Nos. 03-738 and 03-739

In the Supreme Court of the United States

ALBERT E. BIVINGS, PETITIONER

v.

DEPARTMENT OF THE ARMY

NORMAND LABERGE, PETITIONER

v.

DEPARTMENT OF THE NAVY

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DAVID M. COHEN
KATHRYN A. BLEECKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether reports made by federal employees through normal channels as part of their assigned normal job duties are protected disclosures under the Whistleblower Protection Act, 5 U.S.C. 2302(b)(8)(A).

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OPINIONS BELOW

The judgment of the court of appeals in No. 03-738 (Pet. App. 1a) is not published in the *Federal Reporter*, but is *reprinted in* 65 Fed. Appx. 731. The final order of the Merit Systems Protection Board (03-738 Pet. App. 2a-4a), affirming the initial decision of an administrative judge (03-738 Pet. App. 5a-21a), is reported at 92 M.S.P.R. 225 (Table).

The judgment of the court of appeals in No. 03-739 (Pet. App. 1a) is not published in the *Federal Reporter*, but is *reprinted in* 66 Fed. Appx. 204. The opinion of

the Merit Systems Protection Board (03-739 Pet. App. 3a-30a) is reported at 91 M.S.P.R. 585.

JURISDICTION

The judgments of the court of appeals were entered on June 6, 2003. The petitions for rehearing were denied on August 22, 2003 (03-738 Pet. App. 22a; 03-739 Pet. App. 2a). The petitions for a writ of certiorari were filed on November 20, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are federal employees who seek to challenge the judgments of the court of appeals that affirmed without opinion final orders of the Merit Systems Protection Board (MSPB or the Board). The Board denied petitioners' individual right of action (IRA) appeals filed pursuant to the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-112, § 4, 103 Stat. 32 (5 U.S.C. 2302). The WPA gives the Board jurisdiction to adjudicate claims of reprisals by federal employees who make "any disclosure * * * which the employee * * * reasonably believes evidences * * * a violation of any law, rule, or regulation." 5 U.S.C. 2302(b)(8)(A).

1. a. The petitioner in No. 03-738, Albert E. Bivings, is a Wildlife Biologist for the Department of the Army Forces Command (FORSCOM) Headquarters, Fort McPherson, GA. 03-738 Pet. App. 9a. Petitioner is responsible for assisting FORSCOM installations in achieving compliance with various wildlife management statutes. *Ibid.* Petitioner's responsibilities include identifying areas where compliance could be improved. *Id.* at 17a.

Petitioner filed an IRA appeal with the MSPB claiming that various personnel actions were taken against

him in retaliation for his having made allegedly protected disclosures under the WPA. 03-738 Pet. App. 5a-6a. Specifically, petitioner claims that he brought to the Army's attention alleged violations of the Sikes Act, 16 U.S.C. 670a *et seq.*, as it pertains to the privatization of natural resource management positions, and of a 1992 Jeopardy Biological Opinion relating to a forest burning plan designed to promote the growth of long leaf pines at Fort Stewart, North Carolina. 03-738 Pet. App. 9a.

Following a hearing, an administrative judge dismissed petitioner's appeal, finding that none of the alleged disclosures was protected under the WPA. 03-738 Pet. App. 5a-21a. With respect to the Sikes Act reports, the judge found that petitioner had expressed "differences of opinions and disagreement regarding policy" that "do not constitute whistleblowing," *id.* at 12a; that petitioner "was not disclosing anything that was not a matter of general knowledge," *ibid.*; and that petitioner "certainly could not have had a reasonable belief" that he was reporting violations of law, *id.* at 13a. The judge made similar findings with respect to petitioner's alleged Fort Stewart disclosures. *Id.* at 16a-18a.

The judge additionally found that "it is part of [petitioner's] job responsibilities to identify areas where compliance could be improved and to assist installations in making improvements." 03-738 Pet. App. 17a. The judge observed (*ibid.*) that petitioner's reports therefore were not protected disclosures under the Federal Circuit's decision in *Huffman* v. *Office of Personnel Management*, 263 F.3d 1341, 1351-1355 (2001), which held that the WPA does not cover reports by employees that are made through normal channels as part of the employee's normal assigned duties.

b. The MSPB summarily denied the petition for review of the initial decision. 03-738 Pet. App. 2a-4a.

c. The court of appeals in a per curiam decision, without opinion, affirmed the MSPB's decision. 03-738 Pet. App. 1a.

2. a. The petitioner in No. 03-739, Normand Laberge, is an Environmental Engineer at the Naval Computer and Telecommunications Station Cutler, East Machias, Maine (Cutler). 03-739 Pet. App. 4a. He serves as an Environmental and Natural Resources Program Manager who is responsible for ensuring Cutler's compliance with all applicable federal and state environmental laws and regulations. His major duties include providing "authoritative guidance" to the NCTS Cutler commanding officer and others on "the interpretation of environmental laws, regulations, standards, policies and directive concerning same." *Id.* at 4a, 6a-7a. Petitioner is also responsible for documenting compliance with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.* 03-739 Pet. App. 14a.

On June 17, 1999, the Navy issued a letter of reprimand to petitioner. 03-739 Pet. App. 5a. Petitioner subsequently filed an IRA appeal with the MSPB pursuant to 5 U.S.C. 1221, arguing that the Navy's action was taken in retaliation for his role in the review of a project to paint certain towers and other structures that are located on environmentally sensitive federal lands. He claimed that he had made the following allegedly protected disclosures under the WPA: (1) informing the Command that it should have notified the Maine Department of Environmental Protection that PCBs had been discovered in the soil surrounding the project site after paint had been stripped from the towers; (2) informing the Command that it should conduct environmental assessments on the project's

effects after it was determined that the PCBs could not be fully contained; and (3) suggesting that Navy should conduct an environmental assessment on the project. 03-739 Pet. App. 6a.

Following a hearing, an MSPB administrative judge issued an initial decision dismissing petitioner's appeal for lack of jurisdiction because petitioner had failed to show that he had a reasonable belief that his disclosures evidenced the wrongdoing described in the WPA, 5 U.S.C. 2302(b)(8). 03-739 Pet. App. 31a-60a.

b. Petitioner filed a petition for review with the full MSPB and on June 14, 2002, the MSPB denied the petition but reopened the case upon its own motion pursuant to 5 C.F.R. 1201.118. The Board affirmed the initial decision, as modified, and dismissed the appeal for lack of jurisdiction under *Huffman*, *supra*, which was decided after the administrative judge had issued his initial decision. 03-739 Pet. App. 3a-9a. The Board concluded that, although petitioner may have reasonably believed that he was disclosing the Navy's violations of environmental laws or regulations in implementing the tower project, the petitioner merely was performing his normal duties as an Environmental Engineer. *Ibid.*

In a separate concurring opinion (03-739 Pet. App. 9a-30a), Board member Slavet stated that she "agree[d] that the evidence established that the [petitioner] made his disclosures through normal channels as part of his normal assigned duties," *id.* at 9a, but that she disagreed with the court of appeals' decision in *Huffman*, *id.* at 12a.

c. The court of appeals in a per curiam decision, without opinion, affirmed the MSPB's final decision. 03-739 Pet. App. 1a.

ARGUMENT

1. Petitioners contend that the Federal Circuit in *Huffman*, *supra*, was incorrect in holding that the WPA does not protect reports of wrongdoing by federal employees acting through normal channels as part of their normal job duties. 03-738 Pet. 8-13; 03-739 Pet. 8-13. That contention lacks merit.

The WPA provides protection to federal employees who make "any disclosure * * * which the employee * * * reasonably believes evidences * * * a violation of any law, rule, or regulation." 5 U.S.C. 2302(b)(8)(A). As the court of appeals in *Huffman* explained, the statutory term "disclosure" does not address the precise issue whether an employee makes a protected report when he is explicitly assigned the job responsibility of reporting government wrongdoing and he reports such wrongdoing through normal channels. 263 F.3d at 1350, 1352. The court thus properly interpreted the term in light of the remedial scheme for federal workers with normal employment claims and Congress's "central purpose" in the WPA "to protect employees who go above and beyond the call of duty and report infractions of law that are hidden." *Id.* at 1352, 1353.[1]

The Act's central purpose is not served where an "employee has, as part of his normal duties, been assigned the task of investigating and reporting wrongdoing by government employees and, in fact, reports that wrongdoing through normal channels." 263 F.3d at

[1] The *Huffman* court found further support for its conclusion in the related provisions of 5 U.S.C. 1221(e)(1), which govern how an employee can demonstrate that a disclosure was a contributing factor in a personnel action. Those factors appear to presuppose that a report to a distinct supervisor through normal channels is not a "disclosure." See 263 F.3d at 1352 n.4.

1352. For example, "the core purposes of the WPA are simply not implicated by" the reporting of wrongdoing by "[a] law enforcement officer whose duties include the investigation of crime by government employees" or the reporting of wrongdoing by "[e]mployees of an inspector general's office." *Ibid.*

Moreover, the court of appeals in *Huffman* made clear that the WPA *does* protect many disclosures by employees who are responsible for reporting government wrongdoing. The court thus concluded that a protected disclosure includes "the situation in which an employee with such assigned investigatory responsibilities reports the wrongdoing outside of normal channels," as well as "the situation in which the employee is obligated to report the wrongdoing, but such a report is not part of the employee's normal duties or the employee has not been assigned those duties." 263 F.3d at 1354.

Petitioners also are mistaken in faulting the court of appeals in *Huffman* for not giving sufficient weight to the legislative history of the 1994 amendments to the WPA that expresses displeasure with decisions by MSPB administrative judges that had concluded that the Act did not protect disclosure made through normal channels as part of assigned job duties. See S. Rep. No. 358, 103d Cong., 2d Sess. 11 (1994). As the court in *Huffman* explained, "in 1994 the [WPA's] disclosure provisions were not amended," and accordingly "post-en-actment statements made in the legislative history of the 1994 amendment have no bearing on [the court's] determination of the legislative intent of the drafters of the 1978 and 1989 legislation." 263 F.3d at 1354. To the contrary, "it could be viewed as significant that Congress in 1994," aware of prior MSPB decisions, "did not amend the language of section 2302 to address this

issue, thus leaving the matter for judicial resolution under the existing language of the Act." *Ibid.*[2]

2. Petitioners also contend that *Huffman* conflicts with this Court's decision in *Waters* v. *Churchill*, 511 U.S. 661 (1994). 03-738 Pet. 13-17; 03-739 Pet. 13-17. That contention also lacks merit. *Waters* concerned First Amendment protections for speech by governmental employees, and petitioners here have never asserted a First Amendment claim. Moreover, *Waters* does not purport to interpret the WPA, much less purport to address whether reports of government wrongdoing through normal channels as part of the employee's assigned duties is a protected disclosure under the WPA. Rather, *Waters* simply cites the Act for the propositions that arguably "high officials should allow more public dissent by their subordinates," 511 U.S. at 673, and that "the government may certainly choose to give additional protections to its employees beyond what is mandated by the First Amendment, out of respect for the values underlying the First Amendment," *id.* at 674. Neither of those statements addresses petitioners' interpretation of the WPA.

3. Finally, petitioners claim that they did not report the alleged wrongdoing through normal channels or as

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[2] Petitioners also contend that *Huffman* conflicts with earlier decisions of the Federal Circuit. 03-738 Pet. 6-8; 03-739 Pet. 7-9. That claim lacks merit. Although previous Federal Circuit decisions contained some "conflicting statements in dictum," the Federal Circuit previously in *Willis* v. *Department of Agriculture*, 141 F.3d 1139, 1143 (1998), "specifically held that an employee who makes disclosures as part of his normal duties cannot claim the protection of the WPA." *Huffman*, 263 F.3d at 1352. In any event, any intracircuit conflict would be for the Federal Circuit, not this Court, to resolve. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

part of their normal assigned job responsibilities. 03-738 Pet. 17-22; 03-739 Pet. 17-22. The court of appeals did not address those fact-bound contentions in its unpublished decisions, and this Court should accordingly decline to address them in the first instance.

In any event, petitioners' contentions are incorrect. As to petitioner Laberge, the MSPB carefully reviewed the record and petitioner's job descriptions, and the Board found that his "actions were within the duties described in his position description," 03-739 Pet. App. 6a, and similarly that he "was investigating and reporting wrongdoing as part of his normal duties through normal channels," *id.* at 7a. That holding was also joined by Board member Slavet in her concurring opinion, which concluded that "the evidence established that the [petitioner] made his disclosures through normal channels as part of his normal assigned duties." *Id.* at 9a; accord *id.* at 12a, 23a.

Review is similarly not warranted with respect to petitioner Bivings. The MSPB summarily rejected the petition for review of the administrative judge's decision. 03-738 Pet. App. 2a-3a. And the administrative judge specifically found that petitioner's alleged disclosures were unprotected for various reasons in addition to the fact that they were made in connection with petitioner's normal job duties.[3] Therefore, even were the Court to accept petitioner's interpretation of the

[3] The judge found that petitioner expressed "differences of opinion and disagreement regarding policy" that "do not constitute whistleblowing," 03-738 Pet. App. 12a; that petitioner "was not disclosing anything that was not a matter of general knowledge," *ibid.*; and that petitioner "certainly could not have had a reasonable belief" that he was reporting violations of law, *id.* at 13a. Accord *id.* at 16a-18a.

WPA, the court of appeals still correctly affirmed the Board's dismissal of petitioner's appeal.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DAVID M. COHEN
KATHRYN A. BLEECKER
Attorneys

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