‘Mary Reese v. Department of the Navy’’ ‘‘Amicus Brief.’ submitted this May 20, 2024’

INTEREST OF AMICUS

Interest of Amicus is established via United States Postal Service Tracking Numbers 9505-5107-8342-4068-9350-51; 9505-5105-6458-4072-8675-82; 9505-5107-8342-4068-9350-51; and , duplicate copy originals documents mailed to the following on MSPB Clerk of the Board 1615 M St NW, Washington, DC 20419, Washington DC Regional Office 1901 S. Bell Street Suite 950 Arlington, Virginia 22202 and HHS Office of Secretary, Office of Equal Employment Opportunity, Diversity & Inclusion (EEODI) Mary E. Switzer Building 330 C Street, S.W., Suite 2200 Washington, DC 20201. In the three duplicate true test original documents which Amicus mailed on April 8, 2024, this Amicus invited the Secretary, not to mention the MSPB to solicit the advice of the Solicitor General, as per the Solicitor General invitation embedded in Amicus’s April 8, 2024 document. A reading of a motion before the Supreme Court from Solicitor General Elizabeth B. Preloger greatly supports Amicus’ April 8, 2024 invitation General Preloger’s advocates and briefs positions that provide great support Amicus' April 8, 2024 invitation to Secretary Becerra, and the Board to seek, per established “Agency” practice (see April 8, 2024 mailings), to seek General Preloger’s advice to Agencies in related matters; the April 8, 2024. Indeed, the Solicitor General’s advice to “Agency Counsels” embedded in Amicus’ April 8, 2024 correspondence Id bears this long standing practice. The present matter may well merit that the MSPB announce in the Federal Register a “Sunshine in The Government Act Public hearing. Editions of the Federal Register may lead to the conclusion that the Board may have “set the bar” for Sunshine Act Meetings.

“Setting the bar” for “inferior” officers is what is what General Prelogar may have accomplished In the Supreme Court of the United States No. 22-274 Steven Donziger, Petitioner v United States of America, On Petition for a Writ of Certiorari to the United States Supreme Court for a Writ of Certiori to the United Court of Appeals for the Second Cir Brief for the United States in Opposition to Certiorari" SupremeCtBriefs@usdoj.gov (202) 514-2217. At the same time, General Preloger "makes the case" for Administrative Law Judges who under the terms of MMA December 8, 2003 serve to no other -HHS employee (officer) other than Secretary Xavier Becerra-who by law is charged with ensuring the "Judge" Judicial Independence.

Space providing, Amicus envisions demonstrating how the issues at bar, have significant impact upon Prohibited Personnel Practices (PPP) of which both the MSPB & Office of Special Counsel (OSC) missions intersect. Harbinger: Notice to the “Public” of Appointment of Department of Health and Human Services (HHS) Administrative Law Judges in Excepted Service via a Blog amounts to per se PPP. This is the case especially when the Excepted Service Administrative Law Judges/for that matter Administrative Judges criteria fail to find announced in the Federal Register, for that matter – The undersigned, before it disappeared – The undersigned discovered it in an HHS “blog” following some blog item about “chickens.” The key component for the purposes here – is that the blog mentioned the methodology for selection to consist of “Reference checks, **online searches**, **criminal background searches**, and **bar membership searches** are conducted.” Amicus, indeed anyone familiar with Judge hiring as it existed previous to HHS Excepted Service Appointments – may handily cut that HHS system for Excepted Service ALJs “out the window.” Amius notes that this is a form of investigation as well. Criminal Background Searches alone serve provide no set standard - In the event that any

more inquiry as to how such no-standard violates the Merit System and amounts to PPP per-se – under such absence of standards ”who decides” looks, equity, veteran, military background, what if the web pictures of which one. HHS “executives” have admitted they intended to make inquisition in determining fitness for Excepted Service HHS Judges. That said, has “United States Access Board” been consulted by the Secretary in such provision of advocate for social justice? no standard set – no Merit met. Selection of Judges via Online Searches fails to is not in keeping with “Social justice” for that matter rights protected for the people under the Constitution. This bespeaks highly of Judge James E. Boasberg and his sage observation: “'[F]or the citizen-critic of government[,i]t is as much his duty to criticize as it is the official’s duty to administer.' *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964). But what obtains when the roles are mixed and it is the official’s duty to play critic?" *Jefferson v. Harris*, 170 F. Supp. 3d 194 (D.D.C. 2016). . Such methodology to select applicants to make decisions as to the public members “earned benefits” accord licenses for livelihoods The matter at bar involves “investigations” - this is an “investigation” – short of any criteria. It may be in the wake of this that “artificial intelligence” (AI) problem has emerged into public focus as well as elected leadership concern. Amicus draws attention to – Spending Clause implications-untethered Judge selections serve the ends of AI. The seminal “Who choses?” “AI” “ALJ” selection?

Not just for the matters at bar, taking into what the Amicus is seeing and the public may also be seeing and the data Amicus presents herein, lays proof to the standing rule of organization behavior. ‘*Water does not naturally rise higher than its source*.’ *Soucie v. David*, 448 F. 2d 1067 D.C. Cir. 1971). What this Amicus has been seeing in various organizations is “offices” within Departments/Agencies under General Department Appropriations This may invite future discussion in the arena of PPPs

Turning directly to issues at bar "internal" investigation at bar is what really is to an "agency." Amicus calls attention, not only to any Department/Agency's enabling statute, but also to "hornbook" law 'Congress has often delegated portions of its investigatory power to administrative agencies.' *See* 1 K. Davis, *Administrative Law Treatise* Secs. 3.01-3.14 (1958, Supp.1970) The Fifth Circuit has called attention to Presidentially Appointed-Congressionally Confirmed (PAS) Secretary Health & Human Services Xavier Becerra "It is not this court but the applicable law and regulations that cabin the authority of the Secretary and his contractors to reopen proceedings. Besides the obvious interpretive defects of the Secretary's argument, it fundamentally misunderstands the source and scope of agency power. *See Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 357, 106 S. Ct. 1890, 1901, 90 L.Ed.2d 369 (1986) ("[A]n agency literally has no power to act ... unless and until Congress confers power upon it."). *D.G. & E. Holdings v Becerra*. 22 F.4th 470 (5th Cir. 2022).

D.G. Holdings v Becerra serves as a transition a to an "academic" explanation of a what has become a "household" precedent "Thus, *Lucia v. SEC*, 138 S. Ct. 2044 (2018), granted a new administrative hearing because an improperly-appointed ALJ made a recommended decision, id. at 2055, although he was **subject to supervision by** the **agency heads**, who could, inter alia, remove him or reject his recommendation. 5 U.S.C. §§ 557(b), 7521 Yonatan Gelblum, *Why Congress Cannot Delegate Authority to Create Offices, but Can Authorize Administrative Delegations from Offices* 69 WAYNE L. REV. ___ (2024) (emphasis Amicus).

In 2022 Office of Special Counsel (OSC), advanced positions before the Federal Circuit. This Amicus gives deference and avers in the Present Brief that the OSC's points and authorities are

"weighty" the Board's resolution, if not all issues of which the Board has invited the present Amicus to Brief the Board.

The OSC brief, may be troublesome for a "quick find" PACER and as the undersigned Amicus advocates and republishes the Office of Special Counsel's Brief to the Federal Circuit here to render wider public accessibility to consider the points already made therein and that the" OSC has already made the case" for the assign great weight and deference to OSC's brief in resolving issues at bar, and As the accordingly this Amicus invites the Board to defer the [now legacy] OSC Amicus Brief. OSC's Brief amounts largely to the text-book solution of matters herein.

It may be that the OSC Amicus Federal Circuit brief (in question) has long been "on file" with the Board and the Present Amicus need not republish the brief at this juncture. I "republish" OSC's Amicus Brief here. In doing so I "adopt" as my own. Of far as great import, I offer OSC's brief as well as any additional "offerings" "advocacy" of my own – in the spirit of Amicus Briefing – to offer/open discussion before the public forum. With this, what greater support may be found than a "Soapbox speaker podium" which the OSC (the "hammer" against PPPs.

Space and time allowing, I may have additional matters to call forth. But of most import I the Office of Special Counsel (OSC) has already said it well – well for us all – having already said:

Besanceney v Department of Homeland Security

MSPB_OSC_ no 22-1271 case 1271 united states court of appeals for the federal circuit amicus of office of special counsel filed may 18 2022

MARK BESANCENEY,

Petitioner,

v.

DEPARTMENT OF HOMELAND SECURITY,

Respondent.

Petition for Review of the Merit Systems Protection Board in

Case No. PH-1221-19-0255-M-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

The U.S. Office of Special Counsel (OSC) is an independent federal agency charged with protecting the merit system by ensuring that federal employees, former federal employees, and applicants for federal employment are not subject to prohibited personnel practices, as defined by 5 U.S.C. § 2302(b) of the Civil Service Reform Act of 1978 (CSRA), and as amended by the Whistleblower Protection Act of 1989 (WPA) and the Whistleblower Protection Enhancement Act of 2012 (WPEA). OSC investigates and seeks corrective action for federal employee whistleblowers and those who experience retaliation for engaging in

protected activities, including the disclosure of information to or cooperation with an Office of Inspector General (OIG). See 5 U.S.C. §§ 1214, 2302(b)(9)(C).

OSC has a particular interest in one of the legal issues presented by this case: the scope of protection for federal employees under section 2302(b)(9)(C) of the WPEA, which prohibits federal agencies from retaliating against employees for "cooperating with or disclosing information to the Inspector General (or any other component responsible for internal investigation or review) of an agency, or the Special Counsel…" OSC has significant expertise in reviewing and investigating claims of reprisal based on protected activity, and has a strong interest in ensuring that there are clearly defined protections in place for employees who, for example, disclose information to their agency's Inspector General.

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 have on the enforcement of such provisions of law." 5 U.S.C. § 1212(h). OSC respectfully submits this amicus curiae brief to address the scope of protection against retaliation for engaging in protected activities, pursuant to its statutory

authority under section 1212(h) and as a government entity under Fed. R. App. P. 29(a)(2). OSC takes no stance on any other issues in this case.

STATEMENT OF THE ISSUE

Did the Merit Systems Protection Board (MSPB) err by requiring that employees meet the threshold for a disclosure under section 2302(b)(8), which requires a reasonable belief that a disclosure is evidence of wrongdoing, before they can be protected from reprisal for providing information to an OIG under section 2302(b)(9)(C)?

INTRODUCTION AND SUMMARY OF ARGUMENT

Mark Besanceney, a supervisory criminal investigator at the Transportation Security Administration, U.S. Department of Homeland Security (DHS), filed an Individual Right of Action (IRA) appeal with the MSPB alleging that DHS took various personnel actions against him in retaliation for his whistleblowing and protected activity. The MSPB found that Mr. Besanceney's disclosures were not protected under 5 U.S.C. § 2302(b)(8) because he did not have a reasonable belief that they evidenced wrongdoing as defined by that section. The MSPB further held that Besanceney did not engage in protected activity under section 2302(b)(9)(C) by contacting his agency's OIG because the information he provided did not meet

the standards for whistleblowing under section 2302(b)(8).

The MSPB committed reversible error in this case. Requiring employees to meet the threshold for whistleblowing under section 2302(b)(8) before they can be protected from reprisal for providing information to an OIG under section 2302(b)(9)(C) is contrary to the plain text of the WPEA and ignores Congressional intent to provide separate protections under each provision. This case should be remanded for the MSPB to consider Mr. Besanceney's protected activity claim.

RELEVANT BACKGROUND

Mr. Besanceney filed an individual right of action (IRA) appeal with the MSPB alleging that DHS retaliated against him for engaging in whistleblowing activities. *See Besanceney v. Dep't of Homeland Sec*., PH-1221-19-0255-M-1, 2021 MSPB LEXIS 3317 (September 27, 2021), Appx1. Mr. Besanceney alleged that he made several disclosures to agency officials, including a disclosure to the DHS OIG on March 7, 2018. Appx7.

The MSPB found that Mr. Besanceney's disclosures were not protected under section 2302(b)(8) because he did not have a reasonable belief that they

evidenced wrongdoing as defined by that section. Appx22-23, 27. Mr. Besanceney argued that his contact with the OIG is a protected activity, even if the information he provided did not meet the standards for a protected disclosure under section 2302(b)(8). Appx28. The MSPB held that Mr. Besanceney's activity was not protected because, although section 2302(b)(9)(C) prohibits an agency from retaliating against employees for disclosing information to an OIG, that information "must rise to the level of whistleblowing" to be protected. Appx28. Mr. Besanceney 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

Because this appeal turns on a question of statutory interpretation, this court must conduct a de novo review. *See Power Integrations, Inc. v. Semiconductor Components Indus., LLC*, 926 F.3d 1306, 1314 (Fed. Cir. 2019). This court may 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

The MSPB erred by finding that employees must meet the threshold for a disclosure under section 2302(b)(8), which requires a reasonable belief that a

disclosure is evidence of wrongdoing, before they can be protected from reprisal for providing information to an OIG under section 2302(b)(9)(C). The plain language of the statute, legislative history, and case law all demonstrate that those who provide information to an OIG or another covered investigative entity are protected from retaliation without regard to the content of the information provided.

A. The MSPB's Analysis Disregards the Plain Language of the Statute

When the language of a statute "is plain, the sole function of the courts…is to enforce it according to its terms." *Lamie v. United States Tr.*, 540 U.S. 526, 534, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004) (internal citations omitted). The first step in determining the meaning of a statute is to look at its language. *Bank of Am. Corp. v. United States*, 964 F.3d 1099, 1103 (Fed. Cir. 2020). When the "language is clear, and the legislative history does not show that congressional intent was clearly contrary to the section's apparent meaning, th[e] meaning of the statute controls…" Id. (internal citations omitted).

Section 2302(b)(8) of the WPEA prohibits an agency from retaliating against an employee or applicant who discloses information that they reasonably

believe is evidence of "(i) a violation of law, rule, or regulation, or (ii) 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). Section 2302(b)(9)(C) broadly prohibits retaliation against an employee or applicant for "cooperating with or disclosing information to the Inspector General…of an agency, or the Special Counsel …" 5 U.S.C. § 2302(b)(9)(C).

Unlike section 2302(b)(8), section 2302(b)(9)(C) contains no terms or categories qualifying the kind of information that must be disclosed to be protected from reprisal. When "Congress includes particular language in one section of a statute but omits it in another section...it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Sioux Honey Ass'n v. Hartford Fire Ins. Co., 672 F.3d 1041, 1052 (Fed. Cir. 2012), citing Russello v. United States, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983) (internal quotation marks omitted).

Interpreting section 2302(b)(9)(C) to require that an employee meet the standard for whistleblowing under section 2302(b)(8) would make section 2302(b)(9)(C) redundant, because employees are already protected from retaliation for engaging in whistleblowing. Courts should avoid interpreting statutes in a way

that would render them "inoperative or superfluous, void or insignificant…" *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S. Ct. 2276, 159 L. Ed. 2d 172 (2004) (internal citations omitted). The only reasonable interpretation of section 2302(b)(9)(C) is that it covers disclosures of information to an OIG or the Special Counsel even when they are not protected under section 2302(b)(8).

B. The MSPB's Decision is Contrary to Congressional Intent and Controlling Precedent

Over the past several decades, Congress has made clear that it intends to protect employees who engage in covered activities, separate from whether they make whistleblower disclosures. In 1989, Congress amended the CSRA to add statutory protections for employees who disclose information to or cooperate with an OIG or OSC. See Pub. L. No. 101-12, 103 Stat. 16 (1989) § 4(b).

In 2012, Congress further expanded the rights of employees who engage in protected activity by passing the WPEA. See Pub. L. No. 112-199, 126 Stat. 1475 (2012) § 101(b). Before the WPEA, employees had an individual right of action (IRA) to appeal to the MSPB only in cases of whistleblower retaliation brought under section 2302(b)(8). The WPEA expanded MSPB jurisdiction over IRA

appeals alleging violations of section 2302(b)(9)(A)(i), (B), (C), and (D). See 5 U.S.C. §1221(a). The decision to create separate protections for employees who engage in protected activities, and grant IRA rights for those activities, demonstrates Congressional intent to allow employees to pursue protected activity claims independently of any whistleblower claims.

Prevailing case law has consistently recognized the framework Congress set forth in providing separate protections under sections 2302(b)(8) and (9). This court has described the difference between section 2302(b)(8) and section 2302(b)(9) as the difference between "reprisal based on disclosure of information and reprisal based upon exercising a right to complain." Serrao v. Merit Sys. Prot. Bd., 95 F.3d 1569, 1575 (Fed. Cir. 1996) (internal citations omitted). Recently, this court reaffirmed that distinction in the context of protected activities under section 2302(b)(9)(C). Smolinski v. Merit Sys. Prot. Bd., 23 F.4th 1345, 1352-53 (Fed. Cir. 2022) (rejecting MSPB finding that "[e]ngaging in protected activity under section 2302(b)(9) is not sufficient alone" to establish jurisdiction unless the activity is also protected under section 2302(b)(8)).

MSPB case law has also recognized the distinction between the two statutory provisions. The MSPB has held that Section 2302(b)(9)(C) "covers those disclosures to an Inspector General or the Special Counsel which do not meet the precise terms of the actions described in section 2302(b)(8)." *Special Counsel v. Hathaway*, 49 M.S.P.R. 595, 612 (1991), recons. denied, 52 M.S.P.R. 375 and aff'd, 981 F.2d 1237 (Fed. Cir. 1992).

Since the passage of the WPEA, the MSPB has recognized that employees who provide information to an OIG or OSC may have a claim under section 2302(b)(9)(C) even if they do not provide information that meets the standards for whistleblowing under section 2302(b)(8). See, e.g., *Salerno v. Dep't of Interior*, 123 M.S.P.R. 230, 237 (2016) (concluding that employee's disclosures were not protected under section 2302(b)(8), but his action in making a disclosure to OSC was protected under section 2302(b)(9)(C)); *Corthell v. Dep't of Homeland Sec*., 123 M.S.P.R. 417, 423-24 (2016) (interpreting section 2302(b)(9)(C) to protect perceived cooperation with an OIG).

The MSPB cited only one case in support of its finding that Besanceney's

activity was not protected: *Schlosser v. Department of the Interior*, 75 M.S.P.R. 15 (1997). Its reliance on that case was misplaced. A central issue in Schlosser was whether information provided to an OIG constituted a protected disclosure under section 2302(b)(8). However, that issue was only important because *Schlosser* was decided before 2012, when Congress extended IRA rights to section 2302(b)(9) cases. Thus, the MSPB had to determine whether Schlosser engaged in whistleblowing to determine whether it had jurisdiction over his claim. Id. at 20. But Schlosser does not stand for the proposition that section 2302(b)(8) standards should be injected into section 2302(b)(9)(C) claims.

Because the MSPB ignored the current state of the law, it erred in failing to consider Mr. Besanceney's IRA claim under section 2302(b)(9). See 5 U.S.C. §1221(a).

C. Failure to Protect Mr. Besanceney's OIG Contact Under Section 2302(b)(9)(C) Undermines the Work of Oversight Entities

Protecting employees from reprisal "is necessary to prevent employer intimidation of prospective complainants and witnesses, which would dry up the

channels of information and undermine the implementation of the statutory policy which the administrative process was established to serve." I*n re Frazier*, 1 M.S.P.R. 163, 192-193 (1979), citing *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) and *Mitchell v. Robert Demario Jewelry, Inc*., 361 U.S. 288, 292 (1960).

Mr. Besanceney disclosed information to his agency's OIG on March 7, 2018. Appx7. Under section 2302(b)(9)(C), it was the act of disclosing information to his OIG that entitled him to protection, even if the information he provided did not independently qualify as a protected disclosure under section 2302(b)(8). Narrowly reading Section 2302(b)(9)(C) to deny him protection "would defeat the purpose of the statute by discouraging other employees from engaging in activity which Congress has found to be in the public interest." *Corthell v. Dep't of Homeland Sec*., 123 M.S.P.R. 417, 423 (2016). If allowed to stand, the MSPB's decision threatens to undermine the powers of the oversight entities covered by section 2302(b)(9)(C) by leaving non-whistleblower witnesses vulnerable to retaliation.

CONCLUSION

For the above reasons, the MSPB's finding that an employee must provide information that meets the standard for whistleblowing under section 2302(b)(8) of

the WPEA to be protected from reprisal for disclosing information to an OIG under section 2302(b)(9)(C) is not in accordance with law. Therefore, OSC respectfully requests that the court reverse the Board's decision and remand the case for consideration of Mr. Besanceney's protected activity claim.

Respectfully submitted..

Investigation matters are of concern as unveiled in Court decisions as well. As Judge Boasberg summarized the matter, PAS officer's "central grievance concerns an investigation and resulting Report by the Department of Labor's Office of Inspector General (DOL-OIG), which "accused Jefferson ... of legal and ethical violations" for allegedly pressuring a subordinate to steer contracts to three individuals "in violation of federal procurement rules" gave analysis to a complaint of a PAS officer a remedy, Defendants' position would merit greater analysis, as it would be plain that he desired judicial review of DOL's political decision to remove a Presidential appointee. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd*., 561 U.S. 477, 509 (2010) ("Under the traditional default rule, removal is incident to the power of appointment."). *Jefferson v. Harris*, 170 F. Supp. 3d 194 (D.D.C. 2016) Amicus notes this is another harbinger - as shall be seen herein "unchecked" line items of which non-PAS employees admit to in the General Department Management (Office of Secretary).

Chevron deference is not provided when the language of a statute is clear. Amicus has underscored herein that the MMA of December 8, 2003 mandates that Secretary Becerra ensure/assure the Judicial independence of the Judges (the definition provision of the MMA defines that "Administrative Law Judge" as an HHS Administrative Law Judge – no distinction is made as to whether Secretary Becerra's Administrative Law Judges decide 3rd level Medicare Appeals, decide Civil Remedies cases, Provider Exclusion cases, for that matter Tobacco Products disciplinary cases of which by statute the authority is vested in FDA. "Who is to bother, who is to bless?"

We propose to change the text in paragraphs (e) and (f), stating that OPM has "the authority to . . . **[e]nsure the independence of the administrative law judge" and that the employing agency has "[t]he responsibility to ensure the independence of the administrative law judge**." The revised text states that OPM has the authority, and the agency has the responsibility, to "[e]nsure the qualified independence of the administrative law judge, and to faithfully administer the structural protections designed to ensure the impartiality of the administrative law judge." This is a clarifying change because the current reference to "ensuring the independence of the administrative law judge" encompasses two concepts: qualified decisional independence, and the statutory, structural protections designed to ensure judges' impartiality by limiting agency control in matters of position classification, pay, performance management, case assignment, and tenure. See, e.g., Ramspeck v. Fed. Trial Examiners Conf., 345 U.S. 128 (1953).

We propose removing and reserving § 930.203 Cost of competitive examination, since OPM no longer conducts the examination. Under the current regulation each agency is charged a pro rata share of the examination cost, based on the actual number of administrative law judges the agency employs; and under OPM's Revolving Fund statute each agency is also charged a

corresponding share for program administration costs (e.g., for administering the ALJ Loan and Senior ALJ programs, review of position descriptions and job opportunity announcements, approval of noncompetitive actions, and FOIA/Privacy Act activity). While this funding method for program administration must continue for the time being as a matter of appropriations law, the end of the examination has prompted OPM to rethink its funding method for the program. OPM is considering requesting the use of appropriated funds, instead of agency payments under the Revolving Fund, to fund its program costs. OPM seeks comment on the appropriate funding method and plans to amend this section after careful consideration of the feasibility of a new funding method and consideration of public comments....

Then Secretary of OPM Pon's regulation published post-July 12, 2018 Presidential Order re Appointment of Administrative Law Judges in the Excepted Service regulation from former OPM Director Pon document concludes: "Excepted service positions in the Executive Branch of the Federal Government are positions that are specifically excepted from the competitive service by or pursuant to statute, by the President, or by the Office of Personnel Management, and are not in the Senior Executive Service. See 5 U.S.C. 2103:

"Generally, under *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 512-13 (2010), the "agency head" of a multi-member board, commission, or authority is the full body acting collectively, not its chair or a single member. Agencies with questions should seek the advice of the Department of Justice. 71 Fed. Reg. 34231"

What Amicus provides may well covers what the board seeks one may keep in mind the wisdom of which the Court observed were "points which were freely conceded by the Solicitor General in argument of his/her case "Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible." *Watkins v United States* 77

S.Ct. 1173 (1957). [Rather, t]he power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste. But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress." Amicus adds that HHS would be short of authority to expose the private affairs of individuals in use of "AI" or websearches and "criminal searches" for no stated rational or reasons – Amicus avers this is this contravention of to the Administration's Second chance opportunity policy. Infra shall be demonstrated the methods which Office of Medicare Heaings and Appeals (with no PAS officers in its cadre) are attempting to "highjack" - or make cover for such practice and spread such though other "agencies"

"Courts routinely hold that rules like the CMS Bulletin exceed the agency's congressionally delegated authority—e.g.: … So too here. CMS "**may not rewrite clear statutory terms to suit its own sense of how the statute should operate**." *In re Benjamin*, 932 F.3d 293, 300 (5th Cir. 2019); accord Docket No. 10, Ex. 3 (2019 email from CMS representative confirming the agency "do[es] not particularly like" private arrangements among providers). *Texas v. Chiquita Brooks-LaSure*, et. al 2023 WL 4304749 D.C. Eastern Div Texas, Tyler Div (June 30, 2023).

"*Green v United States*. 356, U.S. 165 199 (1955) [w]hen the responsibilities of lawmaker, prosecutor, judge, jury and discipline are thrust on a judge he is obviously incapable of holding the scales of justice perfectly fair and true and reflecting impartiality on the guilt or innocence of

the accused. He truly becomes the judge of his own cause. Amicus advances that when social justice is the cause – well this Amicus accords great deference to Chief Justice Warren's points in *Watkins* – holding the up the scales for all..

Department of Health and Human Services 2015 Justification of Estimates to Congressional Appropriations Committees for HHS General Departmental Management, documents that Andrea Palm was serving as HHS Chief of Staff . "The General Departmental Mangement (GDM) supports the Secretary's roles as chief policy officer and general manager of the Department in administering and overseeing the organization, programs, and activities of HHS.

These budget justifications to Congress (and OMB) for congressional appropriations for FY 2015 Andrea Palm tacitly admitted recognized) ""OMHA was created in response to the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (MMA) "OMHA is funded entirely from Medicare Hospital Insurance and Supplemental Medical Insurance Trust Funds." Similarly, in the Justifications for Congressional Appropriations Committees for FYI 2022 (then Honorable Andrea Palm serving as HHS Deputy Secretary, the "alter-ego" of Secretary Becerra we see that the Office of Medicare Hearings and Appeals is a "staff division" of Office of Secretary of HHS.

What comes further is what was presented to in the Transition Book to the 2016 incoming administration. FYI as here – it compliance was failed in the matter doctor Rick Bright – subsequently vindicated by

OSC-"https://www.hhs.gov/sites/default/files/HHS%20Presidential%20Transition%20Agency%20Landing%20Team%20Book.pdf

DELEGATIONS OF AUTHORITIES A delegation of authority is the formal assignment or commitment of legal power from the Secretary or another senior official to a subordinate so that the subordinate can make decisions and take actions that have legal effect on behalf of the delegating office. Delegations of authority are important to the operation of the Department because without them, only the Secretary would be legally empowered to act. The Department's delegation policy prescribes how the Secretary may delegate his/her authorities, typically to an OpDiv or StaffDiv head, so that those officials may legally carry out the many programs and activities necessary to run the Department. The policy also prescribes how subordinate officials can in turn delegate their authorities to other officials. If a subordinate official were to implement a program or exercise authority without properly delegated authority, that action could be overturned by a court. Therefore, HHS policy states that each official of the Department should have written evidence of his/her legal authority before taking any action to expend or use government funds or resources. In some instances, statute assigns authority and responsibility for a program directly to a particular HHS official rather than assigning them to the Secretary. In these cases, additional delegation of authority from the Secretary is not required." Dr. Bright exposed the misuse of BARDA – Congressionally appropriated funding of which his HHS government office seemed to feely dip –dubbed the "Bank of BARDA." This said, and what does it have to do "at bar" well OSC sent the Investigation to now IG Christi Grimm who reached such findings – interesting case – all "on file" with Secretary Becerra and OSC.

No problems with funding OMHA – that comes from CMS Trust Accounts – Deputy Secretary Palm, indeed Secretary Becerra as much as recognized this.

Turning to 2025 Justifications for FYI Congressional Appropriations Committees one sees McArthur Allen changing the law altogether writing of MMA of 2003 one trusts Secretary Becerra for that matter to forward a “corrected” copy to Congressional Appropriations oversight Commitees. - in short: subjects of a lawsuit by the American Hospital Association . Pursuant to a November 2018 ruling (Judge Boasberg), the Secretary of HHS operated under a mandamus order directing specific annual reductions in the appeals backlog leading to substantial elimination by the end of FY 2022, and total elimination by midyear FY 2023. Through interagency collaboration, additional funding, and increased capacity, all targets were met, and the mandamus order was terminated in April of 2023....

As OMHA continues to right size to match post-backlog workloads, adjudicatory support vacancies are not being backfilled with new hires. Instead, OMHA is using a shared resources model for adjudicatory support within and across teams. For example, ALJs can do more decision writing to bridge gaps as attrition continues, until workload and staffing are in balance and hearings increase.....Pay costs associated with salaries and benefits are 70% of OMHA’s annual budget. Most of that is attributable to the ALJs, attorneys, and legal assistants that support the adjudicatory process. Through reimbursable agreements, OMHA will maintain this pay to non-pay ratio, partially offset budget shortfalls, and remain poised to expand capacity when necessary. Current reimbursable agreements include ALJ loans **to other agencies**, **staff details to other agencies**, and **Human Resource Center services to other agencie**s.

Though the hiring freeze has reduced some of OMHA’s pay costs, and reimbursable agreements have partially offset others, prolonged non-pay cost cuts have also been necessary. Since 2020, OMHA has continuously cut non-pay costs by all available means, including space consolidation projects and spending freezes in cost categories such as travel and training. Combined, non-pay

cost cuts have kept discretionary expenses below 2% of annual budgets. In light of continued attrition, a budget level of $159 million will restore funding to these critical cost categories. OMHA's timeliness-oriented performance targets were unattainable for the duration of the backlog. After precipitous drops in FY 2011 and FY 2012, both related measures were discontinued. In FY 2023,

...with the backlog substantially eliminated, OMHA's primary timeliness-oriented performance measure was restored and further refined to read: Increase the number of Benefits Improvement and Protection Act of 2000 cases closed within the applicable adjudication timeframe, since a 90-day timeframe is not always pertinent. Judge Boasberg observed in *Jefferson, supra* "given the Complaint's Faulknerian sense of time." This calls to mind: Judge Block's observation in adjucicationg bid protest on FBI relocation services is in light of "the sequestration cuts—popularly known as the "fiscal cliff""— "The resulting morass brings to mind William Faulkner's observation as to why the lawyer loves the complex: "[To] a lawyer, if it ain't complicated it don't matter whether it works or not because if it ain't complicated up enough it ain't right and so even if it works, you don't believe it." William Faulkner, THE TOWN 296 (1957). *WHR Group Inc, et. al., v United States of America* 115 Fed. Cl. 386 (2014).

The "fiscal cliff" - via McArthur Allen Secretary Becerra recognizes such PPP-non-merit based practices of venturing "astray" of established CMS Trust Fund budget authority. The "MMA of 2000" - I don't believe it. Congressional Appropriations Committees should believe that either. In larger so not back-filling vacancies – where is the already-funded salaries etc go? Should revert to Dept of Treasury – not for OMHA to Morph itself into bank of BARDA II. Moreover, where is any Federal Register Notice advertising for reimbursable ALJs, support, HR People – to "other Agencies" - is Allen saying OMHA is an Agency? Or is Allen speaking for the Secretary

the real – Agency/Department head? - again in not-back-filling – where is the money going? GAO post Sequestration Report 2013 to House Finance Committee Chair Paul Ryan wrote that some gov agencies routinely "reprogramed" funds. It turned to HHS noting that Office of Medicare Hearings and Appeals within Office of Secretary continued to operate during the 2013 sequestration. Experience may bear out reimbursable agreements for federal employees/indeed judges if not violative of the contracting in prohibition of FAR Inherently Governmental Activities, is not cost effective – such contracted out employees may likely drag out the contracts: in the event of so called 'adjudicators' how does such contract impact not only their "independence" and recall Lucia decision as explained by Yonatan Gelblum, *Why Congress Cannot Delegate Authority to Create Offices, but Can Authorize Administrative Delegations from Offices* 69 WAYNE L. REV. ___ (2024) (Supra) - I inquire who is the Agency Head the nature of which Professor Gelblum described as the SEC equivalent?

Now a few parting matters. As Deputy Secretary Palm recognizes the Secretary is the Head Policy authority for HHS. The next to hidden HR Policy Library – may be found buried in the HHS public website. None of this seems to be in Federal Register. It evidences"role confusion." as this policy library mixes Public Health Service Policies amid others. Thoughout the years, the Amicus has witnessed without replacement Policies being scraped without replacement from this library. One of relevance office of Secretary EEO procedures it too had timeframes. The policy library has not been totally abandoned as one sees that one effective Instruction 990-01 Workplace Flexibilities appears to have been updated effective April 2024.
EEOC Federal Sector October 2023 Management Director re: Anti-Harassment Policy for For Federal Agencies – further provides basis for consideration as a an 'investigation' the nature of

which is the subject of this amicus request. Agencies within HHS have updated their practices per the EEO Management Directive. - this is not the case in the for OS – indeed the present 2017 HHS Anti-Harassment Policy cites references as authoritative which appear to have been scraped out of the HR Policy Library altogether: "EEO & Prohibited Discrimination and Anti-Harassment Policy dated April 20, 2015""OHR Standard Operating Procedures Handling Disruptive Employees, Personnel Threats-Emergencies; Understanding & Responding Workplace Violence Handbook. Amicus – notes that the top of the Apr 17, 2017 Policy notes its proponent to be "HHS OFFICE OF HUMAN RESOURCES (OHR)" and owners " "OHR LER and EEOCO" - per the Fed Sector Anti-Harassment guidelines – this too amounts to an instance of Agency-Office "role confusion." for which the Directive does would not allow. The following may be found pretty much across the board in Federal Agencies the OPM driven – with little in terms of Congressional authorization – or set standard: in short this amounts to a grievance system for "non--bargaining unit employees. The Departmental grievance procedures have been established under the authority of regulations issued by the Office of Personnel Management (OPM) found at Title 5, Code of Federal Regulations, Part 771, Agency Administrative Grievance System. - These are matters which amicus call to the Boards's attention – I have some doubts to the due-process inherent in a number of these – but here as Department Heads – have obligations under the Federal Records Act, the APA of 1946, as well as the Ramsey Clark Privacy Act Amendments to the Records provisions to the APA (requiring systems of records and notices for records – particularly on public), not to mention the Purpose Statute 31 U.S.C. Section 1552-1555