EMPOWER OVERSIGHT
Whistleblowers & Research

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March 19, 2025

VIA EMAIL: HQ-DIV11-CAU-ASSISTANCE@FBI.GOV

Executive Assistant Director
Human Resources Branch
Federal Bureau of Investigation
935 Pennsylvania Avenue, NW
Washington, DC 20535-0001

RE: REQUEST FOR RECONSIDERATION OF REVOCATION OF GARRET O'BOYLE'S SECURITY CLEARANCE

Dear Executive Assistant Director:

INTRODUCTION

Empower Oversight Whistleblowers & Research ("Empower Oversight") is a nonpartisan, nonprofit educational organization dedicated to enhancing independent oversight of government and corporate wrongdoing. It works to help insiders safely and legally report waste, fraud, abuse, corruption, and misconduct to the proper authorities and seeks to hold those authorities accountable to act on such reports. Empower Oversight, the American Center for Law and Justice ("ACLJ"), and the Binnall Law Group ("BLG") represent Special Agent ("SA") Garret O'Boyle, whom the Federal Bureau of Investigation ("FBI") has suspended indefinitely without pay because of the FBI's decision to suspend his security clearance. On July 16, 2024, then Executive Assistant Director Timothy Dunham revoked SA O'Boyle's clearance. Through his attorneys, SA O'Boyle requests reconsideration of that decision.

I. BACKGROUND AND TIMELINE

SA O'Boyle has a distinguished record of service to our country. He served our nation as an infantryman in the United States Army from 2006 to 2012 and deployed to both Iraq and Afghanistan. After exiting the military, he served as a police officer for the Waukesha Police Department for four years. As an American law enforcement officer, O'Boyle dreamed of one day becoming an FBI agent. He realized that dream when he was hired by the FBI in July 2018 and was assigned to the Kansas City Division's Wichita Resident Agency and Joint Terrorism Task Force ("JTTF"). By 2020, SA O'Boyle had already established himself as a decorated agent and was chosen for the Kansas City Division's SWAT team after a rigorous selection process. While in Wichita, SA O'Boyle was also a Relief Supervisor, Training Agent, Assistant Weapons of Mass

Destruction Coordinator, and Defensive Tactics Instructor. When his clearance was suspended, SA O'Boyle was in the process of transferring to a selective new unit the FBI was establishing in Quantico, Virginia.

A. Timeline of Protected Disclosures Before Suspension

Starting in 2020, consistent with his oath to support and defend the U.S. Constitution, SA O'Boyle started making whistleblower disclosures—first through his FBI chain of command and later to Congress. All were protected under 5 U.S.C. § 2303, 28 C.F.R. § 27.2, PPD-19, and 50 U.S.C. § 3341(j). During the fall of 2021, SA O'Boyle made disclosures regarding FBI COVID-19 policies he reasonably believed violated constitutional and statutory law as well as FBI regulations and policies.

It soon became clear that no one within FBI management or leadership took seriously his good-faith protected disclosures of FBI wrongdoing—much less investigated them, fixed the problems, or punished the wrongdoers. Thus, starting in late 2021, SA O'Boyle began making protected disclosures to Congress concerning the politicization and weaponization of the FBI. He initially made these disclosures to the office of his local Congressman, Representative Ron Estes of Kansas, and ultimately to the office of House Judiciary Committee Ranking Member Jim Jordan. SA O'Boyle reasonably believed each disclosure evidenced a violation of law, rule, or regulation, or evidenced gross mismanagement or abuse of authority.

The specifics of SA O'Boyle's protected disclosures are essential to understanding the conduct Security Division ("SecD") is using as the basis for revoking his security clearance. A complete timeline of his protected disclosures is outlined in a reprisal complaint to the U.S. Department of Justice ("DOJ"), Office of the Inspector General ("OIG"), and Office of Professional Responsibility ("DOJ OPR"), which remains pending. Here is a summary of some of SA O'Boyle's disclosures outlined more fully in his reprisal complaint:

1. In spring 2020, Special Agent in Charge ("SAC") Timothy Langan interviewed SA O'Boyle regarding the potential re-hiring of a particular agent. SAC Langan informed SA O'Boyle that the interview was confidential and would remain between him, SA O'Boyle, and FBI human resources. SA O'Boyle disclosed to SAC Langan several reasons the applicant agent should never have been hired in the first place, such as his mishandling of some financial analysis on a case of SA O'Boyle's, his work ethic, and his overall attitude. SA O'Boyle believes SAC Langan memorialized these disclosures in an electronic communication saved to the applicant agent's personnel file.

2. In September 2021, SA O'Boyle disclosed in person to his chain of command—Supervisory Special Agent ("SSA") Sean Fitzgerald, Assistant Special Agent in Charge ("ASAC") Jeff Berkebile, and SAC Charles Dayoub—his reasonable belief that the requirement that FBI employees receive the COVID-19 vaccine, with inadequate accommodations for religious objectors, violated the First Amendment and Title VII of the Civil Rights Act of 1964 ("Title VII").[1]

3. On October 10, 2021, SA O'Boyle reiterated via an email disclosure to SSA Fitzgerald and ASAC Berkebile his reasonable belief that the FBI's COVID-19 vaccination exemption processes violated Title VII. Around this timeframe, SA O'Boyle was added to a Signal channel of FBI employees who did not intend to receive the COVID-19 vaccination. The channel included SA Kyle Seraphin, an agent in the Albuquerque, New

[1] *See* 42 U.S.C. § 2000e(j).

Mexico Field Office, with whom SA O'Boyle began communicating directly in October or early November 2021.

4. On November 22, 2021, SA O'Boyle emailed SSA Fitzgerald, Kansas City Chief Division Counsel ("CDC") Bob Stuart, ASAC Berkebile, and SAC Dayoub regarding the implementation of the FBI's COVID-19 testing program. SA O'Boyle again disclosed his reasonable belief that the FBI's testing program was not providing reasonable accommodations and lacked an individualized inquiry process, which he reasonably believed violated Title VII, the Americans with Disabilities Act,[2] and Equal Employment Opportunity Commission ("EEOC") guidance.[3]

5. The following day, November 23, 2021, SA O'Boyle visited Representative Ron Estes's district office and made a series of protected disclosures. He first disclosed his reasonable belief that the FBI had opened an inappropriate and politically motivated investigation into the investigative journalistic organization Project Veritas, and that DOJ had made false claims about the case in court.

   In early November 2021, the FBI had raided the homes of three individuals associated with Project Veritas, including the group's founder, and seized various materials. The raids received significant media attention, including a focus on the raid's First Amendment implications.[4] Various journalistic associations expressed concern about the raids,[5] and on November 15, 2021, the Reporters Committee for Freedom of the Press even filed a motion in the U.S. District Court for the Southern District of New York to unseal the search warrant application.[6] On November 19, 2021, in response to a separate legal motion from Project Veritas, the U.S. Attorney's Office for the Southern District of New York filed a memorandum with the court stating that Project Veritas "is not engaged in journalism within any traditional or accepted definition of that word" because (DOJ argued) it does not disseminate information to the public like a press or media organization.[7]

   FBI training on its media policy states: "The FBI defines media as 'any person, organization, or entity (other than federal, state, local, tribal, and territorial governments) operating with the primary purpose of collection, production, or

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[2] *See* 42 U.S.C. § 12112(d)(4)(A).

[3] *See Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)*, 5 (EEOC No. 915.002 July 27, 2000).

[4] *See, e.g.,* Josh Gerstein, *FBI raid on Project Veritas founder's home sparks questions about press freedom*, POLITICO (Nov. 13, 2021), *available at* https://www.politico.com/news/2021/11/13/raid-veritas-okeefe-biden-press-521307 ("A predawn FBI raid last weekend against Project Veritas founder James O'Keefe and similar raids on some of his associates are prompting alarm from some First Amendment advocates, who contend that prosecutors appear to have run roughshod over Justice Department media policies and a federal law protecting journalists.").

[5] Press Release, AMERICAN CIVIL LIBERTIES UNION, *ACLU Comment on FBI Raid of Project Veritas Founder*, Nov. 14, 2021, https://www.aclu.org/press-releases/aclu-comment-fbi-raid-project-veritas-founder; Press Release, COMMITTEE TO PROTECT JOURNALISTS, *CPJ concerned over FBI raid on home of Project Veritas founder James O'Keefe*, Nov. 15, 2021, https://cpj.org/2021/11/cpj-concerned-over-fbi-raid-on-home-of-project-veritas-founder-james-okeefe; Trevor Timm and Parker Higgins, *Why the FBI raid of Project Veritas is concerning for press freedom*, FREEDOM OF THE PRESS FOUNDATION (Nov. 17, 2021), https://freedom.press/news/why-the-fbi-raid-of-project-veritas-is-concerning-for-press-freedom.

[6] *See* Press Release, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *In re Search Warrant dated November 5, 2021*, https://www.rcfp.org/litigation/project-veritas-unsealing.

[7] https://storage.courtlistener.com/recap/gov.uscourts.nysd.569823/gov.uscourts.nysd.569823.29.0.pdf.

dissemination of information to the public in any form, including print, broadcast, film, and the Internet.'" A case involving news media would be categorized as a "sensitive investigation matter" (or "SIM"), and only case participants and case managers can access a SIM case file in the FBI's case management system. However, all employees can access a SIM case's landing page—the equivalent of an electronic cover page. SA O'Boyle accessed the Project Veritas landing page and observed that the FBI had, in fact, categorized the Project Veritas case as a SIM for "News Media," in clear contradiction with DOJ's court filing. SA O'Boyle took a screenshot of the landing page to document the conflict that he reasonably believed evidenced a violation of law, rule, or regulation, as well as an abuse of DOJ's authority.[8] SA O'Boyle showed the screenshot to Representative Estes's staff during his November 23, 2021, visit but did not leave the screenshot with the staff.

SA O'Boyle's second disclosure to Representative Estes's staff involved a potential due process violation in a January 6, 2021-related investigation. Finally, he disclosed that the FBI was targeting unvaccinated employees. Over the next several months, SA O'Boyle continued to exchange emails with Representative Estes's staff.

6. In late January or early February 2022, SA O'Boyle submitted to the FBI an Equal Employment Opportunity complaint with nineteen disclosures, which he reasonably believed showed that the FBI's COVID policies violated the law by failing to provide reasonable accommodations. On February 7, 2022, SA O'Boyle also shared the complaint with Representative Estes's staff.

7. In February 2022, SA O'Boyle disclosed via email to SSA Fitzgerald, ASAC Berkebile, and Representative Estes's office his reasonable belief that by forcing SA O'Boyle to either get a COVID test or go on AWOL status because of his unvaccinated status, the FBI was violating a law, rule, or regulation, abusing its authority, and engaging in gross mismanagement as it pertained to the treatment of unvaccinated employees.

8. On March 23, 2022, SA O'Boyle had his first phone call with Ranking Member Jordan's Judiciary Committee staff. SA O'Boyle repeated the disclosures he'd previously made to Representative Estes's office. SA O'Boyle newly disclosed that on March 11, 2022, an FBI email address sent out a flyer regarding a party at FBI offices for Ketanji Brown Jackson's nomination to the U.S. Supreme Court, which SA O'Boyle reasonably believed was a potential Hatch Act violation.

   In this call, SA O'Boyle also disclosed for the first time that, based on prodding by political interest groups and without any federal jurisdictional hook, the FBI had created the threat tag "EDUOFFICIALS" and directed that it be applied to school board-related threats. The threat tag resulted in valuable resources being used to track parents based on mostly anonymous tips.

   Around this time, SA O'Boyle and SA Seraphin discussed with each other disclosures they had been making to Congress. SA Seraphin indicated he intended to make further disclosures to Congress about the Project Veritas case, and SA O'Boyle shared with SA

[8] That FBI Executive Assistant Director for Human Resources Jennifer Leigh Moore would later suggest this screenshot "compromised" the case underscores the significance of DOJ's false legal filings about Project Veritas not being a media organization. Transcript of Jennifer Leigh Moore Interview, House Committee on the Judiciary, 147 (June 2, 2023), *available at* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2023_04_24_Moore%20Transcript_Redacted.pdf (hereinafter "Moore June 2023 Interview").

Seraphin the screenshot of the Project Veritas case landing page—the only time he ever provided the screenshot to anyone other than congressional staff.[9] SA Seraphin stated he also intended to share the screenshot with Congress. SA Seraphin neither stated nor implied that he intended to share the screenshot with any other outside organization (including media).

9. On March 31, 2022, SA O'Boyle disclosed to Ranking Member Jordan's office that the FBI had issued what appeared to be a politically motivated suspension of the security clearance of an FBI employee who attended President Trump's January 6, 2021, rally but did not enter the Capitol and left before it was declared an unlawful assembly. Based on this information, Ranking Member Jordan sent a letter to FBI Director Christopher Wray.[10]

10. On April 19, 2022, SA O'Boyle provided additional information to Ranking Member Jordan's office regarding the FBI's school board threat tagging. SA O'Boyle reasonably believed the FBI was engaging in politically motivated law enforcement, wasting resources, and abusing the FBI's authority. This protected disclosure was referenced in a letter from Ranking Member Jordan and Ranking Member Mike Johnson to Attorney General Merrick Garland on May 11, 2022.[11]

11. On May 5, 2022, SA O'Boyle disclosed to Ranking Member Jordan's office that FBI headquarters used the leak of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[12] as a rationale to aggressively track pro-life individuals on the pretext of potential threats to abortion clinics. SA O'Boyle concluded that the FBI was engaged in politically motivated law enforcement activity: targeting pro-life individuals and using the political blowback to *Dobbs* as an excuse to do so. After all, it made no sense that the *Dobbs* leak would motivate pro-life individuals to target abortion clinics for harassment or violence—if anything, the imminent overturning of *Roe v. Wade* would have made these occurrences less likely. In fact, after the *Dobbs* leak, pro-life organizations were the ones aggressively targeted with violence and threats of violence.[13] SA O'Boyle reasonably believed the FBI's actions presented a gross misuse of resources and a gross abuse of authority.

12. On May 9, 2022, SA O'Boyle submitted documents to Ranking Member Jordan's office disclosing his reasonable belief that the FBI had targeted an employee for expressing, on a supposedly anonymous employee survey, his belief that the FBI had become improperly politicized as evidenced by its handling of the Hillary Clinton investigation, Crossfire Hurricane, and the events of January 6, 2021. SA O'Boyle and others believed that the

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[9] SA Seraphin had not yet been suspended from the FBI at the time SA O'Boyle shared this document with SA Seraphin.

[10] Letter from Ranking Member Jim Jordan, House Committee on the Judiciary, to Director Christopher Wray, Federal Bureau of Investigation (May 6, 2022), *available at* http://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/legacy_files/wp-content/uploads/2022/05/2022-05-06-JDJ-Letter-to-Wray-re-WB-disclosures_Redacted.pdf.

[11] Letter from Ranking Member Jim Jordan, House Committee on the Judiciary, and Ranking Member Mike Johnson, House Subcommittee on Civil Rights and Civil Liberties, to Attorney General Merrick Garland, Department of Justice (May 11, 2022), *available at* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/legacy_files/wp-content/uploads/2022/05/2022-05-11-JDJ-MJ-to-Garland-re-threat-tags_Redacted.pdf.

[12] 597 U.S. 215 (2022).

[13] Jessica Chasmar, *More than 100 pro-life orgs, churches attacked since Dobbs leak*, FOX NEWS (Oct. 20, 2022), https://www.congress.gov/117/meeting/house/115243/documents/HHRG-117-GO00-20221214-SD003.pdf.

FBI's targeting of this agent for providing honest opinions solicited by the FBI itself demonstrated a fundamentally unfair abuse of authority inconsistent with the First Amendment to the U.S. Constitution. On June 7, 2022, Ranking Member Jordan referenced this matter in a letter to Director Wray.[14]

13. On June 9, 2022, SA O'Boyle provided documents to Ranking Member Jordan's office disclosing that the FBI was pushing investigations without a legal basis, including those predicated on uncorroborated, ambiguous, anonymous tips and unreliable identification methods. SA O'Boyle was being pressured to obtain and serve subpoenas that would have violated policy and were of questionable legality.

14. On July 14, 2022, SA O'Boyle made a protected disclosure to Ranking Member Jordan's office regarding an update to the FBI's use of force policy. SA O'Boyle provided the new policy and expressed concern that (a) the associated "training" consisted only of reading a webpage and (b) the scenarios provided created confusion about the new policy, endangering the lives of FBI agents and those involved in possible use of force incidents. SA O'Boyle reasonably believed that the policy and "training" were examples of gross mismanagement and presented a substantial and specific danger to public health and safety.

15. Also in July 2022, SA O'Boyle made a protected disclosure to Ranking Member Jordan's office, providing examples of domestic terrorism "stat padding."[15] For example, SA O'Boyle had worked on a domestic terrorism case in which the FBI mandated that a parallel civil rights case be opened. Another case agent was assigned to the civil rights case, creating the impression of two different cases, but the other agent spent no time working on the case. SA O'Boyle also provided another example of a case being duplicated three times. SA O'Boyle disclosed that the FBI was inflating its domestic terrorism case numbers through these practices.

16. On August 5, 2022, SA O'Boyle made protected disclosures to Ranking Member Jordan's office concerning several matters. The first concerned potentially inaccurate testimony provided by Director Wray regarding the status of a particular FBI agent. The second concerned the FBI's inappropriate targeting of an Army veteran and his organization. An FBI employee reported Mike Glover and his organization, American Contingency, as a potential domestic terrorist group without any evidence. Glover is a decorated former Army Special Forces veteran, and American Contingency is a company that promotes self-reliant living and conducts charity work. The FBI opened a case on American Contingency and Glover and attempted to entrap Glover. It collected various data on Glover and his organization that are now permanently in the FBI's records.

    On August 9, SA O'Boyle made additional protected disclosures about the FBI's labeling of patriotic and military symbols, such as the Betsy Ross flag, as symbols of domestic terrorists. SA O'Boyle reasonably believed that these FBI actions evidenced gross

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[14] Letter from Ranking Member Jim Jordan, House Committee on the Judiciary, to Director Christopher Wray, Federal Bureau of Investigation (June 7, 2022), *available at* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/2022-06/2022-06-07-JDJ-follow-up-letter-to-Wray-re-WB-disclosures_Redacted.pdf.

[15] *See* Letter from Ranking Member Jim Jordan, House Committee on the Judiciary, to Director Christopher Wray, Federal Bureau of Investigation (July 27, 2022), *available at* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/2022-07/2022-07-27-JDJ-to-Wray-re-domestic-violent-extremists32.pdf.

mismanagement and abuse of authority. This protected disclosure was referenced in Ranking Member Jordan's September 14, 2022, letter to Director Wray.[16]

17. In approximately July 2022, the FBI's Inspection Division began an inspection of the Kansas City Field Office. During its approximately month-long inspection, Inspection Division SSA Charles Wilkes interviewed each individual in the Wichita Resident Agency. Near the beginning of August, at the end of SSA Wilkes' interview of SA O'Boyle, Wilkes told O'Boyle he should not hesitate to reach out if any other information came up.

    Then, on approximately August 8, 2022, SSA Fitzgerald angrily confronted SA O'Boyle about his spring 2020 interview with SAC Langan regarding the rehiring of an agent who O'Boyle knew was a friend of Fitzgerald's. SSA Fitzgerald proceeded to show SA O'Boyle an email chain which, to SA O'Boyle's astonishment, contained nearly verbatim statements from his allegedly confidential interview with SAC Langan approximately 18 months before. Despite having spoken with each other on an almost daily basis before this conversation, after the conversation and until the day O'Boyle was transferred from Wichita, SSA Fitzgerald barely spoke to SA O'Boyle at all.

    The morning after SSA Fitzgerald confronted SA O'Boyle, O'Boyle saw SA Steve Cousineau, who was temporarily back in Wichita from an 18-month temporary duty assignment to the FBI's Human Resources Division. SA Cousineau was a friend of both SSA Fitzgerald and the agent who had sought to be rehired, and SA Cousineau also raised with SA O'Boyle his confidential disclosure to SAC Langan.

    It appeared to SA O'Boyle that SSA Fitzgerald had accessed the applicant agent's personnel file—a violation of FBI policy—and found SAC Langan's 2020 electronic communication that contained the summary of his interview with SA O'Boyle. Thus, on August 15, 2022, SA O'Boyle disclosed to SSA Wilkes that he believed SSA Fitzgerald had violated FBI policy by inappropriately accessing personnel records and attempting to intervene in a personnel matter on behalf of a friend of SSA Fitzgerald's.

18. Finally, on September 2, 2022, SA O'Boyle disclosed to Ranking Member Jordan's office three agency-wide emails the FBI had sent to all employees. One of the emails contained a memorandum Attorney General Merrick Garland directed to all Department of Justice ("DOJ") personnel. It stated that "no department employee may communicate with Senators, Representatives, congressional committees, or congressional staff without advance coordination, consultation, and approval by OLA." This memorandum appears to have been directed at would-be whistleblowers and was received as an implicit threat of retaliation.

B. Suspension

In June 2022, the FBI selected SA O'Boyle for its new National Surveillance Team, part of its Critical Incident Response Group ("CIRG") in Virginia. On August 1, 2022, unbeknownst to SA O'Boyle, the FBI's SecD opened an investigation of him.[17] In mid-August 2022, the O'Boyle family sold their Kansas home, put all their belongings into storage, and moved into a temporary residence in anticipation of their move to SA O'Boyle's new duty station. On August 23, 2022, SA O'Boyle attended the FBI's Surveillance Certification Course in Manassas, Virginia,

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[16] Letter from Ranking Member Jim Jordan, House Committee on the Judiciary, to Director Christopher Wray, Federal Bureau of Investigation (Sept. 14, 2022), *available at* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/2022-09/2022-09-14-JDJ-to-Wray-re-WB-follow-up.pdf.

[17] Security Clearance Reconsideration File ("Clearance File) at 3.

in preparation for his new position. On September 8, 2022, SA O'Boyle and his wife welcomed a new baby into their family. Both the Kansas City Field Office and his new National Surveillance Team were aware of this fact.

On September 23, 2022, SA O'Boyle spoke with SSA Mark Grado, who was to become O'Boyle's new supervisor on the National Surveillance Team. SA O'Boyle told Grado that he expected to be in Manassas by September 25 so that he would be ready to report on September 26.

On September 26, SA O'Boyle reported to his new FBI duty station in Stafford, Virginia. Immediately upon his arrival, CIRG Acting Chief Security Officer Laila Blake ushered him to a side office where he was met by two FBI special agents and subjected to a surprise interview. The interviewing agents claimed they were "traveling around the country interviewing anyone who had accessed the Project Veritas case." They proceeded to ask SA O'Boyle whether he had disclosed FBI information to Project Veritas, mentioning the masked FBI agent in a Project Veritas video interview. It seemed to SA O'Boyle that the FBI mistakenly believed him to be the FBI agent whose identity was masked in a Project Veritas interview that had been released May 11, 2022.[18] The agents also asked about leaks to the *Washington Times*. SA O'Boyle explained to the agents that he had disclosed FBI information (including information about the Project Veritas landing page) outside of the FBI, but only in protected disclosures to Congress. He also affirmed that he had never provided FBI information or documents to Project Veritas or any other organization, journalistic or otherwise.

At the interview's conclusion and after the interviewing agents had left, Acting Chief Security Officer Blake returned. She provided SA O'Boyle with a stack of paperwork. The first document was an Inspection Division notification dated September 23, 2022, which stated: "On 08/23/2022, an internal investigation was initiated concerning an allegation that [SA O'Boyle] allegedly made an unauthorized disclosure to the media which was uploaded on a social media website in violation of 4.10 – Unauthorized Disclosure – Sensitive Information." In an apparent violation of 5 U.S.C § 7211 and anti-gag restrictions on appropriated funds, the letter also stated "the employee should be advised that" "[h]e/she is not to discuss this matter with anyone other than" certain FBI divisions "or an attorney who has signed the appropriate Nondisclosure Agreement."[19] Immediately upon reading the letter, SA O'Boyle suspected SSA Fitzgerald had made the referenced allegation.

The second document was a September 23 letter from the FBI Security Division ("SecD") suspending SA O'Boyle's security clearance based on concerns related to Adjudicative Guidelines K ("Handling Protected Information") and M ("Use of Information Technology"). According to the letter, his clearance was suspended due to allegations that he "may have misused FBI information technology systems and records." The third document was a letter from the FBI's Human Resources Division's Performance Appraisal Unit notifying O'Boyle of a "proposal" to indefinitely suspend him from duty.

Because of the adverse personnel action against SA O'Boyle (he no longer had an income), the O'Boyles' home mortgage lender canceled its loan commitment to be secured by the Virginia home the O'Boyles had contracted to buy, leaving the family—including a newborn child—homeless. By this time, the O'Boyles had incurred more than $30,000 in moving expenses, which they reasonably expected would be reimbursed by the FBI. However, the FBI

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[18] Project Veritas, *FBI Whistleblower LEAKS Doc Showing Bureau Targets "News Media" as "Sensitive Investigative Matter"*, May 11, 2022, *available at* https://www.youtube.com/watch?v=HQljttPzSfM.

[19] Consolidated Appropriations Act, 2022, Pub. L. 117-103 Div. E § 713 (2022).

has refused to reimburse any of the moving expenses, likely in violation of its continuing services agreement with SA O'Boyle.[20]

The FBI's Employee Transfer Policy Guide explicitly provides that employees are eligible for transfers only if they "[h]ave no open administrative inquiries."[21] But, as SA O'Boyle later learned from Kansas City CDC Bob Stuart, SAC Charles Dayoub knew that O'Boyle was under investigation and would be suspended yet refused to intervene or pull back SA O'Boyle's transfer and move to Virginia, even though he knew that SA O'Boyle had just had a baby. CDC Stuart also reported to SA O'Boyle that, contrary to FBI policy, SecD had ordered SAC Dayoub to permit the transfer to proceed despite the open investigation.[22] SAC Dayoub resigned from the FBI in 2023, shortly after being interviewed by the House Judiciary Committee.

The FBI could have ordered SA O'Boyle to report to the Milwaukee Field Office, a mere 15-minute drive from where SA O'Boyle was staying on leave, to suspend him. Instead, it allowed SA O'Boyle to travel at his own expense from Milwaukee to Manassas, Virginia, approximately 800 miles one-way. Not only did the suspension leave SA O'Boyle, his wife, and young children homeless (and a few months later without income), but for six weeks in October and November, the FBI denied them access to the storage unit containing nearly all of their belongings, including even the coats they needed to stave off the Wisconsin winter.

C. Post-Suspension

In October 2022, TFO Roubideaux informed SA O'Boyle that SSA Fitzgerald had hosted a meeting during which he falsely claimed to O'Boyle's former squad that O'Boyle had been leaking information to the media and that O'Boyle would lose his job and be charged criminally.

After an internal FBI review, on November 3, 2022, the FBI issued a decision suspending SA O'Boyle indefinitely from duty without pay. The indefinite suspension purported to be based on the same factors described in the September 23, 2022, proposal to suspend him indefinitely from duty: as an FBI employee, it was impossible for SA O'Boyle to continue his employment at the FBI without an active security clearance. SA O'Boyle received a decision letter from the FBI on November 4, 2022, effective as of that date. His indefinite suspension without pay began January 1, 2023. Thus, despite technically remaining an FBI employee, SA O'Boyle has been without FBI duties since September 26, 2022, and without pay since January 1, 2023.

SA O'Boyle participated in a transcribed interview with the House Committee on the Judiciary on February 10, 2023, and testified at a public House Judiciary Committee hearing on May 18, 2023. Both appearances were further protected activity, during which he reiterated many of his earlier protected disclosures.[23]

For *twenty-two months* after the FBI suspended SA O'Boyle, it failed to adjudicate his clearance, leaving him in an unpaid limbo during which he had no access to the basis for his clearance suspension and, hence, was unable to challenge it. Finally, on July 16, 2024, then FBI Executive Assistant Director ("EAD") Timothy Dunham revoked SA O'Boyle's clearance. This action came not long after other whistleblowers from SecD came forward to expose SecD's abuse

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[20] This agreement was processed digitally, and SA O'Boyle does not have a copy.

[21] Federal Bureau of Investigation, Employee Transfer Policy Guide, 4.1 (2021).

[22] SA O'Boyle's counsel referred this allegation to the DOJ OIG for investigation on June 29, 2023. Letter from Jesse Binnall, Binnall Law Group, to Inspector General Michael Horowitz, Department of Justice (June 29, 2023).

[23] *Hearing on the Weaponization of the Federal Government: Hearing Before the Select Subcommittee on the Weaponization of the Fed Government*, 118 Cong. (2023).

of the clearance process and shortly before both Director Wray and Inspector General Horowitz were set to testify on Capitol Hill, where SA O'Boyle's case was inevitably going to be raised.[24]

II. FORMER EAD DUNHAM'S REVOCATION OF SA O'BOYLE'S CLEARANCE WAS IMPROPER, AND SA O'BOYLE'S CLEARANCE SHOULD BE RESTORED.

Former EAD Dunham's decision to revoke SA O'Boyle's clearance was improper because:

1) The revocation of SA O'Boyle's clearance was in reprisal for protected whistleblower disclosures, in violation of Presidential Policy Directive 19 ("PPD-19") and 50 U.S.C. § 3341(j)(1);

2) The revocation did not meet the standards for revocation under Security Executive Agent Directive 4, the National Security Adjudicative Guidelines (June 8, 2017) ("Adjudicative Guidelines"); and

3) The revocation violated the First Amendment to the U.S. Constitution.

A. The Revocation of SA O'Boyle's Security Clearance Was in Reprisal for Protected Whistleblower Disclosures.

1. Applicable Law and Presidential Policy Directive

Under Presidential Policy Directive/PPD-19 ("PPD-19) § B:

> Any officer or employee of an executive branch agency who has authority to take, direct others to take, recommend, or approve any action affecting an employee's Eligibility for Access to Classified Information shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, any action affecting an employee's Eligibility for Access to Classified Information as a reprisal for a Protected Disclosure.

In relevant part, PPD-19 § F(5) defines a "protected disclosure" as:

> [A] disclosure of information by the employee to a supervisor in the employee's direct chain of command up to and including the head of the employing agency, to the Inspector General of the employing agency . . . that the employee reasonably believes evidences (i) a violation of any 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 . . . , lawfully participating in an investigation or proceeding regarding a violation of Section A or B of this directive; or . . . cooperating with or disclosing information to an Inspector General . . . .

Like PPD-19, 50 U.S.C. § 3341(j)(1)(A) prohibits the use of security clearance determinations "in retaliation" for disclosing "(i) a violation of any Federal law, rule, or regulation; or (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety" to a supervisor in the employee's chain of command. Also, under § 3341(j)(1)(D), disclosures "in the exercise of any appeal, complaint, or grievance right granted by any law, rule or regulation" are protected so long as the disclosure does not include classified information. Disclosures to Congress are protected under 5 U.S.C. § 2303(a)(1)(F). Furthermore, "nothing in [50 U.S.C. § 3341(j)(1)] shall be construed to

[24] SA O'Boyle received the revocation notice by FedEx the morning of July 18, 2024.

authorize the withholding of information from Congress or the taking of any personnel action or clearance action against an employee who lawfully discloses information to Congress."[25]

2. SA O'Boyle's Disclosures Were Protected.

SA O'Boyle's disclosures meet several of the required definitions for protection under PPD-19 and 50 U.S.C. § 3341(j). They all involved what reasonably appeared to be (1) violations of law, rule, or regulation, (2) abuse of authority, or (3) gross mismanagement.

Violation of Law, Rule, or Regulation

As explained in Section I.A. above, almost all of the described disclosures involved violations of law, rule, or regulation.

Abuse of Authority

SA O'Boyle's disclosures also described an abuse of authority. The Merit Systems Protection Board has defined abuse of authority as "an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons."[26]

Many, if not all, of SA O'Boyle's disclosures involved FBI personnel using their authority to discriminate against others based on political or personal animus and/or to penalize others for whistleblowing (i.e., pointing out improper FBI actions).

Gross Mismanagement

In a non-precedential decision, the U.S. Court of Appeals for the Federal Circuit has defined gross mismanagement as "a management action or inaction which creates a substantial risk of significant adverse impact upon the agency's ability to accomplish its mission."[27]

Here, O'Boyle's disclosures concerned the FBI basing its decisions not on mission effectiveness, but on whistleblower reprisal and personal or political animus, and in the process, grossly misallocating resources.

3. The FBI SecD Officials Knew of SA O'Boyle's Disclosures.

SA O'Boyle made disclosures #1–4, 7, and 17 directly to his FBI chain of command, mostly in late 2021 and early 2022. His chain of command clearly had knowledge of his protected activity.

By August 30, 2022, SecD had learned of SA O'Boyle's protected disclosures related to COVID-19 vaccination requirements because SecD officials interviewed SA O'Boyle's ASAC who described SA O'Boyle's expressed concerns about the legality of the vaccine mandates.[28] Thus, SecD suspended SA O'Boyle's security clearance approximately three weeks after learning of SA O'Boyle's protected disclosures to his chain of command.

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[25] 50 U.S.C. § 3341(j)(2).

[26] *Wheeler v. Dep't of Veterans Affs.*, 88 M.S.P.R. 236, 241 (2001) (quoting *Ramos v. Dep't of Treasury*, 72 M.S.P.R. 235, 241 (1996)).

[27] *Kavanagh v. Merit Sys. Prot. Bd.*, 176 F. App'x 133, 135 (Fed. Cir. 2006).

[28] Clearance File at 165.

Moreover, just four days before suspending SA O'Boyle's clearance, on September 19, 2022, SecD officials inserted a letter in his clearance file from a member of Congress to then FBI Director Christopher Wray. The letter described whistleblower disclosures authenticating a document and an image of a document, which FBI officials learned were accessed by SA O'Boyle.[29] So, not only was SecD aware of SA O'Boyle's protected disclosures to Congress, but it also used those protected disclosures as part of its basis to suspend his security clearance, in violation of PPD-19 and 50 U.S.C. § 3341(j).

SecD officials learned additional details about SA O'Boyle's protected disclosures during the post-suspension investigation of his clearance. When New York FBI agents investigating Project Veritas interviewed SA O'Boyle on September 26, 2022, he notified them that he had made whistleblower referrals, including a "whistleblower complaint" to a member of Congress.[30] The FD-302 of that interview was included in SecD's clearance file on November 10, 2022.[31] Shortly after the September 26, 2022, interview, SecD received a letter from SA O'Boyle's attorney providing formal notice that SA O'Boyle had made protected disclosures.[32]

Finally, more details of SA O'Boyle's whistleblowing became apparent on May 18, 2023, when he testified publicly before the House of Representatives Select Subcommittee on the Weaponization of the Federal Government ("Weaponization Subcommittee"). SA O'Boyle shared under oath with Congress many of the protected disclosures he had previously made. In what became perhaps the most viral moment of the hearing, SA O'Boyle summarized his experience with whistleblowing on the FBI: "[T]he FBI will crush you. This government will crush you and your family if you try to expose the truth about things that they are doing that are wrong, and we are all examples of that."[33]

Thus, this public testimony to Congress about SecD's violations of law, abuses of authority, and gross mismanagement through its abuse of the clearance process was an additional protected disclosure. The reasonableness of his belief that SecD's suspensions of whistleblowers' clearances were improper is confirmed by the fact that SecD later reinstated the clearance of, fellow whistleblower and former FBI Staff Operations Specialist ("SOS"), Marcus Allen.[34] (Allen was also represented by Empower Oversight and ACLJ.) Of course, SecD was certainly aware of SA O'Boyle's testimony since it was televised and covered by several news outlets.

4. Former EAD Dunham's Revocation of SA O'Boyle's Clearance Was in Reprisal for Protected Disclosures.

Not only were SecD officials aware of SA O'Boyle's congressional testimony and previous protected disclosures, it is also apparent that the revocation of his clearance was in reprisal for those protected disclosures. In a whistleblower reprisal complaint filed by a former SecD SSA ("SecD SSA") represented by Empower Oversight, the SecD SSA reported that SecD officials

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[29] *Id*. at 341–43

[30] *Id*. at 406–07

[31] *Id*. at 405.

[32] *Id*. at 673.

[33] *Hearing on the Weaponization of the Federal Government: Hearing Before the Select Subcommittee on the Weaponization of the Fed Government*, 118 Cong. 79 (2023) (Statement of Garret O'Boyle).

[34] https://empowr.us/fbi-whistleblowers-security-clearance-reinstated-in-full/.

were furious that whistleblowers SA O'Boyle, former SA Stephen Friend, and former SOS Allen had testified before Congress. The SecD SSA also advised that, at the time of the Congressional testimony, SecD was already aware that SA O'Boyle was not the masked agent in the Project Veritas video – a fact SecD acknowledges in the clearance file.[35] That SecD knew O'Boyle had not leaked the information to Project Veritas yet allowed the Committee and the public to be misled by failing to acknowledge that fact is powerful evidence that the revocation of SA O'Boyle's clearance was in reprisal for his protected disclosures.

B. The Revocation of SA O'Boyle's Security Clearance Is Improper Under the Adjudicative Guidelines Because It Fails to Consider Relevant Context and Is Based on Incorrect Facts and Unjustified Assumptions

Not only is the revocation of SA O'Boyle's clearance in reprisal and retaliation for his protected disclosures, but his conduct also fails to meet the standards for revocation under Adjudicative Guidelines E - Personal Conduct, K - Handling Protected Information, and M - Use of Information Technology. As demonstrated below, the conclusions in SecD's Revocation EC are based on incorrect assumptions and a failure to consider relevant facts and circumstances. Of particular significance, SecD's adjudicative analysis fails to account for the fact that SA O'Boyle was accessing the information at issue in connection with protected disclosures to Congress. This alone is fatal to the revocation decision. Indeed, all of SA O'Boyle's disclosures to Congress are fatal to its revocation decision. SA O'Boyle did not knowingly fail to cooperate with a security investigation, provide false information, or mishandle protected information because his actions were informed by his whistleblowing to Congress and FBI/SecD's long history of abusing their authority to retaliate against whistleblowers. Thus, SA O'Boyle's conduct is not disqualifying.

1. SA O'Boyle's Declination, on Advice of Counsel, of SecD's Interview Request Is Not Disqualifying.

In its revocation analysis, SecD invoked the fact that in late summer 2023, SA O'Boyle declined to participate in an interview ostensibly requested by SecD. This request came nearly a year after the FBI suspended his security clearance and placed him on unpaid administrative leave. It also came only *after* he had testified as an FBI whistleblower before Congress and *after* a partisan criminal referral to the DOJ targeted him for a retaliatory investigation based on that testimony. The purpose of the interview was supposedly, "an attempt to resolve questions regarding [his] suitability to maintain a Top Secret clearance." While declining to meet with a security investigator might normally be disqualifying, given the relevant context, it should not be disqualifying here.

First, on September 26, 2022, SA O'Boyle had already voluntarily participated in an FBI interview on the principal subject matter of his suspension: his suspected leaking of information related to the Project Veritas investigation. While that interview was conducted by special agents assigned to the criminal investigation of Project Veritas, the evidence suggests it was coordinated with SecD investigators and reflected their input. In fact, SecD's letter suspending SA O'Boyle's security clearance was dated September 23, 2022, just four days before he was confronted by the criminal agents upon arriving at his new duty station in Virginia. Of course, the letter of suspension was not presented to SA O'Boyle until after the interview had concluded. The FD-302 of that interview found its way into SecD's clearance file by November 10, 2022,[36] further confirming the close and timely coordination between the criminal investigators and the security investigators. In short, at best, SecD had questionable need for a second interview to resolve

[35] Clearance File at 672.

[36] *Id*. at 405

questions related to SA O'Boyle's accessing of the Project Veritas information that was the subject of his protected disclosures to Congress.

Second, immediately after SA O'Boyle's voluntary participation in the September 26, 2022, surprise interview, SA O'Boyle was subjected to the transparently vindictive actions described above. Having been lured, along with his wife and children, to a new position 800 miles from the home he had just sold, he was immediately suspended without pay and left homeless with no access to his personal belongings for weeks. In light of these circumstances, SA O'Boyle was reasonably and justifiably concerned that the FBI's request for a second interview at this late date was a *post hoc,* retaliatory fishing expedition designed to buttress an illegal revocation decision that had already been made in retaliation for legally protected whistleblowing. His suspicion that SecD harbored retaliatory animus was later confirmed by multiple FBI whistleblowers from inside SecD itself, including the SecD SSA who reported SecD officials' anger at SA O'Boyle's testimony before Congress.

Third, after SA O'Boyle voluntarily testified before Congress, he was subjected to a partisan criminal referral to the Department of Justice by U.S. House of Representatives Judiciary Committee Ranking Member Jerrold Nadler and Weaponization Subcommittee Ranking Member Stacey Plaskett.[37] On June 8, 2023, these two high-ranking members of Congress, who argued vociferously in favor of SecD's actions in suspending SA O'Boyle, made false claims that SA O'Boyle had lied to Congress about being a source for Project Veritas. As noted above, at the time of the criminal referral, SecD already knew that SA O'Boyle was not the agent who appeared in the Project Veritas video. Yet, the FBI refused to correct the record with Congress on that fact.

Thus, by the time SecD requested to interview SA O'Boyle in the summer of 2023, FBI officials had already engaged in nearly a year of vindictive, retaliatory misconduct. The FBI had forced him into indefinite leave without pay following an ambush interview without legal representation by agents conducting a criminal investigation of Project Veritas—the case on which O'Boyle had lawfully blown the whistle to Congress. Moreover, partisan allies of the FBI in Congress had targeted O'Boyle with a bogus a criminal referral to the DOJ—which the FBI knew was baseless—in retaliation for those same protected whistleblower disclosures.

In this context, SA O'Boyle justifiably followed the advice of his counsel to decline the SecD interview. As the revocation analysis concedes, a general "refusal to be interviewed based upon the advice of legal counsel is a *mitigating* factor under the Adjudicative Guidelines."[38] Here, the mitigation based on counsel's advice should be overwhelming. The representation by SecD's counsel that the interview would be conducted pursuant to Kalkines warnings was inadequate protection given the glaring specter of retaliation and the risk of a politically-driven "perjury trap" motivated by retaliatory animus for exposing FBI misconduct.[39]

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[37] *See* https://empowr.us/wp-content/uploads/2024/07/2024-07-23-TL-to-JJ-HJC-SecD-SSA-supplementary-disclosure.pdf at 8–9.

[38] Adjudicative Guidelines at 14 (emphasis added).

[39] SecD Associate General Counsel ("AGC") Tasha Gibbs interacted with SA O'Boyle's counsel regarding the interview request and gave the assurances regarding Kalkines warnings. According to FBI whistleblowers, Gibbs has a history of bias against whistleblowers based on their political beliefs. AGC Gibbs was the FBI official who initially reported Marcus Allen to SecD based on his political beliefs, even before she was assigned to assist SecD. Gibbs went on to work with SecD, where she advocated for the revocation of Allen's clearance. Allen's clearance was ultimately reinstated—but not until Gibbs recused herself from consideration of that matter. SecD whistleblowers have also related that AGC Gibbs pressed for the revocation of SA O'Boyle's security clearance just before a phone conversation between Gibbs and SA O'Boyle's counsel regarding the parameters of the requested SecD interview

2. SecD Misrepresented SA O'Boyle's Voluntary and Truthful Interview with the Project Veritas Criminal Investigators.

In its analysis of SA O'Boyle's conduct, SecD states that it "does not credit" his statement to criminal investigators that he "accessed the [Project Veritas] investigation possibly because of a source report."[40] SecD then concludes that SA O'Boyle's statement was not credible because no documented "source report" regarding Project Veritas was authored by SA O'Boyle.

But SA O'Boyle never stated that he "acted" on the basis of a "source report." He stated that he "may have heard about PROJECT VERITAS through a source which prompted him to look it up."[41] The term "source" is extremely broad, clearly encompassing information gleaned from media or the internet. It is certainly not limited to a CHS. Also, agents are required to contact CHSs routinely and often simply document the contact without any substantive report, even though they may have had a long conversation with the source covering such things as current events. Agents cannot and do not document everything a source has told them. Project Veritas could simply have come up in conversation with a CHS, and SA O'Boyle would have had no reason to document it without additional information, especially considering the Project Veritas matter was, at some point, widely reported in the news.[42] Thus, SecD's assumption that SA O'Boyle "would have been expected to document that information"[43] is flat-out wrong. There is no basis for SecD's reliance on SA O'Boyle's voluntary participation in the September 26, 2022, criminal investigative interview as evidence of a lack of candor. The weakness of this tea is confirmed by the fact that SecD makes no claim that SA O'Boyle made false statements or lacked candor in his sworn testimony to Congress. Indeed, SecD includes SA O'Boyle's testimony at a congressional hearing in its file.[44]

Similarly, SecD's claim that SA O'Boyle "first accessed the [Project Veritas] case file one day after news reports referenced FBI search warrants regarding [Project Veritas]"[45] is misleading. In fact, according to SecD's own Clearance File, SA O'Boyle searched for "Project Veritas" in FBI databases on October 13, 2021, about three weeks *before* the *New York Times* article published on November 5, 2021.[46] Thus, although he did not access the Project Veritas case file until after media reports, the fact that he first searched FBI databases for the term "Project Veritas" three weeks *before* those reports suggests that he was truthful when he said he heard about Project Veritas from a source. SecD has selectively cited facts from its own file to justify its desired conclusion.

In addition to putting words into SA O'Boyle's mouth and selectively ignoring the same database searches it uses against him, SecD makes unsupported claims about FBI employees' authority to access databases that conflict with the reality and practice of how FBI investigators

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and whether a Kalkines warning would be given. *See* https://empowr.us/wp-content/uploads/2024/09/2024-09-19-TL-to-Jordan-HJC-FBI.pdf at 5, 14–19. This substantiates SA O'Boyle's fear that the revocation determination was a *fait accompli* and that the interview request was made for other reasons.

[40] Clearance File at 681.

[41] *Id*. at 406.

[42] *Id*.

[43] *Id*. at 681

[44] *Id*. at 566–67, 596, 600–01, 608–11, 616–17, 622, 624–29, 631–34, 636.

[45] *Id* at 681.

[46] *Id*. at 50–52, 64.

do their work every day. SecD's claim that SA "O'Boyle is well aware he is not authorized to search FBI databases based upon news reports that have no relation to investigations he is conducting" is simply false.[47]

No such warnings were provided to SA O'Boyle. And, in fact, FBI employees routinely "search FBI databases based upon news reports that have no relation to investigations [they are] conducting" for multiple legitimate reasons, including to develop new cases. That's precisely why access to that information is broadly granted to line agents all over the country. For example, FBI agents investigating public corruption commonly rely on news reports to provide leads and predicate to open initial investigations. The same is true of agents, like SA O'Boyle, assigned to domestic terrorism investigations. Project Veritas was certainly an area of interest to domestic terrorism investigations because it was a subject of interest to sources, witnesses, and subjects in that area. SA O'Boyle had every reason to believe the subject would come up during investigations he was conducting. Finally, as will be discussed in greater detail below, SA O'Boyle believed he was authorized to access databases as an FBI whistleblower with an obligation to support his reports of government wrongdoing.

Thus, SA O'Boyle was entirely justified in following the advice of his counsel to decline the requested interview by SecD. He did not provide false information to criminal investigators. And, he did not believe he was prohibited from accessing FBI database information on other cases in furtherance of his official duties—which include making protected disclosures regarding FBI misconduct. There is no basis to revoke SA O'Boyle's clearance based on Guideline E – Personal Conduct.

3. SecD Has No Basis to Revoke SA O'Boyle's Clearance Under Guideline K – Handling Protected Information Because SA O'Boyle's Access to FBI Information Was in His Capacity as a Whistleblower Under Law and Regulation.

SA O'Boyle's access to FBI files identified by SecD is not disqualifying under Guideline K because he only did so as part of his protected whistleblowing. Even if his access were disqualifying for some other supposed reason, which it isn't, the alleged access is mitigated under Guideline K because it was "due to improper or inadequate training or unclear instructions."[48]

First, SecD ignores the fact that SA O'Boyle accessed information in order to provide support for protected disclosures to his chain of command and Congress, as described in Section I.A above. Aside from these protected disclosures, he shared FBI information only with other active FBI employees. SecD relies on its claim that SA O'Boyle did not have a need-to-know the information he accessed, but it does not take the position that protected whistleblowing is an improper or unjustifiable reason for him to access the discrete information at issue. The FBI whistleblower protections shield FBI employees when they make protected disclosures of information they reasonably believe is evidence of government misconduct, which is precisely what SA O'Boyle did. FBI employees cannot expose misconduct if they are barred from accessing evidence of the misconduct by the very perpetrators of that misconduct. Simply put, SecD cannot abuse the security clearance process here to chill FBI employees from exposing FBI and DOJ wrongdoing in violation of FBI whistleblower protections.

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[47] *Id*. at 681

[48] Adjudicative Guidelines at 22.

Second, SecD falsely claims that it has no way of knowing why SA O'Boyle was accessing the files because of his refusal to submit to a SecD interview. As explained in Section II.B.1 above, SA O'Boyle was justified in declining to interview. That issue aside, SecD had ample notice that SA O'Boyle accessed the files in connection with his protected disclosures. The Clearance File has several references to SA O'Boyle's protected disclosures to Congress.[49] And O'Boyle told the criminal investigators who interviewed him on September 26, 2022, that he had accessed files and made protected disclosures.[50] Thus, SecD was well aware of his protected disclosures to Congress and that he accessed those files in furtherance of his protected disclosures.

Third, even assuming, *arguendo*, that SA O'Boyle's reasonable concerns about FBI and DOJ wrongdoing and the protections for whistleblowers failed to provide sufficient "need-to-know" to access the information at issue, any violation by O'Boyle is mitigated because of improper or inadequate training or unclear instructions to that effect. Congress enacted FBI whistleblower protections in 5 U.S.C. § 2303. DOJ has promulgated regulations related to those protections.[51] FBI employees receive training on their whistleblower protections. SA O'Boyle received that training on December 20, 2021.[52] Nothing in FBI whistleblower protection training notifies an employee that he has no authority to access FBI information in connection with protected disclosures, either to support such disclosures or to evaluate whether a protected disclosure should be made.

Moreover, nothing in the agreements SA O'Boyle signed to gain access to classified information or FBI databases notifies an employee that reporting government wrongdoing is not a legitimate need-to-know.[53] Furthermore, several of those agreements include specific notifications that they do not conflict with or supersede whistleblower protections.[54] Those agreements that do not specifically provide those notifications are in violation of Congressional appropriation riders that forbid the use of appropriated funds to implement or enforce nondisclosure agreements or policies that do not contain that provision.[55] Simply put, the FBI never provided any training to SA O'Boyle notifying him that he could not access FBI information in connection with his duty to report FBI and DOJ wrongdoing.

SecD implicitly admits as much by not *explicitly and honestly articulating* that it relied on SA O'Boyle's protected disclosures as a basis to revoke his clearance. SecD knows that revoking his clearance for making protected disclosures violates PPD-19 and 50 U.S.C. § 3341(j). Instead, SecD is using SA O'Boyle's access to the information in connection with his protected disclosures as an end-run around whistleblower protections and a pretext to take action indirectly that it knows it cannot take directly.

SecD has no basis to use SA O'Boyle's access to FBI information as a basis to revoke his security clearance under Guideline K – Handling Protected Information.

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[49] Clearance File at 519, 524, 530, 555–636, 673.

[50] *Id*. at 406.

[51] 28 C.F.R. § 27.1, et seq.

[52] Clearance File at 279.

[53] *See id*. at 286–97, 300–07.

[54] *Id*. at 289—90, 292–93, 295.

[55] *See e.g.*, Consolidated Appropriations Act for Fiscal Year 2018, Pub. L. No. 115-141, 132 Stat. 599–600.

4. SecD Has No Basis to Revoke SA O'Boyle's Clearance Under Guideline M – Use of Information Technology.

SecD argues that SA O'Boyle's downloading and transportation of the same information used as the basis for his protected disclosures justifies revocation under Guideline M. For the same reasons his access to that information as part of protected whistleblowing is not disqualifying under Guideline K, it is not disqualifying under Guideline M. His efforts at protected whistleblowing provide him a "discernible job-related reason" to download and transport the information.[56]

The only security incidents used to justify revocation under Guideline M are SA O'Boyle's improper packaging and marking of two classified documents and his use of so-called "personal" thumb drives. First, the "the misuse was minor and done solely in the interest of organizational efficiency and effectiveness."[57] The FBI regularly uses FedEx to transport Secret-level material, and the material at issue was shipped from one FBI facility to another. Second and alternatively, the conduct was unintentional and inadvertent which is an independent basis for mitigation under Guideline M.41(c).[58] SecD cites no identified or suspected malicious purpose for SA O'Boyle to have sent the two classified documents to himself at his new duty station. Third, the shipment of the classified documents and use of the thumb drives appears to be due to improper or inadequate training and unclear instruction which provides another basis for mitigation under Guideline M.41(d).[59] Finally, both incidents are mitigated by the factual context surrounding them.

FBI employees are sometimes constrained to use "personal" thumb drives because official FBI drives are not available. In this case, SA O'Boyle recalls that the thumb drives he used were not his. He did not purchase them and bring them to work. Rather, the squad OST, who had a handful of them in one of her drawers, provided him with the drive. So, he obtained the drive from another FBI employee. FBI employees keep office supplies and tools and share them with each other when necessary to the task at hand. Yet, SecD ignores that practical reality and assumes the worst without any basis.

As for the two classified documents, again, context is important. SA O'Boyle was doing casework virtually until his last day in Wichita. SSA Fitzgerald was adamant that SA O'Boyle finish certain casework before he left. In fact, SSA Fitzgerald kept SA O'Boyle so busy before his transfer that SA O'Boyle was unable to take a house hunting trip. As a result, SA O'Boyle was forced to pack up his desk on his last or second-to-last day in the office, so he did not have time to review all the documents he packed. He did not believe he packed any classified information and was not aware of any being in his desk.

Additionally, it is unclear from the Clearance File what the classified documents were, other than "intelligence products that do not appear to have any relevance to his job duties."[60] The Clearance File does not explain whether the documents might have informed SA O'Boyle's reasonable basis to believe his protected whistleblower disclosures. If so, the documents might be relevant to evaluate his obligations to report wrongdoing. SA O'Boyle does not recall the documents in question, and SecD does not indicate whether SA O'Boyle even accessed those

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[56] Clearance File at 682.

[57] Guideline M.41(b), Adjudicative Guidelines at 23.

[58] Adjudicative Guidelines at 24.

[59] *Id.*

[60] Clearance File at 682.

products. If he did not access the products in FBI databases, it begs the question of whether he was even the individual who printed them out, or whether someone else on his squad or in his office did. SecD would be able to determine whether someone in the Wichita RA accessed those documents and may have been the source of the printed versions.

Regardless, as discussed above, SA O'Boyle was accessing FBI files in connection with his protected disclosures, and thus had legitimate reasons to access files or maintain documents while he was deliberating whether a protected disclosure was appropriate. Whether he made protected disclosures related to those intelligence products, he had a legitimate reason to review intelligence products that could have been relevant to a potential protected disclosure or to his other job duties. Without knowing the nature of those products, it is difficult to tell.

Finally, in any event, SecD has made no allegation that anyone improperly released those products, let alone SA O'Boyle. So, as discussed above, at worst, SA O'Boyle mistakenly caused Secret documents to be shipped to himself. That is not evidence of malicious intent to improperly disclose classified material, and the FBI has cited no evidence that the incident resulted in any inadvertent leakage of classified material or had any impact whatsoever on national security.

Despite these minor and honest mistakes, SecD jumps to an extreme conclusion that SA O'Boyle "appears to have taken steps to avoid being detected inappropriately searching for, copying, and downloading information from FBI databases when he took screenshots of FBI records."[61] Yet, virtually every FBI employee, including SA O'Boyle, knows that the FBI tracks activity on FBI computer systems including searches and use of thumb drives. Whether one uses screenshots and downloads them to a thumb drive or directly downloads files, the FBI can track that activity, and FBI employees know it. SecD's wealth of information about SA O'Boyle's activity in FBI computer systems only proves that point. SA O'Boyle's use of a snipping tool was actually protective of FBI information because it allowed him to copy only the specific information related to his potential protected disclosures.

SA O'Boyle was not engaged in nefarious activities. He reasonably believed he was engaging in protected whistleblowing, which is one of his official duties encouraged and protected by law. Any security incidents related to FBI information technology systems were minor and not intended to evade detection of his activities.

There is no basis to revoke SA O'Boyle's clearance under Guideline M. Even if there were, the conditions of using FBI systems mitigate any security concerns.

5. SecD Violated the Adjudicative Guidelines by Failing to Follow the Whole-Person Concept.

According to the Adjudicative Guidelines:

> The adjudicative process is an examination of a sufficient period and a careful weighing of a number of variables of an individual's life to make an affirmative determination that the individual is an acceptable security risk. This is known as the whole-person concept. All available reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a national security eligibility determination.[62]

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[61] *Id.*

[62] Adjudicative Guidelines at 6.

SecD did not engage in a "careful weighing of a number of variables," nor did it consider "[a]ll available reliable information" in its decision to revoke SA O'Boyle's security clearance. SecD did not consider SA O'Boyle's prior service in combat with the U.S. Army in Afghanistan and Iraq, his service as a police officer, his dedication to the FBI's mission through his eager involvement in various positions within the organization (e.g., SWAT team, Relief Supervisor, Training Agent, Assistant Weapons of Mass Destruction Coordinator, Defensive Tactics Instructor), or the upheaval to his own personal life to join the FBI's newly established National Surveillance Team.

Also, as discussed above, SecD did not consider that all of the alleged security concerns were related to or associated with his protected disclosures. SecD also made incorrect conclusions that have no basis in fact or the reality of how FBI agents do their jobs. SecD's reference to conducting a "whole person assessment" is a hollow check-in-the-block with no actual analysis of the myriad factors that weigh in favor of SA O'Boyle's eligibility to access classified information.[63]

SecD's revocation of SA O'Boyle's security clearance violates the Adjudicative Guidelines.

C. SecD' Revocation of SA O'Boyle's Security Clearance Violates His First Amendment Rights.

1. SecD Revoked SA O'Boyle's Security Clearance Based on His Political Beliefs in Violation of the First Amendment.

The Supreme Court has observed: "'If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein.'"[64] "[T]he First Amendment protects political association as well as political expression."[65] "These protections reflect our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]'"[66] For these reasons, the Supreme Court held that terminating public employees for political patronage purposes—belonging to the wrong political party—"to the extent it compels or restrains belief and association is inimical to the process which undergirds our system of government and is at war with the deeper traditions of democracy embodied in the First Amendment."[67]

Although the FBI has a legitimate interest in limiting access to classified material of employees who seek to overthrow the United States, as the Supreme Court has observed:

> The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes,

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[63] Clearance File at 682.

[64] *Elrod v. Burns*, 427 U.S. 347, 356 (1976) (quoting *Board of Education v. Barnette*, 319 U.S. 624, 642 (1943)).

[65] *Id.* at 357 (internal quotation omitted).

[66] *Id.* (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

[67] *Id.* (internal quotation omitted).

> if desired may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.[68]

For that reason, the Court held that a law allowing the removal of public school teachers for "treasonable or seditious utterances or acts" was vague and violated the First Amendment.[69]

Under *Keyishian*, the Adjudicative Guidelines themselves may be subject to a facial challenge. However, SA O'Boyle does not need to establish that, because, as applied to him, SecD's revocation violates his First Amendment rights. SecD has revoked his clearance based on his political beliefs. SA O'Boyle made a series of protected disclosures about the FBI's COVID-19 vaccination policy, and SecD suspended his clearance just three weeks after his ASAC told SecD that SA O'Boyle had objected to the vaccination policy.[70] SecD targeted SA O'Boyle for his political beliefs just as it targeted Marcus Allen. SecD whistleblowers have reported that SecD managers sought to take security clearance actions against employees who resisted COVID-19 vaccination policies—a factor unrelated to any legitimate security determination.[71]

2. SecD Revoked SA O'Boyle's Security Clearance Because of His Protected Speech in Violation of the First Amendment.

As discussed above, SecD has used SA O'Boyle's actions, which are part of protected disclosures to Congress, as a basis to revoke his security clearance. In addition to statutory and regulatory protections, a federal employee's disclosures to Congress are protected under the First Amendment. The Supreme Court has identified two inquiries to guide the interpretation of the constitutional protections accorded to public employee speech. "The first requires determining whether the employee spoke as a citizen on a matter of public concern."[72] If the answer is "yes," then "[t]he question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[73]

However, the Supreme Court has narrowed the definition of when an employee is performing their job duties in the free speech context. In *Lane v. Franks*, the Court observed that "[t]he critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[74] Although protected by statute, based upon SecD's treatment of SA O'Boyle's activities in furtherance of his protected disclosures, the FBI does not see reports to Congress by street agents as "ordinarily within the scope" of their duties. Therefore, they may be protected under the First Amendment.

Furthermore, SA O'Boyle's disclosures were clearly on matters of public concern. "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."[75] "[C]orruption in a

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[68] *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 602 (1967) (internal quotation omitted).

[69] *Id.* at 604.

[70] Clearance File at 165.

[71] *See* https://empowr.us/wp-content/uploads/2024/09/2024-09-19-TL-to-Jordan-HJC-FBI.pdf at 2, 10, 14, 19.

[72] *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citing *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205, Will Cty., Ill.*, 391 U.S. 563, 568 (1968)).

[73] *Id.* (citing *Pickering*, 391 U.S. at 568).

[74] 573 U.S. 228, 240 (2014).

[75] *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (citing *Pickering*, 391 U.S. at 572).

public program and misuse of [public resources] . . . obviously involve[] a matter of significant public concern."[76]

The FBI lacked adequate justification for its actions against SA O'Boyle. The FBI has no legitimate basis to stop employees from making protected disclosures to Congress, let alone "adequate justification" to take such an extreme action as revocation of a security clearance (and suspension of the clearance and suspension from duty while an employee is in the middle of a transfer, depriving them of their household goods for months). Based upon the facts of this case, a simple counseling by a supervisor would have been enough to address his access to FBI systems and to clarify whether or not he could do so in the course of his protected disclosures.

SecD's revocation of SA O'Boyle's security clearance violates his First Amendment rights.

CONCLUSION

As described above, SecD's decision revocation is: 1) in reprisal/retaliation for protected disclosures; 2) improper under the Adjudicative Guidelines because it is based on incorrect assumptions and a failure to consider relevant facts; and 3) in violation of the First Amendment. SecD's revocation decision should be reversed, SA O'Boyle's clearance should be reinstated, and he should be immediately returned to duty and provided back pay for his time on unpaid leave.

Cordially,

/Jason Foster/

Jason Foster
Chair & Founder

[76] *Lane*, 573 U.S. at 241.