No. 17-1098

IN THE
Supreme Court of the United States

JOHN C. PARKINSON,
Petitioner,
v.

DEPARTMENT OF JUSTICE,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

KATHLEEN M. MCCLELLAN
JESSELYN A. RADACK
WHISTLEBLOWER & SOURCE PROTECTION PROGRAM
EXPOSEFACTS
910 Seventeenth Street NW
Suite 800
Washington, DC 20006
(301) 351-2582
kathleen@exposefacts.org

NEAL KUMAR KATYAL
Counsel of Record
SUNDEEP IYER
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

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INTRODUCTION

The Government does not dispute that this case squarely presents a pure question of statutory interpretation that divided the en banc Federal Circuit: Whether preference-eligible FBI employees may raise whistleblower retaliation as an affirmative defense in proceedings before the Merit Systems Protection Board (MSPB). The Government also does not dispute that the question presented is important—and indeed, it told the Federal Circuit that the question was of "exceptional importance." *See* Pet. 29. Moreover, the Government does not dispute that the Federal Circuit's en banc decision, which held that preference-eligible FBI employees

may not raise whistleblower retaliation as an affirmative defense before the MSPB, establishes a nationwide rule that will harm thousands of veterans employed in the civil service. *See* Pet. 27-32; Amicus Br. German et al. 6-13; Amicus Br. Rutherford Inst. 8-12. And the Government does not dispute that the Federal Circuit's decision is part of a larger pattern of decisions by that court and the MSPB that have narrowed the statutory protections Congress has granted to federal whistleblowers. Br. in Opp. 19; *see* Amicus Br. German et al. 13-15.

Instead of grappling with these arguments that strongly counsel in favor of certiorari, the Government spends nearly its entire brief litigating the merits. The Government asks this Court to prejudge the merits of this case and deny review on that basis. That, of course, puts the cart before the horse. Even so, the Government's merits arguments make plain why this Court's intervention is urgently needed.

The Government's arguments reinforce that the Federal Circuit's decision is irreconcilable with the statutory text and this Court's precedents. The Civil Service Reform Act (CSRA) grants preference-eligible FBI employees the right to raise an affirmative defense that an adverse employment decision is "not in accordance with law." 5 U.S.C. § 7701(c)(2)(C). And the ordinary meaning of the phrase "not in accordance with law" plainly encompasses violations of Section 2303 of the CSRA, which prohibits retaliation against FBI whistleblowers. *See id.* § 2303(a). At no point does the Government disagree with that textual analysis. Nonetheless, the Government concludes that FBI employees may not raise whistleblower retaliation as an affirmative defense—largely by repeating the Federal Circuit's arguments. In

doing so, the Government fails to explain what the phrase "not in accordance with law" means if it does not encompass violations of Section 2303 of the CSRA. And the Government offers no plausible basis for reconciling the Federal Circuit's en banc decision with this Court's precedents. That is more than enough to warrant this Court's review.

The Government's other arguments against certiorari rest on even shakier ground. The Government claims that this Court should await a circuit split—but the decision below will apply to every preference-eligible FBI employee in the country, and the Government itself has previously represented to this Court that a circuit split is highly improbable. The Government also claims that this Court should await a different vehicle—but the question is squarely presented here, and the Government itself has successfully sought certiorari review of a Federal Circuit MSPB appeal in this exact posture before.

The petition should be granted.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S DECISION IS IRRECONCILABLE WITH THE PLAIN TEXT OF FEDERAL LAW AND THIS COURT'S PRECEDENTS

As the petition demonstrates, the Federal Circuit's en banc decision conflicts with the plain text of the relevant federal statutes. Pet. 13-15. Section 7701(c)(2)(C) grants preference-eligible FBI employees the right to raise an affirmative defense that an employment decision is "not in accordance with law." 5 U.S.C. § 7701(c)(2)(C). And Section 2303(a) makes whistleblower retaliation against FBI employees unlawful. *Id.* § 2303(a). Preference-eligible FBI

employees should therefore be permitted to raise whistleblower retaliation as an affirmative defense.

The Government's response repeats the Federal Circuit's errors. And it continues to ignore the conflicts between the decision below and this Court's precedents. This Court should grant certiorari.

1. The Government begins by claiming (at 10) that the Federal Circuit's reading of the statute "does not conflict with any decision of this Court." That is wrong. The petition identified a number of conflicts between the Federal Circuit's decision and this Court's precedents. The Government completely ignores some of these conflicts, and its efforts to downplay the others are unsuccessful.

First, the Government ignores a long line of this Court's precedents interpreting the statutory phrase "not in accordance with law." *See, e.g.*, *FCC* v. *Nextwave Pers. Commc'ns Inc.*, 537 U.S. 293, 300 (2003). Those precedents make clear that the phrase encompasses violations of other federal statutes. Notwithstanding the petition's reliance on these cases, *see* Pet. 14, the Government offers no response. Indeed, the Government fails to explain what the phrase "not in accordance with law" could plausibly mean if it did not encompass violations of statutory provisions like Section 2303.

Second, the Government ignores the conflicts between the Federal Circuit's decision and this Court's precedents identifying the key structural elements of the CSRA. Pet. 15-18; *see Elgin* v. *Dep't of Treasury*, 567 U.S. 1 (2012); *United States* v. *Fausto*, 484 U.S. 439 (1988). Those cases make clear that courts must honor the "painstaking detail with which the CSRA sets out the method for covered employees to obtain

review of adverse employment actions." *Elgin*, 567 U.S. at 11-12; *see* Pet. 17. Here, the CSRA explicitly provides preference-eligible employees with a right to raise an affirmative defense that an employment decision is "not in accordance with law." 5 U.S.C. § 7701(c)(2)(C). But the Government never explains how the Federal Circuit's reading of the statute gives effect to that "painstaking[ly] detail[ed]" language.

Moreover, this Court's precedents also teach that the CSRA grants a "preferred position" to veterans and enshrines "the primacy of the MSPB for administrative resolution of disputes." *Fausto*, 484 U.S. at 449; *see* Pet. 15. The Government claims (at 17) that the Federal Circuit's decision "does not disturb" those features of the CSRA. Not so. The right to raise affirmative defenses is the strongest medicine in the cabinet for preference-eligible employees. As Judge Plager explained in his dissent below, no matter the charges against the employee, an affirmative defense is the one way an employee can be exonerated in full. *See* Pet. App. 23a (Plager, J., dissenting). By depriving preference-eligible FBI employees of their ability to mount a full defense, the decision below undermines basic due process guarantees and makes it less likely that FBI whistleblowers will file an MSPB appeal. *See* Amicus Br. Rutherford Inst. 8-12. That will undercut the "preferred position" of preference-eligible FBI employees and "the primacy of the MSPB" for resolving disputes.

Third, even if the text and structure of the statute were not clear, the Government's interpretation would conflict with this Court's admonition that "legislation is to be liberally construed for the benefit of those who left private life to serve their country" in the military. *Ala. Power Co.* v. *Davis*, 431 U.S.

581, 584 (1977); *see* Pet. 19. The Government responds (at 19) that this canon is inapplicable because the CSRA is not a veterans' benefits statute. But the canon applies to any law in which "Congress has expressed special solicitude for the veterans' cause." *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009). The CSRA fits the bill. *See Fausto*, 484 U.S. at 441 n.1 (noting that the statute "accords preferential treatment" to veterans). Thus, the canon applies with full force here. And it is no mere tie-breaker: The canon requires that *any* "interpretive doubt * * * be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994).

2. The Government relies—as the Federal Circuit did—on the rule of thumb that the specific governs the general. The Government offers two variants of that argument. Both miss the mark.

The Government first argues (at 12) that the remedial scheme in Section 2303(c) preempts Section 7701's affirmative defenses because Section 2303(c) is the more specific provision. The premise of that argument is mistaken: Section 2303(c) is not the more specific provision. Section 7701(c)(2) provides affirmative defenses only for certain preference-eligible FBI employees who have MSPB appeal rights. *See* 5 U.S.C. § 7511(b)(8). Accordingly, Section 7701(c)(2) actually applies to *a narrower set* of FBI employees than Section 2303(c) does.

Moreover, Sections 2303(c) and 7701 apply to different kinds of claims. The specific-general canon applies only "when there is a conflict" between two provisions. *Nat'l Cable & Telecomms. Ass'n, Inc.* v. *Gulf Power Co.*, 534 U.S. 327, 335 (2002). "Here, however, there is no conflict." *Id.* at 336. Section

7701 gives preference-eligible veterans a right to raise an affirmative defense in response to Government accusations of misconduct. Section 2303(c), by contrast, provides a substitute for the two provisions it explicitly mentions—Sections 1214 and 1221. Those provisions pertain to *freestanding* claims of whistleblower reprisal—that is, claims raised by an employee *independent of* any Government accusations of misconduct. Pet. 21-23. Although the Government asserts that the distinction between freestanding claims and affirmative defenses is not grounded in statutory "history or purpose," Br. in Opp. 18, the text and operation of the statute plainly support that distinction. And Section 2303(c), which explicitly mentions Sections 1214 and 1221 but not Section 7701, embraces that distinction: Section 2303(c) provides a substitute for freestanding claims, but does not address affirmative defenses. Where Congress wishes to foreclose a remedy provided by statute, it ordinarily uses explicit language to that effect. *See* Pet. 20-21. Congress's failure to do so in Section 2303(c) demonstrates that Section 2303(c) does not conflict with or preempt Section 7701.[1]

The Government's second argument (at 13) is that Section 7701(c)(2)(B)'s specific affirmative defense for violations of Section 2302(b) means that the more general defense in Section 7701(c)(2)(C)—for decisions "not in accordance with law"—cannot encompass whistleblower retaliation. But the Government

[1] The Government also points (at 11) to DOJ regulations regarding Section 2303. But those *internal DOJ regulations* have no bearing on whether the *MSPB* can consider whistleblower retaliation under Section 7701 of the CSRA.

ignores the canon that "catchall clauses are to be read as bringing within a statute categories similar in type to those specifically enumerated." *Paroline* v. *United States*, 134 S. Ct. 1710, 1721 (2014) (alterations and internal quotation marks omitted). That canon dictates that Section 7701(c)(2)(C)—a catchall clause—must provide an affirmative defense for violations of statutory provisions "similar in nature" to Section 2302(b). *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 115 (2001). Section 2303(a) is plainly one such "similar" provision. Pet. 26.

The Government fares no better in asserting (at 13) that an affirmative defense for FBI whistleblower reprisal under Section 7701(c)(2)(C) would render Section 7701(c)(2)(B) superfluous. Section 2302(b), which is the basis for Section 7701(c)(2)(B)'s affirmative defense, applies to different agencies and different conduct than the FBI whistleblower reprisal provision, Section 2303(a). Accordingly, violations of Section 2303(a) do not "fal[l] within the ambit" of Section 2302(b). *Marx* v. *Gen. Revenue Corp.*, 568 U.S. 371, 387 (2013). Because Sections 2302(b) and 2303(a) do not overlap, an affirmative defense for violations of Section 2303(a) does not render superfluous the affirmative defense for violations of Section 2302(b). *Id*.

Ultimately, it is the Government's interpretation—not petitioner's—that risks rendering parts of the statute superfluous. *See Microsoft Corp.* v. *i4i Ltd. P'ship*, 564 U.S. 91, 106 (2011). The Government never explains what the phrase "not in accordance with law" in Section 7701(c)(2)(C) could mean if it does not refer to violations of provisions like Section 2303(a). That silence speaks volumes. The Govern-

ment's atextual defense of the decision below highlights the need for this Court's review.[2]

II. THE QUESTION PRESENTED WARRANTS THIS COURT'S IMMEDIATE REVIEW

The Government does not *in any way* dispute the importance of the question presented. Indeed, the Government called the question one of "exceptional importance" in the Federal Circuit. *See* Pet. 29. That is exactly right. The decision below establishes a nationwide rule that erodes the whistleblower protections Congress granted to thousands of preference-eligible veterans. Pet. 27-32. And the decision continues a troubling trend of decisions by the Federal Circuit that unduly narrow the whistleblower protections enacted by Congress. *See* Amicus Br. German et al. 13-15.[3] Certiorari is needed to arrest that trend and reset the Federal Circuit's course.

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[2] Perhaps recognizing the dearth of textual support for its position, the Government heavily emphasizes (at 14-16) the legislative history. But the Government points almost exclusively to floor statements, which "rank among the least illuminating forms of legislative history." *NLRB* v. *Sw. Gen.*, 137 S. Ct. 929, 943 (2017). And the Government's citations never address whether Section 2303 displaced the right to raise affirmative defenses. *See* Pet. App. 31a (Linn, J., dissenting). Moreover, the Government ignores the history cited by the panel majority, which strongly suggests that Congress sought to preserve the existing appeal rights of preference-eligible FBI employees. *See* Pet. App. 63a-65a.

[3] The Government claims (at 19) that the "inaction" of Congress on the question presented counsels against review. But until the en banc decision here, Congress may well have assumed that FBI whistleblowers would have an affirmative defense of whistleblower retaliation. That surely would have

1. The Government's primary argument against immediate review (at 20-21) is the absence of a circuit split. But a circuit split is unlikely to ever emerge. The Federal Circuit has exclusive jurisdiction over every appeal from the MSPB, with the exception of a limited class of "mixed cases" involving antidiscrimination claims. *See* 5 U.S.C. § 7703(b)(1)(A), (b)(2). And that narrow class of "mixed cases" does not create any real possibility of a circuit split. Even the Government recently explained—in a successful petition for certiorari, no less—that the possibility of "mixed cases" being heard elsewhere does not diminish the "outsized influence" of the Federal Circuit in reviewing MSPB decisions. Pet. for Cert. at 24, *Dep't of Homeland Sec.* v. *MacLean*, 135 S. Ct. 913 (2015). As the Government put the point: "[T]he potential for a circuit conflict ever to develop is more theoretical than real." *Id.* That assertion applies with full force here—and the Government does not at all explain why it has now suddenly changed its view.

Indeed, a circuit split is particularly unlikely here for several reasons. *First*, "mixed cases" involving preference-eligible FBI employees are extremely rare. Mixed cases account for a very small fraction of CSRA cases.[4] Many mixed cases are settled or

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been Congress's view when it last enacted FBI whistleblower legislation in 2016, as the en banc Federal Circuit had not yet overruled the panel's decision.

[4] During the approximate five-year period in which the Government identifies "1500 decisions in mixed cases" across all federal agencies, Br. in Opp. 20 n.6, the MSPB issued more than 40,000 decisions in total. *See* MSPB, *Agency*

withdrawn, or are not appealed. And precious few mixed cases involve *preference-eligible FBI employees*. It is thus unsurprising that the Government cannot cite a single mixed case in any court of appeals other than the Federal Circuit that involved whistleblower retaliation against a preference-eligible FBI employee.

Second, even if the question does arise elsewhere, other circuits likely will defer to the Federal Circuit's conclusion in this case. The Federal Circuit's decisions interpreting the CSRA are often given heavy weight in other circuits. *See, e.g.*, *Acha* v. *Dep't of Agric.*, 841 F.3d 878, 880 n.2 (10th Cir. 2016); *Aviles* v. *MSPB*, 799 F.3d 457, 461 (5th Cir. 2015). And several circuits defer to the MSPB's reading of the statute. *See, e.g.*, *Aviles*, 799 F.3d at 464; *Nat'l Treasury Emps. Union* v. *MSPB*, 743 F.2d 895, 913 (D.C. Cir. 1984). The combined effect of deference to the Federal Circuit and to the MSPB means that the Federal Circuit's conclusion likely will be replicated even if the issue does arise elsewhere.

Third, the Federal Circuit's decision will further decrease the likelihood of a circuit split by deterring FBI whistleblowers from appealing to the MSPB in the first instance. Many FBI whistleblowers likely will decline to bring an MSPB appeal if they cannot raise their core claim, whistleblower retaliation, during that appeal. Pet. 28. And even if some FBI whistleblowers still might appeal to the MSPB, as the Government claims (at 21), they may opt not to

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Plans and Annual Reports, https://www.mspb.gov/publicaffairs/annual.htm.

argue whistleblower retaliation at all because such claims will assuredly fail at the MSPB.

In any event, even putting aside the improbability of a circuit split, the decision establishes a nationwide rule that warrants this Court's review. The Federal Circuit's decisions are controlling precedent for the MSPB throughout the country. *See* Pet. 27. As a result, the decision below binds *every* FBI employee who appeals to the MSPB, regardless of the circuit in which the employee resides. Only this Court can displace that national rule.

2. The Government also asserts (at 22) that this case is not a suitable vehicle "because the court of appeals' decision is interlocutory." That is wrong. The Federal Circuit issued a final judgment holding that petitioner could not raise an affirmative defense of whistleblower retaliation. Although the Federal Circuit remanded the case back to the MSPB, that did not make the judgment any less final. Time and again, this Court has reviewed court of appeals decisions that have remanded cases for further proceedings. *See, e.g.*, *Bank of Am. Corp.* v. *City of Miami*, 137 S. Ct. 1296, 1302 (2017); *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 134 S. Ct. 1377, 1385 & n.2 (2014). Indeed, at the Government's urging, this Court has previously reviewed a Federal Circuit decision that ordered a remand to the MSPB—the exact posture of this case. *MacLean*, 135 S. Ct. at 918. Moreover, because the proceedings here on remand will not entirely wipe out petitioner's suspension, *see* Pet. App. 71a, the question whether petitioner can raise an affirmative defense of whistleblower retaliation—and thereby obtain complete relief—will be outcome-determinative no matter what happens on remand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KATHLEEN M. MCCLELLAN
JESSELYN A. RADACK
WHISTLEBLOWER & SOURCE PROTECTION PROGRAM
EXPOSEFACTS
910 Seventeenth Street NW
Suite 800
Washington, DC 20006
(301) 351-2582
kathleen@exposefacts.org

NEAL KUMAR KATYAL
Counsel of Record
SUNDEEP IYER
HOGAN LOVELLS US LLP
555 Thirteenth Street NW
Washington, DC 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioner

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