No. 12-1364

In the Supreme Court of the United States

ROBERT JOHN MCCARTHY, PETITIONER

v.

INTERNATIONAL BOUNDARY AND WATER COMMISSION: U.S. AND MEXICO

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly affirmed the final order of the Merit Systems Protection Board denying petitioner's claim under the Whistleblower Protection Act of 1989, 5 U.S.C. 1211 *et seq.*, based on a finding that respondent had demonstrated, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the protected disclosure.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is not published in the *Federal Reporter* but is reprinted in 497 Fed. Appx. 4. The opinion and order of the Merit Systems Protection Board (Pet. App. 82a-154a), affirming in relevant part the initial decisions of an administrative judge (Pet. App. 29a-81a), is reported at 2011 M.S.P.B. 74.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 2012. A petition for rehearing was denied on February 13, 2013 (Pet. App. 155a). The petition for a writ of certiorari was filed on May 13, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. To prove a claim of retaliation under the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. 1211 *et seq.*, a federal employee must show that he made a protected disclosure and that the protected disclosure was a "contributing factor" in the agency's personnel action. 5 U.S.C. 1221(e)(1). If an employee makes that prima facie showing, the agency can seek to prove "by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." 5 U.S.C. 1221(e)(2). If the agency makes such a showing, corrective action may not be ordered. *Ibid.*

2. Petitioner was hired by Commissioner Bill Ruth to serve as a supervisory attorney for the United States International Boundary and Water Commission (Commission). Shortly after petitioner began working in that position, he wrote and distributed a series of memoranda to the Commission's executive staff. The memoranda stated his opinion that, *inter alia*, Commissioner Ruth's appointment was unconstitutional and invalid; that the Chief Administrative Officer was a "mid-level administrator who does not possess the[] core competencies" the job requires; and that the Commission was guilty of "gross mismanagement" for failing to adopt certain recommendations regarding the separation of oversight responsibility for budget and contracts. Pet. App. 2a-3a. The "divisive" memoranda caused "a lot of resentment" among the Commission's staff and caused Commissioner Ruth to question the quality of petitioner's legal advice. *Id.* at 3a-4a.

In May 2009, Commissioner Ruth first expressed his concerns regarding petitioner to his Special Assistant, Mary Brandt. In June 2009, Commissioner Ruth told Brandt that petitioner was not a "team player," that he

regretted hiring petitioner, and that he was considering terminating petitioner's employment. Commissioner Ruth asked Brandt to provide legal contacts at the State Department who could assist in the termination process. On July 18, 2009, Commissioner Ruth began to draft a termination letter. The date on which that drafting commenced was subsequently confirmed by computer metadata. Pet. App. 4a.

On approximately July 20, 2009, Commissioner Ruth told the Commission's Human Resources Director, Kevin Petz, that he was considering terminating petitioner's employment. Pet. App. 4a-5a. Ruth asked Petz to research the appropriate removal procedure. *Id.* at 5a. After a "tense" July 27, 2009, staff meeting, Commissioner Ruth made the "firm decision" to terminate petitioner's employment. *Ibid.*

The following day, petitioner submitted a memorandum entitled "Disclosures of Fraud, Waste and Abuse" to the State Department's Office of Inspector General, the Office of Special Counsel, the Government Accountability Office, the Federal Bureau of Investigation, and the White House. Pet. App. 5a-6a. He also sent an e-mail to Commissioner Ruth informing him of the allegations and stating that he was now "assert[ing] [his] rights as a protected whistleblower." *Id.* at 6a (brackets in original). On July 31, 2009, after consulting with personnel from the State Department, Commissioner Ruth terminated petitioner's employment. *Ibid.* The removal letter explained that petitioner was dismissed for "failure to support [Commissioner Ruth] or other members of the executive staff in a constructive and collegial manner." *Id.* at 6a-7a (brackets in original).

3. Petitioner filed an individual right of action appeal with the Merit Systems Protection Board (MSPB or

Board). Petitioner alleged, *inter alia*, that he had been terminated in retaliation for making disclosures that were protected by the WPA. After a hearing, an administrative judge denied petitioner's request for corrective action. See Pet. App. 42a-81a.

The administrative judge assumed that petitioner had made protected disclosures that were a contributing factor in his dismissal. Pet. App. 52a. The judge also found by clear and convincing evidence, however, that respondent would have removed petitioner regardless of the protected disclosures. *Id.* at 53a-78a. Based on documentary evidence, on Commissioner Ruth's testimony, and on corroborating testimony from other witnesses, the judge found that Commissioner Ruth's decision to terminate petitioner predated the protected disclosures. *Ibid.*

The MSPB affirmed in relevant part. Pet. App. 82a-154a. The Board found that petitioner had made at least one protected disclosure in the July 28, 2009, memorandum, and that the disclosure was a contributing factor in the decision to terminate his employment. *Id.* at 123a-134a. Like the administrative judge, however, the Board also found that respondent had demonstrated, by clear and convincing evidence, that it would have made the same decision regardless of the protected disclosure. *Id.* at 134a-152a. The Board relied on evidence that Commissioner Ruth had decided to terminate petitioner before July 28. *Id.* at 137a-142a. The Board further found that Commissioner Ruth's motive to retaliate was slight because he had hired petitioner despite petitioner's history as a whistleblower, and because there was no evidence that he had read the disclosures before ordering petitioner removed. *Id.* at 148a-151a. The Board also noted, however, that the record contained no

evidence that the Commission had taken similar action against similarly situated employees who were not whistleblowers. *Id.* at 151a.

4. The court of appeals affirmed in an unpublished decision. Pet. App. 1a-28a. The court first held that, because petitioner had no property interest in his employment with the Commission, termination of his employment did not violate his Fifth Amendment rights. *Id.* at 12a-15a. In a footnote, the court noted that petitioner had asserted a "liberty" interest for the first time in his reply brief, but it found that argument waived. *Id.* at 15a n.2.

The court of appeals also held that the record contained substantial evidence to support the Board's finding that respondent would have taken the same personnel action even in the absence of the protected disclosure. Pet. App. 16a-24a. The court noted that it had previously set forth three factors to help evaluate whether an agency has met its burden: (1) "the strength of the agency's evidence in support of its action"; (2) "the existence and strength of any motive to retaliate on the part of agency officials who were involved in the decision"; and (3) "any evidence that the agency takes similar actions against employees who are not whistleblowers, but who are otherwise similarly situated." *Id.* at 17a (citing *Carr* v. *SSA*, 185 F.3d 1318, 1323 (Fed. Cir. 1999)). The court explained, however, that "the ultimate inquiry" is always "whether [the agency] has carried its burden of providing clear and convincing evidence that the same action would have been taken absent the alleged whistleblowing." *Id.* at 22a.

The court of appeals found that respondent had "provided strong evidence in support of its personnel action." Pet. App. 23a. That evidence included testimony

by Commissioner Ruth that, "after months of dissatisfaction, he made the ultimate decision to terminate [petitioner] before the alleged whistleblowing occurred." *Ibid.* The court further explained that, "[b]ased on Commissioner Ruth's demeanor and extensive corroborating evidence, the administrative judge found this testimony credible." *Ibid.* After noting that "a credibility determination may be upset if it is 'inherently improbable or discredited by undisputed evidence or physical fact,'" *id.* at 20a (citation omitted), the court found "no reason to disturb [the administrative judge's] credibility determination on appeal," *id.* at 23a. Because respondent had "definitively established that it was actively working to remove [petitioner] prior to his disclosures," the court found "substantial evidence" to support the Board's determination that respondent had satisfied its burden. *Id.* at 23a-24a.

ARGUMENT

The court of appeals correctly affirmed the Board's finding that respondent had demonstrated, by clear and convincing evidence, that it would have taken the same personnel action even in the absence of the protected disclosure. Petitioner's fact- and case-specific challenges to that decision do not implicate any legal issue of recurring importance. Further review is not warranted.

1. After an extensive review of the record, the court of appeals found substantial evidence to support the Board's finding that respondent had demonstrated, by clear and convincing evidence, that it would have taken the same personnel action even in the absence of the protected disclosure. See Pet. App. 16a-24a. That decision is correct, and petitioner's contrary arguments lack merit.

Petitioner suggests (Pet. 11, 14) that the court of appeals allowed "a mere denial of retaliatory motive," *i.e.*, Commissioner "Ruth's testimony," "to meet the agency's enhanced burden of proof." Petitioner also contends (Pet. 16, 21-22) that the court of appeals deemed the Board's credibility determination unreviewable even though it was contradicted by extrinsic evidence. The course of proceedings below belies those characterizations.

The court of appeals recognized that "a credibility determination may be upset if it is 'inherently improbable or discredited by undisputed evidence or physical fact.'" Pet. App. 20a (citation omitted). The court simply found that neither circumstance was present here. As the court explained, the Board credited Commissioner Ruth's testimony based on his demeanor, as well as "extensive corroborating evidence" including, *inter alia*, other witness testimony and computer metadata establishing that Commissioner Ruth had begun drafting a termination letter more than a week before petitioner's protected disclosure. *Id.* at 19a-20a, 23a. Contrary to petitioner's contention, the court did not accept the employer's bare denial of a retaliatory motive in the face of countervailing evidence. Commissioner Ruth's testimony was both credible and supported by corroborating evidence sufficient to sustain the Board's finding.

Petitioner's contention (Pet. 11, 14-16, 17, 20) that the court of appeals ignored countervailing evidence is equally unavailing. The court discussed the evidence on which petitioner now relies, see Pet. App. 18a, and ultimately concluded that such evidence did not detract from the Board's finding, *id.* at 18a-21a. For example, the court explained why the other witness testimony relied on by petitioner was not inconsistent with Com-

missioner Ruth's testimony, and why the purportedly "backdated memorandum is not backdated at all." *Id.* at 20a-21a. The court accordingly did not refuse to consider countervailing evidence.

Petitioner also argues (Pet. 11-13, 14, 18-20) that the court of appeals failed to examine whether Commissioner Ruth had a motive to retaliate and whether respondent took similar action against similarly situated employees who were not whistleblowers. But, as the court of appeals explained, it had previously looked to those factors to help it answer the ultimate question: whether respondent had "carried its burden of providing clear and convincing evidence that the same action would have been taken absent the alleged whistleblowing." Pet. App. 22a. The court recognized that "in many cases an analysis of" all of the factors it had previously identified "may be necessary to demonstrate what an agency would have done absent whistleblowing." *Id.* at 23a. On the facts of this case, however, the court held that respondent had "definitively established that it was actively working to remove [petitioner] prior to his disclosures." *Id.* at 23a-24a.

Accordingly, it did not matter whether Commissioner Ruth had a motive to retaliate—he had in fact made the personnel decision before the protected disclosure. Likewise, respondent's treatment of similarly situated employees could not counter the definitive evidence that the termination decision had already been made before any protected disclosure. In sum, respondent demonstrated that it would have made the same decision even in the absence of the protected disclosure by proving that it *did* make that decision before any such disclosure.

Petitioner further asserts (Pet. 23-28) that the court of appeals should have drawn an adverse inference from the government's purported spoliation of evidence. As petitioner acknowledges (Pet. 23), however, the court never directly confronted that argument—and for good reason. Petitioner's allegations of spoliation were never presented to the administrative judge because petitioner "refused to follow the administrative judge's directions concerning the conduct of discovery." Pet. App. 26a. And, as the court of appeals correctly recognized, "[p]rocedural matters relative to discovery and evidentiary issues fall within the sound discretion of the [B]oard and its officials." *Id.* at 25a (citation omitted; first set of brackets in original). There was no abuse of discretion here.

Finally, petitioner contends (Pet. 28-31) that the court of appeals erred in failing to consider his claim that the termination deprived him of a liberty interest in violation of the Fifth Amendment. The court of appeals extensively considered, and ultimately rejected, petitioner's due process argument premised on an asserted deprivation of property. See Pet. App. 12a-15a. The court explained, however, that petitioner had mentioned a "liberty" interest for the first time in his reply brief. *Id.* at 15a n.2. Like other courts of appeals, the court accordingly found that petitioner's liberty-interest argument had been waived. *Ibid.*; see, *e.g.*, *Hailemichael* v. *Gonzales*, 454 F.3d 878, 886 n.3 (8th Cir. 2006); *United States* v. *Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005), cert. denied, 546 U.S. 1137 (2006); *United States* v. *Al-Hamdi*, 356 F.3d 564, 571 n.8 (4th Cir. 2004).

Petitioner acknowledges (Pet. 30) that his opening brief to the court of appeals did not raise the liberty-interest argument. He contends, however, that the

Federal Circuit should have excused that failure because his argument implicates "significant questions of general impact and great public concern." Pet. 31. "No procedural principle is more familiar to this Court," however, "than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus* v. *United States*, 321 U.S. 414, 444 (1944). In any event, this Court ordinarily does not consider issues that were "neither raised before nor considered by the Court of Appeals." *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993) (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970)). There is no reason to depart from that approach here.

2. The court of appeals' unpublished decision does not conflict with any decision of this Court. Petitioner asserts (*e.g.*, Pet. 11, 13, 14, 21-22, 30-31) several purported conflicts with other Federal Circuit decisions, but any intracircuit conflict would not warrant this Court's review. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). And while petitioner suggests that a conflict among the circuits is not possible under the WPA, he also acknowledges that this is no longer true. See Pet. 34-35 & n.16 (noting that the WPA now permits appeals from the MSPB to the regional circuits). In the end, petitioner disagrees with the court of appeals' application of the clear and convincing evidence standard to the facts of this case. Such an intensely fact- and case-specific dispute does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2013