NO. 24-1552

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

EILEEN ERIN MCCARTHY,

Petitioner,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

Petition for Review of the Merit Systems Protection Board
in Case No. PH-1221-16-0137-W-1

BRIEF OF *AMICUS CURIAE* U.S. OFFICE OF SPECIAL COUNSEL IN SUPPORT OF PETITIONER AND IN FAVOR OF REVERSING THE MERIT SYSTEMS PROTECTION BOARD'S DECISION

Respectfully submitted,

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus, the U.S. Office of Special Counsel (OSC), is an independent federal agency charged with safeguarding the merit system by protecting federal employees, former federal employees, and applicants for federal employment from prohibited personnel practices, as defined in the Civil Service Reform Act of 1978 (CSRA), as amended by the Whistleblower Protection Act of 1989 (WPA) and the Whistleblower Protection Enhancement Act of 2012 (WPEA), and codified at 5 U.S.C. § 2302(b).[1] OSC regularly investigates and seeks corrective action for whistleblowers who experience retaliation. *See* 5 U.S.C. §§ 1214, 2302(b)(8).

This case concerns the scope of protection afforded under the WPA to federal employees who make whistleblower disclosures that involve wrongdoing by a third party (i.e., a private or non-federal government entity). As such, this case has wide-reaching implications surrounding OSC's ability to protect federal employee whistleblowers from retaliation.

By statute, OSC is "authorized to appear as *amicus curiae* in any action brought in a court of the United States related to section 2302(b)(8) or (9) . . . [and is] authorized to present the views of the Special Counsel with respect to compliance with section 2302(b)(8) or (9) and the impact court decisions would

[1] This brief uses WPA as a shorthand for whistleblower protections adopted in the CSRA and amended in subsequent legislation, including but not limited to the WPEA.

have on the enforcement of such provisions of law." 5 U.S.C. § 1212(h).[2] OSC respectfully submits this *amicus curiae* brief to offer its views on the scope-of-protection issue. OSC takes no stance on any other issues in this case.

STATEMENT OF THE ISSUE

Did the Board err in requiring appellant to allege government complicity for her disclosure of third-party wrongdoing to be protected?

INTRODUCTION AND SUMMARY OF ARGUMENT

Eileen McCarthy, a Disability Processing Specialist with the U.S. Social Security Administration (SSA or agency), filed an Individual Right of Action (IRA) appeal with the Merit Systems Protection Board (MSPB or Board) alleging, in part, that SSA terminated her employment in retaliation for her protected disclosures. The Administrative Judge (AJ) found McCarthy's disclosures related to a potentially fraudulent disability claim were not protected and thus did not shift the burden to the agency to prove by clear and convincing evidence that it would have removed her even in the absence of her disclosures. *McCarthy v. Social Sec. Admin.*, PH-1221-16-0137-W-1, 2017 MSPB LEXIS 1057, at *33 (Mar. 7, 2017). The Board affirmed and, in its analysis, did not comment on McCarthy's alleged disclosures related to third-party conduct.

[2] Congress granted OSC this authority "to ensure the OSC's effectiveness and to protect whistleblowers from judicial interpretations that unduly narrow the WPA's protections, as has occurred in the past." S. Rep. 112-155 (2012), at 14.

The Board committed reversible error in this case. Specifically, on McCarthy's disclosure related to possible Social Security fraud, the AJ found no protected disclosure "because there is no evidence of government wrongdoing." *Id.* at *25. Analogizing this case to *Aviles v. MSPB*, 799 F.3d 457 (5th Cir. 2015), the AJ examined whether the disclosure included "allegations of government complicity in the private wrongdoing." *Id.* at *28. He concluded, "Because such allegations of fraud in *Aviles* were not found to constitute a protected disclosure, I am unable to reach a different conclusion in this case." *Id.* at *30. However, not only is *Aviles* not binding precedent for the Board; it also imposes a "complicity" requirement that exceeds the standard applied in precedential cases as well as the language and intent of the WPA. Accordingly, the Court should reject *Aviles* and remand the case for reconsideration under a less restrictive analysis.

RELEVANT BACKGROUND

In McCarthy's IRA appeal, the first disclosure the AJ analyzed involved McCarthy's concern that the disability claim of an individual referred to as "Claimant Az" needed to be investigated for potential fraud. *Id.* at *10. The AJ described McCarthy's communications with her supervisor and other colleagues about her concerns, including her attempts to persuade them to refer the claim for investigation. *Id.* at *10-15. When McCarthy was terminated several months later, she was charged with Failure to Follow Instructions in connection with the

incident involving Claimant Az, among other matters.

In his initial decision, the AJ said the holding in *Aviles* was "perhaps the most on point, given the factual similarities to some of the allegations brought by the appellant in the present case, and also because it addressed the question of whether or not the WPEA's amendments to the WPA now allow for disclosures of private wrongdoing to be deemed protected." *Id.* at *26-27.

On January 17, 2024, the Board affirmed the initial decision, with one modification regarding a separate disclosure. *McCarthy v. Social Sec. Admin.*, PH-1221-16-0137-W-1, 2024 MSPB LEXIS 50 (Jan. 17, 2024). The Board did not comment on the disclosure regarding Claimant Az or the AJ's reliance on *Aviles*.

McCarthy filed a timely appeal with the U.S. Court of Appeals for the Federal Circuit. *See* 5 U.S.C. § 7703(b)(1)(B).

STANDARD OF REVIEW

The Court conducts a *de novo* review for questions of law like the one presented in this brief. *See Herman v. Dep't of Justice*, 193 F.3d 1375, 1378 (Fed. Cir. 1999). This court shall reverse the Board's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 7703(c).

ARGUMENT

I. The WPA's Plain Language Supports Broad Protections for Federal Employees Who Disclose Third-Party Wrongdoing

Generally, the WPA protects federal employee whistleblowers from retaliation when they disclose wrongdoing. Specifically, the plain language broadly protects "any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences" certain types of wrongdoing. 5 U.S.C. § 2302(b)(8). While the statute further clarifies the parameters around protected whistleblowing—for example, by defining "employee" and "covered position" and excluding certain intelligence agencies—it does not limit the alleged wrongdoing to that committed solely by the federal government or exclude disclosures of third-party wrongdoing. Congress has reaffirmed that the statute's plain text was meant to be "extremely broad," noting it "intend[ed] to protect 'any disclosure' of certain types of wrongdoing in order to encourage such disclosures." S. Rep. 112-155 (2012), at 5.

II. Protecting Federal Employees Against Retaliation for Disclosing Third-Party Wrongdoing Is Consistent with the WPA's Purpose and Legislative History

The WPA's legislative history reinforces the conclusion that the statute protects federal employee whistleblowers from retaliation when they make disclosures of wrongdoing by third parties. The CSRA created the first protections against retaliation for federal employee whistleblowers in 1978. *See* Pub. L. No.

95-454 (1978) § 101(a). The 1978 Senate Committee Report accompanying the CSRA includes a disclosure about third-party wrongdoing as a specific example of whistleblowing that Congress sought to protect. *See* S. Rep. No. 95-969, at 21 (1978) (stating "an allegation by a Nuclear Regulatory Commission engineer that the cooling system of a nuclear reactor is inadequate would fall within the whistle blower [sic] protections," without suggesting the disclosure must implicate government wrongdoing). The express purpose of the WPEA was to strengthen whistleblower protections and overrule previous decisions that restricted them. *See* S. Rep. No. 112-155, at 1-2 (2012). The Senate Committee Report accompanying the WPEA (WPEA Report) states that the WPEA "would, among other things, clarify the broad meaning of 'any' disclosure of wrongdoing that, under the WPA, a covered employee may make with legal protection." *Id.* at 2. In the section titled "Clarification of what constitutes a protected disclosure," the WPEA Report states:

> Unfortunately, in the years since Congress passed the WPA, the MSPB and the Federal Circuit narrowed the statute's protection of "any disclosure" of certain types of wrongdoing, with the effect of denying coverage to many individuals Congress intended to protect. Both the House and Senate committee reports accompanying the 1994 amendments criticized decisions of the MSPB and the Federal Circuit limiting the types of disclosures covered by the WPA. Specifically, this Committee explained that the 1994 amendments were intended to reaffirm the Committee's long-held view that the WPA's plain language covers *any* disclosure . . . .

Id. at 4 (emphasis in original). Each of the *limitations* around what is protected—which are discussed in the WPEA Report—is directly reflected in the statutory text

(e.g., limitations around disclosures of classified information). Any test for whether disclosures involving third parties are protected should be as broad as possible to satisfy Congress's intent.

III. Precedent Supports a Less Restrictive Standard Than the Board Applied When It Relied on *Aviles*

As explained above, the plain language and legislative history show that the WPA protects federal employee whistleblowers from retaliation for making "*any* disclosure" they reasonably believe evidences wrongdoing—even wrongdoing committed by third parties. 5 U.S.C. § 2302(b)(8) (emphasis added). This language and history counsel in favor of a consistent standard with a broadly construed definition of protected disclosures.

To the extent this Court excludes disclosures of non-government wrongdoing from the otherwise expansive protections for "any disclosure," the exception should be narrowly drawn. Case law offers two alternative articulations, with the Board's well-established precedent (*Arauz*) being more protective than the Fifth Circuit's "complicity" requirement (*Aviles*).

In *Arauz*, the Board's standard was whether the disclosure of third-party wrongdoing implicated "the government's interests and good name." *Arauz v. Dep't of Justice*, 89 M.S.P.R. 529, ¶ 7 (2001). The Board elaborated that this standard could be met if the disclosure concerned a third party who used a government program to facilitate their own wrongdoing such that the public may

view the agency as an accessory if it failed to correct it. *Id.* at ¶ 6. The Board recently applied *Arauz* in a precedential decision. *See Covington v. Dep't of Interior*, 2023 MSPB 5, ¶ 21 (Jan. 13, 2023) (finding appellant's disclosures were protected because they "concerned purported wrongdoing by the Navajo Nation that implicated the Federal Government's interests, reputation, and good name"). The Board applied the same standard in *Johnson v. Department of Health and Human Services*, finding the standard was met because "the appellant's disclosures that agency officials ignored contract violations and irregularities that cost the government thousands of dollars, and also ignored a contractor's hiring of undocumented aliens, implicated the government's interests and reputation." 93 M.S.P.R. 38, 44 (2002). *See also Miller v. Dep't of Homeland Sec.*, 99 M.S.P.R. 175, ¶ 13 (2005) (finding appellant's disclosures were protected because his allegations about a state agency's "alleged use of excessive force during the joint execution of [a] search warrant with Customs implicated the government's interests and good name").

By contrast, the Fifth Circuit in *Aviles* held that the WPA does not protect disclosures of private wrongdoing in the absence of "government complicity." 799 F.3d at 466. The decision was critical of Aviles's failure to provide "specific allegations of wrongdoing by government officials." *Id.* at 467. Notably, *Aviles* did not explicitly reject the *Arauz* standard but, rather, affirmed a Board decision

below that relied on *Arauz*. *See Aviles v. Dep't of Treasury*, 121 M.S.P.R. 311, ¶¶ 4, 6 (2014) (explaining and adopting the AJ's analysis of and reliance on *Arauz*). To the extent that "complicity" means participation in the wrongdoing, however, the *Aviles* decision is difficult to reconcile with the Board's long-standing and less-restrictive standard for protecting disclosures of third-party wrongdoing when the government's interests and good name are merely implicated.

As the Board recently acknowledged in *Covington*, 2023 MSPB 5 at ¶ 18, it is not bound by *Aviles*, and this Court should reject the Fifth Circuit's "government complicity" language. Otherwise, agencies will have a largely unfettered ability to retaliate against whistleblowers who may routinely deal with—and allege wrongdoing by—private parties such as vendors, contractors, or members of the public (such as the Social Security claimants whose filings McCarthy assessed). Particularly where a third party may be powerful or influential, government employees must be protected from retaliation when they disclose wrongdoing that might generate retaliatory animus and adverse personnel actions regardless of the fact that the alleged wrongdoer is not a federal employee.

OSC requests this Court remand to the Board to adopt a standard that broadly protects disclosures of third-party wrongdoing consistent with the statute. At minimum, OSC seeks modification of the initial decision to the extent that it interpreted the WPA too narrowly by applying the *Aviles* "complicity"

requirement.

CONCLUSION

For the foregoing reasons, it was error to conclude that McCarthy's disclosure regarding Claimant Az cannot be protected because the government was not complicit with the alleged wrongdoing. Therefore, OSC respectfully requests that the Court reverse the Board's decision, clarify the appropriate legal standard, and remand for further consideration.

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