No. 16-709

In the Supreme Court of the United States

THOMAS C. DANIELS, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Whistleblower Protection Act of 1989, 5 U.S.C. 2302(b)(8)(A)(i), which protects a federal employee's disclosure of information that the employee "reasonably believes evidences * * * any violation of any law, rule, or regulation," applies to petitioner's statements to fellow employees that an Administrative Law Judge had erroneously awarded Social Security disability benefits to a claimant and that the award should not be paid.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 832 F.3d 1049. The final opinion of the Merit Systems Protection Board (Pet. App. 16a-27a) is reported at 120 M.S.P.R. 363. The initial opinion of the Merit Systems Protection Board (Pet. App. 28a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2016. A petition for rehearing was denied on September 13, 2016. The petition for a writ of certiorari was filed on November 22, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an employee of the Social Security Administration (SSA), where he serves as a Hearing

Office Director for the Office of Disability Adjudication and Review in Orange, California. Pet. App. 5a. In December 2010, an administrative law judge (ALJ) from the Orange hearing office issued a decision granting disability benefits to an SSA claimant. *Id.* at 6a. Soon after, the claimant's congressional representative asked the hearing office for a status update and for help securing payments for the claimant. *Ibid.* As Hearing Office Director, petitioner was responsible for responding to the inquiry. After reviewing the ALJ's decision, petitioner decided that the decision to award benefits had been incorrect. *Ibid.*

Under those circumstances, SSA procedures required that "any concerns with an ALJ's decision should be brought to the Office of the Regional Chief ALJ." Pet. App. 6a. Instead, petitioner discussed his concerns with the Orange Office's Chief ALJ, Helen Hesse. Petitioner also called the Payment Center, which is responsible for initiating the payment of benefits based on an ALJ's decision, and told the staff not to pay the claim. *Id.* at 6a-7a. As a result, payment to the claimant was delayed. See C.A. E.R. A9-A10.

After an investigation, petitioner's supervisors reached the following conclusions: (1) Petitioner had engaged in conduct unbecoming a federal employee by showing his "willingness to subvert established procedures to advance [his] personal views"; (2) petitioner had failed to follow SSA procedures for responding to a congressional inquiry; and (3) petitioner had failed to respond truthfully to questions he was asked during the investigation. Pet. App. 7a (citation omitted). Petitioner was suspended for 14 days. *Ibid.*

2. Petitioner filed a complaint with the Office of Special Counsel. Before that office completed its pro-

ceedings, however, petitioner filed an appeal to the Merit Systems Protection Board (Board). Pet. App. 9a. Petitioner alleged that he had wrongfully been disciplined for making disclosures that were protected under the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. 2302(b)(8)(A)(i). That provision generally prohibits a federal agency from taking a personnel action because of "any disclosure of information by an employee" if the employee "reasonably believes [the disclosure] evidences * * * any violation of any law, rule, or regulation." As relevant here, petitioner identified, as protected disclosures, his statements to Chief ALJ Hesse and to the Payment Center about what he considered to be the erroneous benefits determination. Pet. App. 6a-7a.[*]

An administrative judge rejected petitioner's appeal, concluding that he had failed to show that his statements were protected disclosures under the WPA. Pet. App. 10a; see *id.* at 28a-48a (administrative judge's decision). Petitioner filed a petition for review with the Board. In a unanimous decision, the Board denied the petition, concluding that petitioner "had failed to allege a non-frivolous protected disclosure under the WPA." *Id.* at 10a. The Board accordingly dismissed petitioner's claims for lack of jurisdiction. *Ibid.*; see *id.* at 16a-27a (Board decision).

3. The court of appeals denied a petition for review. Pet. App. 1a-15a. The court explained that a disclosure is protected under the WPA only if the employee making the disclosure reasonably believes

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[*] The benefits determination was eventually reviewed by a Regional Quality Review Officer, who concluded that the decision to award benefits to the claimant was supported by "medical evidence in the [claimant's] file." Pet. App. 6a n.6.

that the information disclosed reveals "either (1) a 'violation of any law, rule or regulation,' or (2) 'gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.'" *Id.* at 11a (quoting 5 U.S.C. 2302(b)(8)(A)). Petitioner did not satisfy those requirements, the court concluded, because an "agency ruling or adjudication, even if erroneous, cannot reasonably suffice under either prong." *Ibid.* The court explained that "[a]n ALJ, who makes an erroneous decision, does not violate the law (or engage in gross mismanagement) any more than does a district judge who is subsequently reversed on appeal." *Id.* at 11a-12a.

The court of appeals noted that its conclusion was consistent with the decision of the only other court of appeals to have considered the issue. Pet. App. 12a (citing *Meuwissen* v. *Department of Interior*, 234 F.3d 9 (Fed. Cir. 2000), superseded on other grounds by statute, Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, Tit. I, § 108, 126 Stat. 1469). In *Meuwissen*, the Federal Circuit had held that an ALJ decision, even if later determined to be contrary to law, "is not a 'violation' of that law or any other law within the meaning of the WPA." 234 F.3d at 13. The court of appeals in this case agreed. Pet. App. 12a. The court also noted that, although Congress later overturned a different aspect of *Meuwissen* —its holding that "'disclosures of information already known are not protected'"—that statutory amendment "did not disturb *Meuwissen*'s more general finding that erroneous administrative rulings are not the type of danger or wrongdoing that whistleblower protections were meant to address." *Id.* at 13a (brackets,

citation, and internal quotation marks omitted) (quoting S. Rep. No. 155, 112th Cong., 2d Sess. 5 (2012)). Finally, the court distinguished the disclosure of "malfeasance, fraud, or the like by adjudicators." *Id.* at 12a n.10. Such disclosures, the court explained, "may indeed be subject to WPA protections." *Ibid.* (citing *Cassidy* v. *Department of Justice*, 118 M.S.P.R. 74, 78 (2012)).

ARGUMENT

The court of appeals' decision is correct and does not conflict with the decision of any other court of appeals. The petition for a writ of certiorari should be denied.

1. Under the WPA, a federal employee's disclosure of information is generally protected if the employee "reasonably believes [the disclosure] evidences * * * any violation of any law, rule, or regulation." 5 U.S.C. 2302(b)(8)(A)(i). As the court of appeals correctly determined, an erroneous ALJ decision, rendered in the regular course of agency adjudication, is not a "violation of any law, rule, or regulation" within the meaning of that provision. Although such a decision may be said to "violate" the law in a colloquial sense, the WPA uses the word "violation" in its more precise sense: "An infraction or breach of the law; a transgression." *Black's Law Dictionary* 1800 (10th ed. 2014). That reading is reinforced by a neighboring provision, which provides protection for certain disclosures that evidence "*gross* mismanagement, a *gross* waste of funds, an *abuse* of authority, or a *substantial* and *specific* danger to public health or safety." 5 U.S.C. 2302(b)(8)(A)(ii) (emphasis added). That provision applies only to disclosures that involve intentional or egregiously harmful governmental misconduct. It would thus be incongru-

ous for Section 2302(b)(8)(A)(i) to apply to ALJ decisions that are merely incorrect and can be corrected through established agency procedures.

An adjudicator whose decision is later reversed has not committed a "violation" of law, but has simply made an error of judgment. Indeed, because adjudications may involve complex determinations of fact and law, adjudicative decisions (in both administrative and judicial contexts) are ordinarily subject to comprehensive review procedures. For instance, SSA disability determinations of the type at issue here, if unfavorable to a claimant, are subject to two levels of administrative review, by an ALJ and then by SSA's Appeals Council, see 20 C.F.R. 404.900, followed by judicial review, see 42 U.S.C. 405(g). The SSA similarly provides opportunities for review of decisions favorable to claimants, see 20 C.F.R. 404.969(b), as well as procedures for reconsideration by the ALJ who issued the decision, see 20 C.F.R. 404.988(a). Thus, as the court of appeals explained, "erroneous agency rulings 'are corrected through the appeals process—not through insubordination and policy battles between employees and their supervisors.'" Pet. App. 13a (quoting *O'Donnell* v. *Department of Agric.*, 120 M.S.P.R. 94, 99-100 (2013)).

Petitioner does not directly address the reasoning of the decision below. Instead, he argues that the court of appeals simply ignored the WPA's "clear language," which provides protection for "'*any* disclosure' of '*any* violation of *any* law, rule, or regulation.'" Pet. 23 (quoting 5 U.S.C. 2302(b)(8)(A)(i)). Yet as the court explained, there must still be a "violation," and an ALJ decision, even if contrary to law, "is not a 'violation' of that law or any other law within the

meaning of the WPA." Pet. App. 12a (citation omitted); see *id.* at 13a ("[W]e do not undermine congressional intent nor do we improperly limit the definition of 'disclosure' by concluding that an erroneous agency ruling or adjudication is not a violation of law for purposes of the WPA.").

2. Petitioner contends (Pet. 24-31) that the decision below is inconsistent with decisions from other courts of appeals, and with earlier decisions from the Ninth Circuit itself, in which erroneous ALJ rulings have been treated as "violations" of law. Petitioner has collected numerous examples in which erroneous ALJ rulings have been described as "violating" statutes or regulations. See, *e.g.*, *Gentry* v. *Commissioner of Soc. Sec.*, 741 F.3d 708, 726 (6th Cir. 2014) ("[T]he ALJ *violated* the agency's duty to consider all the claimant's symptoms.") (brackets and internal quotation marks omitted; emphasis added); *Smolen* v. *Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996) (ALJ's "[d]isregard of the testimony of friends and family members *violates* 20 C.F.R. § 404.1513(e)(2)") (emphasis added).

Those decisions, however, merely use the word "violate," in the colloquial sense described above, to describe an erroneous decision. None of the cited decisions involved claims under the WPA. To the contrary, the only other court of appeals to consider the issue has determined that "[a]n erroneous decision by an administrative judge empowered to make adjudicative decisions based on operative facts and relevant law is not the type of violation comprehended by the WPA." *Meuwissen* v. *Department of Interior*, 234 F.3d 9, 13 (Fed. Cir. 2000), superseded on other grounds by statute, Whistleblower Protection Enhancement Act of

2012, Pub. L. No. 112-199, Tit. I, § 108, 126 Stat. 1469. As the decision below noted (Pet. App. 12a-13a), that conclusion is consistent as well with the view adopted by the Board itself. See *O'Donnell*, 120 M.S.P.R. at 99 ("An erroneous agency ruling is not a 'violation of law.'") (quoting *Meuwissen*, 234 F.3d at 14).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2017