THE UNITED STATES OF AMERICA
MERIT SERVICES PROTECTION BOARD

THOMAS F. DAY,
APPELLANT,

v.

DEPARTMENT OF HOMELAND SECURITY
AGENCY.

DOCKET NUMBER
DC-1221-12-0528-W-1

DATE: MARCH 1, 2013

BRIEF OF AMICI CURIAE REPRESENTATIVE ELIJAH CUMMINGS, REPRESENTATIVE JACKIE SPEIER, CENTER FOR FINANCIAL PRIVACY AND HUMAN RIGHTS, GOVERNMENT ACCOUNTABILITY PROJECT, LIBERTY COALITION, PROJECT ON GOVERNMENT OVERSIGHT, UNION OF CONCERNED SCIENTISTS, AND WHISTLEWATCH

Thomas Schafbuch
Thomas.schafbuch@gmail.com
Thomas Devine
tomd@whistleblower.org
Government Accountability Project
1612 K Street, NW Suite #1100
Washington, DC 20006
202.457.0034. ext. 124
Attorneys for Amici Curiae

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

TABLE OF CONTENTS

INTERESTS OF AMICI CURIAE

Amici Elijah Cummings and Jackie Speier are Members of Congress and members of the U.S. House of Representatives Committee on Oversight and Government Reform, which has responsibility for oversight of the civil service system and responsibility for House action on the Whistleblower Protection Enhancement Act. As Ranking Member, *amicus* Cummings was a leader in drafting the WPEA. Both were co-sponsors who participated actively in the legislation's passage. Both offices work actively with individual whistleblowers, to help them make a difference without incurring job-threatening retaliation that would chill other employees from defending the taxpayers.

The Center for Financial Privacy and Human Rights was founded in 2005 to defend privacy, civil liberties and market economics. The Center was the first non-profit human rights and civil liberties organization whose core mission recognizes traditional economic rights as a necessary foundation for a broad understanding of human rights. CFPHR is part of the Liberty and Privacy Network, a non-governmental advocacy and research 501(c)(3) organization. CFPHR helped with passage of the WPEA through congressional lobby visits, support on organizational sign-on letters and participation in broader campaign efforts such as coalition networking. CFPHR cares deeply about the *Day* decision on WPEA retroactivity, because it will determine whether deserving whistleblowers are eligible under the new law as congress intended, after having waited years for its passage.

The Government Accountability Project (GAP) is a non-partisan, non-profit public interest law firm specializing in legal advocacy on behalf of "whistleblowers" – government and corporate employees who expose illegality, gross waste and mismanagement; abuse of authority;

substantial or specific dangers to public health and safety; or other institutional misconduct undermining the public interest. Since 1978 GAP has helped over 5,000 whistleblowers through representation or informal assistance; and been a leader through sharing expertise, drafting, testifying, advocacy, defense of, and/or oversight of implementation for all of America's federal whistleblower laws that have been enacted during that period. Those statutes include the civil Service Reform Act of 1978, the Whistleblower Protection Act of 1989, 1994 amendments to the same law, and the Whistleblower Protection Enhancement Act.

The Liberty Coalition, with 93 member organizations, works to help organize, support, and coordinate trans-partisan public policy activities related to civil liberties and basic human rights. We work in conjunction with groups of partner organizations that are interested in preserving the Bill of Rights, personal autonomy and individual privacy. Since 2006, we have done hundreds of Hill visits as well as press conferences and round table discussions in support of whistleblower protections especially in the national security realm. We strongly support the retroactive application of the Whistleblower Protection Enhancement Act. We see it as a clarification of existing law and not the creation of new law retroactively applied.

The Project on Government Oversight (POGO), founded in 1981, is a nonpartisan independent watchdog that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. Working with whistleblowers to expose government waste, fraud, abuse, and illegality is an integral part of POGO's mission, and ensuring strong whistleblower protections is one of our core policy priorities. POGO helped to lead efforts to pass the Whistleblower Protection Enhancement Act (WPEA), serving as a steering committee member of the Make It Safe Coalition, testifying about the legislation before Congress, lobbying for the

strongest possible provisions, urging the public to take action, and organizing critical support. The *Day* decision on retroactivity of the law is of great concern to POGO, because it will directly influence the effectiveness and legitimacy of the WPEA reforms and deeply affect many of the deserving whistleblowers who have been waiting for years for the rights they deserve, which are now within reach.

The Center for Science and Democracy at the Union of Concerned Scientists strengthens our American democracy by advancing the essential role of science, evidence-based decision making a constructive debate as a means to improve the health, security and prosperity of all people. The Center was founded by UCS in 2012. CSD was launched in 2012 by the Union of Concerned Scientists, whose mission is to put rigorous, independent science to work addressing our planet's most pressing problems. Joining with citizens across the country, UCS combines technical analysis and effective advocacy to create innovative, practical solutions for a healthy, safe, and sustainable future. For more than a decade, UCS has been engaged in efforts to strengthen whistleblower laws in order to ensure scientific integrity at federal agencies. UCS heard from many scientist whistleblowers whose efforts to serve the public had been rebuffed by agency managers, and who experienced threats to their job or other forms of intimidation. UCS surveys of federal scientists also revealed that a concerning number experienced undue corporate or political interference on their work and the work of their respective agencies. UCS actively urged Congress to pass the Whistleblower Protection Enhancement Act, which for the first time recognizes that a scientist who exposes the censorship of federal research is as much a whistleblower as a government worker who blows the whistle on other types of waste, fraud and abuse. The *Day* decision on retroactivity essentially weakens the WPEA, by making whistleblower rights subject to a timetable not envisioned or mandated by Congress. To the

extent that this decision compromises the WPEA, it affects our work educating federal scientists about their rights as whistleblowers, and giving them the confidence to raise concerns about the scientific integrity of their work.

The Brown Center for Public Policy, also known as (a/k/a) Whistlewatch.org, is a Not For Profit, Public Benefit 501(c)(3) corporation, incorporated in the State of California that engages in advocacy, education, journalism and litigation on behalf of whistleblowers and tax payers. WhistleWatch.org qualifies as a representative of the news media under 5 U.S.C. § 552(a)(4)(A)(ii)(II) and is exempt from fees for Freedom of Information Act (FOIA) requests because we disclose information on government performance, oversight responsibilities and costs in the public interest. Whistlewatch.org converts the information received and conducts independent research then publicizes distinct Internet publications and provides information to fellow colleagues in the public policy community including the Make It Safe Campaign & Coalition (MISC). We are a member affiliate of MISC, and worked actively for passage of the Whistleblower Protection Enhancement Act.

SUMMARY OF THE ARGUMENT

The statutory language and legislative history of the Whistleblower Protection Enhancement Act, P. L. No. 112, 126 Stat. 1376 (November 26, 2012) ("WPEA") is clear. The WPEA clarifies and reaffirms the thrice-repeated original intent of Congress from the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111(1978); the Whistleblower Protection Act of 1989 ("WPA"), Pub. L. No. 101-12, 103 Stat. 16 (1989); and 1994 amendments to the WPA. Clarification of an existing law does not require retroactive analysis of its potential ramifications and applies immediately upon enactment. The WPEA is a clarifying

statute, in which Congress tightened statutory language and strengthened legislative history in a final attempt to attain compliance with the same legal rights it had intended to enact all along. It has had to legislate repeatedly because the U.S. Federal Circuit Court of Appeals ("Federal Circuit") created loopholes in whistleblower protection that Congress did not include in statutory language and repeatedly explained that it had not intended.

Independent from its clarifying status, the WPEA should be applied retroactively. It does not add new, materially significant substantive rights, liabilities or burdens to plaintiffs or defendants that were unanticipated or upset settled expectations. Further, the changes do not undermine the rights of private parties, but rather reinforce a repeatedly unanimous good government mandate. As a result, the doctrine to apply the law in effect when a decision is issued can be honored, without incurring concerns of manifest injustice that would disfavor retroactivity.

The primary grounds for caution on retroactive application involve unfairness due to changes in contractual terms or government taking of property, not issues here. The doctrine is applied flexibly, and is relaxed significantly when retroactivity promotes or is necessary for significant public policy objectives.

The WPEA does not upset settled expectations or create new, unanticipated burdens, which are primary criteria to evaluate whether there is a manifest injustice. Agencies long have been on notice that under merit system principles, including the Code of Ethics for Government Service, it is unlawful to act against employees because of lawful, credible and significant whistleblowing disclosures, regardless of context. Whistleblower rights were created specifically so that employees could safely honor their duties under the Code of Ethics. The WPEA does not change those rights. Rather, it makes them enforceable. It would be a manifest injustice both to

whistleblowers and the public concerns they defend, if their cases were adjudicated under outdated, unanimously discredited legal standards.

Even if the WPEA materially affected parties' substantive rights, it must be applied retroactively due to repeatedly-expressed, uncontradicted congressional intent in the legislative history. Retroactivity also is necessary to achieve the law's statutory purpose of protecting whistleblowers wrongfully excluded from the WPA due to hostile judicial activism.

Finally, the Board should use this proceeding to establish the related rules for prospective WPEA application. The Board should apply the WPEA in all otherwise-acceptable complaints filed after the effective date, whether or not protected communications and/or personnel actions occurred before the enactment.

ARGUMENT

I. WPEA'S APPLICATION IS NOT RETROACTIVE SINCE IT IS A CLARIFICATION OF LAW

The WPEA clarifies rights established since 1978 in 5 USC 2302(b)(8) by eliminating judicial decisions that erroneously rewrote the statute's plain language. Applying a clarifying statute to pending cases is not retroactive application of the law. As the D.C. Circuit explained in *Baptist Memorial-Golden Triangle v. Sebelius* 566 F.3d 226, 229 (D.C. Cir. 2009),

> A change in statutory language need not *ipso facto* constitute a change in meaning or effect. Statutes may be passed purely to make what was intended all along even more unmistakably clear....An amendment containing new language may be intended to clarify existing law, to correct a misinterpretation, or to overrule wrongly decided cases. (internal quotation marks and citations omitted)

See also Brown v. Thompson, 374 F.3d 253, 259 (4th Cir. Va. 2004); *Cortes v. American Airlines, Inc.*, 177 F.3d 1272, 1283 (11th Cir. Fla. 1999); *Liquilux Gas Corp. v. Martin Gas*

Sales, 979 F.2d 887, 890 (1st Cir.1992); *Boddie v. American Broadcasting Cos.*, 881 F.2d 267, 269 (6th Cir.1989).

Statutory construction is the first step to learn whether a new statute clarifies previous law. *See Loving v. United States,* 517 U.S. 748, 770 (U.S. 1996), quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-1 ("Subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction.") This is especially true if the enacting body's declaration is included in an amendment's text. *Cortes,* 177 F.3d at 1283 Courts also examine the legislative history of an amendment to assess whether it is consistent with a "reasonable" interpretation of the original statute. *See Liquilux*, 979 F.2d at 890; *Sykes v. Columbus & Greenville Ry.*, 117 F.3d 287, 293-94 (5th Cir.1997), quoting *Bobsee Corp. v. United States*, 411 F.2d 231, 237 n.18 (5th Cir.1969) ("Although a committee report written with regard to a subsequent enactment is not legislative history with regard to a previously enacted statute, it is entitled to some consideration as a secondarily authoritative expression of expert opinion.") *SEC v. Clark, 915 F.2d 439*, 451-52 (9th Cir.1990) ("While a statement concerning an earlier statute by members of a subsequent legislature is of course not conclusive evidence of the meaning of the earlier statute, the later interpretation may be accorded some deference where the subsequent legislative commentary accompanies the enactment of an amendment to the earlier law.")

Relevant WPEA language and legislative history on coverage loopholes is squarely within this doctrine. Section 101 of S.743, the version of the legislation ultimately passed by Congress, is entitled "Clarification of Disclosures Covered [.]" The protection loopholes that Congress removed in Section 101 specifically include those relevant for this proceeding -- disclosures to wrongdoers, supervisors and as part of job duties.

The corresponding Senate Report explanation for Section 101 is entitled, "Clarification of what constitutes a protected disclosure[.]" It not only is unequivocal about the "no exceptions" scope of the 2012 legislation, it quotes dispositive legislative history from the 1989 and 1994 statutes demonstrating that the new law reaffirms what Congress wrote and intended all along:

> The Committee . . . *reaffirms* the plain language of the Whistleblower Protection Act, which covers, by its terms, `any disclosure,' of violations of law, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The Committee *stands* by that language, as it explained in its 1988 report on the Whistleblower Protection Act. That report states: `The Committee intends that disclosures be encouraged. The OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue.'
>
> The House Committee on the Post Office and the Civil Service similarly stated: Perhaps the most troubling precedents involve the [MSPB's] inability to understand that `any' means `any.' The WPA protects `any' disclosure evidencing a reasonable belief of specified misconduct, a cornerstone to which the MSPB remains blind. The only restrictions are for classified information or material the release of which is specifically prohibited by statute. Employees must disclose that type of information through confidential channels to maintain protection; otherwise there are no exceptions.

S. Rep. No. 112-155, 112th Cong., 2d Sess. (2012), at 4 ("Senate Report")

As explained further, the 1994 amendments "were intended to reaffirm the Committee's long-held view that the WPA's plain language covers 'any' disclosure .... S. 743 *makes clear, once and for all*, that Congress intends to protect 'any disclosure' of certain types of wrongdoing in order to encourage such disclosures." (emphasis added) *Id.*, at 4-5.

The Senate Report specifically cited and rejected the two Federal Circuit precedents on which *Huffman* is based -- *Horton v. Department of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995)(disclosures to alleged supervisory wrongdoer not protected); and *Willis v. Department of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998) (disclosures made during an employee's normal job duties are not protected). As emphasized, "Section 101 amends the WPA ... by *clarifying* that a

whistleblower is not deprived of protection just because the disclosure was made to an individual, including a supervisor, who participated in the wrongdoing...Finally, an employee is not deprived of protection merely because the employee made the disclosure in the normal course of the employee's duties..." (emphasis added) Senate Report, at 5.

As stated without qualifier in the Senate Report's section-by-section analysis, Section 101(b) makes –

> *clear* that 'any disclosure' means 'any disclosure' by specifically stating that a disclosure does not lose protection because: the disclosure was made to a person, including a supervisor, who participated in the wrongdoing disclosed.... 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, providing the employee is able to show reprisal....

Senate Report, at 41 (emphasis added).

If there were any doubt, the Senate Report explicitly relies on the principle of clarification as one of the reasons for its instructions to apply the WPEA retroactively to pending cases: "Such application is expected and appropriate because the legislation generally corrects erroneous decisions by the MSPB and the courts..." *Id.,* at 52.

While not as in-depth, the House Report for the WPEA is consistent. Its statement on "BACKGROUND AND NEED FOR LEGISLATION" includes the following composite explanation: The Whistleblower Protection Enhancement Act "*reestablishes* appropriate whistleblower protections from retaliation." (emphasis added) H. Rep. no. 112-508, 112th Cong., 2d Sess. (2012), at 6 ("House Report").

In short, Congress repeatedly has affirmed and reaffirmed the Act to make clear what it intended all along. In terms of statutory language, Mr. Day's disclosures always have been protected under 5 USC 2302(b)(8). It is not retroactive to respect Congress' latest affirmation of the same legal rights it has legislated four times since 1978.

II. RETROACTIVE WPEA APPLICATION SATISFIES SUPREME COURT STANDARDS NOT TO CREATE MANIFEST INJUSTICE BY MATERIALLY PREJUDICING PARTIES

The keystone case on retroactivity is *Landgraf v. USI Film Prods,* 511 U.S. 244 (1994). In *Landgraf* the Supreme Court addressed how to implement laws with an effective date but without guidance on retroactive application to pending cases. It reconciled two longstanding valid but conflicting principles -- (1) a presumption against statutory retroactivity which occurs when a new law "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, with respect to transactions or considerations already past . . . ." *Landgraf,* 544 U.S. at 569, 572-73 (citations and internal quotations omitted); and (2) the doctrine that a court should "apply the law in effect at the time it renders its decision," even though that law was enacted after the events that gave rise to the suit. *Id.,* at 273, quoting *Bradley v. School Bd. of Richmond,* 416 U.S. 696, 711 (1974).

The Court concluded the two doctrines can be reconciled by granting a qualified presumption on retroactivity. For the reasons summarized by Judge Weiss in *Day v. Dep't of Homeland Security,* MSPB No. DC-1221-12-0528- W-1, Order and Certification for Interlocutory Appeal, at 7-9 ("Certification Order"), the Court recognized there should be a presumption against retroactivity that creates new burdens which prejudice a party. It qualified the presumption, however, which is rejected where there is explicit congressional intent for retroactivity that is consistent with or necessary for a statute's purpose. *Landgraf,* 544 U.S. at 262.

The Court also emphasized that the presumption should be applied flexibly on a case-by-case basis after a "process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event."

Id., at 269-70 The Court warned not to be mechanical in application. If citizens were "made secure against any change in legal rules, the whole body of our law would be ossified forever." (citation omitted) *Id.,* at 270.

Not all disruption is sufficient to trigger the presumption against retroactivity. The anti-retroactivity canon requires more than "potential unfairness" before applying a statute's scope. *Id.,* at 272 The Court cautioned that its presumption is designed to guard against changing "settled expectations" without "individualized consideration.... Familiar considerations of fair notice, reasonable reliance and settled expectations offer sound guidance." *Id.,* at 266, 270.

Another criterion relevant for this proceeding is whether retroactive application threatens contractual or property rights, either between private parties or when the government seeks to take private property. *Id.,* at 269-71; Laitos, "Legislative Retroactivity," 52 *Journal of Urban and Contemporary Law* 81 (1997) Those are the primary types of rights the presumption against retroactivity seeks to protect, and prejudice in those contexts is entitled to more weight.

With respect to prejudicing a party, the composite rule is that courts should apply the law in effect at the time of the rulings, "unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.,* at 277 (quoting *Bradley v. School Bd. of Richmond, supra,* 416 U.S. at 711). While there is no mechanical formula, *Bradley's* guidance is to consider three factors in assessing whether a manifest injustice would occur: "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights. *Bradley*, 416 U.S. at 717. Relevant criteria to assess those factors include whether retroactive application will strengthen the public interest in national concerns. "It is true that in mere private cases between individuals, a court will and ought to struggle against a construction which will, by a retroactive operation, affect the rights of

parties, but in great national concerns ... the court must decide according to existing laws ...." *Id.*, at 712.

With respect to the nature of rights affected, a public interest criterion also is relevant. As explained in a municipal employment case, "The City never had a vested or unconditional right to discriminate against individuals in the workplace ...." *Guess v. City of Portage,* 58 Fair Empl. Prac. Cas. (BNA) 250 (N.D. Ind. 1992).

The primary criterion to assess the third factor is the element of surprise that upsets legitimately settled expectations. It seeks to prevent "the possibility that new and unanticipated obligations may be imposed upon a party without notice or an obligation to be heard." *Bradley*, 416 U.S. at 720.

Even if the WPEA were not technically a clarifying statute, the same statutory language and legislative history demonstrate the law does not significantly affect substantive rights, duties, liabilities or burdens. Nor could it create a manifest injustice under the *Bradley* criteria to retroactively apply the standards that Congress intended all along.

With respect to the first manifest injustice criterion, nature of the parties, closing the *Huffman* loopholes is not about disputes between private parties. The WPEA defines when government employees may safely uphold their duties under the Code of Ethics for Government Service. When Congress originally passed whistleblower rights in 1978, a bi-partisan coalition of seventeen senators summarized the reason:

> [t]o vindicate the code of Ethics for Government Service, established by Congress twenty years ago, which demands that all federal employees "Uphold the Constitution, laws and legal regulations of the United States and all governments therein, and never be a party of their evasion" and "Expose corruption wherever discovered." Under our amendment, an employee can fulfill those obligations without putting his or her job on the line.

Reprinted in 124 *Cong. Rec.* S14302-03 (daily ed. Aug. 24, 1978).

The stakes of associated public concerns are doubly significant here – government breakdowns and/or breaches of the public trust, on issues ranging from government illegality to substantial and specific threats to public health or safety. As observed in the "Leahy Report," a Senate Judiciary Committee study that provided the in-depth public policy foundation to pass whistleblower rights in 1978,

> The Code of Silence thwarts top management's ability to effectively manage and actually removes the burden of accountability from their shoulders. Fear of reprisal renders intra-agency communications a sham, and compromises not only the employee, management and the Code of Ethics, but also the Constitutional function of congressional oversight itself.

The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Government Waste, Abuse and Corruption Prepared for the Senate Comm. on Governmental Affairs, 95th Cong., 2d Sess. 49 (1978). That is why there never has been a dissenting vote in Congress when the rights in section 2302(b)(8) were enacted and reenacted in final votes, four times since 1978.

The nature of the rights further rebuts concerns of any manifest injustice. Analogous to *City of Portage,* there is no general right to retaliate. Nor can there be any contention that retroactively protecting disclosures to supervisors or as part of job duties would undermine the rights of managers, who are still empowered to take any valid action they would have independently, even if illegal retaliation were a contributing factor. 5 USC 1221(e). Indeed, the WPEA will strengthen their ability to manage by freeing up the flow of information necessary to carry out their duties.

Finally, it cannot be seriously contended that retroactive application would take anyone by surprise through unanticipated action that upsets settled expectations without enfranchising those affected. The WPEA or earlier versions received unanimous chamber and committee votes in every Congress since 2004, and approval only was delayed through secret holds that blocked

final enactment at the end of each session. The unanticipated action was judicial defiance of unequivocal statutory language, and despite repeated expressions of frustration in legislative intent that "any" means "any." Nor could it be contended that government management officials were disenfranchised. To illustrate, employee burdens were raised to require retaliatory animus for "job duty" disclosures to prevail. In response to management concerns, the modification was added to facilitate supervision of employees like auditors whose duties regularly require disclosures of government misconduct. (Senate Report, at 5-6).

The ban on harassment of whistleblowers is not a new obligation at all, anticipated or unanticipated. It is only newly enforceable under the WPEA. Agency officials always have been on notice that whistleblower retaliation is illegal, even if judicial loopholes deprived enforcement through 5 USC 2302(b)(8). In 5 USC 2301(b) (9) there are no *Huffman* loopholes in merit system principles for lawful disclosures to possibly wrongdoing supervisors, or those that are part of job duties. That merit system principle also applies without exception to any Executive agency. *See* 5 USC 2302(a)(1).

Further, there can be no question that agency managers are aware of another law that "implements or directly concerns merit system principles" under 5 USC 2302(b)(11) -- the Code of Ethics for Government Service. PL 96-303, 94 Stat. 855 (July 3, 1980) and 5 CFR Part 2635. They have seen the Code's controlling guidance in its first principle every day, because it is required by law to be displayed in every government office: "I. Put loyalty to the highest moral principles and to country above loyalty to persons, party, or Government Department." The point of enacting section 2302(b)(8) in 1978 was so that an employee can "fulfill those obligations without putting his or her job on the line." *Amici* suggest that section 2302(b)(9) and the Code of Ethics should govern whether agencies would suffer a manifest injustice from

retroactivity. Rather than undermine those merit system principles, retroactivity would enforce them.

Indeed, it would create a manifest injustice not to apply the WPEA retroactively. It would be an injustice to permit punishment of employees for honoring their public service duties under the Code of Ethics while carrying out taxpayer-funded activities, merely because they fulfilled their duties in the "wrong" context or too soon. Managers would escape the accountability of justice. As recognized by the Leahy Report, it would be an injustice to the public to sustain public service breakdowns by continuing to undermine the free flow of information. As the Senate Report further explained, retroactive application is "expected and appropriate because the legislation ... removes and compensates for burdens that were wrongly 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." Senate Report, at 52.

III. CONGRESSIONAL INTENT IS CLEAR: APPLY THE STATUTE RETROACTIVELY

Even if the Board finds that the WPEA is not a clarification and its retroactive application would cause manifest injustice, clear congressional intent mandates retroactivity. To do otherwise would frustrate legislative intent and the statute's purpose. This final criterion has supremacy over the other factors. *Landgraf*, 544 U.S. at 262. As the Court explained,

> Retroactivity provisions often serve entirely benign and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary. However, a requirement that Congress first make its intention clear helps ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness.

Id., 511 U.S. at 268-69.

There is a dearth of relevant jurisprudence analyzing congressional intent on this issue in Federal Circuit and Merit Services Protection Board case law. Previous cases involved statutes that specifically authorized retroactivity in some sections but not others (*See Bernklau v. Principi, 291 F.3d 795*, 803-804 (Fed. Cir. 2002))[1]; did not contain relevant legislative history on retroactivity (*See Caddell v. DOJ, 96 F.3d 1367, 1371* (Fed. Cir. 1996) for the 1994 Whistleblower Protection Act amendments); or explicitly rejected retroactivity. (See *Terran v. Secretary of HHS*, 195 F.3d 1302, 1315-16 (Fed. Cir. 1999); *Moran v. MSPB*, 1998 U.S. App. LEXIS 2891 (statute did not have a retroactive effect upon application); *Avila v. Office of Personnel Management*, 79 F.3d 128, 131 (Fed. Cir. 1996) (statute stated it did not affect rights of persons prior to effective date of act)).[2]

Landgraf's progeny in other jurisdictions, however, have produced a wealth of cases finding clear congressional intent to apply a statute retroactively when its language did not specifically prescribe retroactively. That degree of intent can be discerned from legislative history. *Hamdan v. Rumsfeld,* 548 U.S. 557, 583 (2006).

Committee reports have been primary sources for courts to find clear congressional intent for retroactive application. *See United States v. Olin Corp.*, 107 F.3d 1506, 1512-1513 (11th Cir. Ala. 1997), In *Olin*, the 11th Circuit ruled that not applying the statute retroactively would

---

[1] Although Judge Weiss asserted that is the scenario here, Certification Order at 6, 10n.1, his analysis was incomplete. His basis was that the statute authorizes prospective application of the statute to Transportation Security Administration (TSA) workers upon immediate enactment, as opposed to 30 days afterwards for all other covered workers. These arguments, however, are convincing only on a surface level. The Senate Report details how TSA workers were never covered under the WPA and had an ad-hoc relationship with the Office of Special Counsel. The Senate saw no legitimacy in this relationship and wanted to afford whistleblower rights to TSA workers immediately upon enactment where none existed before. *See* Senate Report, at 18-19.

[2] That similarly was the case with *Parker v. Office of Personnel Management*, 90 M.S.P.R. 480 (2002), cited by Judge Weiss. Certification Order, at 9. *Parker* is inapposite. The court never made it past the first step of the *Landgraf* analysis, since the statute specifically prescribed that it did not apply to pending cases or injuries occurring before enactment. *See Parker,* M.S.P.R. at 486. No such parallel exists in the WPEA. The statute's language is silent on pending cases and retroactivity in Section 202: "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." Judge Weiss correctly interprets *Landgraf* when he concludes that the language fails to satisfy its requirement for express language. *Id.*

frustrate clear congressional intent to punish pre-enactment polluters. *Olin* quoted committee reports on the statute and statements by legislators specifically supporting retroactive application. *Olin,* 107 F.3d at 1514. Another post-*Landgraf* case found committee reports persuasive in retroactively applying a statute. *Ninth Ave. Remedial Group v. Chalmers*, 946 F. Supp. 651, 660 (N.D. Ind. 1996). In *Ninth Avenue Remedial Group,* the court examined committee reports and member statements to discern that while Congress had different motivations and ideas on the scope of the bill, it clearly intended application of the statute against polluters who had violated the statute before passage. *Ninth Avenue Remedial Group,* 946 F. Supp. at 662-64

Both before and after *Landgraf*, courts have inferred clear congressional intent from a bill's sponsor floor statement when it conforms to statutory language or other legislative history. In *Department of Toxic Substances Control v. Interstate Non-Ferrous Corp.*, 99 F. Supp. 2d 1123, 1135 (E.D. Cal. 2000) (quoting *Brock v. Pierce County,* 476 U.S. 253, 263 (1986), the court relied on a sponsoring Senator's statement to deduce congressional intent in favor of retroactivity. Another court found that a Senator's section-by-section analysis of a 2002 statute supporting retroactivity introduced into the legislative history provided clear congressional intent to apply the statute retroactively. *Harvey ex rel. Widmann v. Lewandowski (In re Lewandowski)*, 325 B.R. 700, 706 (Bankr. M.D. Pa. 2005). *See also Leake v. Long Island Jewish Medical Center,* 695 F. Supp. 1414, 1417 (quoting *Regents of the University of California v. Public Employment Relations Board*, 485 U.S. 589, 108 S. Ct. 1404, 1409, 99 L. Ed. 2d 664 (1988)) (E.D.N.Y. 1988), *affirmed Leake v. Long Island Jewish Medical Center*, 869 F.2d 130 (2d Cir. N.Y. 1989).

In the WPEA it is undisputed that Congress did not expressly prescribe the statute's temporal reach. As with *Landgraf*, the effective date states the Act will take effect 30 days after enactment (WPEA Sec. 202) but is silent on retroactivity. [3]

The record on congressional intent in *Landgraf* was anything but clear on retroactivity and is inapposite to the case at hand. The Court analyzed the legislative history of the Civil Rights Act of 1991 and found it conflicted. The bill was vetoed a year before by the President on grounds that the retroactive provision of the statute was unfair. The reintroduced bill diluted the retroactive provision of the bill, and an "interpretive memorandum" was introduced by seven Senators emphasizing their view that the statute was not retroactive in application unless explicitly stated. *Landgraf,* 511 U.S. at 262 n.15.

The record of clear WPEA congressional intent for retroactivity is the opposite of *Landgraf.* Directly parallel to *Harvey*, a Section-by-Section analysis of the Senate Report for the final bill states:

> This section states the Act would take effect 30 days after the date of enactment. 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.

(Senate Report, at 52). As with *Olin*, the Senate Report also states that wrongful burdens have been imposed on whistleblowers exercising their rights. (Senate Report, at 4-7). The House Report on the statute was published after the Senate Report. While mentioning prospective application to cases filed after enactment, it is silent on retroactivity. House Report, at 12.

[3] While Judge Weiss conceded that this statutory language did not qualify as express guidance on retroactivity, Certification Order at 6, he later contradicted himself by evaluating identical language in the House Report as an express prohibition. *Id,* at 9 *Amici* submit he was right the first time The House Report's language reflects silence on retroactivity, the same as statutory text.

Judge Weiss correctly noted that prior to final legislative passage there can be many compromises, referencing *Landgraf*. Certification Order, at 10. His insight was well-taken for the WPEA, to put it mildly. In the end, Congress chose S. 743 for final passage but made major modifications, such as removing provisions for jury trials, Board summary judgment authority, extension of the WPEA to the intelligence community and extension of the legislation to prohibit retaliation in security clearance actions. However, there were no changes to the silent text on retroactivity, and no subsequent contrary legislative history to the unqualified mandate and instruction to apply the WPEA retroactively in S. 743's committee report. The only reference before final passage came from the legislation's original sponsor Todd Platts, for whom the House bill was named. House Report, at 12. Similar to *Department of Toxic Substance Controls* and *Leake*, Representative Platts gave a floor speech directly quoting the Senate Report on retroactivity and supporting the Senate Report's mandate for retroactive application to pending cases: "[I]t must be understood that those whistleblowers who have been waiting for this bill to be enacted are protected by its provisions." 158 Cong. Rec. E1664 (Sept. 28 2012). Clearly, Congress has considered and consistently expressed its intentions on retroactivity.

Complementing the supremacy of congressional intent, *Landgraf* and *Olin* call for similar deference with respect to a statute's purpose. *Landgraf*, 511 U.S. at 268-69; *Olin,* 107 F.3d at 1513-14 Not applying the statute to pending cases would frustrate the purpose of the statute. As the Senate Report explains,

> [S]eventeen years after the last major revision of the WPA, it is again necessary for Congress to reform and strengthen several aspects of the whistleblower protection statutes in order to achieve the original intent and purpose of those laws....[T]he Committee has concluded that the strong national interest in protecting good faith whistleblowing requires broad protection of whistleblower disclosures.

Senate Report, at 4, 6. Not applying the WPEA retroactively would frustrate the law's purpose by continuing to deny justice for the same whistleblowers Congress intended to protect all along, through discredited standards that have been specifically overturned as erroneous barriers to the public interest in accountable government.

The record created by Congress on the purpose and intent of the WPEA is stronger than all the cited cases finding congressional intent for retroactivity through legislative history. The statute must be applied retroactively because of clear congressional intent.

IV. THE STATUTE MUST BE APPLIED PROSPECTIVELY FOR ALL CASES

Independent of pending cases, the Board should clarify prospective application by informing whistleblowers whether the WPEA will control proceedings in all cases filed after its effective date. In *Landgraf*, the Court reminded that a statute is not retroactive "merely because it draws upon antecedent facts for its operation." 511 U.S. at 270, quoting *Cox* v. *Hart*, 260 U.S. 427, 435, 67 L. Ed. 332, 43 S. Ct. 154 (1922). At a minimum, the Board's ruling should address the following contexts relevant for prospective application -- 1) both protected communication and personnel action before effective date of the WPEA but suit filed afterwards; and 2) protected communication before the effective date but personnel action after.

The WPEA must govern both prospective scenarios. Congressional intent is even stronger here than for retroactivity. While the House Report was silent on retroactivity, it unequivocally instructed that there should be no loopholes for prospective application: "Rights in this Act shall govern legal actions filed after its effective date." House Report, at 12.

Even in the absence of clear congressional intent, the law should be applied prospectively under principles consistent with *Landgraf.* As applied in *United States ex rel. Anderson v. Northern Telecom*, 52 F.3d 810, 814-815 (9th Cir. Wash. 1995); *cert. denied,* 516 U.S. 1043

(1996), the statute's public policy goals control the balance of equities. In *Andersen* plaintiff disclosed information to the government relating to a false claim. Under prior law, plaintiff would have been barred from bringing a complaint against defendant after informing the government. Congress passed an amendment in 1986 allowing relators to file suit after disclosing the evidence of a false claim to the government. Plaintiff filed suit after enactment. Plaintiff's suit was found to be prospective in application despite material facts occurring before the 1986 amendment's passage. The court reasoned that while the amendment strengthened plaintiff's right to file suit after informing the government; this did not create a new liability for defendant. Defendant was on notice before the 1986 amendment that false claims to the government were illegal. *Id. at* 814-15.

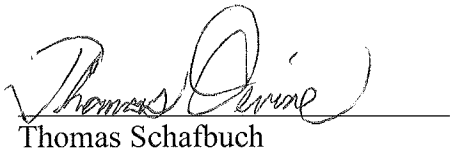
With respect to the WPEA, any whistleblower who files suit after its effective date should receive a well- deserved benefit -- restoration of protection that Congress long has intended to govern the merit system. Full prospective application provides no injustice for agencies. As discussed above, those institutions long have been on notice that on any lawful whistleblowing disclosures are protected by merit system principles in general and the Code of Ethics in particular. The alleged retaliation at issue here always has been unlawful under those basic merit system standards. By removing loopholes and other non-statutory barriers, the WPEA merely made those principles enforceable.

CONCLUSION

The Whistleblower Protection Enhancement Act was enacted unanimously to eliminate loopholes and other barriers that have prevented the law from providing protection when unanimously intended and unanimously-reaffirmed all along. For the reasons stated above, the

Board should respect clear, repeatedly-expressed congressional intent. There is no discretion for any new loopholes that would deny the WPEA's authority, prospective or retroactive.

Respectfully submitted,



Thomas Schafbuch
Thomas.schafbuch@gmail.com
Thomas Devine
tomd@whistleblower.org
Government Accountability Project
1612 K Street, NW Suite #1100
Washington, DC 20006
202.457.0034. ext. 124
Attorneys for Amicus Curiae

March 1, 2013