

No. 17-1434

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**In The  
SUPREME COURT OF THE UNITED STATES**

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**JOSEPH P. CARSON,  
PETITIONER,**

**v.**

**MERIT SYSTEMS PROTECTION BOARD,  
RESPONDENT**

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**AMICUS CURIAE BRIEF OF**

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**SUPPORTING PETITION FOR WRIT OF CERTIORARI**

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## CONSENT OF THE SOLICITOR GENERAL

Per Supreme Court rule 37(2)(a), the Solicitor General was timely notified of the intent to file this amicus curiae brief and consented, in writing, to it.

### IDENTITY OF PARTIES TO AMICUS CURIAE BRIEF AND THEIR INTEREST IN THE CASE

Parties to this amicus curiae brief are members of Congress who agree the Supreme Court should vacate the summary, non-precedential, decision of the Court of Appeals for the Federal Circuit in the federal whistleblower appeal *Carson v. Merit Systems Board*, docket no. 2015-3135; -3211 and remand it with instructions to consider Supreme Court precedent in *Burlington North & Santa Fe Ry. Co. v. White*, 126 S.Ct. 2405 (2006) in issuing a new, precedential, decision.

Since the passage of the landmark Civil Service Reform Act of 1978, Congress has repeatedly passed laws for improving federal whistleblower protection as a result of this appeals court - or its predecessor - issuing precedential decisions that unduly narrowed them. Given that history, Congress has a clear interest in the appeals court being instructed to issue precedential decisions when presented with novel questions about the protection of federal whistleblowers.

### SUMMARY OF ARGUMENT

By the Constitution, Congress conducts oversight, including over the federal civil service and passes laws, including budgets for the agency - the US Office of Special Counsel (OSC) - with the exclusive statutory mandate to protect federal agency employees from reprisal and to “act in (their) interests” in doing so.<sup>1</sup> When, as here, an appeals court does not follow its established

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<sup>1</sup> See 5 U.S.C. §§1212(a)(1), 1214(a)(1)(A), and 1201 “notes” that codifies the “Congressional Statement of Finding and Purpose,” §2 of Pub. L. 101-12, “Federal Whistleblower Protection Act of 1989, §2(b)(2)(B).

criteria and issues a non-published, summary, decision in an appeal presenting novel questions about federal whistleblower protection law, Congress does not get the feedback its needs to evaluate the whether the Court interpreting the law as intended and/or if a legislative remedy is needed.

## **ARGUMENT**

The law in question, 5 U.S.C. §2302(a)(2)(A)(xii), makes “any other significant change in duties, responsibilities or working conditions” a “personnel action.” It was passed in 1994 to create a “catch-all” personnel action, different in kind from other personnel actions, in that it requires a “case-by-case” analysis of the perception or impact of agency’s actions on other, similarly situated, employees to determine if it occurred, *See* Petition for Writ of Certiorari (Pet.), pages 10-11.<sup>2</sup>

This “catch-all” personnel action was created as a result of Congressional oversight that revealed gaps in existing whistleblower protection, including review of published decisions in whistleblower cases. Twenty four years later, this statute still lacks an appellate review, *See* Pet., page 13. Such a review would have wide applicability, including to agencies outside the adjudicatory jurisdiction of the Merit Systems Protection Board.<sup>3</sup>

Despite this case presenting novel questions of federal whistleblower protection law, both at the Merit Systems Protection Board (MSPB) and the appellate level, neither cited precedent (none exists) nor created any in determining that simply and solely because the petitioner, Joseph

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<sup>2</sup> *See Shivaee v. Dept. of Navy*, 74 M.S.P.R. 383, 388-89 (1997); H. Rpt. 103-769, page 9; S. Rpt. 103-769, page 14.

<sup>3</sup> The FBI and Intelligence agencies listed at 5 U.S.C. §2302(a)(2)(C)(ii), separately include this personnel action in relevant law, regulation or Presidential directive

Carson, PE, is not employed by the Office of Special Counsel (OSC), OSC can refuse or fail to comply with its non-discretionary statutory duties to process his whistleblower disclosures and/or his whistleblower reprisal complaints without, in any circumstance apparently, creating “any other significant change in his duties, responsibilities, or working conditions.” *See* Pet (appendix) pages A4 -5, 8-9 (¶4), 13-15 (¶¶13-14), 22-23 (¶3), 25-26 (¶¶7-8), 37-39, and 50-52.

For Congress to perform its oversight and legislative duties for the vitality of the merit system of the federal civil service requires, Congress reviews the published decisions of the MSPB and Court of Appeals for the Federal Circuit. Non-published, summary, decisions involving novel questions of federal whistleblower law cases thwart Congress’ ability to perform its Constitutional functions. Additionally, these non-precedential decisions are contrary to relevant rules at both MSPB and the Court of Appeals.<sup>4</sup>

By the appeals court’s Internal Operating Procedure (IOP) 10, “Precedential/nonprecedential Opinions and Orders,” at ¶2, “The purpose of a precedential disposition is to inform the bar and interested persons other than the parties.” (emphasis in original). IOP 10 at ¶ 4 states the Court issues precedential decisions when a case meets one or more of the following criteria that are present in this case and/or would have been created by a precedential decision that considered *Burlington*:

- An issue of first impression is treated.
- A new rule of law is established.

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<sup>4</sup> For MSPB, 5 CFR §1201.117(c), cited in footnote 1 on A6 and A20. For the Court of Appeals of the Federal Circuit, see Internal Operating Procedure 10, “Precedential/Nonprecedential Opinions and Orders,” at <http://www.cafc.uscourts.gov/sites/default/files/rules-of-practice/IOPs/IOPsMaster2.pdf>.

- A legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved.
- A new interpretation of a Supreme Court decision, or of a statute, is set forth.

As the legislative history demonstrates, following the passage of the Civil Service Reform Act of 1978, Congress has - in 1989, 1994 and 2012 - passed laws that legislatively overturned specific precedential decisions of the MSPB and/or this appellate court in federal whistleblower appeals, demonstrating the long-standing commitment of Congress to protecting federal agency employees from whistleblower reprisal.<sup>5</sup>

Five themes recur in this history of Congressional attention and oversight of the adequacy federal whistleblower protection when reviewing, the associated legislative history, and statutory language of resultant legislation:

1. Federal whistleblowers play a vital role in protecting American health, safety, welfare, and security.<sup>6</sup>
2. OSC needs to be and be perceived as a strong protector of federal agency employees from reprisal.<sup>7</sup>

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<sup>5</sup> For example, see S. Rept. 100-413, pages 7-10; S. Rept. 103-769, pages 7-9; H. Rept. 103-769, pages 8, 17-19; H. Rept. 112-508, pages 6- 8; and S. Rept. 112-155, pages 1-12

<sup>6</sup> For example, see H. Rept. 103-769, pages 12; S. Rept. 112-155, pages 1-3; and H. Rept. 115-268, pages 3-4 (citing previous legislative history, back to 1977).

<sup>7</sup> For example, see S. Rept. 100-413, pages 7-10; S. Rept. 103-358; pages 1-12, H. Rept. 103-769, pages 15-17; H. Rept. 112-508, pages 5-6; S. Rept. 112-155, pages 3-4, 12-16; S. Rept. 115-74, pages 1-10; and H. Rept. 115-268, pages 1-11.

3. OSC is not an adequate protector of federal agency whistleblowers.<sup>8</sup>
4. MSPB and the Court of Appeals for the Federal Circuit (as well as its predecessor) have frequently misinterpreted Congressional intent above their overly narrow published rulings, thwarting the first three Congressional objectives (see footnote 5).
5. Congressional attention to address and remedy the above is more than should be necessary.<sup>9</sup>

This case illustrates these recurring themes - and warrants a published decision to enable Congress to discharge its oversight and legislation functions.

### **CONCLUSION**

So that Congress can perform its Constitutional duties of oversight and enacting legislation in the area of federal agency whistleblower protection, we respectfully request Supreme Court, per Supreme Court Rule 10(a) and (c), vacate the current decision and remand the case with instructions to the appeals court to issue a precedential decision that addresses whether Supreme Court precedent in *Burlington* applies to determining whether a federal agency employee has experienced “any other significant change in duties, responsibilities, or working conditions” in unlawful agency reprisal.

Respectfully Submitted,

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<sup>8</sup> For example, see S. Rept. 100-413, pages 7-10; S. Rept. 103-358, pages 1-4; and H. Rept. 103-769, pages 15-17.

<sup>9</sup> For example, see S. Rept. 103-358, pages 4-5; H. Rept. 103-769, pages 8-9, 12-13; H. Rept. 115-268, pages 6-11.