

June 26, 2026

Via Federal Rulemaking Web Portal

Hon. Scott Kupor
Director
Office of Personnel Management

Re: Docket ID: **OPM-2026-0100**

Public Comment in Response to Confidential Government Information Nondisclosure Agreement, 91 Fed. Reg. 31,478 (May 27, 2026)

Dear Director Kupor:

We write on behalf of the whistleblower-rights on-line newspaper [Whistleblower Network News](http://www.whistleblowersblog.org) (www.whistleblowersblog.org) (hereinafter “WNN”) and the [National Whistleblower Center](http://www.whistleblowers.org) (“NWC”).¹ These written comments are submitted in response to the Office of Personnel Management’s proposed rulemaking regarding “Confidential Government Information Nondisclosure Agreement,” 91 Fed. Reg. 31,478 (May 27, 2026) (hereinafter, “NDA Rulemaking”). The NWC and WNN are keenly aware of the issues facing employees who report fraud, waste and abuse both internally to government agencies and externally to the news media. We are deeply troubled by the proposed NDA Rulemaking because the proposed rule and NDA violate the Whistleblower Protection Act (“WPA”) protecting federal employees, as implemented by the Civil Service Reform Act (“CSRA”), as well as the First Amendment rights of federal employees and the news media. Lawful whistleblower disclosures are not “leaks” and whistleblowers are not “leakers.” For the reasons stated herein, we respectfully request that OPM

¹ The NWC is a nonprofit, non-partisan, tax-exempt, charitable organization dedicated to the protection of whistleblowers founded in 1988. See, National Whistleblower Center Website at www.whistleblowers.org.

withdraw the proposed rule and NDA and enforce whistleblower rights of federal employees consistent with the laws enacted by Congress and the Constitution.

I. INTRODUCTION

The NWC and WNN submits this comment to express deep concern and staunch opposition to the Office of Personnel Management's ("OPM") proposed rule that would establish a Confidential Government Information Nondisclosure Agreement (the "NDA") for federal employees. The proposed regulation systematically dismantles foundational civil service protections to promote and protect federal employee whistleblowing, undermines transparency and accountability, and introduces an impermissible "chilling effect" across the federal workforce. By shifting the paradigm from objective, merit-based public service to an environment of systemic intimidation, this proposed rule compromises the integrity of federal agencies. Furthermore, it would erode necessary and institutional protections for staff in the federal government, enabling scrutiny and intimidation of agency employees for engaging lawful activities. The proposed rule would undermine whistleblowing which is essential to democratic governance; suppressing the avenues through which civil servants report waste, fraud, abuse, and corruption directly compromising public safety and institutional accountability. Whistleblowing plays an important and essential role in improving the lives of all Americans. It is integral to a functioning democracy and curtailing the avenues available to *all* United States citizens, including those who work for the federal government, cracks the foundation of a democracy. The proposed NDA is fundamentally flawed, legally unsustainable and unconstitutional for the reasons detailed below.

II. THE RULE IS ILLEGAL UNDER THE CIVIL SERVICE REFORM ACT, WHISTLEBLOWER PROTECTION ACT FOR FEDERAL EMPLOYEES, AND SUPREME COURT PRECEDENT.

The Civil Service Reform Act of 1978 (“CSRA”) was a comprehensive piece of legislation that reformed the management structure of the federal bureaucracy and established the initial, baseline statutory protections for whistleblowers, and was signed into law on October 13, 1978. The law dismantled the historic Civil Service Commission and split its duties into three separate new agencies, namely the OPM; the Merit Systems Protection Board (“MSPB”); and the Federal Labor Relations Authority (“FLRA”). As part of the Whistleblower Protection Act amendments to the CSRA, federal employees were granted additional protections from retaliation for making “any” lawful disclosure of information about fraud, waste and abuse. These whistleblower protections have been enhanced by Congress over the years and have been broadly construed by the Supreme Court to permit lawful disclosure of information external to agency employers, including disclosures to the public via the news media as well as to Congress, Inspector Generals, and the Office of Special Counsel. *See* 5 U.S.C. § 2302, and further implemented by 5 U.S.C. §§ 1213-1219 and 1221-1222. The proposed NDA rule creates impermissible conflict with the CSRA and part of its subsequent statutory expansions through, among other things, the Whistleblower Protection Act (“WPA”).

Additionally, the merit principles formalized the nine merit system principles to ensure federal employment remains fair, non-partisan, and free from political favoritism. The nine merit system principles were codified under 5 U.S.C. § 2301(b) and include, but are not limited to, non-coercion and whistleblower protection.² Under 5 U.S.C. § 2301(b)(8)(A), “[federal] employees should be protected against arbitrary action, personal favoritism, or coercion for

² *See* 5 U.S.C. § 2301(b)(8)(A) and 5 U.S.C. § 2301(b)(9)(A)-(B), respectively.

partisan political purposes.” The WPA states that “employees should be *protected against reprisal for the lawful disclosure of information* which the employees reasonably believe evidence a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” 5 U.S.C. § 2301(b)(9) (emphasis added).

The proposed rule also directly violates 5 U.S.C. § 2302(b)(8) and 5 U.S.C. § 2302(b)(13). Section 2302(b)(8), the statutory core of the WPA, explicitly bars agency officials from taking, failing to take, or threatening to take a personnel action against an employee for “any” disclosure of information they reasonably believe evidences any violation of a law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

OPM’s proposed NDA directly undermines this protection by imposing an administrative standard that treats unclassified, non-public, or pre-decisional information as categorically restricted. By threatening employees with adverse suitability determinations or debarment if they refuse to sign—or if they disclose such “confidential” agency information without prior written management clearance—the rule institutes a structural mechanism to penalize the exact behavior Congress explicitly sought to protect under subsection (b)(8). OPM lacks the legal authority to create a broad, catch-all category of “Confidential Government Information” to suppress or chill lawful public interest whistleblowing.

Under 5 U.S.C. § 2302(b)(13), any non-disclosure policy, form, or agreement issued to federal employees **must explicitly contain a specific, congressionally mandated anti-gag**

provision.³ This mandatory text clarifies that the NDA does not supersede or diminish an employee’s right to make protected whistleblower disclosures, not just to an Inspector General, the Office of Special Counsel, or Congress, but also protects any lawful disclosure. OPM’s proposed is defective and fundamentally flawed because it drastically conflicts with the statute’s mandate. The proposed rule omits the necessary language required by Congress to fully protect federal employee whistleblower “rights” that are “created by existing statute...” *See* 5 U.S.C. § 2302(b)(13)(A). Existing federal whistleblower “rights” include the right to make lawful disclosures of fraud, waste or abuse to the news media, provided that such disclosures do not violate the Executive Orders or laws pertaining to classified information. The proposed NDA does not disclose the right to make lawful whistleblower disclosures to the news media and the President is without authority to create new categories of “confidential information” to restrict unclassified disclosures of information that is permitted to be disclosed under existing law. Implementing or enforcing a blanket NDA for federal employees as being proposed by OPM violates federal employee whistleblower statutory rights as well as their First Amendment rights.

The Whistleblower Protection Act of 1989 (“WPA”) establishes the fundamental legal framework that protects most federal civil service employees from retaliation (such as termination, demotion, or suspension) for reporting illegality, waste, or corruption. Section 3 of

³ *See* 5 U.S.C. § 2302(b)(13)(A) – Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: “*These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General or the Office of Special Counsel of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection.*” *Id.* (emphasis added).

the WPA amended 5 U.S.C. § 2302(b)(8), among other things, to strengthen the protections against whistleblower retaliation. This section now states:

Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, **shall not**, with respect to such authority take or fail to take, or threaten to take or fail to **take, a personnel action** with respect to any employee or applicant for employment **because of any disclosure of information by an employee or applicant** which the employee or applicant reasonably believes evidences any violation of any law, rule, or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, **if such disclosure is not specifically prohibited by law** and if such information is **not specifically required by Executive order to be kept secret** in the interest of national defense or the conduct of foreign affairs.⁴

The statute makes clear that “any” lawful disclosure is protected if the information is unclassified and falls within the scope of a protected disclosure of wrongdoing defined by the statutes. The only disclosures punishable are those specifically prohibited by law, i.e. laws made by Congress, and information deemed classified by the President.⁵ The OPM claims the form will “expressly preserv[e] the right to make disclosures authorized by law.”⁶ A carve out is not the point—the OPM is misstating the law, and thus the entire legal basis for the NDA is not valid because it does not clearly state that employees may make “any” disclosures protected by the WPA, including lawfully permitted disclosures of unclassified information to the news media.

In *Dep’t of Homeland Sec. v. MacLean*, 574 U.S. 383 (2015), the Supreme Court established precedent protecting the scope of lawful disclosures by whistleblowers under the WPA. In *MacLean*, the Supreme Court evaluated whether an agency could use its own internal regulations to block or penalize disclosures protected under the WPA. The Supreme Court held

⁴ See 5 U.S.C. § 2302(b)(8).

⁵ See *Dep’t of Homeland Sec. v. MacLean*, 574 U.S. 383, 392-3 (2015).

⁶ See OPM, Docket ID: OPM-2026-0100, Confidential Government Information Nondisclosure Agreement, p. 1.

that the WPA protects disclosures unless they are “specifically prohibited by law,” i.e. expressly prohibited by a statute enacted by Congress, or “specifically required to be kept secret in the interest of national defense,” i.e. classified.⁷ The Department of Homeland Security (“DHS”) argued that its internal regulatory restriction on disclosing “Sensitive Security Information” carried the force of law, thereby stripping the employee of whistleblower protection. The Supreme Court rejected the government’s position in a resounding 7-1 decision.⁸ This established legal boundaries that invalidate OPM’s current NDA proposal.

The Court ruled that the word “law” in the context of the WPA means a statutory enactment by Congress, not an internal agency rule, regulation, or executive policy. In the words of the Court:

Throughout 5 U.S.C.S § 2302, Congress repeatedly used the phrase “law, rule, or regulation.” . . . In contrast, Congress did not use the phrase “law, rule, or regulation” in 2302(b)(8)(A); it used the word “law” standing alone. That is significant because Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another. Thus, Congress’s choice to say “specifically prohibited by law” rather than “specifically prohibited by law, rule, or regulation” suggests that Congress meant to exclude rules and regulations.⁹

The word “law” is meant to be narrowly understood as Congressionally enacted statutes because:

A broad interpretation of the word “law” could defeat the purpose of the whistleblower statute. If “law” included agency rules and regulations, then an agency could insulate itself from the scope of 5 U.S.C. § 2302(b)(2)(A) merely by promulgating a regulation that “specifically prohibited” whistleblowing. But Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks. Thus, it is unlikely that Congress meant to include rules and regulations within the word “law.”¹⁰

⁷ See 5 U.S.C. § 2302(b)(8)(A).

⁸ See *MacLean* at 386 (“Sensitive security information is not classified, so the TSA can share it with individuals who do not have a **security clearance.**”) (emphasis added).

⁹ See *MacLean* at 393.

¹⁰ *Id.*

Thus, “law” refers to a Congressionally enacted statute—*not* an internal agency rule, regulation, or executive policy.

The Court also drew the line in the **exclusion of administrative discretion in statutory interpretation** via an explicit warning that allowing an agency to dictate what information is prohibited via administrative rule would grant the agency too much power. Agencies could simply declare any humiliating or improper conduct “confidential” or “restricted” by internal policy, effectively neutralizing the statutory protections enacted by Congress. The Court said: After creating an exception for disclosures “specifically prohibited by law,” Section 2302(b)(8)(A) goes on to create a second exception for information “specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.” This exception is limited to action taken directly by the President. That suggests that the word “law” is the only other exception is limited to actions by Congress—after all, it would be unusual for the first exception to include action taken by executive agencies, when the second exception requires action by the President himself.¹¹

The OPM is misstating the law by creating a broad definition of what is considered “confidential” information that cannot be disclosed by employees. That broad definition will reach to virtually every form of information and communication in the federal government and will restrict lawful disclosures of information protected by existing statutes, including the WPA. The entire legal basis for the NDA is illegal. The WPA protects “any” disclosure, including to the media so long as it is not prohibited by statute or involve classified information on national security grounds.¹² The only exception to general whistleblower disclosure protections carved

¹¹ See *MacLean* at 392-3.

¹² See 26 U.S.C. § 7623(b)(2)(A).

out is law passed by Congress and national security interests.¹³ The proposed NDA does not meet this standard.

The President cannot dictate what federal employees are allowed to say when they report fraud, waste, abuse, violations of law, rules or regulations, and other information about misconduct that is protected by the WPA. The Supreme Court in *MacLean* quoted 5 U.S.C. § 2302(b)(8)(A), “[f]ederal law generally provides whistleblower protections to an employee who discloses information revealing ‘any violation of any law, rule, or regulation,’ or ‘a substantial and specific danger to public health or safety.’”¹⁴ OPM’s proposed rule attempts to do exactly what *MacLean* and the WPA prohibits. OPM uses an executive agency policy to create a sweeping, artificial classification of “Confidential Government Information” to restrict speech. Because OPM lacks the constitutional and statutory authority to override the CSRA and WPA via administrative decree, the NDA’s broad restrictions on unclassified, non-public information are legally invalid. The government has no right to prohibit disclosures to media when speaking on matter of public interest unless prohibited by Congress or classified for national security interests by the President. The sweeping proposed NDA flies in the face of *MacLean*, which articulated the scope of disclosure protections.

Under these authorities, OPM’s proposed NDA is invalid and must be withdrawn.

III. THE PROPOSED NDA IS INCONSISTENT WITH SUITABILITY, AS AFFORDED UNDER THE CONSTITUTION.

The legal authority OPM claims to make suitability determinations is derived from the authority granted to the President in 5 U.S.C. § 3301.¹⁵ In enacting 5 U.S.C. § 3301(2), Congress

¹³ See 5 U.S.C. § 2302(b)(8)(A).

¹⁴ See *MacLean* at 385-6.

¹⁵ See 5 U.S.C. § 3301 – “The President may – (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of

granted the President the authority to make suitability determinations based on the conduct or character of *applicants* for federal employment.¹⁶ Suitability determinations are evaluations an applicant’s character and conduct and prior conduct of applicants for federal employment. A suitability investigation, by its very nature, investigates an applicant’s activities prior to employment with the government. Events that occur after an employee begins working for the government do not deal with the character or conduct of an applicant and are not suitability issues. The statute deals with applicants and only applicants—the word “employee” is not mentioned in that statute. Tying an employee’s failure to sign this legally deficient document to an agency’s “Suitability and Fitness” standard—thereby threatening termination or debarment without standard statutory appeals—violates the merit systems principles codified within the CSRA.¹⁷

Similarly, in *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976), Mow Sun Wong and other lawful permanent residents challenged a Civil Service Commission (the federal agency partially replaced by OPM) regulation that restricted most competitive federal service jobs to American citizens. The Court ruled that the Civil Service lacked the authority to make such a sweeping policy.¹⁸ Moreover, the Civil Service Commission’s justifications for the rule were deemed arbitrary because it was not the proper body to enact law.¹⁹ Similarly, Congress granted the President the authority to ascertain the suitability of federal applicants under 5 U.S.C. § 3301,

the service; (2) ascertain the fitness of *applicants* as to age, health, character, knowledge and ability for the employment sought”

¹⁶ See 5 U.S.C. § 3301(2).

¹⁷ See 5 U.S.C. § 2301(b)(8)(A) and § 2301(b)(9); see also Section II(a) of this document.

¹⁸ See *Hampton v. Mow Sun Wong*, 426 U.S. 88, 116 (1976) (“By broadly denying [a] class substantial opportunities for employment, the Civil Service Commission rule deprives its members an aspect of liberty.”)

¹⁹ See *Mow Sun Wong* at 116.

but, in line with *Mow Sun Wong*, it does not give OPM a blank check to make sweeping, national interest policies regarding federal employees.

Suitability determinations cannot be based solely on post-employment conduct. The authority granted in 5 U.S.C. § 3301(2) does not grant OPM the authority to get involved in the post-employment conduct of employees at other federal agencies.²⁰ OPM has no legal authority to interfere with another agency's management of its own employees for **post-employment** conduct. OPM's proposed NDA violates the plain language of 5 U.S.C. § 3301(2). Additionally, if the NDA is to be enforced against current employees for refusing to sign the NDA on suitability grounds it would violate these legal principles.

If the federal employment system is to have any integrity, this proposed rule must be withdrawn.

IV. FEDERAL EMPLOYEES HAVE A FIRST AMENDMENT RIGHT TO PUBLICLY DISCLOSE MATTERS OF PUBLIC CONCERN.

For over half a century, the Supreme Court has affirmed that public employees do not relinquish their right to speak as a citizen merely by virtue of their employment.²¹ To the contrary, in fact, the Court has long held government employees' ability to speak upon the matters of their work with the utmost regard. It has persistently recognized the significant value in encouraging the speech of government employees, as they "are often in the best position to know what ails the agencies for which they work."²² As the D.C. Circuit, sitting *en banc*, stated:

Individuals do not automatically relinquish their rights under the First Amendment by accepting government employment. *See, e.g., Keyishian v. Board*

²⁰ See 5 C.F.R. § 731.202 – Criteria for making suitability and fitness determinations. This gives the OPM, or an agency to which OPM has delegated suitability authority, the ability to make a suitability determination for one of its **employees** based on specific criteria, like misconduct, criminal conduct, and dishonesty.

²¹ See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

²² See *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion).

of Regents, 385 U.S. 589, 605-06, 17 L. Ed. 2d 629, 87 S. Ct. 675 (1967). ... Therefore, to determine the validity of a restraint on the speech of government employees, a court must "arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968).

Embedded in the *Pickering* test is the condition that to qualify for its protection, government employee speech must involve "matters of public concern." See *Connick v. Myers*, 461 U.S. 138, 146, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983).²³

The Supreme Court's consistent jurisprudence highlights the immense worth of the speech of government employees because of their unique ability to speak on matters of great public concern. As the Court emphasized, "[s]peech concerning public affairs is more than self-expression; it is the essence of self-government."²⁴ It is more than just the employee's interests at stake. For democratic systems of accountability to exist, the public must be able to hear the informed opinions of those who truly understand the government—its very own employees. The discourse that government employees alone can create produce the "free and open debate [that] is vital to informed decision making by the electorate."²⁵ This is a bedrock principle of the First Amendment.

The singular exception to this principle is the speech that public employees make directly as part of their official responsibilities. That speech may be subject to employer oversight.²⁶ But the OPM's proposed rule covers speech that extends far beyond a government employee's duties and attempts to restrict what an employee may say at any time, in any place, and in any capacity. Such restriction is prohibited by law.

²³ *Sanjour v. EPA*, 56 F.3d 85, 90-91 (D.C. Cir. 1995) (*en banc*).

²⁴ See *Garrison v. Louisiana*, 379 U. S. 64, 74-5 (1964).

²⁵ See *Pickering*, 391 U.S. at 571-72.

²⁶ See *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

The OPM’s proposed rule is a strict violation of the First Amendment. The coercive NDA would prohibit all employees of the federal agencies from disclosing any “non-public, confidential, or proprietary information,” including information that Congress has not designated as confidential. The prohibition would extend to any entity not explicitly authorized by the federal government.²⁷ The proposed rule constitutes a direct breach of constitutional free speech rights, which federal employees do not lose by virtue of being a federal employee.²⁸

As Chief Justice Roberts has noted regarding the holding of several Supreme Court cases:

[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.' *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-759, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (opinion of Powell, J.) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978)). The First Amendment reflects “a profound national commitment to the principle that debate [***181] on public issues should be uninhibited, robust, and wide-open.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). That is because “speech concerning public affairs is more than self-expression; it is the essence of self-government.” *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S. Ct. 209, 13 L. Ed. 2d 125 (1964). Accordingly, “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) (internal quotation marks omitted).²⁹

This proposition is a strict violation of the First Amendment, which stands as a pillar to safeguard the “unfettered exchange of ideas for the bringing about of political and social changes desired by the people.”³⁰ This integral exchange of ideas cannot occur if the government silences an entire class of citizens—their very own employees, who are most informed on government

²⁷ See *Confidential Government Information Nondisclosure Agreement*, 91 Fed. Reg. 31,478, 31,479 (May 27, 2026).

²⁸ See *Pickering*, 391 U.S. at 568.

²⁹ *Snyder v. Phelps*, 562 U.S. 443, 451-52, 131 S. Ct. 1207, 1215 (2011).

³⁰ See *Roth v. United States*, 354 U.S. 476, 484 (1957); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), as cited in *Connick*, 461 U.S. at 145.

policies and actions, which are “perhaps the paradigmatic ‘matter[] of public concern.’”³¹

Whistleblowers are an indispensable component of this democratic government that ensures accountability at every level. They undoubtedly speak on matters of extraordinary public concern through non-official statements made in their private capacities.

A categorical prohibition on government employees’ speech, which is precisely what this rule seeks to implement, contravenes the very purpose of the First Amendment and undermines democratic accountability. Barring disclosures that Congress specifically prohibits by law as well as the deference Congress has extended to the executive branch on information pertaining to national security, public employees retain a constitutional right to inform the public about matters of public concern related to their work in their capacity as a private citizen, so long as their interest is not outweighed by damages to their employer’s institutional efficiency.³²

The proposed rule coerces federal employees into relinquishing their First Amendment rights to speak freely, in their private capacity, on matters of great public interest. The NDA broadly violates employee rights to make unclassified disclosures to the news media, and it violates the First Amendment rights of the news media to inform the public on matters of public concern. By proposing NDA restrictions that infringe on federal employee rights to make any disclosure of information protected by the WPA and the First Amendment, OPM is creating a “chilling effect” on the rights of employees and the news media in the exercise of rights protected by the constitution. As the Court has emphasized time and time again, “public

³¹ See *Sanjour v. EPA*, 56 F.3d 85, 91 (D.C. Cir. 1995).

³² See *Pickering*, 391 U.S. at 568; see also 5 U.S.C. § 2302(b)(8).

employers may not condition employment on the relinquishment of constitutional rights.”³³ It is indubitable that this rule endeavors to do exactly that.

V. OPM’s PROPOSED NDA WOULD BE VOID ON PUBLIC POLICY GROUNDS, INCONSISTENT WITH OTHER FEDERAL WHISTLEBLOWER STATUTES WHICH PERMIT PUBLIC DISCLOSURES.

Public disclosures are anything but a foreign concept to the federal government. Federal whistleblower statutes—notably the Dodd–Frank Wall Street Reform and Consumer Protection Act and the Internal Revenue Service’s own whistleblower law, 26 U.S.C. § 7623 (2018)—all incorporate the concept that whistleblowers may make disclosures to the media. Federal legislation leaves this avenue open to whistleblowers because the public attention that media reports of wrongdoing garner are exactly what spur action to punish misconduct, corruption, fraud, waste, and abuse in government.

Strikingly, the Organization for Economic Co-operation and Development’s (“OECD”) 2022 audit of U.S. enforcement activity under the Foreign Corrupt Practices Act of 1977 (15 U.S.C. §§ 78dd-1, et seq.) (“FCPA”) found that only 10% of successful sanctions under that law came from corporate reports. However, over 80% came from whistleblowers and sources which typically get their information from whistleblowers (the news media, NGOs, and foreign governments), demonstrating the importance of external reporting structures for whistleblowers.³⁴

³³ See, e.g., *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 605 (1967); *Pickering*, 391 U.S., at 568; *Connick*, 461 U.S. 138, 142 (1983), as cited in *Lane v. Franks*, 573 U.S. 228, 236 (2014).

³⁴ See Organisation for Economic Co-operation and Development, *Implementing the OECD Anti-Bribery Convention Phase 4 Two-Year Follow-Up Report: United States* (2022), https://www.oecd.org/content/dam/oecd/en/publications/reports/2022/10/implementing-the-oecd-anti-bribery-convention-phase-4-follow-up-report-united-states_bbccd968/d994f92a-en.pdf, 10.

Congress has been consistent in this rationale. Section 922 of the Dodd–Frank Act, which governs whistleblower incentives and protections, awards whistleblowers in instances where they report to the news media so long as they possess original information.³⁵ This provision clearly acknowledges that public disclosures of information gained during a government employee’s duties are both lawful and beneficial. Similarly, the IRS whistleblower statute awards whistleblowers who report to the news media, again recognizing the importance of allowing whistleblowers to disclose misconduct within their offices publicly.³⁶

Public policy dictates that the importance in allowing whistleblowers to disclose internal information exceeds any interest in keeping the federal government under lock and key. The OPM’s proposed NDA requirement would *only* leave open internal government whistleblowing channels, forcing whistleblowers to place their careers on the line whenever they contemplate reporting government misconduct or wrongdoing.

The NDA requirement fundamentally contradicts Congress’s intentions. Not only has Congress consistently made clear that public disclosures of private agency information are well within the bounds of the law, but it has also explicitly encouraged such disclosures by allowing them to be statutorily rewarded, such as in the Dodd–Frank Act and the IRS whistleblower statute. According to the NDA requirement, agencies that elect to use the NDA would prohibit all their employees from disclosing any “non-public, confidential, or proprietary information” without government authorization.³⁷ That information is precisely what whistleblowers must be able to spread public awareness of, and precisely what Congress has allowed whistleblowers to disclose time and time again.

³⁵ See Dodd-Frank Act § 922(a); 15 U.S.C. § 78u-6(a)(3)(C).

³⁶ See 26 U.S.C. § 7623(b)(2)(A).

³⁷ See *Confidential Government Information Nondisclosure Agreement*, 91 Fed. Reg. at 31,479.

Further, sharing information with the news media is rarely the first step that whistleblowers take. Rather, whistleblowers often exhaust other avenues, including internal reporting structures, before doing so. A 2011 Ethics Resource Center study found that 84% of whistleblowers who reported externally attempted to report internally first.³⁸ Public disclosures are often essential as a last resort because they do what internal reports cannot—produce enough public attention that pressures the government into acting against corruption. The proposed NDA entirely removes that avenue in violation of established law. Its internal restriction of disclosures would undercut a crucial check on the government, allowing government misconduct and corruption to go publicly unnoticed and unaddressed.

VI. THE NDA WOULD HAVE A CHILLING EFFECT ON WHISTLEBLOWING.

The OPM's broad NDA requirement will turn government employees into a permanently silenced class, chilling the speech of citizens who are undoubtedly the most informed on public policy and the government. Restricting what employees say in the course of performing their official duties may be lawful, but restricting their ability to contribute to public discourse on their own time and in their own capacity is unequivocally not.

This NDA requirement will discourage government employees from speaking on any matter related to their employment, or even the agency in which they are employed, for fear of retaliation. The practice of whistleblowing is entirely dependent on employees' willingness to expose their employers' misconduct and wrongdoing, but that cannot happen if the NDA requirement forces employees to self-censor constantly. Even with existing protections and external reporting structures in place, threats of job loss, financial retribution, and other

³⁸ See C.M. Matthews, *Most Whistleblowers Report Internally, Study Finds* (May 30, 2012), <https://www.wsj.com/articles/BL-CCB-6515>.

consequences are a strong deterrent to whistleblowing. A 2024 study by Medius, a fraud detection software company, found that more than half of financial professionals in the U.S. and U.K. had witnessed or suspected misconduct in their workplace, but more than 80% chose not to report for fear of retaliation.³⁹

While the proposed NDA requirement leaves internal reporting structures to Congress and an Inspector General or the OSC open for whistleblowers, those government channels alone are inadequate. As Thomas Jefferson said in 1786, “Our liberty depends on the freedom of the press, and that cannot be limited without being lost.” Prohibiting lawful disclosures of information protected by the WPA to the news media through the proposed NDA requirement would only increase the proportion of individuals who witness misconduct but are functionally powerless to help put an end to it. External accountability mechanisms, such as lawful reports about government misconduct to the news media, are indispensable in a democracy to ensure that there is a greater check on the government than the government itself.

Further, unlike the OPM’s claim, this proposed NDA requirement *does* create new substantive restrictions on employee speech and disclosure rights under existing law. Removing employees’ ability to disclose information to the news media that is protected by the WPA—barring information that Congress itself deems confidential or that the executive determines is integral to national security—is not just a “standardized mechanism” for employees to “comply

³⁹ See Medius, *Courageous Whistleblowers Reclaim Derogatory Terms As Data Shows 80% of Financial Professionals Stay Silent on Suspected Internal Fraud, Fearing Retaliation*, PR Newswire (May 21, 2024), <https://www.prnewswire.com/news-releases/courageous-whistleblowers-reclaim-derogatory-terms-as-data-shows-80-of-financial-professionals-stay-silent-on-suspected-internal-fraud-fearing-retaliation-302151618.html>.

with obligations.”⁴⁰ It constructs an entirely new framework that chills employee speech and all but neuters government whistleblowers.

It is not disclosures of government information that erode public trust, as the OPM claims, but rather the insulation of the government from any public scrutiny.⁴¹ Employees have the right to disclose misconduct in government offices, and, just as importantly, the public has a right to hear about it. The NDA requirement is antithetical to the democracy that citizens have been promised since the adoption of the Constitution and the Bill of Rights, and it cannot be squared with both existing congressional statutes, the precedent of the Supreme Court, and the right of the citizenry to be informed about what their government is up to.

VII. Request for Comment: Q&A

- 1. What scope of information should be covered by the NDA? Should it cover only unclassified information? How do you understand the terms *confidential* and *confidentiality* in the context of this NDA? What customization of the NDA, if any, may be necessary for agencies to ensure it covers the appropriate information?**

The NDA is noncompliant with the WPA, 5 U.S.C. §§ 2302(b)(8), (b)(9) and (b)(13). Congress has not permitted to cover unclassified information unless prohibited by law. It also violates the constitution as set forth above. For good reason, Congress has never passed a law that permits such far reaching restriction on the lawful disclosure of unclassified information by federal employees and the proposed NDA is overbroad and illegal under current law. This proposal exceeds the agency’s statutory authority and should be withdrawn in its entirety.

⁴⁰ See *Confidential Government Information Nondisclosure Agreement*, 91 Fed. Reg. at 31,480.

⁴¹ *Id.* at 31,479.

- 2. Does the NDA clearly communicate the types of information that would be subject to non-disclosure requirements? If not, how could OPM better describe what information can or cannot be disclosed to ensure employees have appropriate notice of their responsibilities?**

No, the entire NDA creates a chilling effect that is not permissible under law.

- 3. Are there other statutes to which OPM should cite in Appendix A of the NDA when describing the nondisclosure requirements applicable to individuals working for or on behalf of the Federal government?**

No, but if any NDA is implemented the proposed NDA must make clear it does not apply to the disclosure of unclassified information or any information that may be lawfully disclosed.

The President and OPM may not by Executive Order restrict employee rights to disclose information that may be lawfully disclosed pursuant to the WPA. *See MacLean, supra.*

- 4. Do you have suggestions regarding the layout or formatting of the NDA?**

No, the NDA should be discarded.

- 5. Does the Privacy Act statement in the NDA provide sufficient notice to employees of the authorities, principal purposes, routine uses, and effects of the form?**

There should not be a broader NDA than what is currently permitted under existing law. The President and OPM may not unilaterally extend or broaden restrictions beyond what Congress has authorized without violating the WPA.

- 6. Does the OPM/GOVT-1 system of records notice provide sufficient notice that the government-wide system of records would maintain records related to the signing of, or failure to sign, the NDA?**

Under the Privacy Act of 1974, employees should be trained in privacy regularly. There is no need for the NDA as the Privacy Act contains criminal penalties for individual violations and the agencies may take disciplinary action against federal employees or officials who violate the Privacy Act.

7. What are the appropriate actions, if any, for agencies to consider taking if existing employees choose not to sign the NDA?

There are none. Asking that question in itself creates a “chilling effect” and the administration should order all agencies to follow the WPA, which permits the disclosure of unclassified information or information that is not prohibited by statute from being disclosed.

8. What are the appropriate actions, if any, for agencies to consider taking if new employees choose not to sign the NDA?

The proposed rule is inherently discriminatory, retaliatory and coercive against employees who choose to follow the WPA and make any protected disclosure in a lawful manner as interpreted by the Supreme Court.

9. Does the NDA clearly communicate the potential consequences of refusal to sign the form for both existing and new employees, along with whether signing the form is voluntary or mandatory?

There should not be consequences for refusal to sign the form for either existing employees or applicants. A mandatory NDA is illegal, and the proposed rule is nothing short of coercive, if not mandatory. The OPM steps beyond its bounds.

10. What else should OPM consider with regard to the NDA?


For the above reasons, the National Whistleblower Center urges the OPM to immediately withdraw this proposed rule. OPM cannot by executive whim or administrative policy re-

engineer the legal boundaries of federal employee speech, bypass statutory anti-gag requirements, or override clear Supreme Court precedent protecting public-interest disclosures. The Trump administration will make every utterance confidential, including law breaking activity, which has never been law in the United States.

VIII. CONCLUSION

On behalf of the NWC and WNN, the American public, and policymakers, we urge that American principles and democracy be protected by rejecting this rule. In sum, the proposed NDA seriously threatens the effectiveness, integrity, and quality of democratic roles, federal employees' Constitutional rights, and federal agency operations. By undermining the principles of whistleblowing and threatening job security of career civil servants, the proposed NDA could lead to politicization, loss of trust and expertise, low morale, and disrupted agency operations. Thank you for your time and consideration. NWC and WNN is available to answer any questions OPM may have or elaborate on any of the points made in this comment submission.

Respectfully submitted,



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