No. 17-1098

In the Supreme Court of the United States

JOHN C. PARKINSON, PETITIONER

v.

DEPARTMENT OF JUSTICE

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 an employee of the Federal Bureau of Investigation (FBI) may seek to enforce 5 U.S.C. 2303's FBI-specific prohibition on whistleblower reprisals in an appeal of an adverse personnel action before the Merit Systems Protection Board.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-31a) is reported at 874 F.3d 710. The vacated panel opinion of the court of appeals (Pet. App. 32a-80a) is reported at 815 F.3d 757. The decision of the Merit Systems Protection Board (Pet. App. 81a-105a) is available at 2014 WL 5423584. The initial decision of the administrative law judge (Pet. App. 106a-134a) is available at 2013 WL 6731696.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2017. The petition for a writ of certiorari was filed on January 24, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case presents the question whether an employee of the Federal Bureau of Investigation (FBI)

may assert that he has suffered whistleblower reprisal in violation of 5 U.S.C. 2303 as an affirmative defense in an appeal of a removal or other adverse personnel action to the Merit Systems Protection Board (MSPB or Board).[1] That question turns on the interaction between Section 2303's FBI-specific prohibition on whistleblower reprisals and the more general statutes governing MSPB review of adverse actions.

a. FBI employees are not covered by the prohibition on whistleblower reprisals that covers most federal employees. The general provision is set forth in 5 U.S.C. 2302, which defines "[p]rohibited personnel practices" involving employees in "covered position[s] in an agency." 5 U.S.C. 2302(a)(2). One of the prohibited practices is taking, failing to take, or threatening to take or fail to take a variety of actions against a covered employee in reprisal for protected whistleblowing activity. 5 U.S.C. 2302(b)(8). Congress provided that a covered employee who suffers such a reprisal may seek corrective action from the Office of Special Counsel (OSC), followed by MSPB review. 5 U.S.C. 1214, 1221.

Congress excluded FBI employees from Section 2302 and the associated review procedures by specifying that the FBI is not an "agency" for purposes of Section 2302. 5 U.S.C. 2302(a)(2)(C)(ii)(I). Instead, Congress separately prohibited the FBI from retaliating against whistleblowers in 5 U.S.C. 2303. During the period relevant to this case, Section 2303 barred the FBI from taking or not taking personnel actions because of an employee's disclosure within the Department of Justice (DOJ) of

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[1] Citations to 5 U.S.C. 2302, 2303, 7512, and 7703 refer to the 2012 edition and Supplement IV (2016).

information like that described in Section 2302(b)(8). 5 U.S.C. 2303(a).[2]

Unlike the general whistleblower protection in Section 2302(b)(8), Section 2303 does not provide for OSC or MSPB review. Instead, Congress directed the President to "provide for the enforcement of" Section 2303 "in a manner consistent with applicable provisions of [S]ections 1214 and 1221." 5 U.S.C. 2303(c). That directive reflects Congress's judgment that, because of the sensitivity of the FBI's law-enforcement and counterintelligence mission, "[t]he President, rather than the Special Counsel and the Merit Board," should "have responsibility for enforcing" Section 2303. H.R. Conf. Rep. No. 1717, 95th Cong., 2d Sess. 128 (1978) (Conference Report). Members of Congress explained that Section 2303(c) was adopted to "let the President set up [the FBI's] own whistle-blower system so that appeals would not be to the outside but to the Attorney General." 124 Cong. Rec. 28,770 (Sept. 11, 1978) (Rep. Udall); see, *e.g.*, *id.* at 28,699-28,770 (Reps. Collins, Levitas, and Udall).

Consistent with that understanding, the President delegated to the Attorney General authority "to establish appropriate processes" to enforce Section 2303 "within the Department of Justice." 62 Fed. Reg. 23,123 (Apr. 28, 1997). The Attorney General, in turn, issued regulations providing for the enforcement of Section 2303 through internal administrative procedures. 28 C.F.R. 27.1 *et seq.* Under those regulations, DOJ's Office of the

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[2] In 2016, Congress amended Section 2303 by expanding the definition of protected whistleblowing activity to include certain disclosures outside DOJ. Federal Bureau of Investigation Whistleblower Protection Enhancement Act of 2016, Pub. L. No. 114-302, § 2, 130 Stat. 1516-1517; see Pet. App. 8a n.2.

Inspector General (OIG) and Office of Professional Responsibility (OPR) investigate whistleblower claims in the same manner that OSC investigates claims by other federal whistleblowers. 28 C.F.R. 27.1(b), 27.3; see 64 Fed. Reg. 58,782, 58,783 (Nov. 1, 1999). OIG and OPR report their findings to DOJ's Office of Attorney Recruitment and Management (OARM), which adjudicates whistleblower-reprisal claims in the same manner that the MSPB adjudicates matters referred to it by OSC. 28 C.F.R. 27.4; see 64 Fed. Reg. at 58,783. Finally, the regulations permit both employees and the FBI to appeal OARM's decisions to the Deputy Attorney General for final resolution. 28 C.F.R. 27.5.

The regulations provide that OARM may, during the pendency of an investigation, grant a "stay of any personnel action allegedly taken or to be taken in reprisal for a corrective disclosure." 28 C.F.R. 27.4(d). And if OARM determines that an employee has suffered a prohibited reprisal, it is required to order appropriate "corrective action," which may include "placing the [employee], as nearly as possible, in the position he would have been in had the reprisal not taken place," an award of "back pay and related benefits," and "any other reasonable and foreseeable consequential damages." 28 C.F.R. 27.4(e)(1) and (f).

b. Congress enacted Sections 2302 and 2303 as part of the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.* The CSRA also established a "comprehensive system for reviewing personnel action taken against federal employees." *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 5 (2012) (citation omitted). This case concerns the provisions stating that certain federal employees may appeal specified adverse personnel actions to the MSPB. 5 U.S.C. 7513(d). Those adverse actions

include removals, certain suspensions and furloughs, and reductions in pay or grade. 5 U.S.C. 7512. The MSPB's decisions in adverse-action appeals are subject to judicial review in the Federal Circuit or the federal district courts. 5 U.S.C. 7703; see *Elgin*, 567 U.S. at 5-6.

When a covered employee appeals an adverse action, the MSPB may not sustain the action unless the agency proves by a preponderance of the evidence that the action was warranted. 5 U.S.C. 7701(c)(1)(B). In addition, the MSPB may not sustain the agency's decision to take 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 prohibited personnel practice described in [5 U.S.C. 2302]; or
>
> (C) shows that the decision was not in accordance with law.

5 U.S.C. 7701(c)(2). Those three showings are commonly called "affirmative defenses." Pet. App. 54a.

Congress generally provided that FBI employees are not among the covered "employee[s]" eligible to appeal adverse actions to the MSPB. 5 U.S.C. 7511(b)(8). But it made an exception for FBI employees who are "preference eligible"—generally, military veterans and certain family members—and who have completed at least a year of continuous federal service. 5 U.S.C. 7511(a)(1)(B) and (b)(8); see 5 U.S.C. 2108(3).

2. Petitioner is a preference-eligible veteran who served as a special agent in the FBI's Sacramento field office until his removal in 2012. Pet. App. 3a, 83a-84a. Before his removal, petitioner led a group responsible for setting up an undercover facility. *Id.* at 83a, 107a.

In February 2008, he complained to a supervisor about the misconduct of two pilots who worked with the group. *Id.* at 34a, 83a. Petitioner was later reassigned from his leadership role because of concerns about his performance in supervising other team members and overseeing expenses associated with the undercover facility. *Id.* at 83a, 108a. Petitioner claimed that the reassignment and poor performance review were reprisals for reporting the pilots' misconduct. *Id.* at 34a. OIG opened a whistleblower inquiry, but concluded that petitioner had not suffered any prohibited reprisal. *Ibid.*; C.A. App. A163-A166, A388-A389.

During the whistleblower inquiry, OIG also opened an investigation into separate allegations that petitioner had misused FBI funds. Pet. App. 83a. As a result of that inquiry, petitioner was charged with theft, unprofessional conduct, obstructing the investigation, and lack of candor under oath. *Ibid.* In 2012, the FBI sustained those charges and directed petitioner's removal. *Id.* at 83a-84a.

3. Petitioner appealed to the MSPB. He challenged both the charges against him and the penalty of removal, and he sought to raise an affirmative defense that his removal constituted whistleblower reprisal in violation of Section 2303. Pet. App. 84a.[3]

a. An MSPB administrative judge affirmed petitioner's removal. Pet. App. 106a-134a. The judge rejected two of the charges, but sustained the charges of obstruction and lack of candor. *Id.* at 111a-129a. The judge dismissed petitioner's whistleblower defense, concluding that it was outside the MSPB's jurisdiction.

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[3] Petitioner also sought to raise a separate affirmative defense that is not at issue here. Pet. App. 84a, 98a-100a.

Id. at 111a; see *id.* at 84a. And the judge upheld petitioner's removal as a reasonable penalty for the two sustained charges. *Id.* at 130a-134a.

b. The MSPB affirmed. Pet. App. 81a-105a. As relevant here, a majority of the Board upheld the dismissal of petitioner's whistleblower-reprisal defense based on *Van Lancker* v. *DOJ*, 119 M.S.P.R. 514 (2013), which held that the Board may not consider a Section 2303 defense because Congress "provided for a separate remedial process under [Section] 2303 for the purpose of keeping such matters out of the jurisdiction of external tribunals such as the [MSPB]." *Id.* at 519; see Pet. App. 97a-98a. One Board member dissented, explaining that she adhered to her dissent in *Van Lancker*. Pet. App. 104a-105a.

4. Petitioner appealed to the court of appeals. The panel unanimously sustained the obstruction charge, reversed the lack-of-candor charge, and remanded to allow the MSPB to reconsider the penalty. Pet. App. 42a-52a, 69a-72a. The panel divided, however, over the dismissal of petitioner's defense based on Section 2303.

The panel majority held that the MSPB should have considered petitioner's Section 2303 defense. Pet. App. 57a-67a. It reasoned that if petitioner could show that he was removed for whistleblowing, the removal would violate Section 2303 and would therefore fall within Section 7701(c)(2)(C)'s general affirmative defense for adverse personnel actions that are "not in accordance with law." *Id.* at 58a. The majority further concluded that neither Congress's exclusion of FBI employees from Section 2302's general bar on whistleblower reprisals nor its creation of an FBI-specific remedial scheme in

Section 2303 "preempt[ed] the availability of an affirmative defense of whistleblower retaliation" under Section 7701(c)(2)(C). *Ibid.*

Judge Taranto dissented in part. Pet. App. 72a-80a. In his view, Section 2303 and its implementing regulations "embody[] a determination by Congress, the President, and the Attorney General that [Section] 2303 claims * * * are outside the Board's jurisdiction and within the full and final control of the Attorney General." *Id.* at 73a.

5. The court of appeals granted rehearing en banc. In a 12-2 decision with only the members of the original panel majority dissenting, the en banc court held that the MSPB may not consider a defense of whistleblower reprisal in violation of Section 2303. Pet. App. 1a-31a.

a. The en banc court examined the text and structure of the CSRA and concluded that "[t]he relevant statutory provisions make clear that the Board does not have jurisdiction to hear preference-eligible FBI employees' claims of whistleblower reprisal under [Section] 7701(c)(2)(C)." Pet. App. 11a. The court reasoned that "[t]he broad and encompassing language of [Section] 2303, and the corresponding broad exclusion of the FBI from [Section] 2302," demonstrate "Congress's intent to establish a separate regime for whistleblower protection within the FBI." *Ibid.* The court thus concluded that permitting a whistleblower-reprisal defense under Section 7701(c)(2)(C) "would contradict the unambiguous statutory language of [Section] 2303 and inappropriately expand the protections provided to FBI employees by Congress." *Id.* at 12a.

The en banc court also emphasized that Section 7701(c)(2)(B) specifically provides an affirmative de-

fense based on prohibited personnel practices that violate Section 2302—including the general prohibition on whistleblower reprisals—but not those that violate Section 2303. Pet. App. 12a-13a. The court stated that "allowing the Board to review FBI whistleblower reprisal claims under the broad language of [Section] 7701(c)(2)(C) would render the specific provisions of [Section] 7701(c)(2)(B) superfluous." *Id.* at 12a. And the court added that legislative history confirmed its understanding of the CSRA's text by showing that Congress adopted Section 2303 because it concluded that the FBI's unique and sensitive mission made external review of FBI whistleblower-reprisal matters inappropriate. *Id.* at 13a-15a.

The en banc court reinstated the portions of the panel opinion sustaining the obstruction charge, vacating the lack-of-candor charge, and remanding to the MSPB for reconsideration of the penalty. Pet. App. 16a. The relevant portion of the panel opinion states that "the maximum penalty that can be sustained by the Board for the sole charge remaining in this case is a suspension of up to 30 days" and that the question for the Board on remand is whether the FBI has established a basis "to warrant greater than a 10-day suspension." *Id.* at 71a.

b. Judges Plager and Linn filed dissenting opinions reiterating the panel majority's analysis of the Section 2703 issue. Pet. App. 17a-31a.

ARGUMENT

Petitioner renews his contention (Pet. 12-32) that the MSPB should have resolved his claim that his removal constituted whistleblower reprisal in violation of Section 2303. The en banc court of appeals correctly re-

jected that argument, recognizing that Section 2303 establishes a specific and exclusive enforcement mechanism for FBI whistleblower-reprisal claims based on Congress's judgment that such claims should be resolved within DOJ. The court's 12-2 decision does not conflict with any decision of this Court or another court of appeals. And even if the question presented otherwise warranted this Court's review, this interlocutory case would not be an appropriate vehicle in which to consider it. The petition for a writ of certiorari should be denied.

1. The CSRA's text, structure, and history confirm that the MSPB lacked jurisdiction to consider petitioner's claim that his removal violated Section 2303.

a. Congress specifically excluded FBI employees from Section 2302's general prohibition on whistleblower reprisals. 5 U.S.C. 2302(a)(2)(C)(ii)(I). Instead, Congress enacted an FBI-specific prohibition in Section 2303. And rather than incorporating that prohibition into the CSRA's general enforcement mechanisms, Congress vested the President with exclusive authority to establish self-contained procedures within DOJ "for the enforcement of [Section 2303]." 5 U.S.C. 2303(c).

The President exercised that authority by directing the Attorney General "to establish appropriate processes *within the Department of Justice*" for enforcing Section 2303. 62 Fed. Reg. at 23,123 (emphasis added). Consistent with that direction, the Attorney General issued regulations providing that Section 2303 must be enforced through procedures that are "entirely internal to the Department." 64 Fed. Reg. at 58,783; see 28 C.F.R. 27.1 *et seq.* Those regulations do not allow FBI employees to assert violations of Section 2303 in the MSPB, the

courts, or any other "fora outside the Department." 64 Fed. Reg. at 58,785.

As the en banc court of appeals explained, "[t]he broad and encompassing language of [Section] 2303, and the corresponding broad exclusion of the FBI from [Section] 2302, indicate[] Congress's intent to establish a separate regime for whistleblower protection within the FBI." Pet. App. 11a. To allow employees to assert Section 2303 violations before the MSPB when Section 2303 itself "does not provide such a right" would "contradict the unambiguous statutory language of [Section] 2303 and inappropriately expand the protections provided to FBI employees by Congress." *Id.* at 12a.

b. Petitioner does not dispute that Section 2303's implementing regulations make internal DOJ procedures the exclusive mechanism for enforcing Section 2303. He also does not appear to challenge the validity of those regulations. But petitioner nonetheless asserts (Pet. 13-19) that he can raise an alleged violation of Section 2303 in his appeal before the MSPB because an adverse action accomplished in violation of Section 2303 falls within the broad, general terms of the affirmative defense for adverse actions that are "not in accordance with law." 5 U.S.C. 7701(c)(2)(C).

Petitioner's argument is foreclosed by this Court's repeated instruction "that a precisely drawn, detailed statute" addressing a particular subject "pre-empts more general remedies." *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 834 (1976). For example, the Court has "consistently held that statutory schemes with their own remedial framework exclude alternative relief under the general terms of the Tucker Act." *United States* v. *Bormes*, 568 U.S. 6, 13 (2012). Similarly, the Court has "consistently held that a narrowly tailored" statute

addressing federal employees "pre-empts * * * more general tort recovery statutes" even if those more general provisions are "facially applicable." *Brown*, 425 U.S. at 834-835 (collecting cases); see, *e.g.*, *Hinck* v. *United States*, 550 U.S. 501, 507 (2007) (applying the same principle to tax statutes).

That well-established interpretive principle controls here. Section 2303 specifically defines the enforcement mechanism for its prohibition on whistleblower reprisals in the FBI by vesting the President with authority to "provide for the enforcement of this section." 5 U.S.C. 2303(c). As in other contexts, the detailed remedial procedure established pursuant to that specific delegation "pre-empts more general remedies," *Brown*, 425 U.S. at 835—including Section 7701(c)(2)(C)'s general provision allowing an employee to argue to the MSPB that an adverse action was "not in accordance with law."

If Section 2303 itself left any doubt on that score, Section 7701(c)(2)'s other provisions defining affirmative defenses would eliminate it. In Section 7701(c)(2)(B), Congress expressly addressed the extent to which "prohibited personnel practice[s]"—including whistleblower reprisals—may be asserted as affirmative defenses. There, Congress specified that an employee may establish an affirmative defense if he shows that an adverse action "was based on any prohibited personnel practice *described in* [*S*]*ection 2302(b)*." 5 U.S.C. 7701(c)(2)(B) (emphasis added). Section 2302(b) defines "prohibited personnel practices" to include whistleblower reprisals, but it does not apply to FBI employees. See 5 U.S.C. 2302(a)(2)(C)(ii)(I). And although Section 2303 also describes whistleblower reprisals within the FBI as "[p]rohibited personnel practices," 5 U.S.C. 2303, Congress did not include violations of Section 2303 among the

"prohibited personnel practice[s]" that qualify as affirmative defenses under Section 7701(c)(2)(B).

Sections 2302, 2303, and 7701 were all enacted together in the CSRA. Congress thus excluded FBI employees from Section 2302 at the same time that it created a "prohibited personnel practice" defense limited to the prohibited practices described in Section 2302(b). 5 U.S.C. 7701(c)(2)(B). Congress could have included a reference to the prohibited personnel practices in Section 2303 as well. But, consistent with Congress's view that FBI whistleblower matters should be handled within DOJ, it did not do so. That omission from Section 7701(c)(2)(B) forecloses petitioner's contention that he should be permitted to assert a violation of Section 2303 under the more general terms of Section 7702(c)(2)(C).

Indeed, as the court of appeals observed, "allowing the Board to review FBI whistleblower reprisal claims under the broad language of [Section] 7701(c)(2)(C) would render the specific provisions of [Section] 7701(c)(2)(B) superfluous." Pet. App. 12a. If Section 7701(c)(2)(C)'s general reference to adverse actions that are "not in accordance with law" were interpreted to encompass violations of Section 2303, it would also be broad enough to encompass violations of Section 2302—leaving no independent work for Section 7701(c)(2)(B).

Petitioner acknowledges (Pet. 26) that Section 7701(c)(2)(C) cannot sensibly be read to include the prohibited personnel practices in Section 2302(b). He nonetheless maintains (*ibid.*) that it should be construed to reach violations of Section 2303 because that provision is "similar to" but not "coterminous with * * * Section 2302(b)." That is not how this Court ordinarily reads statutes. Where, as here, "a general authorization and a more limited, specific authorization exist side

by side," this Court applies the "'commonplace of statutory construction that the specific governs the general'" and insists that "[t]he terms of the specific authorization must be complied with." *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012) (citation omitted). Section 7701(c)(2)(B) authorizes an employee to assert an affirmative defense based on a "prohibited personnel practice," but only if it is "described in [S]ection 2302(b)." That specific authorization precludes an employee from invoking Section 7701(c)(2)(C)'s general language to assert an affirmative defense based on a prohibited personnel practice that is *not* "described in [S]ection 2302(b)." Any other reading of Section 7701(c)(2)(C) would subvert the statutory design by overriding a congressional choice reflected in the immediately preceding provision.[4]

c. The history and purpose of the relevant statutory provisions confirm what is apparent from their text and structure. The language that became Section 2303 was developed on the House floor as a carefully negotiated "compromise," 124 Cong. Rec. at 28,700 (Rep. Udall), to

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[4] Section 7701(c)(2)'s other specific affirmative defense illustrates the error of petitioner's approach. Under Section 7701(c)(2)(A), an employee may establish an affirmative defense if he "shows harmful error in the application of the agency's procedures." The Federal Circuit has correctly recognized that, because that specific provision is limited to "harmful" procedural errors, an employee cannot assert that a nonprejudicial procedural violation constitutes an affirmative defense under Section 7701(c)(2)(C)—even though such a violation could be said to result in a decision that was "not in accordance with law." See *Handy* v. *U.S. Postal Serv.*, 754 F.2d 335, 337-338 (Fed. Cir. 1985). And just as an employee may not invoke Section 7701(c)(2)(C)'s general language to evade the limitations in Section 7701(c)(2)(A), petitioner may not use it to evade the limitations in Section 7701(c)(2)(B).

reconcile protection for whistleblowers with the FBI's sensitive law-enforcement and counterintelligence mission. Some Members of Congress argued that "[t]he rigorous and dangerous duties performed by the Bureau's employees do not lend themselves to some aspects of [the CSRA]," including its whistleblower protections. *Id.* at 28,699 (Rep. Derwinski); see *id.* at 28,698-28,699 (Rep. Collins); *id.* at 28,700 (Rep. Livingston). Others acknowledged those unique considerations applicable to the FBI, but sought to create "special rules and regulations" so that "FBI 'whistle-blowers' will be in a position to have someplace to go" and "will have some protection." *Id.* at 28,699 (Rep. Udall).

The result was a "compromise" amendment that provided whistleblower protection to FBI employees, but "empowered [the President] to set up a separate system" under which FBI whistleblower-reprisal claims would "go through the Attorney General." 124 Cong. Rec. at 28,700 (Rep. Udall). That compromise was carried forward in the final version of the CSRA as Section 2303. The House Conference Report explained that Section 2303 was crafted so that "[t]he President, rather than the Special Counsel and the Merit Board, would have responsibility for enforcing [the prohibition on whistleblower reprisals] with respect to the FBI." Conference Report 128; see 124 Cong. Rec. 33,763 (Oct. 5, 1978) (Joint Explanatory Statement of the Committee on Conference) (same).

Several Members of Congress emphasized that the critical feature of the compromise reflected in Section 2303 was that it ensured that review of FBI whistleblower-reprisal matters "would not be to the outside but to the Attorney General." 124 Cong. Rec. at 28,770 (Rep. Udall). Thus, for example, one Member observed

that it would "defeat the purpose of the [compromise] amendment" if the President provided for outside review of Section 2303 violations. *Id.* at 28,701 (Rep. Levitas). As the court of appeals explained, allowing the MSPB to consider affirmative defenses based on Section 2303 would upset Congress's careful compromise in the same way. Pet. App. 13a-15a.[5]

2. Petitioner identifies no sound reason to question the court of appeals' interpretation of Sections 2303 and 7701(c)(2)(C).

a. Petitioner first contends that the MSPB's refusal to consider asserted Section 2303 violations "diminishes the 'preferred position' of preference-eligible veterans in the CSRA." Pet. 16 (quoting *United States* v. *Fausto*, 484 U.S. 439, 449 (1988)). That is not so. Unlike other FBI employees, preference-eligible veterans are entitled to appeal adverse personnel actions to the MSPB, where the FBI bears the burden to prove that the action was supported by a preponderance of the evidence. 5 U.S.C.

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[5] Petitioner is quite wrong to assert (Pet. 24) that the court of appeals "cherry-picked" the legislative history supporting its interpretation. In fact, as illustrated above, the court relied on the statements specifically explaining the origin and purpose of Section 2303. Petitioner is equally mistaken in dismissing those statements (Pet. 25) because they do not specifically discuss preference-eligible FBI employees. The relevant point is that the history of Section 2303 confirms that Congress intended it to be enforced exclusively through internal DOJ procedures—a concern that applies to all FBI employees, including preference-eligible veterans. And although petitioner maintains (*ibid.*) that "[o]ther portions of the legislative history" show that Congress intended those employees to be able to assert violations of Section 2303 as a defense in adverse-action appeals, none of the cited sources addresses Section 2303 at all, and the one source he cites directly is a report issued more than a decade *after* the CSRA's enactment. See H.R. Rep. No. 328, 101st Cong., 1st Sess. 5 (1989); see also Pet. App. 63a-65a.

7511(a)(1)(B) and (b)(8); see 5 U.S.C. 7701(c)(1)(B). The court of appeals' decision does not disturb that valuable right. And this case belies petitioner's unsupported assertion (Pet. 16) that the benefit of an MSPB appeal "depends in large part on the availability of affirmative defenses." Even without a Section 2303 defense, petitioner's appeal to the MSPB (and the Federal Circuit) eliminated three of the four charges against him and reduced his penalty from a removal to a suspension of no more than 30 days. Pet. App. 71a.

b. Petitioner next argues (Pet. 20-24) that the special enforcement procedures established under Section 2303(c) preempt only "freestanding *claims* of whistleblower retaliation" (like those that employees outside the FBI may bring under 5 U.S.C. 1214 and 1221) and do not preempt "an *affirmative defense* of whistleblower retaliation before the MSPB." Pet. 22. Petitioner observes that Congress directed the President to "provide for the enforcement of [Section 2303] *in a manner consistent with the applicable provisions of [S]ections 1214 and 1221*." 5 U.S.C. 2303(c) (emphasis added). Petitioner states (Pet. 23) that the italicized language "displace[d] and provide[d] a substitute for Sections 1214 and 1221," and he asserts that Congress "did *not* displace the explicit statutory right of preference-eligible FBI employees to raise an affirmative defense based on the FBI's failure to comply with Section 2303(a)." There are three problems with that argument.

First, it assumes an "explicit statutory right" that does not exist. Section 7701(c)(2)(B) provides that employees may raise an affirmative defense based on a "prohibited personnel practice described in [S]ection 2302(b)"; it does not establish any similar affirmative defense for prohibited personnel practices described in

Section 2303. See pp. 12-14, *supra*. And because Congress did not confer a right to assert such an affirmative defense in Section 7701(c)(2)(B), the provision specifically addressing the issue, there was nothing for Congress to "displace" in Section 2303(c).

Second, the plain language of Section 2303(c) does not "displace" any remedies that would otherwise be available under Sections 1214 and 1221. Instead, it merely uses those provisions as models, directing the President to "provide for the enforcement of [Section 2303] in a manner consistent with the applicable provisions" of those sections. 5 U.S.C. 2303(c). Section 2303 is self-contained, and the procedures promulgated by the President under Section 2303(c) are the *only* enforcement mechanisms it identifies. The fact that Section 2303(c) and its implementing regulations make no mention of an affirmative defense based on Section 2303 thus means that no such defense exists—not that courts should read one into Section 7701(c)(2)(C)'s general language.

Third, petitioner's distinction between claims and affirmative defenses has no plausible basis in Section 2303's history or purpose. Petitioner does not appear to deny that Congress enacted Section 2303 to ensure that FBI whistleblower issues are resolved within DOJ, not by the MSPB or other external bodies. Congress's concerns about confidentiality and the disruption of the FBI's sensitive mission are not unique to affirmative claims of whistleblower reprisal. To the contrary, exactly the same concerns would arise if the MSPB could consider alleged violations of Section 2303 as affirmative defenses.

c. Petitioner also asserts (Pet. 19) that the court of appeals failed to apply the canon that "interpretive doubt is to be resolved in the veteran's favor." *Brown*

v. *Gardner*, 513 U.S. 115, 118 (1994). But unlike the statutes at issue in *Brown* and the other cases in which this Court has applied that interpretive canon, Sections 2203 and 7701(c)(2) are not "provisions for benefits to [veterans]." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991). Instead, they are general statutes that apply to both veterans and nonveterans. In any event, there is no interpretive doubt to resolve here because the court of appeals correctly found that the meaning of those statutory provisions is "clear" and "unambiguous." Pet. App. 11a-12a.

d. Finally, petitioner (Pet. 31-32) and his amici (*e.g.*, German Amicus Br. 6-13) criticize DOJ's internal procedures for addressing whistleblower-reprisal claims. Those criticisms are misdirected. As the en banc court of appeals emphasized, whether and to what extent Section 2303 should be amended to provide for MSPB or judicial review "is a matter for Congress," not the federal courts. Pet. App. 16a.

For decades, Section 2303's "express delegation of remedy-creation authority to the President has been implemented by regulations that keep review of alleged FBI reprisals within [DOJ], with no Board review or judicial review" for any FBI employees, including those who are preference-eligible. Pet. App. 15a. During that time, Congress has not hesitated to act when it concludes that existing law provides insufficient protection for federal whistleblowers. See German Amicus Br. 13-15 (citing examples). Yet Congress has never altered Section 2303(c) or its implementing regulations.

That inaction is particularly significant because "[t]he sufficiency of whistleblower protections available to FBI employees has been debated in Congress more than once," and Congress has been presented with the

same criticisms that petitioner and his amici raise here. Pet. App. 15a. Most notably, in 2016 Congress considered a proposal that would have provided for judicial review of FBI whistleblower-reprisal claims. *Id.* at 15a-16a. But Congress rejected that proposal and instead enacted an amendment that "slightly modified" Section 2303 "by expanding the group of people and offices to which FBI employees may make protected disclosures" while leaving the remedies untouched. *Id.* at 16a.

3. Petitioner does not argue that the court of appeals' decision conflicts with any decision of this Court or another court of appeals, and he identifies no sound reason for this Court to take up the question presented absent a disagreement in the lower courts.

Petitioner observes (Pet. 27-28) that most MSPB decisions are appealed to the Federal Circuit. But as he appears to acknowledge (*ibid.*), the question presented is *not* within the Federal Circuit's exclusive jurisdiction. The same question arises in "mixed cases" in which preference-eligible FBI employees appeal to the MSPB and allege both civil-service claims under the CSRA and claims under federal antidiscrimination statutes. See *Kloeckner* v. *Solis*, 568 U.S. 41, 44-45 (2012). The Federal Circuit does not review the MSPB's decisions in mixed cases; instead, those cases go to the district courts and then to the regional circuits. 5 U.S.C. 7703(b)(2); see *Perry* v. *MSPB*, 137 S. Ct. 1975, 1979-1980 (2017); *Kloeckner*, 568 U.S. at 49-50. Hundreds of mixed cases are appealed to the MSPB each year.[6] And in recent years, those appeals have included cases in which preference-

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[6] See MSPB, *Prohibited Personnel Practice of the Month* (Nov. 2011), https://www.mspb.gov/ppp/nov11.htm (describing 1500 decisions in mixed cases over a five-year period).

eligible FBI employees have attempted to assert an affirmative defense based on Section 2303. See, *e.g.*, *Jones* v. *DOJ*, 111 F. Supp. 3d 25, 32-33 (D.D.C. 2015); *Litton* v. *DOJ*, No. 752-14-1110-I-2, 2017 WL 4232429 (M.S.P.B. Sept. 22, 2017). Accordingly, unlike some other areas of the Federal Circuit's docket, this is not an issue on which a circuit conflict is impossible—rather, other courts simply have not yet had occasion to consider it.[7]

Petitioner asserts (Pet. 28) that the question presented may not arise in future cases because the court of appeals' decision will lead preference-eligible FBI employees to "opt out of an MSPB appeal altogether." But petitioner provides no support for that speculative assertion. In fact, as this case illustrates, preference-eligible FBI employees have much to gain from MSPB review even without the ability to assert a Section 2303 defense. See p. 17, *supra*. And the decision below is

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[7] Consistent with the decision below, however, other courts have recognized in a variety of contexts that Section 2303(c) and its implementing regulations provide the exclusive remedy for Section 2303 violations and preclude outside review. See, *e.g.*, *Sewerynia*k v. *Sessions*, No. 17-cv-237, 2018 WL 1212539, at *1 (E.D. Va. Mar. 8, 2018), adopting 2018 WL 1220845, at *4 (E.D. Va. Jan. 31, 2018) (rejecting an attempt to enforce Section 2303 through a suit in federal court because "[c]laims under [Section] 2303 are governed by [DOJ] regulations and handled internally by [DOJ]," a process that is "not subject to judicial review"); *McGrath* v. *Mukasey*, No. 07-cv-11058, 2008 WL 1781243, at *4 (S.D.N.Y. Apr. 18, 2008) (rejecting an attempt to assert a violation of Section 2303 under the Administrative Procedure Act because "[S]ection 2303 precludes judicial review of whistleblower complaints brought by FBI employees"); *Roberts* v. *DOJ*, 366 F. Supp. 2d 13, 20 (D.D.C. 2005) (same); *Runkle* v. *Gonzales*, 391 F. Supp. 2d 210, 232-233 (D.D.C. 2005) (holding that Section 2303 and its implementing regulations do not "permit a complainant to seek judicial review or otherwise pursue a reprisal case through entities external to and independent of the DOJ") (citation omitted).

particularly unlikely to deter a preference-eligible employee from pursuing MSPB review in a mixed case, where the Board's decision would be reviewed by a district court and a regional circuit that would not be bound by the Federal Circuit's decision.

4. Even if the question presented otherwise warranted the Court's review, this case would not be a suitable vehicle in which to consider it because the court of appeals' decision is interlocutory. The court vacated the MSPB's decision and "remand[ed] to the Board for consideration of the appropriate penalty." Pet. App. 16a. The Federal Circuit's decision has already reduced petitioner's maximum penalty to a 30-day suspension, and the proceedings on remand may reduce that penalty even further. *Id.* at 71a. And if they do not, petitioner may again appeal to the Federal Circuit asserting different or additional claims arising out of the remand proceedings. Because this Court ordinarily awaits a final judgment before exercising its certiorari jurisdiction, the present interlocutory posture of this case "alone furnishe[s] sufficient ground for the denial" of the petition for a writ of certiorari. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2018