No. 20-60051

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TEXAS EDUCATION AGENCY,

Petitioner,

v.

United States Department of Education,

Respondent.

BRIEF FOR RESPONDENT

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CERTIFICATE OF INTERESTED PERSONS

Texas Education Agency v. U.S. Department of Education

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

s/ Jaynie Lilley
JAYNIE LILLEY

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Texas Education Agency

Respondent:
U.S. Department of Education

Intervenor:
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STATEMENT REGARDING ORAL ARGUMENT

The United States respectfully requests oral argument in light of the importance of the issues presented by this appeal.

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INTRODUCTION

The National Defense Authorization Act (NDAA) prohibits federal contractors and grantees from retaliating against employees who report the misuse of federal funds. 41 U.S.C. § 4712. The Act specifies that a federal contractor or grant recipient that violates these whistleblower protections may be subject to remedies including compensatory damages, back pay, attorney's fees and costs. *Id.* § 4712(c)(1).

Petitioner Texas Education Agency (TEA) is a recipient of federal funding. Following disclosure of her concerns to relevant authorities that TEA was misusing federal funds in a vendor contract, intervenor Laurel Kash was discharged from her position as the state Director of Special Education. Kash filed a reprisal complaint with the Department of Education (agency) under the NDAA's whistleblower-protection provision for employees of federal grantees, 41 U.S.C. § 4712. After a full investigation by the agency's Office of Inspector General and a live hearing before an agency fact-finder, the agency determined that Kash's whistleblowing activities had been a "contributing factor" in TEA's decision to remove her from employment and that TEA had not established by clear and convincing evidence that allegations made in a lawsuit about her conduct in a previous job, and not her whistleblowing activities, were the reason for her removal. *Id.* § 4712(c)(6). The agency ordered TEA to pay Kash compensatory damages, back pay, attorneys' fees and costs.

TEA petitioned for review of the agency's order. In its petition, TEA raises three principal challenges to the agency's order. First, it argues that the agency's

determination that TEA engaged in an unlawful reprisal was arbitrary and capricious. Second, it argues that the agency's process violated statutory requirements and did not satisfy the requirements of the Due Process Clause. Finally, it contends that state sovereign immunity bars its compliance with the agency's award of damages. As explained below, these arguments are without merit.

This Court, accordingly, should deny the petition.

STATEMENT OF JURISDICTION

On November 22, 2019, the Department of Education issued a decision granting Dr. Kash relief under 41 U.S.C. § 4712(c)(1). JA63. TEA invokes this Court's jurisdiction under 41 U.S.C. § 4712(c)(5), which permits any person "adversely affected or aggrieved" by an order issued under Section 4712(c)(1) to "obtain review of the order[] . . . in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred." TEA filed a petition for review in this Court January 21, 2020, within the 60 days provided under Section 4712(c)(5).

STATEMENT OF THE ISSUES

(1) Whether the agency's determination that TEA's discharge of Dr. Kash violated the NDAA's whistleblower-protection provision was arbitrary and capricious.

(2) Whether the issuance of the agency's final order violated statutory and constitutional procedural requirements.

(3) Whether principles of state sovereign immunity permit TEA to avoid compliance with the agency's order.

STATEMENT OF THE CASE

A. Statutory Background

As part of the National Defense Authorization Act for Fiscal Year 2013, Congress enacted the Pilot Program for Enhancement of Contractor Protection from Reprisal for Disclosure of Certain Information. *See* Pub. L. No. 112-239, 126 Stat. 1632, 1837. The program was codified at 41 U.S.C. § 4712 (Section 4712), and made permanent in 2016. *See* Pub. L. No. 114-261, 130 Stat. 1362. To protect taxpayer money from waste, fraud, and abuse, Congress mandated certain requirements applicable to all federal contractors and grantees that encourage whistleblowers to report misuse of federal funds by federal contractors and grantees.

To that end, Section 4712 prohibits federal contractors and grantees from "discharg[ing], demot[ing] or otherwise discriminat[ing] against" an employee in reprisal for making disclosures described in the Act. A protected disclosure is defined as reporting "information that the employee reasonably believes is evidence of gross mismanagement of a Federal contract or grant, a gross waste of Federal funds, an abuse of authority relating to a Federal contract or grant, . . . or a violation of law, rule, or regulation related to a Federal contract . . . or grant." 41 U.S.C. § 4712(a)(1). The disclosure must be made to "person[s] or bod[ies] described in" Section 4712, *id.*, which include, as relevant here, "an inspector general" or a "management official or

other employee of the contractor, subcontractor or grantee who has the responsibility to investigate, discover, or address misconduct." *Id.* § 4712(a)(2).

To obtain relief under Section 4712, then, an employee must have (1) made a protected disclosure (2) to a qualifying person, and (3) suffered a reprisal for making that protected disclosure. The employee must "demonstrate[] that a disclosure or protected activity . . . was a contributing factor in the personnel action which was taken." *See* 5 U.S.C. § 1221(e)(1); 41 U.S.C. § 4712(c)(6) (adopting the "legal burdens of proof specified in section 1221(e)(1) of title 5"). To avoid liability, the federal grantee must "demonstrate[] by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure." *See* 5 U.S.C. § 1221(e)(2).

If an employee believes she has suffered a reprisal for making a protected disclosure, the employee may submit a complaint to the inspector general of the agency involved. 41 U.S.C. § 4712(b)(1). The inspector general will investigate the complaint and submit a report of findings to the head of the agency, as well as to the complainant and the contractor or grantee. *Id.* The head of the agency then determines whether the contractor or grantee has violated Section 4712. The agency head must either "issue an order denying relief" or take action to remedy the reprisal. *Id.* § 4712(c)(1).

Section 4712 expressly provides for certain remedies, including monetary damages and attorneys' fees, to redress a complainant's injury. Specifically, the statute

provides that the agency head "shall take one or more of the following actions," after determining that an unlawful reprisal has occurred:

> (A) order the contractor or grantee to take an affirmative action to abate the reprisal.
>
> (B) order the contractor or grantee to reinstate the person to the position that the person held before the reprisal, together with compensatory damages (including backpay) employment benefits, and other terms and conditions of employment that would apply to the person in that position if the reprisal had not been taken.
>
> (C) order the contractor or grantee to pay the complainant an amount equal to the aggregate amount of all costs and expenses (including attorneys' fees and expert witnesses' fee) that were reasonably incurred by the complainant for, or in connection with, bringing the complaint regarding the reprisal, as determined by the head of the executive agency.

42 U.S.C. § 4712(c)(1).

If the agency denies relief to a complainant or has not issued a decision within the deadline set by the statute, "the complainant may bring a de novo action at law or equity against the contractor . . . in the appropriate district court of the United States." 41 U.S.C. § 4712(c)(2). Alternatively, "[a]ny person adversely affected or aggrieved by an order issued under [Section 4712(c)(1)] may obtain review of the order[] . . . in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred." *Id.* § 4712(c)(5). Review in the court of appeals "shall conform to chapter 7 of title 5," *i.e.*, the judicial review provisions of the Administrative Procedure Act (APA). *Id.*

B. Factual Background and Prior Proceedings

TEA is a state education agency and is a federal grantee by virtue of the grant funds it receives from the U.S. Department of Education pursuant to section 611 of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1411(a). TEA received over $1 billion in section 611 IDEA funds for fiscal year 2017, a portion of which was reserved for state administration and state activities at issue here.[1] TEA hired Laurie Kash, who had previously worked in various positions in education in Oregon, as the Director of Special Education, and she began her job with TEA on August 15, 2017. Early in her tenure, Kash became concerned about misuse of funds, including federal IDEA funds, associated with a specific TEA contract with a third-party vendor. JA66-67. In particular, she was concerned that the contract was not issued in conformity with applicable bidding requirements; that the contract was improperly awarded because of a personal relationship between a TEA official and the vendor; and that the vendor contract required TEA to pay for items that were of little value or were not in fact completed. JA66. She also believed that the vendor had improper access to certain TEA student records and that TEA did not appropriately monitor the vendor's data security practices. JA66.

[1] *See Funds for State Formula Allocated and Selected Student Aid Programs, U.S. Department of Education Funding*, https://www2.ed.gov/about/overview/budget/history/sthisbyst17.pdf (last visited July 24, 2020) (Special Education—Grants to States $1,037,781,783 for year beginning July 2017).

1. Whistleblower Complaint and OIG Investigation

Kash reported her concerns to a TEA internal auditor on October 9, 2017 and made further disclosures to the TEA auditor on November 6, 2017. JA66. She also reported her concerns to a local district attorney's office, the state auditor's office, and the U.S. Department of Education's Office Special Education Programs. JA70. She then disclosed her concerns about the contract to the Office of the Inspector General (OIG) for the U.S. Department of Education on November 21, 2017. TEA terminated her employment on November 22, 2017.

In September 2018, Kash filed a whistleblower complaint with the agency's OIG pursuant to Section 4712, alleging that TEA unlawfully terminated her in retaliation for her whistleblowing reports about misuse of IDEA funds.[2] Upon receiving her complaint, OIG began a months-long investigation into her claims of retaliation. OIG interviewed current and former TEA employees and obtained documentary evidence from TEA and permitted TEA to submit supplemental evidence. JA22-23. OIG provided TEA with an opportunity to explain its reasons for terminating Kash, and TEA submitted a lengthy response to the investigator. JA817. In it, TEA contended that Kash's termination "had nothing to do with" her whistleblowing activities but "everything to do with" allegations made in a lawsuit

[2] Her complaint alleged that two prior reprimands were also made in retaliation for her protected whistleblowing activity, but the agency determined that those actions were not retaliatory because Kash failed to show that TEA had knowledge of her disclosures prior to the reprimands. JA11, 43-44.

filed shortly before she was terminated. JA820. The lawsuit, arising from her previous employment in Oregon, alleged that Kash interfered with the reporting of abuse of a special education student. JA10. TEA asserted that TEA officials first learned of these allegations in news reports about the lawsuit shortly before she was terminated and decided that the allegations in the lawsuit, while unproven, were serious enough to terminate Kash solely because she was the subject of those allegations. JA83.[3]

The OIG investigation "sustained Kash's allegations of whistleblower reprisal." JA67. The investigation found evidence that demonstrated that Kash's disclosures were a contributing factor in TEA's decision to terminate her because TEA was aware of her disclosures shortly before TEA fired Kash. JA68 (noting that TEA "does not dispute the fact that it was aware of the disclosures prior to Kash's termination."). Indeed, Kash's disclosures to the internal auditor resulted in an internal investigation into the issues surrounding the vendor contract. JA88. The OIG investigation also found that TEA had not provided clear and convincing evidence of its claims both (1) that TEA officials learned of the allegations against Kash in the Oregon lawsuit for the first time shortly before she was fired; and (2) that the mere fact that such allegations had been made against Kash was the basis for her removal. The investigation found "conflicting and contradictory information" on both issues. JA67.

[3] During the investigation, TEA also argued that Kash's poor job performance was an additional reason for her termination, but OIG determined that there was insufficient evidence of performance issues that would justify termination. JA84-85.

In particular, OIG pointed to evidence that TEA knew about the allegations prior to hiring Kash, JA78-80, 88 ("It is evident that TEA, or at least . . . the hiring official, was aware of the allegations that formed the basis of the lawsuit, prior to hiring Kash, and chose to proceed with offering her the position."). OIG also noted that during the hiring process, TEA had dismissed other, unrelated allegations against Kash of an equally serious nature because they were unfounded, but did not wait to investigate the validity of the allegations in the Oregon lawsuit before firing her. JA84-85 ("TEA does not attempt to reconcile how the seriousness of an unproven allegation of failure to report child abuse is of such gravity to result in contributing to her dismissal when compared in relation to an unfounded sexual contact allegation that did not prohibit her from being hired"). OIG also noted that "upon hearing of the allegations [in the Oregon lawsuit] days before Kash's termination, TEA conducted a limited review . . . but did not wait for the results [of that review] before terminating Kash's employment." JA85.

2. Agency Determination

OIG concluded its investigation and issued an initial version of its report to the agency, Kash, and TEA on September 6, 2019 and subsequently submitted its complete investigatory report on October 28, 2019. JA 1053 (acknowledging that September 6, 2019 initial issuance of report was not a final, complete investigatory report). The Secretary then delegated her authority to issue a final decision on Kash's whistleblower complaint to an administrative law judge, and the parties were given an

opportunity to present evidence, legal submissions, and live testimony. After the parties submitted pre-hearing motions and submissions, the administrative law judge held a live hearing on November 12, 2019, with the presentation and cross-examination of three witnesses: 1) Kash; 2) the TEA Commissioner, the official who made the decision to fire Kash; and 3) a TEA internal auditor to whom Kash had disclosed her concerns about the vendor contract. JA24-27. Following the hearing, the parties were permitted to submit further briefing on damages as well as post-hearing briefs, and TEA submitted two lengthy briefs raising a number of issues. JA27.

After considering the live and documentary evidence and the parties' submissions, the administrative law judge issued a 61-page order, determining that TEA had terminated Kash in retaliation for her protected whistleblowing activities and ordering TEA to pay damages, including compensatory damages, backpay, attorneys' fees and expenses. JA5-64. The agency concluded that Kash had shown that 1) she was an employee of a federal grantee; 2) she made disclosures protected by Section 4712 to TEA's internal auditors, the agency's OIG as well as state and local officials; and 3) that she had shown that those disclosures were a contributing factor in TEA's decision to terminate her. Specifically, Kash had satisfied her burden by demonstrating that TEA had knowledge of her various disclosures as early as November 3, weeks before she was fired, and that TEA officials involved in the decision to fire her had knowledge of other whistleblowing activity days before she

was fired. JA44-45 ("[T]he submitted evidence conclusively proves that [three TEA officials] had knowledge of the protected disclosures weeks before she was fired."); 5 U.S.C. § 1221(e) (permitting complainant to satisfy her burden through circumstantial evidence including the employer's knowledge of her whistleblowing and close temporal proximity between whistleblowing and termination).

The agency also concluded that TEA had "failed to prove by clear and convincing evidence that it would have terminated Kash's employment in the absence of her protected disclosures." JA62. The agency based its conclusion on its examination of the entire record as well as the "strength of TEA's evidence in support of its personnel action, the existence and strength of any motive to retaliate on the part of the TEA officials who were involved in the decision, and any evidence that TEA ha[d] taken 'similar actions against employees who are not whistleblowers but who are otherwise similarly situated.'"). JA45 (quoting *Carr v. Social Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999) (setting out factors for satisfying employer's burden under 5 U.S.C. § 1221(e)). The agency observed that documentary evidence failed to support or even contradicted the live testimony of the TEA Commissioner, who made the decision to terminate Kash, that the decision to fire Kash was based solely on the existence of allegations in the Oregon lawsuit. The agency further found contradictory evidence about "what the reason for firing Kash was, who made the decision, and when the decision was made, undermining TEA's ability to meets its burden." JA46. Even accepting TEA's asserted reason, the agency found "significant

evidence challenging this as a sufficient reason for TEA to have fired Kash." JA46. The agency pointed to evidence that gave rise to an inference that TEA officials were already planning to meet to discuss Kash's employment status prior learning about the Oregon lawsuit. JA46-47 ("The fact that Kash's direct supervisor and TEA's General Counsel already had planned a meeting about Kash before learning about the lawsuit indicated that the lawsuit was not the only reason to terminate Kash."). Moreover, there was some record evidence indicating that TEA knew about the allegations before hiring Kash, despite TEA's claims that officials only learned about the allegations when they were alerted to the Oregon lawsuit shortly before she was fired. JA47-48. And, finally, the agency questioned whether "unproven allegation[s] of something that happened in another job in another state [were in fact] a compelling reason to fire Kash." JA48. In light of the "fluctuation as to the reason for Kash's firing, [the] evidence that Kash's employment status was being discussed before TEA learned about the lawsuit, and [TEA's] claims to be acting on a belief in . . . accusations without investigation or even an opportunity for Kash to respond," the agency determined that the basis for TEA's reasons for firing Kash are "at a minimum, murky and unconvincing." JA49. The agency also found that TEA had a motive to retaliate against Kash and that the TEA officials involved in Kash's firing "had an interest in bringing a swift conclusion to any allegations of wrongdoing" around the vendor contract. JA51. Finally, the agency found that there were no

comparable non-whistleblowing employees to enable a comparison of TEA's treatment with Kash. JA51.

The agency also rejected a number of challenges TEA raised to the administrative process. The agency dismissed TEA's challenges to the agency's jurisdiction based on TEA's assertions that the agency's decision was untimely and that the Secretary had improperly delegated her decision-making authority to an administrative law judge. The agency also rejected TEA's due process challenges to the agency's procedures. The process afforded to TEA, the agency determined, comported with the statute and was also constitutionally adequate. Pointing to several opportunities for submission of documentary evidence and live testimony and presentation of legal argument, the agency reasoned that TEA had sufficient opportunity to be heard, and that the additional procedural protections TEA sought, in the form of discovery and additional time beyond that authorized by Section 4712, were not required. In fact, "the process due to the parties in this case is a hearing, at a meaningful time and in a meaningful manner, providing for cross-examination of witnesses, conducted expeditiously enough to be entirely completed with an adequately considered final decision, within the statutory 30-day time limit." JA34-37. The agency reasoned that "[t]hose protections more than adequately protect the due process rights of the parties." JA37.

The agency also concluded that Congress validly conditioned TEA's acceptance of the IDEA funds at issue on TEA's compliance with Section 4712. Therefore,

"TEA is not immune [from the Section 4712 administrative proceedings] based on a protected whistleblowing activity implicated by TEA's management of IDEA funds." JA31.

SUMMARY OF ARGUMENT

The agency's determination that TEA engaged in an unlawful reprisal when it removed Kash for her protected whistleblowing activity is supported by the record and was not arbitrary and capricious. The agency reasonably concluded that Kash's protected disclosures were a contributing factor in her termination, based both on evidence that TEA officials involved in the decision to fire her had knowledge of her whistleblowing disclosures as well as a temporal proximity of weeks, if not days, between her whistleblowing and the TEA's retaliation. The agency's determination that TEA had not satisfied its burden of establishing by clear and convincing evidence that it would have removed Kash even absent her disclosures is supported by the record. After making credibility determinations based on the documentary and live testimonial evidence, the agency properly concluded that TEA's assertions that it fired Kash solely because of the allegations raised in a lawsuit filed against her were not adequately supported.

The agency afforded TEA adequate process to protect TEA's interests. TEA was given and availed itself of the opportunity to be heard at the investigative stage before the Office of the Inspector General and before the agency itself. The agency afforded TEA an opportunity to submit its own views and evidence, and TEA

participated in a live hearing conducted by an administrative law judge. The agency's order, completed within the statutory deadline, evidences its thorough consideration of TEA's arguments and all of the record evidence.

Having accepted federal funds with the condition that it comply with Section 4712's substantive and remedial whistleblower protections, TEA cannot now evade the terms of the statute on grounds of state sovereign immunity. Receipt of federal funds validly conditioned on the whistleblower-protection provision obligates TEA to comply with the agency's order, including its award of damages. TEA does not dispute that it is a grantee within the meaning of the statute or that the statute expressly authorizes the agency to award damages, and accordingly TEA must abide by Congress's express conditions on the federal funding it received.

STANDARD OF REVIEW

Agency orders issued pursuant to Section 4712 are reviewed under the familiar standards of the Administrative Procedure Act. *See* 41 U.S.C. § 4712(c)(5). Under those standards, a court may not set aside agency action unless it is based on factual findings "unsupported by substantial evidence," 5 U.S.C. § 706(2)(E), or unless the "agency action, findings, and conclusions [are] found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706(2)(A).

This Court's standard of review for agency actions is "highly deferential." *See Pension Benefit Guar. Corp. v. Wilson N. Jones Mem'l Hosp.*, 374 F.3d 362, 366 (5th Cir. 2004); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 453 (5th Cir. 2015). An agency's

factual findings are subject to substantial evidence review. *Willy v. Administrative Review Bd.*, 423 F.3d 483, 490 (5th Cir. 2005). Substantial evidence is "more than a mere scintilla but less than a preponderance." *Allen v. Administrative Review Bd.*, 514 F.3d 468, 476 (5th Cir. 2008). And, under this standard, the agency's decisions "must be upheld if, considering all the evidence, a reasonable person could have reached the same conclusion." *Id.*

ARGUMENT

I. The Agency Properly Determined That TEA Violated the Whistleblower-Protection Provision of the NDAA.

A reprisal occurs within the meaning of Section 4712 when "a disclosure described in [§ 4712(a)] was a contributing factor" in the personnel action and the employer fails to show by "clear and convincing evidence" that it would have taken the same action in the absence of the protected disclosures. 5 U.S.C. § 1221(e)(1); 41 U.S.C. § 4712(c)(6) (incorporating standards in 5 U.S.C. § 1221(e)). The agency's determination that Kash's termination was retaliatory is fully supported by the statutory text and the administrative record. The agency based its conclusion that Kash's protected disclosures were a contributing factor in her discharge on TEA's admitted knowledge of her disclosures and the proximity of those disclosures—only weeks if not days—to TEA's decision to fire her. TEA failed to show by clear and convincing evidence that it would have removed Kash in the absence of her

whistleblowing activity. 5 U.S.C. § 1221(e)(2). Rather, the agency found the evidence of TEA's asserted rationale for firing Kash to be contradictory and "murky."

A. The Agency Properly Determined That Kash's Disclosures Were a Contributing Factor in Her Termination.

To establish a violation of the Section 4712, the complainant must provide evidence that a protected disclosure "was a contributing factor" in the adverse personnel action. 5 U.S.C. § 1221(e)(1) (incorporated by 41 U.S.C. § 4712(c)(6)). Section 4712 allows a complainant to satisfy her burden with circumstantial evidence, such as evidence that "(A) the official taking the personnel action knew of the disclosure or protected activity; and [that] (B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure or protected activity was a contributing factor in the personnel action." *Id.* As this Court has explained, "[a] contributing factor is 'any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.'" *Allen v. Administrative Review Bd.*, 514 F.3d 468, 476 n.3 (5th Cir. 2008) (construing Sarbanes-Oxley whistleblower provision). In light of the record evidence, the agency reasonably determined that Kash satisfied her burden of showing that her protected disclosures were a contributing factor in TEA's decision to terminate her.

1. The agency's factual determinations were based on substantial evidence, and TEA has presented no basis to disturb those findings. The agency reasonably concluded that TEA's knowledge of the Kash's whistleblowing disclosures was

sufficient to establish that those disclosures were a contributing factor in the decision to terminate her employment. JA43-44. TEA does not dispute that TEA personnel involved in the decision to terminate Kash knew of her disclosures to TEA's internal auditor as well as state authorities in November 2017, shortly before she was terminated on November 21, 2017. JA44-45. In addition, while there was a dispute about whether TEA personnel knew about Kash's formal OIG complaint about the vendor contract prior to the decision to terminate her, there was no dispute Kash had revealed to the TEA internal auditor that she had made informal reports to OIG and that the TEA internal auditor's report documented those assertions for TEA leadership days before she was terminated. JA45. Indeed, TEA's brief concedes that Kash satisfied both bases outlined in the statute for satisfying her burden with circumstantial evidence: "TEA does not dispute that TEA officials knew of at least some of Kash's protected disclosures, and that the termination occurred a short time after the protected disclosures." Br. 33-34. Given the undisputed record evidence establishing knowledge of Kash's protected disclosures within days or weeks of her termination, the agency's determination that Kash satisfied her burden to show a causal connection was reasonable.

2. TEA argues that that the agency erred by not concluding that the causal connection was severed by the intervening event of the Oregon lawsuit, but the cases TEA cites confirm that the agency's conclusion here—based on undisputed evidence of both knowledge and temporal proximity—was reasonable. In *Feldman v. Law Enf't*

Assocs., 752 F.3d 339 (4th Cir. 2014), the Fourth Circuit explained that the contributing-factor element in a similar statute is "broad and forgiving" and that a whistleblower "need not show that the activities were a primary or even a significant cause of his termination." *Id.* at 348; *see also Allen*, 514 F.3d at 476. The court found that the whistleblower in that case had not satisfied this rather "light burden" because the whistleblower "concede[d] the complete absence of temporal proximity" between his disclosures and his termination and similarly conceded that an intervening event occurred much closer in time to his termination. *Feldman*, 752 F.3d at 348-49. ("Feldman's [more recent] conduct . . . undoubtedly constitute a legitimate intervening event further undermining a finding that his long-past protected activities played any role in the termination."). Similarly, in *Kuduk v. BNSF Railway Co.*, 768 F.3d 786, 791-92 (8th Cir. 2014), the court concluded that temporal proximity alone was insufficient to establish that the disclosures were a contributing factor in the employee's termination, where the employer had no knowledge of the disclosures and an intervening event also led to the employee's discharge. Neither case addressed the circumstances in which a whistleblower showed that her disclosures were made days or weeks before her discharge and that the employer had knowledge of those disclosures. Rather, the cases explain that where a whistleblower has weak evidence of a connection between her disclosures and her discharge, such as a long time period between the two events or only temporal proximity, an intervening event may sever

that weak connection. By contrast, Kash demonstrated sufficient evidence of a connection, and the agency reasonable credited that evidence.

B. TEA Failed to Present Clear and Convincing Evidence That it Would Have Discharged Kash in the Absence of Her Protected Disclosures.

In order to rebut a whistleblower's claim of reprisal, Section 4712 requires TEA to show by "clear and convincing evidence" that TEA "would have taken the same personnel action in the absence of the disclosure." 5 U.S.C. § 1221 (e)(2) (as incorporated in Section 4712). After considering the live testimony, documentary evidence, and the OIG report, the agency determined that the reason TEA offered for terminating Kash was not credible. The agency's determination was reasonable and supported by the record.

1. The agency reasonably determined, based on the record and its credibility assessments, that TEA's asserted reasons for firing Kash were "at a minimum, murky and unconvincing" and did not carry TEA's burden. JA49. The agency found little record evidence to corroborate the TEA's asserted reason for firing Kash, noting that "[t]here is contradictory evidence in the record from TEA sources about what the reason for firing Kash was, who made the decision, and when the decision was made, undermining TEA's ability to meet its burden of providing clear and convincing evidence." JA46.

TEA's brief does not meaningfully dispute the agency's conclusion that the TEA's asserted reasons for removing Kash have little evidentiary basis or were

contradicted by the record. Instead, TEA's suggests (at 33-34) that the agency did not consider TEA's proffered reasons or evidence for terminating Kash, but a review of the agency's decision demonstrates that the agency considered those reasons but did not find TEA's explanation credible or adequately supported in the record. TEA's mere disagreement with the agency's assessment is not a basis for setting aside the agency's determination. *See Ameristar Airways, Inc. v. Administrative Review Bd.*, 771 F.3d 268, 273 (5th Cir. 2014) (declining to disturb similar conclusion based on agency's assessment that employer's responses were "shifting and contradictory"); *Frey v. U.S. Dep't of Health & Human Servs.*, 920 F.3d 319, 331 (5th Cir. 2019) ("Although [petitioner] might disagree with the [agency's] evaluation of the countervailing evidence he submitted, the agency did consider it.").

The agency also properly looked to the factors for evaluating whether an employer has satisfied its burden set forth in *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). In concluding that TEA had not satisfied its burden, the agency properly took into account the 1) "murky" state of TEA's evidence in support of the discharge; 2) the strength of the motive by TEA officials to retaliate against Kash for her disclosures; and 3) the paucity of any non-whistleblowing comparators. JA41-43. As initial matter, TEA cannot object (Br. 32) to the agency's reliance on the *Carr* factors because TEA asked the agency decision-maker to look to the *Carr* factors. *See* JA 947 (TEA's post-hearing brief) ("The ALJ should consider the *Carr* factors in assessing whether TEA has shown by clear and

convincing evidence that it would have taken the same personnel action even in the absence of any alleged whistleblowing."). Moreover, the *Carr* factors appropriately explain the types of considerations an agency decision-maker should take into account when determining whether an employer has satisfied it burden under the statute. *See Carr*, 185 F.3d at 1323; *Duggan v. Department of Def.*, 883 F.3d 842, 846 (9th Cir. 2018) (adopting the *Carr* factors); *see also King v. Department of the Army*, 570 F. App'x 863, 866 (11th Cir. 2014)(per curiam)(using *Carr* factors). This Court has looked to similar considerations when examining an employer's burden under similar whistleblower statutes. *See Ameristar Airways*, 771 F.3d at 273 (evaluating strength of evidence in support of employer's asserted rationale); *Frey*, 920 F.3d at 331 (same); *id.* (consideration of evidence about employer's treatment of other comparable employees). Accordingly, the agency's consideration of those factors was not error. In any event, the administrative record and the decision make clear that the agency's determination that TEA had not met its burden was based on the agency's evaluation of the record as a whole. JA38-43.

The agency also reasonably limited its consideration of the evidence to TEA's asserted reasons for terminating Kash and appropriately declined to consider evidence unrelated to TEA's stated reasons for firing Kash. Nothing in Section 4712 or any authority TEA has cited requires an agency fact-finder to admit evidence about unrelated matters. TEA argues (at 41-43) that the agency improperly excluded evidence of 1) the merits of allegations against Kash when the merits were not TEA's

stated basis for terminating her (rather the mere existence of the allegations was TEA's stated reason); 2) the value of a settlement of that matter; and 3) TEA's treatment of a different whistleblower, who made allegations about TEA's mishandling of a different agency initiative. But TEA has not explained how any of that evidence would be relevant to the agency's inquiry into TEA's asserted reasons for firing Kash, 41 U.S.C. § 4712(c), nor has TEA explained what could be gleaned about whether TEA retaliated against Kash from the fact that it apparently did not retaliate against a another whistleblower in a different context. *Cf. Carr*, 185 F.3d at 1323 ("For an employee to be considered similarly situated to an individual who is disciplined, it must be shown that the conduct and the circumstances surrounding the conduct of the comparison employee are similar to those of the disciplined individual.").

2. TEA's primary objection to the agency's determination is its disagreement with the agency fact-finder's credibility determinations and inferences drawn from the record. But TEA cannot show that those determinations, which are subject to deferential review, were error. *See Frey*, 920 F.3d at 331 (Under the deferential standard, "[g]iven that the OIG considered some facts that supported its conclusions and other facts that did not, we must defer to the [agency's] decision.").

TEA objects that the agency found the testimony of the TEA Commissioner not credible, but offers little explanation about why the fact-finder's assessment was wrong. Br. 35-36. The agency showed that the Commissioner's testimony that he

made the decision to terminate Kash "based completely" on the allegations in the Oregon lawsuit was not corroborated by any evidence in the record; that the Commissioner admitted he had knowledge of Kash's earlier protected disclosures; and that the Commissioner's testimony about the date of his decision to fire Kash and his reason for doing so was "contradict[ed]" by documentary evidence. JA45-46. Moreover, the agency determined that even accepting the Commissioner's explanation of his reason for terminating Kash, there was significant doubt that this reason would be otherwise sufficient for terminating her. JA46. While TEA claims (at 38-39), that the agency did not credit the severity of the allegations in the Oregon lawsuit as a factor in TEA's decision to discharge Kash, the agency discussed and quoted at length from the Commissioner's testimony on that very point and noted that it was implausible that the Commissioner would credit such serious allegations without giving Kash an opportunity to respond. JA47-49.

Similarly, TEA argues (at 38) that the agency improperly credited the testimony of a former TEA employee who supported Kash's contention that TEA knew of the allegations at the time she was hired and therefore they could not be the basis for its decision to fire her months later once the same allegations were made in a lawsuit. As the agency's decision noted, the former employee's testimony was supported by documentary evidence as well as Kash's testimony. JA47. The agency properly relied on this contradiction as one of many reasons for concluding that the TEA's asserted reason for discharging Kash was not strong. JA47 ("[I]t would not follow that TEA

believed that Kash had to be removed from the job . . . based on the allegations if TEA also hired Kash less than half a year earlier knowing that she had such allegations against her."). For the same reason, TEA is incorrect to say (at 37) that the agency "ignored" evidence that TEA officials, including the Commissioner, were unaware at the time they hired Kash of the allegations that later formed the basis for the Oregon lawsuit. The agency noted there was contradictory evidence on that point as well, a further basis for concluding that TEA's asserted reasons for discharging Kash were weak.

TEA also takes exception (at 43-44) to the agency's reasonable inference that TEA had been discussing Kash's employment status prior to the Oregon lawsuit. Other than to argue that refuting the inference might divulge privileged information, TEA does not explain why the agency's inference from non-privileged information—the existence of a previously-scheduled meeting between Kash's supervisor and TEA's General Counsel about a matter they then described as "related" to the Oregon lawsuit meant that they were already planning to discuss Kash's employment status—was improper. In any event, the evidence that TEA was discussing Kash's employment status prior to the Oregon lawsuit was only one of several factors that supported the conclusion that TEA's reasons for firing Kash were "murky and unconvincing" and would not be grounds for disturbing the agency's decision. JA49.

II. The Administrative Process Complied With Statutory and Constitutional Procedural Requirements.

TEA alleges a number of defects in the agency's process for adjudicating Kash's whistleblower complaint and argues that those deficiencies deprived the agency of jurisdiction over the complaint and violated TEA's due process rights. None of these contentions have merit. The agency's decision-making complied with statutory and constitutional procedural requirements, and TEA received adequate and ample process.

A. The Agency's Decision Comported With Statutory Requirements.

TEA argues that the agency's decision was untimely and that this asserted delay deprived the agency of authority to render a decision on the whistleblower complaint. Neither argument is correct.

1. The agency complied with the statutory deadline to issue a final decision. Section 4712 requires the head of agency to make a determination on a whistleblower complaint within 30 days of receiving the OIG investigatory report. 41 U.S.C. § 4712(c)(1). As the agency's decision explains, OIG issued its full report on October 28, 2019, and the agency rendered a decision on November 22, 2019, within the 30-day timeline set out in the Section 4712. *See* JA31-32 ("[C]ounsel for OIG confirms that the Secretary received the OIG report by hand delivery on October 28, 2019.").

TEA argues instead that the Secretary in fact received the report earlier, on September 6, 2019, when OIG forward a version of the report to the Secretary and

sent a copy of that version of the report to TEA and Kash that lacked all of investigatory details contained in the attachments. At that point, the Secretary informed TEA and Kash that the agency would issue its decision 30 days after OIG had issued the complete investigatory report. *See* JA 1053. The agency's decision correctly acknowledged that timeframe for an agency head's resolution of a whistleblower's claim commences when OIG issues its final investigatory report. JA31-32. That began on October 28, 2019, when the final complete report was issued. TEA's theory that the agency's decision must be rendered within 30 days of the Secretary receiving any version of the OIG report makes little sense. An OIG investigation may result in several preliminary versions of a report before it issues a final report. *See, e.g.*, *Frey*, 920 F.3d at 325 & n. 21 (noting that OIG issued three versions of its report, only one of which was the final report). If OIG's transmission of a preliminary report to the agency head (or, as in this case, transmitted a report to the agency head and the parties with only a partial investigatory record) triggered the 30-day deadline for final resolution of the complaint, the administrative process would be required to proceed with only a preliminary or partial record.

2. Even if the agency's decision was issued twenty-two days late as TEA posits, that delay alone would not deprive the agency of jurisdiction to render a decision.

As the Supreme Court has explained, not "every failure of an agency to observe a procedural requirement voids subsequent agency action." *Brock v. Pierce County*, 476 U.S. 253, 260 (1986). Indeed, where there are "less drastic remedies available for

failure to meet a statutory deadline," such as an available action to compel agency action unlawfully withheld, the statutory deadline is not jurisdictional. *Id.* 260 & n.7. That is particularly true where the deadline is not a statute of limitations for filing an individual complaint, but a deadline for an agency resolution of an entire dispute within a short timeframe. *Id.* at 261 ("[An agency's resolution of dispute] is a more substantial task than filing a complaint, and the Secretary's ability to complete it within [a short, fixed time period] is subject to factors beyond his control.").

The question whether failure to comply with a deadline for an agency's decision is jurisdictional is one of Congressional intent. *Brock*, 476 U.S. at 260. Section 4712 makes clear that an agency's failure to render a decision within 30 days of receipt of the investigatory report does not, by itself, deprive the agency of authority to act. *Cf. Frey*, 920 F.3d at 325 & n. 21 (months-long delay between OIG report and agency decision under whistleblower provision of the Recovery Act was "not legally significant"). Rather, Section 4712 provides for an alternative mechanism for resolution of a whistleblower complaint if the agency has not rendered a timely decision: the whistleblower is permitted to file a de novo district court action. *See* 41 U.S.C. § 4712 (c)(2). Only then would the agency lose the authority to proceed with its resolution of the retaliation complaint. At the conclusion of the administrative process, the employer may seek review of an adverse decision in this Court, as TEA did here. 41 U.S.C. § 4712(c)(5). Having provided for an optional mechanism for

resolution of untimely agency decisions, Congress did not intend for its deadline to be jurisdictional.

3. TEA also appears to raise a question about whether the Secretary properly delegated her authority under Section 4712 for resolution of Kash's whistleblower complaint to the administrative law judge. *See* Br. 28 n. 2. By raising this argument in a footnote, TEA has forfeited it. *Wise v. Wilkie*, 955 F.3d 430, 437 (5th Cir. 2020) (failure to adequately raise argument in opening brief forfeits the argument).

In any event, contrary to TEA's contention, nothing in the text of Section 4712 limits the authority of the Secretary to delegate, or an ALJ to hear, a whistleblower dispute. Nor does a separate regulation *acknowledging* an ALJ's jurisdiction over certain proceedings subject to a delegation from the Secretary render the delegation here improper. *See* 34 C.F.R. § 81.3 ("The OALJ also has jurisdiction to conduct other proceedings designated by the Secretary. If a proceeding or class of proceedings is so designated, the Department publishes a notice of the designation in the Federal Register."). That regulation does not require publication in the Federal Register to make the delegation valid, rather the publication requirement provides notice to affected parties. TEA does not dispute that it had notice of the delegation, and it does not point to any prejudice it suffered from the lack of publication in the Federal Register. Indeed, it would be impractical to enforce such a requirement in light of the Section 4712's 30-day deadline for agency resolution of the whistleblower complaint.

B. TEA Received Constitutionally Adequate Process.

The guarantee of procedural due process contained in the Fifth Amendment requires the government to treat an individual with fundamental fairness when it deprives him or her of a liberty or property interest. *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985). Procedural due process is "not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria & Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961) (citation omitted). Instead, due process is a "flexible concept," with the procedural requirements mandated by the Constitution depending upon the circumstances of the particular deprivation of liberty or property. *Walters*, 473 U.S. at 320; *see also Lassiter v. Department of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 24, 31 (1981); *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). The "fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (quotation marks omitted); *see also Brock v. Roadway Express, Inc.*, 481 U.S. 252, 261 (1987).

The agency's process adequately protected TEA's due process interests. The agency followed the procedures outlined in Section 4712; it gave careful and thorough consideration to TEA's position and evidentiary submissions, and provided TEA with meaningful opportunities to be heard both on the merits and the remedy, including an opportunity to submit its own evidence. Due process requires nothing more in these

circumstances. As the administrative record demonstrates, none of TEA's allegations of defects in the process have merit.

1. TEA has waived its claim to procedural protections beyond those provided in Section 4712. TEA accepted federal IDEA funds on the condition that it comply with the procedures set out in the text of Section 4712, none of which require the additional procedures it seeks now. *See Chippewa Cree Tribe of Rocky Boy's Reservation, Montana v. U.S. Dep't of Interior*, 900 F.3d 1152, 1160 (9th Cir. 2018) ("Congress could undoubtedly bolster the Act's whistleblower protections by requiring grant recipients to agree to procedures that would allow agencies to investigate whistleblower complaints more efficiently."). To the extent that any other additional procedures might be required by due process (and they are not), Congress has validly conditioned the receipt of federal funds on the procedures outlined in Section 4712. *See infra* Part III. Indeed, "[i]t was well within Congress's prerogative to diminish—slightly—the full panoply of usual procedural protections to ensure that agencies could efficiently investigate whistleblower complaints." *Chippewa Cree Tribe*, 900 F.3d at 1161. Accordingly, TEA cannot object to the procedural safeguards to which it agreed.

2. Even if TEA has not waived its due process challenge, the agency's procedures readily comply with constitutional requirements. To analyze whether the government deprived TEA of procedural due process, the familiar rubric of *Mathews v. Eldridge* requires balancing the competing governmental and private interests at stake. 424 U.S. at 335. Under *Mathews*, due process generally requires consideration of three

factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the government's interest, including the governmental function at issue and the fiscal and administrative burdens that the additional or substitute procedural requirement would require. *Id.* (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)). An assessment of these factors demonstrates that the procedures followed by the agency provided TEA with all the process that was required.

a. The procedures used by the agency pursuant to Section 4712 satisfies due process. And TEA does not argue that the agency failed to adhere to any of the procedural requirements of the Act. Section 4712 provides that "the inspector general shall investigate the complaint [of whistleblower reprisal] and, upon completion of such investigation, submit a report of the findings" to the whistleblower, the employer, and the head of the agency. 41 U.S.C. § 4712(b)(1). Section 4712 further provides that the relevant agency head "shall determine whether there is sufficient basis to conclude" that the employer has subjected the complainant to a prohibited reprisal. *Id.* § 4712(c)(1).

Thus, pursuant to Section 4712, before the agency makes a reprisal determination, the OIG conducts an investigation during which the employer is afforded notice and an opportunity to present evidence and its explanation for the personnel action. Upon completion of the investigation, a copy of the OIG report is

provided to the complainant, the employer, and the agency. In addition, Section 4712 provides for prompt judicial review. 41 U.S.C. § 4712(c)(5). Under settled principles, the process in the statute is entitled to a "strong presumption . . . of . . . validity." *Schweiker v. McClure*, 456 U.S. 188, 200 (1982) (citation omitted). Because Section 4712 provides an employer "the opportunity to be heard at a meaningful time and in a meaningful manner," it satisfies the fundamental requirement of due process. *Mathews*, 424 U.S. at 333 (quotations marks omitted).

Because the procedures described above were followed here, TEA received all the process it was due. TEA was notified of Kash's allegations and received the opportunity to submit substantial evidence during the OIG's thorough, year-long investigation. TEA participated in the investigation, with OIG interviewing a number of current and former TEA employees. TEA also submitted documentary evidence and supplementary material. JA22-23. Prior to the agency's final decision, TEA received OIG's report, with some redactions to protect personal privacy, and the agency held a hearing, with live testimony from several TEA witnesses and significant documentary evidence and the opportunity for cross-examination. In addition, TEA had an additional opportunity to submit post-hearing briefing, and submitted additional argument on the merits and on damages, JA 929-79. And, the agency's final determination thoroughly considered each of TEA's arguments and the factual submissions from both parties and included a reasoned explanation for why it was

unpersuaded by the evidence TEA submitted regarding the reasons for its termination of Kash.

b. TEA nevertheless complains that the agency failed to afford TEA a host of additional procedural protections, but it fails to show that due process requires any of TEA's preferred procedures. Nor has TEA demonstrated that it suffered any prejudice from the agency's asserted failings to provide any of the additional protections that TEA suggests are necessary.

The plurality opinion in *Brock v. Roadway Express*, *Inc.*, 481 U.S. 252 (1987) on which TEA relies (at 29-31) confirms that TEA was afforded all process it was due. In *Roadway Express*, the Supreme Court considered whether an agency's preliminary order requiring reinstatement of a discharged employee prior to an evidentiary hearing violated the due process rights of the employer. The Court concluded that certain aspects of the agency's pre-hearing process were unconstitutional, but none of those are relevant here because the agency's decision on Kash's complaint was rendered *after* a hearing with many more procedural protections.

In *Roadway Express*, the Court considered an opportunity to meet with the inspector significant because the process involved a temporary deprivation based solely on the investigator's reasonable cause to believe that unlawful retaliation occurred, prior to a full hearing. 481 U.S. at 260. And the Court explained that permitting a meeting with the investigator satisfied the requirement that the employer have an "avenue . . . through which the employer could effectively articulate its

response." *Id.* at 265. *Roadway Express* did not hold that a meeting with an investigator was constitutionally required in the context of a preliminary deprivation without a hearing, much less in a procedure concluding in a full live hearing like that afforded to TEA. Moreover, it is not at all clear that TEA ever asked for a meeting with the investigator or explained what sort of information it would have provided during such a meeting that it could not or did not provide during the investigation or the agency hearing.

TEA's claims that the agency was required to publish the procedural rules and that certain discovery or evidentiary rules were required during the hearing are incorrect. Nothing in *Roadway Express* or the Constitution requires publication of the rules of administrative procedures in any particular form. Such a requirement, if it existed, would serve to ensure that TEA had adequate notice of the procedures for the proceeding. TEA has not complained that it lacked notice of what procedural rules applied in the hearing or that it suffered any prejudice from any lack of notice. To the contrary, TEA concedes that the agency "explicitly ruled" (Br. 31), albeit unfavorably, on some of TEA's procedural questions, prior to the hearing. Similarly, there is no constitutional rule requiring an agency to use the Federal Rules of Evidence, provide for discovery, or allow for more time than allotted by the statutory timeframe for decision-making. *See* JA35; *see also FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940) (Administrative agencies are "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge

their multitudinous duties."); *Kelly v. U.S. EPA*, 203 F.3d 519, 523 (7th Cir. 2000) ("There is no constitutional right to pretrial discovery in administrative proceedings," and neither the APA nor the Federal Rules provide for discovery in administrative proceedings).

Finally, there is nothing unusual or unconstitutional about TEA's receiving notice of the full details of Kash's allegations in the OIG report or the fact that the OIG report contained redactions to protect personal privacy. TEA fully participated in the OIG investigation and presented its own evidence to the investigators, and had notice and an opportunity to respond to the allegations during the agency hearing. Nothing more was required.

III. State Sovereign Immunity Does Not Bar the Damages Award.

Section 4712 applies to all grantees, including states, that accept federal funds, and TEA does not dispute that Section 4712 applies to it as a federal grantee. Nor could it. TEA accepted millions of dollars of IDEA funds conditioned upon its agreement to adhere to the terms of Section 4712. Having participated in the OIG process and a live hearing before the agency, TEA belatedly claimed that it was immune, not from the administrative process or determination that TEA violated the Section 4712, but solely from the agency's decision to award damages. JA913-915 (raising immunity from damages award in post-hearing brief on damages). After accepting federal funds conditioned on its compliance with Section 4712 and

participating in the administrative process, TEA cannot now claim immunity from the agency's damages award.

1. State sovereign immunity "bars suits that individuals file against states in federal court" as well as certain administrative proceedings. *Gruver v. Louisiana Bd. of Supervisors*, 959 F.3d 178, 180 (5th Cir. 2020); *Federal Mar. Comm'n v. South Carolina State Ports Auth.*, 535 U.S. 743, 760 (2002). But "a state may waive its immunity, and Congress can induce a state to do so by making waiver a condition of accepting federal funds." *Gruver*, 959 F.3d at 180-81 (citing *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 277-79 (5th Cir. 2005) (en banc)); *Lapides v. Board of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 618 (2002). To validly condition funds on such a waiver, the funding condition must "unambiguous." *Gruver*, 959 F.3d at 182 (citing *South Dakota v. Dole*, 483 U.S. 203, 207-08 (1987)).[4] A condition is unambiguous when a "state official" deciding whether to "accept [federal] funds" can "clearly understand" that the funds come with strings attached. *Hurst v. Texas Dep't of Assistive & Rehab. Servs.*, 482 F.3d 809, 811 (5th Cir. 2007) (alteration in original). As this Court has explained, however,

[4] *Dole* also requires that any expenditure benefit the general welfare; that it be reasonably related to the purpose of the expenditure; that no condition can violate an independent constitutional requirements; and that a condition cannot "amount to coercion as opposed to encouragement." *Gruver*, 959 F.3d at 182. TEA does not contend that Section 4712 fails to satisfy any of these other requirements. Section 4712 protects the general welfare by protecting the public fisc; is related to the purposes of the specific funds about which any whistleblower claims are made; does not violate any other constitutional requirement, and is not coercive. *Id.*

clarity does not require "talismanic incantations of magic words." *Pace*, 403 F.3d at 281.

Section 4712 makes all federal grantees subject to the statutory whistleblower protections and clearly mandates that all grantees are subject to the remedies specified in the statute. The provision makes plain that, if found to have engaged in a prohibited reprisal, a grantee would be responsible for monetary damages, including "compensatory damages (including back pay), employment benefits, and other terms and conditions of employment." 41 U.S.C. § 4712(c)(1)(B); *see also id.* § 4712(c)(1)(C) (authorizing award of costs, expenses and attorneys' fees). This language puts a grantee, such as TEA, on notice that if it accepts a federal grant and retaliates in violation of the provision, it is subject to the remedies outlined in Section 4712(c), including damages. Moreover, agency guidance confirms that state grantees will be subject to Section 4712. Department of Education guidance requires that all "non-[f]ederal" grantees, a term defined to include state governments, must "[c]omply with [f]ederal statutes [and] regulations," 2 C.F.R. § 200.303(b); *id.* § 3474.1 (applying 2 C.F.R. pt. 200 to Department of Education grantees); *id.* §§ 200.69, 200.91 (non-federal grantees to include states), with specific reference to Section 4712. *See* 2 C.F.R. § 200.300(b) ("The non-Federal entity is responsible for complying with all requirements of the Federal award . . . . See also statutory requirements for whistleblower protections at . . . 41 U.S.C. 4712.")(citations omitted). Having

accepted a federal grant, TEA cannot now deny that it is a grantee or that it is bound by the express conditions on the federal funds set out in the text of Section 4712.[5]

Congress validly enacted Section 4712 as a condition on the receipt of federal funds by all grantees, including the large number of state recipients of federal grant funds. Congress's spending powers authorizes it to the impose conditions on grantees, including state grantees, to protect federal funds from misuse and fraud. And the Supreme Court has recognized the important federal interests in protecting federal funds from misuse by States. *See Sabri v. United States*, 541 U.S. 600, 605 (2004) (Congress has "authority . . . to see to it that taxpayer dollars appropriated under [its powers] are in fact spent for the general welfare, and not frittered away in graft or on projects undermined when funds are siphoned off or corrupt [state] officers are derelict about demanding value for dollars.")(citations omitted). Indeed, in appropriating funds and distributing those to state grantees, "Congress does not have to sit by and accept the risk of operations thwarted by local and state improbity." *Id.* at 606. Instead, Congress can condition the acceptance of federal funds on participation in an administrative scheme to protect those funds by extending protections for employee who report misuse and impose remedial measures, including damages awards, for state grantees that violate those protections. In accepting the

[5] The agency's decision pointed to a different provision, 20 U.S.C. § 1403, conditioning the receipt of IDEA funds on a waiver of sovereign immunity, JA30-31, but that provision applies to violations of the relevant chapter of the IDEA.

IDEA funds, TEA voluntarily agreed to participate in the administrative whistleblower scheme that clearly provided for damages remedies if it violated the whistleblower protection provisions in relation to those funds. The text of Section 4712 clearly and unambiguously put TEA on notice that it would be subject to that remedial scheme. *See AT&T Commc'ns v. BellSouth Telecomms., Inc.*, 238 F.3d 636, 644 (5th Cir. 2001) (A valid condition on spending requires only that "the state has been put on notice clearly and unambiguously by the federal statute that the state's particular conduct or transaction will subject it to" proceedings otherwise barred by state sovereign immunity.).

2. TEA's contrary arguments rest on a misunderstanding of the applicable law. TEA's suggestion (at 15-17) that Congress must abrogate state sovereign immunity in exercise of its authority under the Fourteenth Amendment ignores Congress' authority to validly condition the use of federal funds on waivers of immunity. The abrogation cases are thus not relevant to assessing whether a funding condition waiving state sovereign immunity is valid. Indeed, this Court has explained that statutory language that is not sufficiently clear to abrogate state immunity can nevertheless be an unambiguous funding condition. *See Pace,* 403 F.3d at 282.

In addition, TEA cites two out-of-circuit district court decisions that concluded that Section 4712 did not validly condition the receipt of federal funds on a waiver of state sovereign immunity, but those cases are inapposite for several reasons. Br. 21-22 (citing *Slack v. Washington Metro. Area Transit Auth.*, 353 F. Supp.3d 1 (D.D.C. 2019);

Williams v. Morgan State Univ., No. 19-5, 2019 WL 4752778 (D. Md. Sept. 30, 2019)). First, the district court cases appear to address immunity from suit under Section 4712 in district court, not immunity from the administrative process. In both cases, the plaintiffs appeared to have filed suit directly in district court, so the district courts only addressed whether Section 4712 waived immunity for that type of suit. *See Slack*, 353 F. Supp. 3d at 10; *Williams*, 2019 WL 4752778, at *2. Second, neither case addressed the language of Section 4712 highlighted here that clearly put TEA on notice that it would be subject to awards for damages. In *Slack*, the employee did not argue that the statute conditioned receipt of federal funds on a waiver of immunity, so the district court did not address the issue. 353 F. Supp. 3d at 10 ("Ms. Slack admits that Congress did not . . . explicitly condition receipt of federal funds on WMATA's waiver of its immunity."); *see also Williams*, 2019 WL 4752778, at *6 (stating without analysis that the statute did not expressly conditions funds on a waiver of immunity). Finally, the waiver analysis in the two decisions conflict with this Court's case law, so those courts' analysis of statutory language necessary to constitute a valid condition would not apply here. Both cases reflect a "magic words" approach to sovereign immunity that this Court has specifically rejected. *Cf. Pace*, 403 F.3d at 281. The district court in *Slack* required "conditional language" or an express "reference [to] sovereign immunity," *Slack*, 353 F. Supp. 3d at 11; *see also Williams*, 2019 WL 4752778 *6, *13-14, but this Court has rejected that precise approach. In *Pace*, this Court held that neither "conditional language" nor express references to "waivers" of sovereign

immunity are the *sine qua non* of waiver. *Pace*, 403 F.3d at 281. And in *AT&T*, this Court found a waiver where a statute involved neither a condition nor an express reference to state sovereign immunity. *AT&T*, 238 F.3d at 646. Accordingly, the district court decisions on which TEA relies cannot undermine the conclusion that Section 4712 applies to TEA.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 10,497 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

s/ Jaynie Lilley
JAYNIE LILLEY

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2020, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system and that counsel for the parties will be served through that system.

s/ Jaynie Lilley
JAYNIE LILLEY