



**In the Matter of:**

**MICHAEL S. PECK,**

**ARB CASE NO. 2017-0062**

**COMPLAINANT,**

**ALJ CASE NO. 2017-ERA-00005**

**v.**

**DATE: DEC 19 2019**

**NUCLEAR REGULATORY  
COMMISSION,**

**RESPONDENT.**

**Appearances:**

**For the Complainant:**

**Billie Pirner Garde, Esq., *Clifford & Garde, LLP*, Washington,  
District of Columbia**

**For the Respondent:**

**C. Jack McKimm, Esq., *U.S. Nuclear Regulatory Commission*,  
Rockville, Maryland**

**Before: William T. Barto, Chief Administrative Appeals Judge; James A.  
Haynes, Thomas H. Burrell, and Heather C. Leslie, Administrative Appeals  
Judges**

**FINAL DECISION AND ORDER**

HAYNES, *Administrative Appeals Judge*. This case arises under the whistleblower protection provision of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. § 5851 (2005), and as implemented by regulations codified at 29 C.F.R. Part 24 (2018). On February 16, 2017, Dr. Michael S. Peck filed a complaint with the Occupational Safety and Health Administration (OSHA) alleging that his employer, the U.S. Nuclear Regulatory Commission (NRC or Commission), violated the ERA when it failed to select him for a vacant Senior

Resident Inspector position at the Callaway Nuclear Plant. OSHA denied the complaint and Peck requested a hearing before an Administrative Law Judge (ALJ).

Prior to any hearing, NRC filed a Motion to Dismiss Peck's complaint because "under longstanding principles of sovereign immunity and precedential case law of the Department of Labor Administrative Review Board, the Office of Administrative Law Judges lacks subject-matter jurisdiction over this action brought under [the ERA]."<sup>1</sup> On July 13, 2017, the ALJ issued an Order in which he concluded that he did not have jurisdiction in this case because although "[t]he NRC is an instrumentality of the U.S. Government which through the laws of the United States permits certain actions under a waiver of sovereign immunity ... [t]he United States has not waived sovereign immunity for ERA whistleblower actions."<sup>2</sup> Peck appealed the Order to the Administrative Review Board (ARB or Board). Due to the significance of the issue to be considered, the Chief Administrative Appeals Judge designated this case for en banc consideration. For the following reasons we affirm the ALJ.

#### JURISDICTION AND STANDARD OF REVIEW

Congress has authorized the Secretary of Labor to issue final agency decisions with respect to claims of discrimination and retaliation filed under the ERA.<sup>3</sup> The Secretary has delegated that authority to the Board.<sup>4</sup> The Board reviews an ALJ's conclusions of law, including whether to deny a complaint on a motion to dismiss, *de novo*.<sup>5</sup>

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<sup>1</sup> Respondent's Motion to Dismiss at 1.

<sup>2</sup> Order, Summary Decision as to Jurisdiction, Claim Dismissed (hereinafter, "Order") at 4.

<sup>3</sup> 42 U.S.C. § 5851.

<sup>4</sup> Secretary's Order No. 01-2019 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 84 Fed. Reg. 13,072 (Apr. 3, 2019); *see* 29 C.F.R. § 24.110.

<sup>5</sup> *Saporito v. Progress Energy Serv. Co.*, ARB No. 2011-040, ALJ No. 2011-ERA-00006 (ARB Nov. 17, 2011).

## DISCUSSION

Peck raises the following issues on appeal: (1) Whether the language of the ERA clearly and unambiguously waives sovereign immunity for the Commission; and (2) If the ARB determines that the statutory language is ambiguous, "is there evidence to demonstrate Congress intended to waive sovereign immunity?"<sup>6</sup> The NRC maintains its argument that the United States has not waived sovereign immunity for ERA whistleblower claims.<sup>7</sup> We agree with the NRC and will deny Peck's complaint because the whistleblower protection provision of the ERA, as amended, does not contain an unequivocal expression of an intent to waive sovereign immunity.

### 1. Statutory Background.

We begin with a review of the text of the relevant laws. Congress first regulated the creation and use of nuclear energy in the Atomic Energy Act (AEA) of 1946, which established the Atomic Energy Commission (AEC). It was amended by the AEA of 1954, which allowed private construction, ownership, and operation of commercial nuclear power reactors under AEC supervision. The provisions of the AEA of 1954 were codified in Chapter 23 of Title 42 of the United States Code.

Congress passed the ERA in 1974 as part of its continuing effort to regulate nuclear energy. The ERA's provisions were placed in Chapter 73, a new chapter of Title 42 of the United States Code. The ERA abolished the AEC and created two new entities to take its place – the NRC and the Energy Research and Development Administration. In adopting the ERA, Congress did not repeal the provisions of Chapter 23.

In 1978, Congress amended the ERA to prohibit employers from discriminating against employees who report violations of the ERA or the AEA or who participate in any other action to carry out the purposes of those acts. It also established processes and remedies to redress such discrimination.

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<sup>6</sup> Initial Brief of Complainant in Support of Petition for Review (Initial Brief) at 1.

<sup>7</sup> Brief of Respondent Nuclear Regulatory Commission in Opposition to Petition for Review at 7-10.

Finally, in 2005, Congress added the NRC to the definition of “employer” under the ERA but failed to identify the NRC or any other governmental entities as a “person” from whom relief may be sought. The anti-retaliation provision of the ERA which prohibits certain employer conduct was codified at 42 U.S.C. § 5851(a)(1) and provides as follows:

(1) *No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) –*

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. § 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954 [42 U.S.C. § 2011 et seq.], if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954 [42 U.S.C. § 2011 et seq.];

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 et seq.], or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this

chapter of the Atomic Energy Act of 1954, as amended [42 U.S.C. § 2011 et seq.].<sup>8</sup>

For purposes of § 5851, the term “employer” includes specified entities identified below:

(A) a licensee of the Commission or of an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. § 2021);

(B) an applicant for a license from the Commission or such an agreement State;

(C) a contractor or subcontractor of such a licensee or applicant;

(D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. 2210(d)), but such term shall not include any contractor or subcontractor covered by Executive Order No. 12344;

(E) a contractor or subcontractor of the Commission;

(F) the Commission; and

(G) the Department of Energy.<sup>9</sup>

We now shift our analysis. The remedy provision of the ERA establishes specific processes for filing, investigating, and adjudicating employee complaints:

(b) Complaint, filing and notification

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any *person* in violation of subsection (a) of this section may, within 180 days after such violation occurs, file (or

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<sup>8</sup> 42 U.S.C. § 5851(a)(1) (emphasis added).

<sup>9</sup> *Id.* § 5851(a)(2).

have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the *person* named in the complaint of the filing of the complaint, the Commission, and the Department of Energy.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the *person* alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the *person* alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. Upon the conclusion of such hearing and the issuance of a recommended decision that the complaint has merit, the Secretary shall issue a preliminary order providing the relief prescribed in subparagraph (B), but may not order compensatory damages pending a final order. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.<sup>10</sup>

We reach the end of our statutory review with the passage below concerning the application of penalties under the ERA for violations of the Act. If the Secretary (or his delegates) concludes that a violation has occurred, remedies may be ordered against the *person* who committed the violation:

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<sup>10</sup> *Id.* §§ 5851(b)(1) and (b)(2)(A) (emphasis added).

(B) If, in response to a complaint . . . the Secretary determines that a violation of subsection (a) . . . has occurred, the Secretary shall order the *person* who committed the violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with . . . compensation . . . and the Secretary may order such *person* to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.<sup>11</sup>

In sum, the text of the ERA presents a semantic challenge to the reader: the anti-retaliation provision of the Act constrains certain “employer” conduct toward employees, while the remedy provision allows an employee to obtain relief from discriminatory conduct by “any person.” And while “employer” is defined by statute to include the U.S. Department of Labor and the NRC, there is no similar definition or any statutory cross-reference for the word “person” as used in the remedy provision. The relationship between the words “employer” and “person” is, at best, ambiguous<sup>12</sup> and requires the use of traditional interpretive tools to clarify the relationship, if any, between the two words and the intent of the legislature in using dissimilar words in related parts of the ERA. As will be seen, this analysis will be critical to our resolution of the question as to whether Congress has waived the sovereign immunity of the federal government in connection with whistleblower complaints under the ERA.

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<sup>11</sup> *Id.* § 5851(b)(2)(B) (emphasis added).

<sup>12</sup> For example, are the terms synonymous, as argued by Respondent and our dissenting colleague, or does the use of different words in related parts of a statute evince different meanings for each?

## 2. Sovereign Immunity.

Sovereign immunity shields the federal government and its agencies from suit absent a waiver by the government.<sup>13</sup> The extent of the federal government's waiver of sovereign immunity and the types of damages allowable are authorized and defined by the language of the waiver, and that language is to be narrowly construed.<sup>14</sup> Moreover, the waiver must be established by the statute itself.<sup>15</sup> Waivers of sovereign immunity must be "unequivocally expressed"<sup>16</sup> and are strictly construed in favor of the United States.<sup>17</sup> The immunity applies in administrative adjudications as well as adjudications in the federal courts.<sup>18</sup>

To determine if sovereign immunity has been waived, we must focus on the statutory text that relates to liability.<sup>19</sup> And for Peck's case to proceed, we must

<sup>13</sup> *Dept. of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999).

<sup>14</sup> See, e.g., *Lane v. Pena*, 518 U.S. 187, 192, 200 (1996) (citing *United States v. Williams*, 514 U.S. 527, 531 (1995)) ("Although neither of these conceivable readings of § 1003(a)(2) [of the Rehabilitation Act of 1973] is entirely satisfactory, their existence points up a fact fatal to Lane's argument: Section 1003(a) is not so free from ambiguity that we can comfortably conclude, based thereon, that Congress intended to subject the Federal Government to awards of monetary damages for violations of § 504(a) of the Act. Given the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity in § 1003, it would be ironic indeed to conclude that that same provision "unequivocally" establishes a waiver of the Federal Government's sovereign immunity against monetary damages awards by means of an admittedly ambiguous reference to "public ... entit[ies]" in the remedies provision attached to the unambiguous waiver of the States' sovereign immunity.").

<sup>15</sup> *Id.* (quoting *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992)) ("A statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text: 'the "unequivocal expression" of elimination of sovereign immunity that we insist upon is an expression in statutory text."').

<sup>16</sup> *Nordic Vill., Inc.*, 503 U.S. at 33-34; *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (citing *United States v. King*, 395 U.S. 1 (1969)).

<sup>17</sup> *Ardestani v. Immigration and Naturalization Serv.*, 502 U.S. 129, 137 (1991).

<sup>18</sup> *Fed. Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 761 (2002)

<sup>19</sup> See, e.g., *Bath v. U.S. Nuclear Regulatory Comm'n*, ARB No. 2002-0041, ALJ No. 2001-ERA-00041 (ARB Sept. 29, 2003), slip op. at 4, citing *Pastor v. Dep't of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-011 (ARB May 30, 2003), slip op. at 6 ("To sustain a claim that the Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims."). Peck asserts that he "seeks, essentially, equitable damages of transfer into the position he



determine whether Congress has waived the federal government's (and specifically, the NRC's) sovereign immunity under the ERA. As noted previously, the anti-retaliation provision of the ERA prohibits any "employer," as defined therein, from retaliating against any employee who engages in any of the protected activities set forth therein. But the remedy provision allows for remedies only against "persons," a term of art that generally excludes the federal government.<sup>20</sup> The Supreme Court has recently affirmed the "longstanding interpretive presumption" that the word "person" excludes federal agencies.<sup>21</sup>

We note that "person" is defined in the Atomic Energy Act (AEA) to include any "Government agency," and the argument can be made that the definition should extend to the ERA. However, the AEA definition of "person" is, by the terms of the applicable definitions section, expressly limited to that chapter of the AEA.<sup>22</sup> The limiting language noted in the AEA means that in this case the term "person" must be construed as it is used in the ERA and as part of a discrete legal regime, distinct from the AEA.<sup>23</sup> But even if we were to conclude that AEA definition of "person"

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applied for," but he also seeks monetary damages in the form of "wages, bonuses and other job-related benefits associated with the position he would have been eligible to receive" if he had been selected for the vacant position. See Initial Brief at 4.

<sup>20</sup> *E.g.*, 1 U.S.C. § 1 (omitting reference to governmental entities in omnibus definition of "person").

<sup>21</sup> *Return Mail, Inc. v. U.S. Postal Service*, 587 U.S. \_\_\_, 139 S.Ct. 1853, 1862 (2019) ("The Dictionary Act has since 1947 provided the definition of 'person' that courts use '[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise.' 1 U.S.C. § 1 ... The Act provides that the word "'person' ... include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." § 1. Notably absent from the list of 'person[s]' is the Federal Government.").

<sup>22</sup> 42 U.S.C. § 2014(s) ("The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter ... (s) The term "person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or any political subdivision of, or any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.").

<sup>23</sup> See *Pastor*, slip op. at 19 ("Although Congress chose to establish new agencies through the ERA and transfer to them functions given to other bodies by the AEA, it did not transfer or otherwise incorporate the definitions of the AEA. This is particularly notable because Congress did specifically incorporate into the ERA (and Chapter 73) certain other references ... Congress has continued to treat the AEA and the ERA (and Chapters 23 and 73 thereby) as separate, by selectively amending each Act. The fact that Congress chose to

raises an inference as to Congressional intent concerning the ERA, that inference merely creates a debatable point, at most, and falls short of the unequivocal expression the Supreme Court requires to establish a waiver of federal sovereign immunity.<sup>24</sup>

In *Mull v. Salisbury Veterans Admin. Med. Ctr.*,<sup>25</sup> the Board rejected the argument that the AEA definition of person applied to the ERA.<sup>26</sup> The board also concluded that it could not assume that because a respondent is an “employer” under the anti-retaliation provision, it is also a “person” under the remedy provision.<sup>27</sup> The Board compared the whistleblower protection provision of the ERA to the one contained in the Clean Air Act, which clearly indicates Congress’ intent to waive the federal government’s sovereign immunity:

The lack of clarity in 42 U.S.C.A. § 5851’s provision that an employee can bring a complaint against “any person,” with “person” being undefined is underscored by the precision with which Congress waived the Federal

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adopt the whistleblower provision of § 5851 as an amendment to the ERA, which contains no definition of “person,” rather than as an amendment to the AEA, which contains a definition, cannot be ignored.”).

<sup>24</sup> It is equally logical and no less speculative to infer that the language of the AEA is different from that of the ERA in its definition of “person” as applied to federal agencies because Congress intended to convey a different meaning. The AEA language may be read to show that Congress knew how to waive sovereign immunity for the AEA and intentionally declined to do so in the ERA. There is no explicit justification for this, not illogical, interpretation and we decline to adopt it in preference to other equally unjustified theories.

<sup>25</sup> ARB No. 2009-0107, ALJ No. 2008-ERA-00008 (ARB Aug. 31, 2011).

<sup>26</sup> *Mull*, slip op. at 10 (“The Assistant Secretary asks that we look outside of the ERA’s language, to the AEA’s definition of “person” to find that the federal government has waived its immunity under the ERA. However, we can find no language in the ERA that expressly requires or directs us to look outside of the act. While the Supreme Court has “never required that Congress make its clear statement in a single section or in statutory provisions enacted at the same time,” *Kimel v. Florida*, 528 U.S. 62, 76 (2000), the Court has required that Congress make a clear statement in the statutory text, even if simply by including in the statute, language that incorporates provisions from other statutes. *Lane*, 518 U.S. 187, 192 (1996); *Kimel*, 528 U.S. at 74-77.”).

<sup>27</sup> *Id.*, slip op. at 9 (citing *Pastor*, slip op at 17-18) (“Based on the principles of statutory construction ‘that to the extent possible all Congressional provisions are to be given meaning, and that when Congress uses two different words in close proximity, the use of different words indicates a difference in meaning.’”).

Government's sovereign immunity under 42 U.S.C.A. § 7622 (Thomson/West 2003) of the Clean Air Act, which prohibits discrimination on the basis of protected activity under the Clean Air Act in employment decisions by the Federal Government. In 42 U.S.C. § 7622, Congress allows an employee to file a CAA complaint with OSHA against "any person in violation of" the CAA whistleblower provisions. In 42 U.S.C. § 7602(c), "person" is defined to include "any agency, department, or instrumentality of the United States," thereby unequivocally expressing the intent to waive the federal government's sovereign immunity. In contrast, 42 U.S.C.A. § 5851's lack of any language including the federal government as an entity against which complaints can be filed or otherwise waiving its sovereign immunity, tends to suggest that Congress did not intend the federal government's sovereign immunity to be waived.<sup>28</sup>

Our dissenting colleague nevertheless raises a number of plausible arguments concerning the intent of Congress in this regard, focusing primarily upon the 2005 amendment to the ERA that subjected the NRC to the Act's anti-retaliation provisions as circumstantial evidence of a further intent to allow suit against the NRC if it violated those provisions.<sup>29</sup> But more than plausibility is required by the law.<sup>30</sup> As we have previously noted, "[w]hen one reading of a statutory text could plausibly support a finding of waiver, but another reading that is incompatible with waiver is also plausible, the latter must prevail. That is because the very presence of ambiguity precludes a finding of waiver."<sup>31</sup> The

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<sup>28</sup> *Id.*, slip op. at 10.

<sup>29</sup> On this point we disagree. The addition of the NRC as a covered employer under the ERA should be read as just that. To give effect to that addition it is not necessary to further assume that Congress made a tacit addition to the definition of person. Likewise, an addition to the list of employers under the Act does not necessitate an assumption that Congress intended to waive sovereign immunity. Our judgment on this point is strongly influenced by our recognition that Congress retains the power to legislate on the question before us and to unequivocally resolve the matter. We have no warrant to substitute our interpretive efforts for the legislative authority of Congress.

<sup>30</sup> When there are multiple "plausible" interpretations of a statute, "a reading imposing monetary liability on the Government is not 'unambiguous' and therefore should not be adopted." *United States v. Nordic Village*, 503 U.S. 30, 37 (1992).

<sup>31</sup> *Pastor*, slip op. at 17 (citing *Dep't of Energy v. Ohio*, 503 U.S. 607, 627). Congress did not add the NRC to the definition of "employer" until 2005. One can argue that, in light of

ambiguity in the statutory text at issue here, considered in favor of the sovereign, compels us to conclude that the ERA does not contain an unequivocal expression of legislative intent to waive immunity.<sup>32</sup>

### CONCLUSION

We hold that the whistleblower protection provision of the ERA does not contain an unequivocal expression of intent to waive sovereign immunity, and, as such, the United States has not waived sovereign immunity for ERA whistleblower claims. We therefore conclude that the ALJ's decision was correct in law and should be **AFFIRMED**. Accordingly, we **DENY** Peck's complaint.

**SO ORDERED.**

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*Pastor*, Congress would have also defined "person" to include the federal government if it intended to waive immunity. *See, e.g., Mull*, slip op. at 11, fn 5 (citing *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"))).

<sup>32</sup> At least two members of Congress consider the use of the term "person" in the ERA sufficiently vague that they proposed a bill on May 24, 2018, "[t]o amend the Energy Reorganization Act of 1974 to clarify whistleblower rights and protections, and for other purposes." *See* S. 2968, 115th Cong. § 2 (2018). The amendment would have created a definition of the word "person" that would specifically identify the NRC as a person under the act. *Id.* ("The term 'person' includes - (i) a person (as defined in Section 11 of the Atomic Energy Act of 1954 (42 U.S.C. 2014)); (ii) the Commission; and (iii) the Department of Energy."). As of the date of this decision, no such legislation has been enacted.

BURRELL, *Administrative Appeals Judge*, dissenting:

Respectfully, I dissent from the majority's holding. I would hold that the ALJ erred in concluding that Congress did not waive the Nuclear Regulatory Commission's (NRC) sovereign immunity in the 2005 amendments to Section 211 of the ERA of 1974, 42 U.S.C. § 5851.

## Discussion

### 1. The Supreme Court's sovereign immunity standard

The Supreme Court has stated on many occasions that a waiver of sovereign immunity must be "unequivocally expressed" in statutory text. *See, e.g., Lane v. Peña*, 518 U.S. 187, 192 (1996); *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33 (1992); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990). Waivers of immunity, furthermore, "must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (citations omitted); *see also Lane*, 518 U.S. at 192 (noting that "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign"). Any ambiguities in the statutory language are to be construed in favor of immunity. *United States v. Williams*, 514 U.S. 527, 531 (1995). The Supreme Court has held that where there are two plausible interpretations of a provision, with only one waiving sovereign immunity, such provision does not unequivocally indicate a waiver. *See Nordic Village*, 503 U.S. at 36-37. Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government. *Id.* at 34, 37.

### 2. In 2005, Congress amended the ERA following the ARB's decisions in *Pastor* and *Bath*

In 2005, Congress amended the definition of "employer" in § 5851's whistleblower provision to expressly include the NRC. This amendment follows two ARB decisions concluding that immunity was not waived for the respective federal entities, one involving the NRC.

In *Pastor v. Dep't of Veterans Affairs*, ARB No. 99-071, ALJ No. 1999-ERA-011 (ARB May 30, 2003), the ARB held that Pastor's claim for monetary damages

was barred by the federal government's sovereign immunity. Pastor was employed by the Philadelphia Veterans Affairs Medical Center and terminated for what she alleged was retaliation in violation of § 5851 of the ERA. Pastor initially sought reinstatement and monetary damages but later dropped her effort for reinstatement. The Department of Veterans Affairs argued that while it was an "employer" as a licensee of the Commission, it was not a "person" subject to § 5851's remedies section. The ARB agreed. *Pastor*, ARB No. 99-071, slip op. at 16.

Shortly after *Pastor*, the ARB issued *Bath v. U.S. Nuclear Regulatory Comm.*, ARB No. 02-041, ALJ No. 2001-ERA-041 (ARB Sept. 29, 2003). Bath had filed a complaint against the NRC and five NRC employees for violating the whistleblower protection provisions of the ERA, § 5851. NRC sought to dismiss Bath's complaint on the grounds that neither the NRC nor its employees are "employers" for purposes of § 5851, and the claim against the NRC is barred by sovereign immunity. Citing *Pastor*, the ARB held that Bath's claim against the NRC and its employees must fail as Congress did not waive the federal government's immunity in § 5851. The ARB wrote as follows:

The term "person" carries special significance in the context of sovereign immunity because it is presumed to not include the federal government. . . . Congress' choice of the word "person" in the liability section of § 5851(b) was strong evidence that Congress did not intend to include federal agencies among the employers subject to liability under § 5851(b).

*Bath*, ARB No. 02-041, slip op. at 4 (citation omitted).

Congress amended § 5851 in 2005 to add the NRC and the DOE to § 5851's existing definition of "employer."<sup>33</sup> As amended, § 5851 prohibits an employer, now

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<sup>33</sup> Pub. L. 109-58, § 629, 119 Stat. 594 (2005). The Complainant's Brief to the ARB and the Amicus Brief filed by the Government Accountability Project provide a persuasive history showing that the 2005 amendment to the ERA was intended to overturn the ARB's holding in *Bath* that the NRC was not a covered entity. *Cf. Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations of a statute when it amends or re-enacts a provision).

The question as to whether the DOE can be a respondent also has a history. *Teles v. U.S. Dep't of Energy*, No. 1994-ERA-022 (Sec'y Aug. 7, 1995) (observing that DOE was not provided for in the final definition of "employer" in the ERA's whistleblower provision but

expressly including the NRC and DOE, from retaliating against employees of the NRC or the DOE:

(a) Discrimination against employee

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-- ...[engages in protected activity].

(2) For purposes of this section, the term "employer" includes--

...

(F) the Commission; and

(G) the Department of Energy.

42 U.S.C. § 5851(a). Congress's intent to waive the NRC's immunity by including the NRC as an employer subject to the prohibition, to me, is unmistakable. The NRC asks the ARB to ignore the express text of the 2005 amendment by applying rules of statutory construction that are misplaced or distinguishable from the facts of this case.

### 3. Section 5851 uses "employer" and "person" interchangeably

Section 5851 defines "employer" but does not define "person."<sup>34</sup> The crux of the question is whether "employer" and "person" are used interchangeably. The majority focuses solely on § 5851's undefined use of "person" in the remedies section and contends that Congress did not expressly waive NRC's immunity for "persons" even if it extended the definition of "employers" to include the NRC. I would hold that Congress intended for "employer" to include "person" when it amended the definition of "employer" to include the NRC.

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may have been intended in draft language that did not make it to the final language adopted by Congress).

<sup>34</sup> The majority and dissent in *Mull v. Salisbury Veterans Admin. Med. Clinic*, ARB No. 09-107, ALJ No. 2008-ERA-008 (ARB Aug. 31, 2011), disagreed as to whether § 5851 borrowed the Atomic Energy Act's definition of person. The majority of the panel decided, over the amicus brief of the Occupational Safety and Health Administration, that Congress did not intend for § 5851's whistleblower provision to incorporate AEA's definition of "person," codified at 42 U.S.C. § 2014(s).

The majority correctly identifies the long-standing presumption that a statute's use of "person" does not generally include the federal government for purposes of a waiver of sovereign immunity. Majority Opinion, *supra* page 9, citing *Return Mail Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1861–62 and 1 U.S.C. § 1; see also *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780–81 (2000). I do not take issue with the majority's recitation of rules of construction or its analysis of relevant case law on ambiguity and waiver of immunity. I respectfully disagree with the application of that law to the matter at hand.

The presumption that "person" does not include the United States is not a "hard and fast rule of exclusion." *United States v. Cooper*, 312 U.S. 600, 604–05 (1941). "[I]t may be disregarded only upon some affirmative showing of statutory intent to the contrary," *Stevens*, 529 U.S. at 781. The 2005 amendments provide the necessary intent to rebut the presumption. Viewing § 5851's whistleblower provision holistically, I would hold that Congress did use the terms "employer" and "person" interchangeably or more precisely that Congress's use of the term "person"—undefined in § 5851—did not make the amended definition of "employer" to include the NRC equivocal so as to preclude a finding of waiver.

*a. Section 5851's form links "employer" and "person" together in the prohibition, complaint, and remedies sections*

To properly give credit to the 2005 amendment adding the NRC as an employer for purposes of waiver, I examine the construction of § 5851's sections as they interrelate to each other and explore § 5851's origin for the connection between "employer" and "person."

Section 5851(a), the prohibition section, provides that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) . . . [engages in protected activity]." The 2005 amendments include "the Commission" and the "Department of Energy" as employers.

Section 5851's "complaint" and "remedies" sections link "employee" to "person" in the language "[a]ny employee who believes that he has been *discharged or otherwise discriminated* against by *any person* in violation of subsection (a) may, .



... file ... a complaint with the Secretary of Labor ...”<sup>35</sup> If the Secretary finds a violation, the Secretary shall “order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant.”<sup>36</sup>

Section 5851 uses “employer” in the prohibition section and “person” in the remedies and complaint sections. The federal reporters are full of references to a common rule of construction that “where Congress includes particular language in one section of a statute but omits it in another ..., it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

The *Russello* presumption does not always control the construction of a term or provision. The Third Circuit in *Port Authority Trans-Hudson, Corp. v. Sec’y, U.S. Dep’t of Labor*, 776 F.3d 157 (3d Cir. 2015), found that the presumption in *Russello* “only applies when the two provisions are sufficiently distinct that they

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<sup>35</sup> 42 U.S.C. § 5851(b)(1) (emphasis added):

(b)(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the “Secretary”) alleging such discharge or discrimination. . . .

<sup>36</sup> 42 U.S.C. § 5851(b)(2)(B):

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys’ and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

do not—either explicitly or implicitly—incorporate language from the other provision.” *Id.* at 164. The Third Circuit did not find the *Russello* presumption persuasive because there was no “hypothesis of careful draftsmanship,” evidenced in the “inexact drafting in [FRSA’s 49 U.S.C.] § 20109.” *Id.* at 165, citing *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435–36 (2002) (notably not following the *Russello* presumption due to perceived drafting inconsistencies).

This exception to or the inapplicability of the *Russello* presumption is appropriate here. “As in all cases of statutory interpretation, our task is to interpret the words of th[e] statut[e] in light of the purposes Congress sought to serve.” *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979); see also *Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006) (“Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis”). The context of § 5851 reinforces the interchangeability of the terms “employer” and “person.” Employees authorized to sue in the complaint section are employed by employers prohibited in the prohibition section. If the Secretary determines that a violation has occurred, the Secretary may order remedies against the “person,” including action to abate the violation, reinstatement, back pay, and compensatory damages. The entity with power to discharge or affect the employee’s terms, conditions, and privileges of employment is an employer. The person with the power to reinstate an employee is an employer. Employers are expressly entitled to an affirmative defense in § 5851(b)(3)(D) because they are persons who are subject to complaint and liability. Importantly, the prohibition applicable to “employers” does not have a consequence for an entity that is not a “person.” Similarly, the complaint and remedies sections available to “any employee” against “any person” are linked solely to the prohibition applicable to “employers.” Excessive reliance on rules of construction like the *Russello* presumption is “unhelpful” in specific contexts, where they “run the risk of defeating the central purpose of the statute.” *Cf. Kosak v. United States* 465 U.S. 848, 853, n.9 (1984).

*b. ERA’s whistleblower provision is modeled after other environmental whistleblower provisions*

Section 5851’s use of “person” and “employer” is informed by its near replication of the 1977 amendments to the Clean Air Act (CAA), Pub. L. No. 95-95, 91 Stat. 685 (Aug. 7, 1977). That provision provides the following:

**(a) Discharge or discrimination prohibited**

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) . . . [engages in protected activity]

**(b) Complaint charging unlawful discharge or discrimination; investigation; order**

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor . . .

**(2)(A)...**

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant.

42 U.S.C. § 7622 (1977). In the 1977 CAA whistleblower provision, Congress did not define "employer" but defined "person" in another section of the CAA to include the federal government.

(e) The term "person" includes an individual, corporation, partnership, association, State, municipality, political subdivision of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof.

42 U.S.C. § 7602(e) (1977). As with § 5851, “person” and “employer” are used interchangeably in the CAA’s overall structure, as limited by the definition of “person.”

The ARB has concluded that the CAA contains a clear waiver of federal sovereign immunity for the remedies available to a successful complainant based on CAA’s definition of “person” to include the federal government. *Erickson v. U.S. Envtl. Prot. Agency*, ARB Nos. 03-002, et seq. ALJ Nos. 1999-CAA-002, et seq. (ARB May 31, 2006). In 2005, the Office of Legal Counsel (OLC) recognized that the CAA and Solid Waste Disposal Act (SWDA), 42 U.S.C. § 6971, defined “person” in a manner that included the federal government, but the Federal Water Pollution Control Act, 33 U.S.C. § 1367 (FWCPA, Clean Water Act, or CWA), omitted the clear language including the federal government in its definition of “person.”<sup>37</sup>

These references to other environmental provisions are not included to argue that Congress intended for § 5851 to adopt their respective definitions but to exemplify the interrelationship between “person,” “employer,” and “employee.” In these environmental whistleblower statutes, Congress did not intend “employer” and “person” to refer to separate entities. Congress borrowed the language of one statute as model for the other.<sup>38</sup> The absence of a definition of “employer” has not created a sovereign immunity problem or “equivocalness” when the statute clearly defines “person” to include the federal government. Here, we simply face the converse.

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<sup>37</sup> 29 Op. O.L.C. 171 (Sept. 23, 2005). The 1976 SWDA’s anti-retaliation provision provides the following:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this Act or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act or of any applicable implementation plan.

42 U.S.C. § 6971. SWDA’s definition of “person” was amended to include federal government. *Id.* at § 6903(15).

<sup>38</sup> S. Rep. 95-848, 95th Cong., 2d Sess. (May 15, 1978), available at 1978 WL 8524; see also *Mackowiak v. Univ. Nuclear Sys. Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984).

c. *Environmental whistleblower case law has recognized the interchangeability of “employer” and “person” in other contexts*

Section 5851’s precedent recognizes the interchangeability of “person” and “employer” outside of the sovereign immunity context. *Billings v. OFCCP*, No 1991-ERA-035, slip op. at 2 (Sec’y Sept. 24, 1991) (“It is well established that a necessary element of a valid ERA claim under Section 5851 is that the party charged with discrimination be an employer subject to the Act”); see also *DeFord v. Sec’y of Labor*, 700 F.2d 281, 286 (6th Cir. 1983).

Similar conclusions as to the interchangeability of “employer” and “person” but the importance of “employer” in qualifying the reach of the provision have been discussed in CAA case law. In *Varnadore v. Oak Ridge Nat’l Lab.*, Nos. 1992-CAA-002, -005, 1993-CAA-001 (ARB June 14, 1996), the ARB observed that the Secretary of Labor (before the creation of the ARB) had held that while the CAA’s definition of “person” includes “individuals,” individuals are not subject to suit under the environmental whistleblower provisions of the Toxic Substances Control Act and the CAA, which, like § 5851, prohibit “employers” from retaliating against employees who engage in protected activity. “[P]ersons who are not ‘employers’ within the meaning given that word in the ERA may not be held liable for whistleblower violations.” Slip op. at 34-35 (denying claim against the Secretary of Energy), citing *Stevenson v. Nat’l Aeronautical & Space Admin.*, No. 1994-TSC-005, slip op. at 3-5 (Sec’y July 3, 1995) (subordinating the CAA’s definition of “person,” which includes “individuals,” because “[t]he plain language of these employee protection provisions suggests that they were intended to apply to persons who are employers. That classification does not include the employees named here as respondents. Any other construction would require a clearer statement of intent than appears in the statutes at issue.”).

d. *Construing “person” independent of “employer” renders § 5851 meaningless for specified employers*

The NRC’s strained reading segregating “employer” from “person” in § 5851(a) would place employees of named employers without a remedy against their retaliating employers even though the complaint and remedies sections give “any employee” a remedy against “any person” discharging or discriminating with respect to their terms, conditions, and privileges of employment in violation of the

prohibition section.<sup>39</sup> The NRC's implausible construction would emasculate a pivotal definitional section and Congress's expressed intent as to the applicability of the prohibition. *United States v. Menasche*, 348 U.S. 528, 538–39 (1955) (“The cardinal principle of statutory construction is to save and not to destroy.’ . . . Courts must ‘give effect, if possible, to every clause and word of a statute. . .”). The NRC fails to provide any plausible construction for construing the terms independently. *Corely v. United States*, 556 U.S. 303, 314 (2009) (a court’s construction must be read so that each of the sections will be operative and not superfluous).

In *Lane v. Pena*, 518 U.S. 187 (1996), *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607 (1992), and *United States v. Nordic Village*, 503 U.S. 30 (1992), the Supreme Court examined and compared multiple statutory sections to conclude that Congress did not unequivocally waive immunity for the requested relief in the challenged section because another section (or a definition) including waiver for the United States or providing for monetary or punitive damages could be plausibly read as limited to that one area and not include the challenged section. Accordingly, the case for waiver in the challenged section was equivocal with respect to the requested relief, and the interpretation of that section without waiver was plausible because the pieces of the statute fit or fit even better without waiver.

In § 5851’s whistleblower provision, there is no such logical construction separating “employer” and “person.” There is not, for example, a separate remedies section that applies to named “employers” who are not “persons” to explain Congress’s naming “the Commission” and “the Department of Energy” as

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<sup>39</sup> In *Lane*, 518 U.S. at 193, the Supreme Court distinguished the relationship between § 504(a) and § 505(a)(2) from that of § 501 and § 505(a)(1). Concluding that there was no waiver under § 505(a)(2), the Court sharply distinguished “the precision with which Congress has waived the Federal Government’s sovereign immunity from compensatory damages” in the remedy section connected with Section 501 of the Rehabilitation act, 29 U.S.C. § 791, prohibiting disability discrimination in federal government. Section 505(a)(1), the remedy section associated with Section 501, provides the following:

The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 [which allows monetary damages] . . . shall be available, with respect to *any complaint under section 501* of this Act, to *any employee* or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint.

29 U.S.C. § 794a(a)(1) (emphasis added). I would hold that the ERA’s relationship between “employer” and “person” resembles this relationship and not that between § 504(a) and § 505(a)(2) where the Court in *Lane* found no waiver.

“employers.” When Congress amended “employer” to include the NRC, it must have intended it to be both an “employer” and “person” throughout the prohibition, complaint, and remedies sections. Analogously, when Congress defined “person” in the CAA, it intended the term “employer” to be applicable to those persons even though “employer” is not defined.

I would hold that § 5851’s construction of “person” and “employer” in this matter is similar to the Court’s construction of the term “tax,” “taxpayer,” and “any civil action” in *United States v. Williams*, 514 U.S. 527 (1995). Williams was not a taxpayer by some definitions, but the Supreme Court concluded that she was authorized to sue under 28 U.S.C. § 1346(a)(1) because the tax affected her. Not allowing Williams to sue under § 1346(a) would have left her without a viable remedy to reclaim the money she had spent satisfying the lien. This fact reinforced the Court’s conclusion that this was not Congress’s intent. Justice Scalia, concurring in *Williams*, stated that the rule of strictly construing waivers “does not, however, require explicit waivers to be given a meaning that is implausible.” 514 U.S. at 541. “The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.” *Id.*, quoting *Anderson v. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29–30 (1926) (Cardozo, J.).

### Summary

I do not find equivocalness in § 5851’s use of “employer” and “person.”<sup>40</sup> I would give effect to Congress’s amendment stating precisely what the text of the amendment states. *Conn. Nat. Bank v. Germain*, 503 U.S. 249, 253–254 (1992) (“[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there”). When Congress amended § 5851 in 2005 to add the NRC as an “employer,” it intended that the NRC also be a person subject to the complaint and remedies provisions.

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<sup>40</sup> Section 5851’s interconnected use of “employer” and “person” is not an instance where Congress has used “person” in a sentence, clause, or section inconsistently or there is a competing definition of “person” such that a generic, undefined use of “person” in the statute cannot borrow another reference or context where waiver is express. *U.S. Dep’t of Energy v. Ohio*, 503 U.S. 607, 617–19 (1992). Here, the ERA’s whistleblower provision contains a simple prohibition and complaint and remedies sections intimately connected with the prohibition.

I recognize the Supreme Court's case law strictly construing waivers. *McMahon v. United States*, 342 U.S. 25, 27 (1951). The Supreme Court has also stated that strict construction is neither hostile nor hyper-technical construction. “[Courts] should not take it upon [them]selves to extend the waiver beyond that which Congress intended. Neither, however, should we assume the authority to narrow the waiver that Congress intended.” *Smith v. United States*, 507 U.S. 197, 203 (1993). In analyzing the issue of immunity, the Supreme Court does not require that Congress use magic words to effect waiver. To the contrary, the Court has observed that the sovereign immunity canon “is a tool for interpreting the law’ and that it does not ‘displac[e] the other traditional tools of statutory construction.” *Richlin Security Serv. Co. v. Chertoff*, 553 U.S. 571, 589 (2008). “What we thus require is that the scope of Congress’ waiver be clearly discernable from the statutory text in light of traditional interpretive tools. If it is not, then we take the interpretation most favorable to the Government.” *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 291 (2012). Tribunals are not “self-constituted guardian[s] of the Treasury import[ing] immunity back into a statute designed to limit it.” *Indian Towing Co. v. United States*, 350 U.S. 61, 69 (1955).

Respectfully, I dissent from the majority’s opinion. I would hold that Congress, in the 2005 amendments, expressly waived NRC’s immunity when it included NRC as an “employer” prohibited from retaliation in violation of § 5851.<sup>41</sup> The ERA’s generic use of “person,” without definition and in light of the specificity of “employer” in the prohibition section, does not create equivocalness to preclude a finding of waiver.

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<sup>41</sup> The majority cites to pending legislation seeking to “clarify” § 5851’s definition of “person” for the point that the legislation without a definition of “person” is ambiguous. Majority Opinion, *supra* page 12 n.32. The pending legislation is equally indicative of judicial construction failing to give plain language its intended effect. At some point, “strict construction” is less “construction” of legislation and more akin to the imposition of a limitation on Congress’s power.