopper*, 786 F.3d 1340 (Fed. Cir. 2015) and *Lal v. Merit Systems Protection Board*, 821 F.3d 1376 (Fed. Cir. 2016)). In both cases, this Court declined to read implicit exemptions into a statute where the statute explicitly listed exemptions. *Hopper*, 786 F.3d at 1348 (finding no implicit exemption for suitability-based removals, where 5 U.S.C. § 7512 listed exemptions for specific types of removals); *Lal*, 821 F.3d at 1381 (finding no implicit exemption for distinguished consultant in 5 U.S.C. § 7511's exclusions for covered employees). Unlike here, neither case dealt with an area in which Congress provided a comprehensive alternative remedy

for a specific group of employees.

"The detailed protections and remedies afforded federal civil servants by the CSRA do not apply uniformly to all covered employees." *Dotson v. Griesa*, 398 F.3d 156, 163 (2d Cir. 2005). Section 7701 does not provide that all employees possessing MSPB appeal rights must be granted the same rights, much less that all employees in all agencies have identical rights to raise affirmative defenses.

Agency-specific laws may limit the board's power to act, or to award complete relief. For example, although the board normally may order the payment of back pay, prior to 2012, a specific Federal Aviation Administration statute precluded the board from enforcing a back pay award. *Gonzalez v. Dep't of Transportation*, 551 F.3d 1372, 1376 (Fed. Cir. 2009) (citing 49 U.S.C. § 40122(g)(3)). The varying levels of protection afforded to employees under the CSRA reflects Congress' effort "to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Fausto*, 484 U.S. at 445.

Finally, adopting the board's interpretation would be consistent with the conclusion reached by other courts that 5 U.S.C. § 2303, and its implementing regulations, preclude all outside review. *See, e.g.*, *Roberts v. Dep't of Justice*, 366 F. Supp. 2d 13, 20 (D.D.C. 2005); *Runkle v. Gonzales*, 391 F. Supp. 2d 210, 232-

33 (D.D.C. 2005); *McGrath v. Mukasey*, Civ. No. 07-11058, 2008 U.S. Dist. LEXIS 32120 (S.D.N.Y. Apr. 18, 2008).

II. The Department of Justice And The Board's Interpretations Of The Statutes They Are Charged With Administering Are Consistent With Preclusion Of Board Review Of FBI Whistleblower Reprisal Claims

As demonstrated above, the statutes and legislative history convey Congress' intent to preclude board review of FBI whistleblower claims. Nonetheless, to the extent that the Court views sections 2303 or 7701(c) as ambiguous, or as not speaking directly to the issue of whether the board may review whistleblower allegations by FBI preference-eligible employees, this Court may defer to the authoritative interpretations of these statutes by the agencies charged with administering them. *Chevron v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 842-43 (1984). The board and the Department of Justice have consistently interpreted 5 U.S.C. § 2303 and 5 U.S.C. § 7701 to preclude board review and provide for exclusive Department of Justice review of whistleblower allegations by FBI employees.

First, in implementing Congress' directive, the Department of Justice emphasized that it maintains complete, and internal, authority to adjudicate whistleblower disputes. *Whistleblower Protection For FBI Employees*, 64 Fed. Reg. 58,782 (Dep't of Justice Nov. 1, 1999) (adopting, as a final rule, 28 C.F.R.

§§ 27.1-27.6).

As demonstrated in section I.A above, while the Attorney General made many of the provisions of the promulgated regulations "consistent with" 5 U.S.C. §§ 1214 and 1221, she declined to incorporate provisions providing for, or referencing in any manner board review. The Department of Justice's rulemaking is consistent with the President's direction that the Attorney General "establish appropriate processes *within* the Department of Justice to carry out these functions." *See Delegation of Responsibilities Concerning FBI Employees Memorandum*, 62 Fed. Reg. at 23,123 (emphasis added).

Second, Mr. Parkinson appears to suggest that the Court should defer to the Merit Systems Protection Board's interpretation of its relevant appellate jurisdictional statute. Pet. Suppl. Br. at 14. That argument weighs in favor of the Department of Justice's position. *See Cornelius v. Nutt*, 472 U.S. 648, 657-59 (1985) (according *Chevron* deference to the MSPB's interpretation of section 7701(c)(2)(A)). The board correctly interpreted 5 U.SC. § 7701 as not permitting the board to entertain whistleblower reprisal claims by FBI employees. A26; *Van Lancker*, 119 M.S.P.R. at 519.

III. Mr. Parkinson's Remaining Arguments Do Not Require A Different Result Than That Correctly Reached By The Board

The remainder of the arguments made by Mr. Parkinson and the *amici* do not demonstrate that the board's decision on this issue should be reversed.

First, the canon of construction concerning the interpretation of ambiguous language in statutes for the benefit of veterans has no application here. *See* Nat'l Reserve Officer Ass'n Amic. Br. at 9-13. The relevant statutes – 5 U.S.C. §§ 2303 and 7701(c)(2), do not purport to provide "for benefits to members of the Armed Services." *King v. St. Vincent's Hosp*., 502 U.S. 215, 220 n. 9 (1991).[3] Even if this canon of construction were applicable, it would require the Court to hold that board review of whistleblower reprisal claims is more favorable to veterans than equivalent Department of Justice review. There is no basis to reach that holding as a legal proposition.

[3] The Reserve Officers Association overstates the holding of *Hudgens v. McDonald*, 823 F.3d 630 (Fed. Cir. 2016), a case involving the interpretation of a Department of Veterans Affairs regulation. ROA Amic. Br. at 11. This Court did not hold that it was required, in all circumstances, to adopt a "veteran friendly" interpretation of law over the Department of Veterans Affairs' interpretation of its own regulation. This Court reached a much narrower holding by adopting what it found to be the plain meaning of the regulation. *Id*. at 639. This Court found that VA's interpretation of its regulation was not entitled to deference because VA had previously held a contrary interpretation. *Id*.

Second, amicus National Whistleblower Center mistakenly suggests that Congress "repealed" its prior statements when it passed the Whistleblower Protection Act in 1989. NWC Amic. Br. at 11-12. The subsequent legislative history does not suggest that Congress altered its view in 1989 and abruptly changed course to permit FBI whistleblower reprisal allegations to be investigated and enforced by outside bodies.

The Whistleblower Protection Act amended 5 U.S.C. § 2303 by striking the reference to former 5 U.S.C. § 1206 ("Authority and responsibilities of the Special Counsel") and inserting "applicable provisions of [5 U.S.C.] sections 1214 and 1221." Pub. L. No. 101-12, Sec. 9. Congress described this revision as a "technical amendment," not a substantive or clarifying change. *Id*. In other words, the WPA merely replaced the prior statute authorizing the Special Counsel with a new one. Congress did not, however, provide for judicial or board review of whistleblower claims by FBI employees, or in any manner act contrary to its prior statements emphasizing the importance of an exclusive, internal process for review of whistleblower claims and enforcement of FBI whistleblower protections. Responsibility for providing for enforcement of any whistleblower protections identified in 5 U.S.C. § 2303 remained solely with the President, who delegated that responsibility to the Department of Justice.

Third and finally, any perceived inefficiencies or complaints concerning the Department of Justice's administration of its whistleblower adjudication program are not a basis to override congressional intent to provide a separate remedial scheme for FBI whistleblower reprisal claims. Pet. Suppl. Br. at 22-23; NWC Amic. Br. at 16-20. Congress, not the courts, is charged with resolving perceived problems with the protection of whistleblowers.

Since the enactment of CSRA, Congress has actively revised the laws to protect government whistleblowers when it believes the laws are inadequate or being improperly interpreted.[4] Yet Congress has consistently maintained a unique and separate mechanism to address FBI whistleblower reprisal claims. Congress' decision not to act in this area, while revising other whistleblower statutes, confirms its acquiescence to the interpretation held by the Department of Justice and the board. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change").

[4] By way of one example, Congress removed the Federal Aviation Administration from OSC's jurisdiction in 1996, but later restored limited, retroactive, jurisdiction to OSC. Pub. L. 106-181 (2000); *see Miller v. Dep't of Transp*., 86 M.S.P.R. 293 (2000).

CONCLUSION

An interpretation of 5 U.S.C. § 7701(c)(2)(C) that permits the MSPB to adjudicate the whistleblower claims of preference-eligible FBI employees undermines Congress' overarching purpose in setting aside a separate system for adjudication of the whistleblower reprisal allegations of all FBI employees. This Court should affirm the board's decision finding that Mr. Parkinson was not permitted to raise an affirmative defense of whistleblower reprisal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6846 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 26th day of October, 2016, a copy of the foregoing "SUPPLEMENTAL EN BANC BRIEF OF RESPONDENT DEPARTMENT OF JUSTICE" was filed electronically.

X This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/Tara K. Hogan