ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
WASHINGTON, D.C.

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In the Matter of:

SHANNON FAGAN,

Complainant,
v.

THE DEPARTMENT OF THE NAVY,

Respondent.
* *

ALJ CASE NO. 2021-CER 00001
ARB CASE NO. 2023-0006

AMICUS BRIEF OF THE SOLICITOR OF LABOR

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TABLE OF CONTENTS

Page(s)

AMICUS IDENTITY, INTERESTS AND RELEVANCE OF BRIEF 2

QUESTION PRESENTED FOR INTERLOCUTORY REVIEW 2

STATEMENT OF THE CASE 2

A. Procedural History 2

B. Statutory Framework 3

C. Development of Significant Caselaw 5

ARGUMENT 7

A. Summary of Argument 7

B. Authority to Conduct Hearings Under the Administrative Procedure Act Does Not, Alone, Convey Authority to Issue and Enforce Third Party Subpoenas 8

C. Childers and Its Progeny Do Not Mandate Reversal of the ALJ's Order 12

CONCLUSION 13

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Page(s)

Cases:

Bobreski v. U.S. Env't Prot. Agency,
284 F. Supp. 2d 67 (D.D.C. 2003)....................7, 11

Childers v. Carolina Power & Light Co.,
2000 WL 1920346....................Passim

Cohens v. State of Virginia,
19 U.S. 264, 5 L. Ed. 257 (1821)....................12

Hvser v. Reed,
318 F.2d 225 (D.C. Cir. 1963)....................8, 9

Immanuel v. U.S. Dep't of Labor,
1998 WL 129932 (4th Cir. 1998)....................7, 8

Johnson v. United States,
628 F.2d 187 (D.C. Cir. 1980)....................8

Old Republic Ins. Co. v. Fed. Crop Ins. Corp.,
947 F.2d 269 (7th Cir. 1991)....................4, 9

Serr v. Sullivan,
270 F. Supp. 544 (E.D. Pa. 1967)....................9

Ubiotica v. Food and Drug Admin.,
427 F.2d 376 (6th Cir. 1970)....................9

Statutes:

Administrative Procedure Act
5 U.S.C. § 554....................4
5 U.S.C. § 555(d)....................Passim
5 U.S.C. § 556(b)....................8
5 U.S.C. § 556(c)....................9
5 U.S.C. § 556(c)(2)....................4, 8, 9
5 U.S.C. § 556(c)(5)....................8
5 U.S.C. § 556(e)....................5

Immigration and Nationality Act,
8 U.S.C. § 1182(n)(2)(B)....................6

Water Pollution Control Act,
33 U.S.C. § 1367(a) 7
33 U.S.C. § 1367(b) 7

Safe Drinking Water Act,
42 U.S.C. § 300j-9(i).......... 1
42 U.S.C. § 300j-9(i)(2)(b) 4

Atomic Energy Act,
42 U.S.C. § 2201(c) 5, 6

Energy Reorganization Act,
42 U.S.C. § 5851(b)(2)(A) 5

Comprehensive Environmental Response, Compensation and Liability Act,
42 U.S.C. § 9610 1
42 U.S.C. § 9610(b) 4

Code of Federal Regulations:

29 C.F.R. Part 24 1
29 C.F.R. § 18.12(b)(3) 8
29 C.F.R. § 18.56(a)(1) 3, 4, 7, 9

Other Authorities:

Notice of Proposed Rulemaking, Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges,
77 FR 72142-01, 2012 WL 5996358 8

Administrative Law Practice and Procedure § 2:4 10

Attorney General's Manual on the Administrative Procedure Act (1947) 10

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	*	
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* *	*	

BRIEF OF THE SOLICITOR OF LABOR AS AMICUS CURIAE

This matter arises out of the whistleblower provisions of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610, the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i), and their implementing regulations. 29 C.F.R. Part 24 (2022). On April 6, 2023, the Administrative Review Board ("Board") granted interlocutory review of the Administrative Law Judge's ("ALJ") order denying Complainant Shannon Fagan's ("Complainant") motions for subpoenas for third-party witnesses' hearing attendance. The Board granted interlocutory review of this order to "focus on the issue of whether *Childers* and its progeny mandate an outcome different than that ordered by the ALJ below." The Solicitor of Labor ("Solicitor") submits this *amicus* brief to answer that narrow question – *Childers* and its progeny do not mandate reversal of the ALJ's order.

AMICUS IDENTITY, INTERESTS AND RELEVANCE OF BRIEF

Pursuant to the Board's April 6, 2023 order, the Solicitor submits this brief as *amicus curiae*. The Solicitor represents OSHA in the agency's enforcement of multiple whistleblower statutes. This amicus brief clarifies that the determination of whether Congress has authorized administrative whistleblower hearing officials to issue subpoenas must be made on a statute-by-statute basis. The Solicitor, through the undersigned counsel, wholly authored this brief, and no monetary contributions to the briefing effort were made by third parties.

QUESTION PRESENTED FOR INTERLOCUTORY REVIEW

In a whistleblower matter arising under CERCLA and SDWA, do the Board's decisions in *Childers* and its progeny mandate reversal of the ALJ's denial of motions for issuance of subpoenas to third parties?

STATEMENT OF THE CASE

A. Procedural History

Complainant Fagan ("Complainant") alleges the Navy terminated her employment in violation of the whistleblower provisions of CERCLA and SDWA; the Department of the Navy ("Navy") responds that she was legitimately terminated for unprofessional conduct. Complainant's Br. at 1. Complainant filed several motions for subpoenas to compel the trial testimony of approximately six individuals (all either former employees of the Navy or employees of other government agencies) who she asserts will testify to her protected disclosures, her working relationships and her professionalism. *Id.* at 2-3.

On October 7, 2022, the ALJ issued an *Order Denying Complainant's Motion for Subpoenas for Attendance at Hearing* ("Order"). The ALJ rejected Complainant's contention that subpoena authority could come from Congress's general conveyance of authority in

CERCLA and SDWA to conduct trial-type proceedings. Order at 2-3. The ALJ observed that the Secretary of Labor has no general subpoena authority, and that rather, "subpoena authority has been granted to the Secretary of Labor by Congress on a statute-by-statute basis," and that this principle has been enshrined by the OALJ rules of procedure, which limit ALJ subpoena power to where it has been "'authorized by statute or law.'" *Id*. at 4 (quoting 29 C.F.R. § 18.56(a)(1)). The ALJ then determined that neither CERCLA nor SDWA contained an express or implied grant of subpoena authority, and, after distinguishing *Childers* because it arose under the Energy Reorganization Act ("ERA"), stated that, "[a]t bottom, I disagree with the assumption in the *Childers* opinion that Congress (or executive branch agency heads, by delegation) meant to implicitly imbue ALJ's with subpoena authority simply by establishing formal trial-type hearing procedures, without more." *Id*. at 2, 4-5 (citing *Childers v. Carolina Power & Light Co.*, 2000 WL 1920346, ARB Case No. 98-077, 97-ERA-32 (Dec. 29, 2000)).

Complainant moved for interlocutory review of the Order, and the ALJ certified the Order for review. *Order Granting Motion to Certify Interlocutory Appeal and Stay Proceedings* (Oct. 7, 2022). The Board then granted interlocutory review, *de novo*, of the legal issue presented by the ALJ's Order. *Order Granting Interlocutory Review* (April 6, 2023).

B. Statutory Framework

The Administrative Procedure Act (APA) provides that, in the context of an administrative hearing conducted "on the record," agency subpoena authority may be exercised where granted by Congress. At such agency "record" hearings conducted pursuant to the APA, "[a]gency subpoenas *authorized by law* shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought." 5 U.S.C. § 555(d) (emphasis added). Subject to published rules of the

agency and within its powers, employees presiding at administrative hearings may, among other adjudicative powers, issue subpoenas when "*authorized by law*." 5 U.S.C. § 556(c)(2) (emphasis added). Litigants' general procedural rights, such as the right to receive notice of a hearing and the right to submit information, are listed at 5 U.S.C. § 554. Procedural regulations for OALJ hearings also likewise state that hearing officials may issue subpoenas only where "authorized by law." 29 C.F.R. § 18.56(a)(1).

CERCLA and SDWA both grant the Secretary authority to conduct "record" hearings on whistleblower claims. See 42 U.S.C. § 9610(b) and 42 U.S.C. § 300j-9(i)(2)(b). CERCLA provides in pertinent part that following the filing of a retaliation complaint:

> [T]he Secretary of Labor shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing at the request of any party to such review to enable the parties to present information relating to such alleged violation. . . . *Any such hearing shall be of record and shall be subject to section 554 of Title 5*. . . .

42 U.S.C § 9610(b) (emphasis added). SDWA similarly provides that, following the filing of a retaliation complaint:

> [T]he Secretary shall conduct an investigation of the violation alleged in the complaint. Within 90 days of the receipt of such complaint the Secretary shall . . . issue an order either providing the relief . . . or denying the complaint. An *order of the Secretary shall be made on the record after notice and opportunity for agency hearing*.

42 U.S.C. § 300j-9(i)(2)(b) (emphasis added).

Notably, "'[o]n the record' is a term of art in administrative law, meaning a full trial-like proceeding pursuant to § 556 of the Administrative Procedure Act ('APA'), where the agency's decision is based solely upon papers filed in the proceeding and evidence adduced at the hearing and thereby made part of the record." *Old Republic Ins. Co. v. Fed. Crop Ins. Corp.*, 947 F.2d

269, 277 (7th Cir. 1991) (Citing 5 U.S.C. § 556(e) and 2 K. Davis, Administrative Law § 10.7 (2d ed. 1979)).

C. Development of Significant Caselaw

Prior to 2000, the Board's leading decision on the question of ALJ subpoena authority was the ERA whistleblower case *Malpass v. General Electric Co.*, Nos. 85-ERA-38 & 39 (Sec'y Mar. 1, 1994), which stated, in *dictum*, that ALJs lacked subpoena authority where the underlying statute did not delegate such authority.

In 2000, the Board rejected the reasoning in the *Malpass* decision when it issued its opinion in *Childers v. Carolina Power & Light Co.*, 2000 WL 1920346, ARB Case No. 98-077, 97-ERA-32 (Dec. 29, 2000). In *Childers*, the Board, affirming the ALJ's decision against the complainant, determined that the complainant's alleged protected activity under the ERA was unconnected to his employer's decision to terminate him for poor job performance. *Id*. at *11. However, though it was unnecessary to do so, the Board also addressed the ALJ's denial of the complainant's request for subpoenas. *Id*. at *3-10. The Board asserted *Malpass* was wrong to limit an agency's authority to issue subpoenas to circumstances where Congress had "explicitly" granted such powers. *Id*. at *4-5. Relying heavily on the fact that the ERA provided the agency with authority to issue orders "'on the record after notice and an opportunity for a public hearing'" *Id*. at *6 (quoting 42 U.S.C. § 5851(b)(2)(A)), the Board concluded that Congress had therein intended to convey the power to employ "procedural mechanisms routinely used by courts to manage the gathering of material evidence….[W]hether mentioned in the legislation or not." *Id*.

In reaching this conclusion, the Board considered that the Nuclear Regulatory Commission was granted general administrative subpoena power by 42 U.S.C. § 2201(c), but no

similar provision of the ERA explicitly granted subpoena authority to the Secretary of Labor. The Board observed that "[o]rdinarily, this would be strong evidence that Congress intended to limit subpoena power to Commission proceedings under §2201(c). It would seem reasonable to regard the different treatments as deliberate and purposeful." *Id.* at *8. However, the Board also examined the ERA's legislative history – and in particular, the 24-year gap between the 1978 amendments adding whistleblower protections and the enactment of the original 1954 Atomic Energy Act legislation containing the subpoena authority granted to the NRC– and found Congress had not been "deliberate and purposeful" in granting subpoena power in some sections of the law but not the whistleblower section. *Id.* at *8. In sum, the Board based its reasoning on the text of the statute, particularly Congress's conveyance of "record" hearing authority, as well as its analysis of the statute's structure and legislative history.

In 2011, the Board revisited the question of hearing officials' ability to issue and enforce third-party subpoenas in the H-1B case *Adm'r v. Integrated Informatics, Inc.*, ARB Case No. 08-127 (ARB Jan. 31, 2011). For the purposes of that case, the pertinent INA provision requires "notice of [the WHD Administrator's] determination to the interested parties and an opportunity for a hearing on the complaint, in accordance with section 556 of Title 5 [of the Administrative Procedure Act]." 8 U.S.C. 1182(n)(2)(B). Unlike the statute at issue in *Childers*, this provision of the INA does not reference hearings "on the record." *Id*. Nevertheless, the Board cited to the conclusions about the authority granted by the ERA in *Childers* and concluded that ALJs had subpoena authority in H-1B hearings "[b]ecause both the ERA and the INA contain mandates that ALJs provide formal hearings in cases arising under those statutes." *Id.* at *7. This aspect of the *Integrated Informatics* opinion, like *Childers*, is also *dictum*, as the Board upheld the ALJ's

decision because the relevant individual testified at the hearing and was subjected to cross-examination, and therefore any error in the ALJ's denial of the subpoena was harmless. *Id*.

In addition to the Board's cases on hearing officials' authority to issue subpoenas to third parties, both the Fourth Circuit and the District Court for the District of Columbia have examined the same or similar legal issues. In an unpublished 1998 opinion, the Fourth Circuit held the whistleblower provisions of the Water Pollution Control Act ("WPCA") at 33 U.S.C. § 1367(a) and (b) did not authorize the ALJ to issue subpoenas to compel the attendance of third-party witnesses at a hearing on whistleblower claims. *Immanuel v. U.S. Dep't of Labor*, No. 97-1987, 1998 WL 129932, at *5 (4th Cir. 1998) (unpublished). The court reached this conclusion even though WPCA states that whistleblower hearings would be "of record." *Id.*; 33 U.S.C. § 1367(b). In 2003, a whistleblower bringing claims under multiple environmental statutes, including CERCLA and SDWA, requested an injunction from the District Court for the District of Columbia to force the EPA to comply with non-party subpoenas. *Bobreski v. U.S. Env't Prot. Agency*, 284 F. Supp. 2d 67, 75–77 (D.D.C. 2003). After examining the text, structure and legislative history of those statutes, the court concluded that neither of them conveyed implied or express third-party subpoena authority to hearing officials. *Id.* Neither of these precedents are controlling in this matter.

ARGUMENT

A. Summary of Argument

Childers and its progeny do not mandate overturning the ALJ's denial of Complainant's motions for issuance of subpoenas to third parties. Unlike *Childers* and *Integrated Informatics*, this case arises under CERCLA and SDWA. Here, the Board must assess whether these specific statutes "authorize" third-party subpoenas for purposes of §§ 555(d) and 556(c)(2) of the APA

and 29 C.F.R. § 18.56(a)(1). In making that determination, the Board must not end its enquiry with an observation that both CERCLA and SDWA authorize administrative hearings of "record," as a review of the text of the APA demonstrates congressional intent that such record hearings may occur in the absence of third-party subpoena authority. Rather, the Board should consider whether, taken in whole, the text, structure, purpose, and legislative history of each specific whistleblower statute clearly grants the agency express or implied authority to issue hearing subpoenas to third parties.

B. Authority to Conduct Hearings Under the Administrative Procedure Act Does Not, Alone, Convey Authority to Issue and Enforce Third Party Subpoenas.

The APA, alone, does not grant ALJs automatic authority to subpoena third-party witnesses. [1] Instead, as indicated above, the APA provides that such authority may exist where otherwise granted by Congress. 5 U.S.C. § 556(c)(2) (providing that, subject to published rules of the agency and within its powers, employees presiding at administrative hearings may issue subpoenas "authorized by law"). "Subpoena power is not an intrinsic feature of the administrative process[.]" *Johnson v. United States*, 628 F.2d 187, 193 (D.C. Cir. 1980); *see also Hyser v. Reed,* 318 F.2d 225, 239-40 (D.C. Cir. 1963) (subpoena power "is not an inherent attribute of agency authority" and courts "cannot read into the statute"); *Immanuel,* 1998 WL

[1] Litigants can obtain documents and testimony under the parties' control pursuant to 29 C.F.R. § 18.12(b)(3). *Immanuel,* 1998 WL 129932, at *5 ("[W]e believe that the ALJ nevertheless had the authority to compel the appearance of all witnesses within the control of Wyoming Concrete and that he erred when he failed to grant Immanuel's request to compel the appearance of those witnesses."). Section 18.12(b)(3) derives from the APA's grant of authority for officials to preside at hearings and to "regulate the course of the hearing." 5 U.S.C. §§ 556 (b) and (c)(5). *See* Notice of Proposed Rulemaking, Rules of Practice and Procedure for Hearings Before the Office of Administrative Law Judges, 77 FR 72142-01, 2012 WL 5996358 (referencing the relationship between the APA and agencies' powers to regulate hearings before them). Crucially, this statutory provision of the APA lacks the limiting "authorized by law" phrase the APA uses at 5 U.S.C. §§ 555(d) and 556(c)(2) when referring to third-party subpoena authority.

129932, at *5 ("Thus, unless the WPCA specifically provides for the issuance of subpoenas by administrative hearing officers, the ALJ does not have the authority to issue them.").[2]

While the specifics of Congress's grant of hearing-of-record authority may be *relevant* to analyses of whether subpoena authority is also conveyed, the contention that a grant of hearing authority *always* confers third-party subpoena authority is at odds with the APA's repeated limitation that agencies may only exercise third-party subpoena power when "authorized by law." 5 U.S.C. § 555(d) and § 556(c)(2).

Section 554 lays out certain procedural rights afforded to parties at APA "record" hearings, and then § 556(c) describes the powers hearing officials possess to effectuate those procedural rights. 5 U.S.C. §§ 554 and 556(c). Specifically, § 556(c) enumerates the actions that "employees presiding at hearings may" take, including administering oaths, making evidentiary rulings, and authorizing depositions, but – unlike the other listed hearing administration powers – permits the issuance of subpoenas as part of such hearings *only* when "authorized by law." 5 U.S.C. § 556(c)(2). Reviewing these sections as a whole makes plain that Congress contemplated the possibility of formal administrative "record" hearings conducted according to § 554 where subpoena authority was *not* "authorized by law." *Id*. This limitation is therefore also

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[2] Complainant is incorrect to suggest that, where ALJs are not granted subpoena authority by Congress, the lack of such authority implicates a due process violation. Complainant Br. at 5. It is widely recognized that, alone, an absence of subpoena authority in administrative proceedings does not violate due process. *Ubiotica v. Food and Drug Admin.,* 427 F.2d 376, 381 (6th Cir. 1970) (finding lack of administrative subpoena power does not render proceedings before the Food and Drug Administration unconstitutional under the due process clause); *Old Republic Ins. Co. v. Fed. Crop Ins. Corp.,* 947 F.2d 269, 281-82 (7th Cir. 1991) (rejecting assertion that lack of agency subpoena authority made administrative proceedings unconstitutional); *Hvser*, 318 F.2d at 239-40 (finding that compulsory process is not a constitutional requirement in the criminal parole violation hearing process).

appropriately incorporated in the applicable procedural regulations for administrative whistleblower claim hearings. 29 C.F.R. § 18.56(a)(1).

Consequently, a determination regarding whether such statutory authorization exists is a necessary prerequisite to the issuance of any administrative subpoena to a third party. *See Serr v. Sullivan*, 270 F. Supp. 544, 546 (E.D. Pa. 1967), *aff'd,* 390 F.2d 619 (3d Cir. 1968) (in the investigative context, interpreting "as authorized by law" language of Section 555(c) such that "before an agency may undertake an investigation aided by the subpoena power it must have Congressional authorization."); Attorney General's Manual on the Administrative Procedure Act 67 (1947) ("It should be emphasized that section 555(d) relates only to existing subpoena power conferred upon agencies; it does not grant power to issue subpoenas to agencies which are not so empowered by other statutes. Senate Comparative Print of June 1945, p. 14 (Sen. Doc. pp. 29–30)."); Modjeska, Administrative Law Practice and Procedure § 2:4 ("The power of administrative agencies to issue investigative subpoenas depends upon congressional authorization in the particular enabling statute. Agencies have no inherent subpoena power.").

Likewise, the Administrative Conference of the United States ("ACUS") has also long acknowledged that administrative subpoena authority is not an inherent characteristic of hearings conducted pursuant to the APA, suggested that agencies advocate for congressional grants of such authority, and advocated that the APA be amended to clearly grant administrative subpoena authority. *See* Final Report, Administrative Conference of the United States (Mar. 31, 2014), https://www.acus.gov/sites/default/files/documents/FINAL%20EEOC%20Final%20Report%20%5B3-31-14%5D.pdf, at 19-20 (noting that "[t]he APA does not automatically endow ALJs with the powers enumerated in 5 U.S.C. § 556, including [] subpoena power… A statute other than the APA must grant an agency statutory authority to issue subpoenas before that agency can sub-

delegate the authority to its ALJs.") (citations omitted); ACUS Recommendation No. 74-1, 39 Fed. Reg. 23041, June 26, 1974 (recommending amendments to the APA to ensure hearing officers have administrative subpoena authority in administrative adjudications). ACUS's stance on this issue reinforces the conclusion that authority to conduct hearings on the record is not, alone, sufficient to indicate that Congress has conveyed subpoena authority to an agency.

Complainant's brief suggests that the phrase "authorized by law" in 5 U.S.C. §§ 555(d) and 556(c)(2) might refer to factors such as relevance and burdensomeness rather than "'whether the agency has power to issue the subpoena in the first place.'" Complainant's Br. at 13 (quoting *Childers*, slip op. at 12) However, as demonstrated by the citations in the preceding two paragraphs, above, this contention cannot be reconciled with the widespread and longstanding interpretation of the phrase "authorized by law" in the relevant provisions of the APA. These authorities indicate that the controlling understanding of Congress's use of "authorized by law" in this context is that the phrase refers precisely to the threshold question of whether the agency has the authority to issue third-party subpoenas.

Finally, a clear grant of statutory authority to assert certain adjudicative powers, such as authority to issue third-party subpoenas, may be express or implied.[3] *See Bobreski*, 284 F. Supp. 2d at 75-77; *Uniroyal, Inc. v. Marshall*, 579 F.2d 1060, 1066 (7th Cir. 1978) (determining that an Executive Order had authorized the type of party-discovery sought by the government pursuant to Section 555 of the APA though such a grant was not "express.") Thus, as explained below, in resolving the issue presented in this case, the Board must look to the statutory text,

[3]When Respondent states "[t]he Department of Labor Secretary and Solicitor Take the Position that Subpoena Power Must Be Expressly Delegated By Congress," Respondent oversimplifies the Solicitor's actual position, which is that clear delegations may be express or implied. Resp't Br. at 16.

structure, context and history of the CERCLA and SDWA whistleblower provisions to determine whether Congress has conveyed subpoena authority.

C. *Childers* and Its Progeny Do Not Mandate Reversal of the ALJ's Order.

First, as a technical matter, the sections of *Childers* and *Integrated Informatics* wherein the Board opined on subpoena authority are *dicta* because those sections were superfluous to the central result in both cases; it is a bedrock principle of jurisprudence that the extent to which a court's statement is *dictum* influences the extent to which that statement is binding. *Cohens v. State of Virginia*, 19 U.S. 264, 399–400, 5 L. Ed. 257 (1821) ("[i]f [general expressions in an opinion] go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit[,] when the very point is presented for decision.") Indeed, *Childers* itself, in pointing out that the relevant sections of *Malpass* were *dictum*, implicitly recognized that such *dictum* carries less precedential weight than a binding holding. *Childers,* 2000 WL 1920346, at *3 (concluding that, despite the importance of stare decisis, sufficiently important concerns "justif[ied] withdrawal of the *Malpass dictum*").

Moreover, as the ALJ's opinion correctly highlighted, neither *Childers* nor *Integrated Informatics* arose from CERCLA or SDWA. Order at 4-5. Therefore, much of the Board's analysis in those earlier cases is inapplicable, as these statutes have distinct text, structures, and legislative histories; these differences are pertinent to the statutory interpretation that the Board must now undertake in this matter. Indeed, *Childers* itself emphasized the importance of the legislative history and statutory structure of the ERA in reaching its conclusions, explaining that had there *not* been a 24-year gap between the enactment of the relevant sections of that statute, the Board may have reached a different conclusion about congressional intent. *Childers,* 2000 WL 1920346, at *8. While both *Childers* and *Integrated Informatics* made sweeping assessments

about the powers conveyed by grants of authority to conduct hearings, those overbroad statements do not and should not control the outcome here. As discussed above, a grant of authority to conduct hearings pursuant to the APA by itself is insufficient to also convey third-party subpoena authority.

CONCLUSION

Given that CERCLA and SDWA were not the statutes at issue in *Childers* and its progeny, the Board is correct in stopping short of the "vast" question of "whether every federal whistleblower or other statute 'with trial-type hearings' contains statutory direction regarding the authority of an ALJ to issue subpoenas." *Order Granting Interlocutory Review* (April 6, 2023). Instead, the Board must specifically review the text, structure, and legislative history of CERCLA and SDWA to determine whether those specific statutes expressly or implicitly provide such authority.

Dated: June 15, 2023

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I certify that a true and correct copy of the foregoing Brief was served on this 15th day of June, 2023, by the Board's electronic filing system and by email on the following:

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