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May 13, 2013

Clerk of the Court
United States Court of Appeals
for the Ninth Circuit
95 Seventh Street
San Francisco, CA 94103-1526

Re: *Kerr v. Salazar*, No. 12-35084 (Amicus Brief of the Special Counsel)

Dear :

As the Special Counsel, I respectfully submit this amicus brief on a matter of great importance to my agency. 5 U.S.C. § 1211. The U.S. Office of Special Counsel ("OSC") is an independent federal agency that is responsible for protecting federal employees from prohibited personnel practices. 5 U.S.C. § 1212. One of the prohibited personnel practices my agency enforces protects federal employees from whistleblower retaliation. 5 U.S.C. § 2302(b)(8). In 2012, Congress passed historic reforms in the Whistleblower Protection Enhancement Act ("WPEA"). I supported this legislation because, in my view, erroneous court decisions made it necessary

to legislatively clarify the Whistleblower Protection Act of 1989 ("WPA") that Congress enacted to protect two million federal employees from retaliation for whistleblowing.

I am authorized to appear as amicus curiae in actions brought related to section 2302(b)(8) and (9) of Title 5, United States Code. 5 U.S.C. § 1212(h). As the head of OSC, the Federal Rules of Appellate Procedure allow me to file this letter brief. Fed. R. App. P. 29(a).

On April 26, 2013, this Court ordered the parties to submit supplemental briefs addressing the effect of the WPEA on this case, including whether the WPEA should be applied to pending cases commenced before its enactment. I write to urge the Court to apply the new provisions of section 101 of the WPEA to this appeal.

I. The WPEA Clarifies Existing Law

Section 101 of the WPEA overturns decisions by the U.S. Court of Appeals for the Federal Circuit that unduly limited protections for federal whistleblowers under the WPA. Entitled "Clarification of Disclosures Covered," Section 101 clarifies the meaning and scope of the WPA by

recognizing that Congress intended to protect whistleblowing disclosures "made during the course of duties of an employee." Pub. L. No. 112-199, § 101(b)(2)(C), 126 Stat. 1465, 1466 (2012) (codified as amended at 5 U.S.C. § 2302(f)(2) (2012)). This section expressly forbids the application of Federal Circuit precedents that hold otherwise.

Congress did not create new rights and liabilities in the WPEA when it overruled the flawed decisions of the Federal Circuit. Rather, Congress clarified existing law by restoring and underscoring earlier protections granted by the WPA that were denied by erroneous court decisions. When Congress acts to clarify existing law, retroactivity is not at issue. *See Republic of Iraq v. Beaty*, 556 U.S. 848, 864 (2009); *Piamba Cortes v. Am. Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. 1999) ("[C]oncerns about retroactive application are not implicated when an amendment that takes effect after the initiation of a lawsuit is deemed to clarify relevant law rather than effect a substantive change in the law.").

Courts have "long recognized that clarifying language is not subject to any presumption against retroactivity and is applied to all cases pending as of the date of enactment." *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689

(9th Cir. 2000). In determining whether an amendment clarifies or changes an existing law, a court looks to several factors, including statements of intent made by the legislature that enacted the amendment. *See, e.g.*, *Piamba Cortes*, 177 F.3d at 1284 ("[C]ourts may rely upon a declaration by the enacting body that its intent is to clarify [a] prior enactment."); *Liquilux Gas Corp. v. Martin Gas Sales*, 979 F.2d 887, 890 (1st Cir. 1992) (using the "legislature's expression of what it understood itself to be doing" to determine whether an amendment is a clarification).

When enacting the WPEA, Congress repeatedly said its purpose was to clarify existing law. For example, the title of section 101 is "Clarification of Disclosures Covered." Pub. L. No. 112-199, 126 Stat. 1465 (2012). The Senate Report states, "Section 101 of S. 743 amends the WPA to overturn decisions narrowing the scope of protected disclosures by *clarifying* that a whistleblower is not deprived of protection …." S. Rep. No. 112-155, at 5 (2012) (emphasis added). It also states, "Section 101(b) also *clarifies* that a disclosure is not excluded from protection because it was made during the employee's normal course of duties …." *Id.* at 41 (emphasis added).

"The Supreme Court has long instructed that … 'subsequent legislation declaring the intent of an earlier statute' be accorded 'great weight in statutory construction.'" *Brown v. Thompson*, 374 F.3d 252, 260 (4th Cir. 2004) (*citing Loving v. United States*, 517 U.S. 748, 770 (1996)). This Court should similarly give great weight to Congress's repeated declarations that the WPEA clarifies the WPA and apply the Act's clarifications to pending cases.

Furthermore, as the WPEA is clearly a remedial statute, it should be liberally construed to achieve its ends. If a retroactive interpretation "will promote the ends of justice," the Supreme Court has stated, the statute should "receive such construction." *Landgraf v. USI Film Products*, 511 U.S. 244, 264 n.16 (*citing* Karl N. Llewellyn, *Remarks on the Theory of Appellate Decisions and the Rules of Canons About How Statutes are to be Construed*, 3 Vand. L. Rev. 395, 402 (1950)).

II. Congress Expressly Intended the WPEA to Apply to Pending Cases

Even if the WPEA is determined to be more than a mere clarification of existing law, Congress may enact laws that have a retroactive effect,

Landgraf, 511 U.S. at 267-68, and it intended to do so with the WPEA. The Supreme Court has held that Congress is required to make its intentions clear so reviewing courts can be assured that Congress "itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits." *Id.* at 272-73. I believe Congress met this burden in enacting the WPEA.

The WPEA's principal authors state clearly and unambiguously that the law applies to "proceedings . . . pending on [the Act's effective date]." S. Rep. No. 112-155, at 52 (2012). The Senate authors' complete statement reads as follows:

> The Committee expects and intends that the Act's provisions shall be applied in OSC, MSPB, and judicial proceedings initiated by or on behalf of a whistleblower and *pending on or after that effective date*. Such application is expected and appropriate because the legislation generally corrects erroneous decisions by the MSPB and the courts; removes and compensates for burdens that were wrongfully imposed on individual whistleblowers exercising their rights in the public interest; and improves the rules of administrative and judicial procedure and jurisdiction applicable to the vindication of whistleblowers' rights.

Id. (emphasis added). The Senate Report reflects the views of the Senate Committee on Homeland Security and Governmental Affairs, which

approved a version of this legislation in every Congress since 2002. *Id.* at 40. The Report was filed by the Committee without any dissenting views on April 19, 2012. 158 Cong. Rec. S2545 (2012). Every Senator had the opportunity to review the statement of intent in the Report before the bill's unanimous approval in the Senate on May 8, 2012. *See* "Rule 6: Committee Reporting Procedures" included in *Rules of Procedure of the Committee on Homeland Security and Governmental Affairs*, S. Prt. 112-11, at 18 (Mar. 2011).

It is important to note that under the Committee's rules, any Member who wishes to file an alternative or dissenting view may do so and those views are included in the Committee Report. "Rule 6: Committee Reporting Procedures" included in *Rules of Procedure of the Committee on Homeland Security and Governmental Affairs*, S. Prt. 112-11, at 18-19 (Mar. 2011). No dissenting views on this issue are included in the Committee Report.

The House affirmed and adopted the Senate's statement of intent to apply the WPEA to pending cases. Immediately before the House considered S. 743, Rep. Todd Platts, one of the principal sponsors of whistleblower reform in that chamber, told his colleagues from the House

floor that the new law would apply to "pending" cases. He then read verbatim the Senate Report's statement of intent into the record. 158 Cong. Rec. E1664 (2012). Moreover, while the House struck from the bill the section of S. 743 entitled, "Intelligence Community Whistleblower Protections," it left untouched the portions of Title I that concern the Act's clarification of protected disclosures by federal employees. S. 743, 112th Cong. § 1 (as passed by House, Sept. 28, 2012). Included in Title I are the provisions that overturned erroneous court decisions interpreting the WPA that are the subject of the Senate's statement of intent. *Id.*

On September 28, 2012, the House adopted S. 743 by unanimous consent. S. 743, 112th Cong. (as passed by House, Sept. 28, 2012). When S. 743 returned to the Senate with the House amendment striking the intelligence community provision, the Senate passed S. 743 for a second time without dissent. S. 743, 112th Cong. (as passed by Senate, Nov. 13, 2012). Both houses of Congress passed S. 743 by unanimous consent. 158 Cong. Rec. S6737 (2012); 158 Cong. Rec. S6761 (2012). In doing so, Congress provided clear evidence of its intent that "the Act's provisions

shall be applied . . . in proceedings pending on or after [the effective date]." S. Rep. No. 112-115, at 52 (2012).

In deciding to apply the WPEA to pending OSC complaints, my agency found persuasive the legislative history of S. 743, suggesting that the WPEA provisions clarifying the scope of protected whistleblowing should be applied to pending cases. This Court should follow the straightforward congressional mandate and not apply legislatively overturned Federal Circuit decisions to cases pending at the time of the WPEA's enactment.

III. The Court Should Apply the Law in Effect at the Time It Renders a Decision

Even if this Court determines that applying the WPEA to pending cases would constitute retroactive application, and even if this Court does not believe Congress clearly expressed its intent with respect to the retroactivity of the law, it should apply the WPEA to pending cases to promote government efficiency and accountability. Two canons of statutory construction regarding retroactivity exist. The first is the rule that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative

history to the contrary." *Landgraf*, 511 U.S. at 244, 277 (*citing Bradley v. School Bd. of Richmond*, 416 U.S. 696, 711 (1974)). The second is simply a judicial presumption against retroactivity. *Id.* at 265.

The Court observed in *Landgraf* that "[a]ny test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity." *Id.* at 270. By applying "familiar considerations of fair notice, reasonable reliance, and settled expectations," the Court explained, judges would be able to exercise sound guidance in making these difficult decisions. *Id.*

The government's primary interest in enacting the WPA and the WPEA is to create a work environment where employees are safe to blow the whistle about waste, fraud, abuse and threats to public health or safety. In order to further this important interest, Congress determined over three decades ago that the government will protect whistleblowers and make them whole if officials, acting beyond the limits of their legal authority, cause employees harm because of whistleblowing activity. If this remedial process causes minor disturbances to personnel management, such disturbances are more than offset by savings to taxpayers from increased government

efficiency and accountability through an effective whistleblower protection program.

The application of the WPEA to pending cases simultaneously promotes the interests of employees, employers and taxpayers. We all share a common interest in the promotion of government efficiency and accountability, an interest advanced by protecting federal whistleblowers from retaliation.

Denying appellant the benefit of Congress's restorative law would therefore undermine, rather than promote, the very governmental interest that Congress advances in the WPEA. That interest is so fundamental to good government that it easily outweighs competing interests, e.g., potential administrative costs, or liability for back pay or attorneys' fees. The WPEA is intended to strengthen the protections for whistleblowers "so that they can more effectively help root out waste, fraud, and abuse in the federal government." S. Rep. No. 112-155, at 1 (2012). Applying the WPEA to pending cases would further that important legislative purpose.

* * * *

I urge the Court to apply Section 101 of the WPEA to the pending appeal. Without the full benefit of the WPEA reforms, I fear that dedicated public servants will continue to be discouraged from reporting waste, fraud, abuse and corruption at their agencies and that our government will lose a critical opportunity to be more efficient and effective.

Respectfully submitted,

s/ Carolyn N. Lerner

Carolyn N. Lerner
Special Counsel