No. 13-894

IN THE

Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,
Petitioner,
v.
ROBERT J. MACLEAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES IN SUPPORT OF ROBERT J. MACLEAN

DAVID A. BORER
General Counsel

ANDRES M. GRAJALES*
Deputy General Counsel
American Federation Of
Government Employees,
AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
Grajaa@afge.org
(202) 639-6426

* Counsel of Record

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

QUESTION PRESENTED

The Whistleblower Protection Act exists to encourage federal employees to disclose government wrongdoing to persons who may be in a position to remedy it and to protect employees who come forward from agency retaliation for making such disclosures.

The question presented is whether the Whistleblower Protection Act bars the Transportation Security Administration from retaliating against an employee who discloses information that reveals an agency mistake which causes a substantial and specific danger to public safety, when the employee's disclosure is retroactively deemed contrary to an agency regulation but is not specifically prohibited by law or Executive order.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

INTEREST OF THE AMICUS[1]

The American Federation of Government Employees ("AFGE") is a national labor organization that, on its own and in conjunction with affiliated councils and locals, represents over 650,000 civilian employees in agencies and departments across the federal government and in the District of Columbia. AFGE's representation of these employees includes collective bargaining and direct representation in unfair labor practice proceedings and grievance arbitrations arising under the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101, *et seq*. ("the Statute"). AFGE's representation of federal employees also extends to litigation before the United States Merit Systems Protection Board ("MSPB"), the United States Equal Employment Opportunity Commission, and before federal district and appellate courts across the United States. AFGE has a demonstrated history of representing whistleblowers and will continue to do so in the future. *See, e.g.*, *Niswonger v. Dep't of the Air Force*, 60 M.S.P.R. 655 (1994).

Among the many employees for whom AFGE is certified as their exclusive labor organization are Transportation Security Officers, or "security screeners," employed by the Transportation Security Administration ("TSA"). *See U.S. Dep't of Homeland Security, TSA and AFGE and NTEU*, 65 F.L.R.A. 242 (2010). Unlike the majority of federal employees represented

---

[1] The parties have filed blanket letters of consent to *amicus* briefs in support of either party or neither party. No counsel for a party authored this brief in whole or in part, and no person or entity other than AFGE or its counsel made a monetary contribution to the preparation or submission of this brief.

by AFGE, however, Transportation Security Officers are not covered by the Statute. Key protections and rights that are granted to nearly all federal, civilian employees by the Civil Service Reform Act of 1978 also do not apply to Transportation Security Officers. They are not entitled to the procedural protections granted by 5 U.S.C., chapter 75. *Brooks v. Dep't of Homeland Security*, 95 M.S.P.R. 464, 469 (2004) (Transportation Security Officers not covered by 5 U.S.C., chapter 75). Nor do they have the right to appeal an adverse action imposed against them by TSA to the MSPB. *Conyers v. Merit Sys. Prot. Board*, 388 F.3d 1380, 1383 (security screeners not covered by 5 U.S.C. § 7701(a)).

One of the very few protections guaranteed to Transportation Security Officers is the protection against whistleblower reprisal granted by the Whistleblower Protection Act, 5 U.S.C. § 2302(b), ("WPA"). Protecting Transportation Security Officers from whistleblower reprisal, of course, makes eminent sense. These officers serve a vital function. They are the primary federal employees responsible for screening passengers and baggage for air travel, thereby protecting the traveling public. *See* TSA, Transportation Security Officer Careers, available at http://www.tsa.gov/careers/transportation-security-officer-tso (last visited Sept. 24, 2014). They are, in many ways, a first line of defense against acts of terrorism.

As such, Transportation Security Officers are also especially well-situated, much like the respondent in this case was, to learn of agency misdeeds and mistakes that create a substantial and specific danger to

public safety. Indeed, while their coverage under the WPA first originated from a memorandum of understanding between TSA and the U.S. Office of Special Counsel, Congress later recognized the critical and necessary protection granted by the WPA when it passed the Whistleblower Protection Enhancement Act ("WPEA"). *See* Memorandum of Understanding Between the U.S. Office of Special Counsel and the Transportation Security Administration Regarding Whistleblower Protections for TSA Security Screeners, available at https://osc.gov/Resources/tsa_mou.pdf (last visited Sept. 24, 2014). The WPEA expressly protects Transportation Security Officers from whistleblower retaliation as a matter of law. 5 U.S.C. § 2304.

Despite, however, the self-evident importance of ensuring public safety and protecting those employees who reveal a substantial and specific threat to that safety, a Transportation Security Officer ("TSO") is just as likely to receive reprisal as accolades for blowing the whistle. *See Aquino v. Dep't of Homeland Security*, 121 M.S.P.R. 35 (2014) (finding TSA removed security screener in retaliation for disclosing mistake that allowed air passengers to bypass security screening procedures). Consequently, AFGE has a deep-rooted interest in this matter and in shielding federal employees from illegal agency retaliation.

BACKGROUND

The crux of this case is that TSA removed Federal Air Marshal Robert J. MacLean for disclosing unclassified information which revealed that TSA had made a grave mistake. That mistake, TSA's ill-advised decision to remove all air marshal coverage from long-dis-

tance flights at a time when TSA was aware of a credible threat to those same flights, created a substantial, specific and imminent risk to public safety.

MacLean learned of TSA's mistake via an unencrypted text message that the agency sent to his personal cell phone, a hijacking alert. That alert was not marked as Sensitive Security Information ("SSI"), an unclassified type of information that is protected from certain disclosures, at the time it was sent. The agency, however, later designated the text message alert as SSI, in the course of justifying and defending MacLean's removal from service. MacLean had first attempted to address his concerns with the agency's decision to leave long distance flights undefended within his chain of command and through the agency's Office of Inspector General. But neither his supervisors nor the Inspector General took any action.

MacLean then, and only then, disclosed TSA's cancellation of air marshal coverage to the media. There was, understandably, a public outcry that subjected TSA to scathing criticism and lasting embarrassment. *See* http://pascrell.house.gov/media-center/press-releases/pascrell-air-marshal-decision-an-abomination (last visited September 21, 2014); *see also* http://maloney.house.gov/media-center/press-releases/dhs-fighting-air-marshals-instead-terrorists (last visited September 21, 2014).

TSA quickly rescinded its cancellation of air marshal coverage and no attack occurred. This incident is not the only time that TSA has been required to reverse course following public and Congressional scrutiny of its poor decision-making. *See* TSA reverses itself: No knives on planes, CBS News, June 5,

2013, available at http://www.cbsnews.com/news/tsa-reverses-itself-no-knives-on-planes/ (last visited Sept. 26, 2014).

When TSA learned that it was MacLean who blew the whistle, it fired him. MacLean eventually, after earlier cases before the MSPB and Court of Appeals for the Ninth Circuit, appealed to the Court of Appeals for the Federal Circuit. The Federal Circuit found that MacLean's disclosure was not specifically prohibited by law and therefore remanded the case to the MSPB for further consideration of MacLean's claim under the WPA. *MacLean v. Dep't of Homeland Security*, 714 F.3d 1301, 1311 (Fed. Cir. 2013).[2]

The Federal Circuit examined the law which TSA asserted forbade MacLean's disclosure, 49 U.S.C. § 40119(b)(1) (2009)[3], and the TSA regulation listing various types of SSI and prohibiting the disclosure of

---

[2] The Federal Circuit's non-final remand order, along with the absence of any split among the circuits and factual circumstances that are, in part, unique to the respondent (e.g., TSA's retroactive SSI designation) should have foreclosed the granting of certiorari in this case. *Cf. Rogers v. U.S.*, 522 U.S. 252, 258 (1998) (record should fairly represent the question upon which certiorari was granted). The writ ought to be dismissed as improvidently granted. This case does not clearly present the question of whether agency regulations may ever be "law" under the WPA.

[3] The petitioner notes that although the law briefed and argued below was Section 40119(b), the applicable law was actually 49 U.S.C. § 114(r). Pet. Brief p. 10, n. 2. The petitioner therefore focuses its arguments in this Court on Section 114(r), on the assertion that the legal analysis would be similar under either section. For the sake of clarity, this brief focuses on Section 40119(b), as that is the section that both the parties and the Federal Circuit relied upon.

SSI, 49 C.F.R. § 1520.5(b)(8)(ii) (2005). The lower court weighed both of these authorities against the pertinent section of the WPA, 5 U.S.C. § 2302(b)(8)(A) (2008). The court recognized that the WPA protects a federal employee's disclosure of "a substantial and specific danger to public health or safety" as long as "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." 5 U.S.C. § 2302(b)(8)(A).

Considering that no Executive order specifically requires that SSI be kept secret, the Federal Circuit found that Section 40119(b)(1) of title 49 did not *specifically* prohibit MacLean's disclosure. *MacLean*, 714 F.3d at 1309 ("The ATSA's plain language does not expressly prohibit employee disclosures[.]"). The lower court also held that TSA's regulation, Section 1520.5, was not a "law" under the WPA because it was, in fact, a regulation. The Federal Circuit found that Section 1520.5's status as a regulation placed it squarely within Congress's articulated intent that the term "specifically prohibited by law" not extend to "internal procedural regulations against disclosure." *Id.*; *see also* H.R. Rep. No. 95-1717 (1978) (Conf. Rep.), 1978 U.S.C.C.A.N. 2860, 2864 (**Specifically prohibited by law "does not refer to agency rules and regulations**.") (emphasis added). TSA petitioned for certiorari, which this Court granted.

SUMMARY OF THE ARGUMENT

The public was safer after MacLean's disclosure than it was before it. This is why a robust and meaningful bar on whistleblower retaliation is paramount.

Nowhere is this truer than when applied to those federal employees, like MacLean, who are in the best position to reveal that which their agencies would prefer remain hidden: agency misdeeds and embarrassing mistakes which cause a substantial and specific danger to public safety.

Yet, whistleblowers face an extraordinarily uphill battle. Before they ever make a protected disclosure whistleblowers must often overcome their own doubts and both societal and employment indoctrination against disclosure. The "blue wall of silence" is more than an inchoate cultural phenomenon, it is a palpable disincentive to disclosure. For those employees who choose the greater good over their own, the risk of adverse employment action is also high, with termination of their employment more often a reality than not. And even whistleblowers who are successful in challenging their termination and bringing their agency's retaliation into the light may have to wait years for relief. *Cf. Chambers v. Dep't of the Interior*, 116 M.S.P.R. 17 (2011) (finding retaliation under the WPA after approximately 7 years of litigation).

AFGE therefore supports MacLean's undistorted reading of the WPA. The Court of Appeals for the Federal Circuit correctly determined that MacLean's disclosure was not specifically prohibited by law. Indeed, it is uncontested that TSA fired MacLean because he exposed TSA's rash decision to remove federal air marshals from long-distance flights at a time when TSA was facing a credible threat of terror on those very same flights. The petitioner concedes that the respondent's disclosure is the very reason that it terminated his employment. Pet. Brief p. 8.

The Federal Circuit, moreover, correctly determined that the plain language and expressed legislative intent of 5 U.S.C. § 2302(b)(8) protects the disclosure of a substantial and specific threat to public safety when that disclosure is not specifically prohibited by law or Executive order. The Federal Circuit likewise got it right when it found: a) that 49 U.S.C. § 40119(b)(1) (2009) does not specifically prohibit anything; and b) that TSA's regulation prohibiting the disclosure of SSI is not a law within the meaning of the WPA, 5 U.S.C. § 2302(b)(8).

A contrary holding would ignore the language of the statute and effectuate the reverse of Congress's intent. It would discourage future whistleblowers from coming forward, and undermine their protection when they did. This is especially so with respect to TSA because, as this case demonstrates, potential whistleblowers would have to contend with the uncertain possibility that TSA might retroactively designate information contained in an otherwise protected disclosure as SSI in order to remove it, and the whistleblower, from the protection of the WPA. The decision of the Federal Circuit should therefore be affirmed.

ARGUMENT

I. MacLean's Disclosure Was Not Prohibited By Law And Allowing TSA Regulations To Dictate Which Disclosures Are Prohibited Would Defeat The Purpose of the WPA and Stifle Future Whistleblowers

Every possible reading of Section 40119(b)(1)(C) demonstrates that law's lack of specificity concerning

which particular disclosures may be prohibited. In pertinent part, the law provides that:

> Notwithstanding section 552 of title 5 and the establishment of a Department of Homeland Security, the Secretary of Transportation shall prescribe regulations prohibiting disclosure of information obtained or developed in ensuring security under this title if the Secretary of Transportation decides disclosing the information would—be detrimental to transportation safety.

But nowhere does it define the phrase "detrimental to transportation safety." It is an open-ended phrase that does not specifically prohibit any identifiable or describable piece of information. A TSA employee who wished to determine whether a particular disclosure was prohibited by Section 40119(b)(1)(C) could not do so by reference to the law. The law provides no advance warning as to whether a *specific* disclosure is prohibited.

Any attempt by a TSA employee to determine in advance which disclosures are prohibited is further hampered by the fact that in its regulations TSA has arrogated to itself the power to designate *anything* as SSI. While TSA's SSI regulation is specific in a way that the law plainly is not, among the many categories of information designated as SSI by TSA's regulation there is a catchall category: Other information. Other information, according to TSA, is "[a]ny information not otherwise described" in the regulation that TSA or the Department of Transportation determines is SSI. 49 C.F.R. § 1520.5(b)(16). In other words, it is obvious that some things are SSI, but there is no telling in advance what else might be or might become SSI.

The petitioner implicitly concedes this fact by acknowledging that TSA's regulations have added "new categories of SSI" "over the last decade." Pet. Brief p. 5. Even the lengths to which the regulation goes to identify what may constitute SSI underscores the law's lack of specificity because were the statute specific, it would not require such interstitial additions.

The broad sweep of the regulation thus highlights the very risk that Congress intended Section 2302(b)(8) to protect against: that agencies might seek to regulate their way out of the WPA. This is another reason why it is clear and unequivocal that Congress did not intend for the term "law" in the WPA to include "rule or regulation." And the Federal Circuit saying that "[r]egulations promulgated pursuant to Congress's express instructions would qualify as specific legal prohibitions" is just another way of saying that the relevant "specific prohibition" must arise in the first instance from the applicable statute and not from subsequently adopted regulations. *MacLean*, 714 F.3d at 1310. Congress did not intend to allow agencies to self-select which whistleblower disclosures should be prohibited by law.

Specificity is key. Had Congress specifically directed TSA to promulgate regulations prohibiting the disclosure of air marshal deployments, for example, then it is conceivable that whatever regulation TSA drafted might qualify as law for the purpose of Section 2302(b)(8)(A). But that is not what Congress did. Congress instead gave TSA *discretion* to determine which information should be designated as SSI. It is that discretion that ultimately undermines the petitioner's arguments because a grant of discretion is by

definition non-specific. The entire purpose of granting discretion could, indeed, be explained as a Congressional determination to avoid "specificity" in favor of flexibility. This may be all to the good in a broader statutory scheme relying on agency expertise but it cannot overcome the plain language of the WPA. It is simply fallacious to suggest, as the petitioner does, that the phrase "specifically prohibited by law" in Section 2302(b)(8)(A) means exactly the same thing as the much broader phrase "specifically prohibited by law, rule, or regulation."

Further, because the clearly expressed intent of Congress does not conflict one iota with the statutory language that it chose, this Court should apply Section 2302(b)(8) as it is written. For example, any latent ambiguity in Congress's conference committee statement that, "[t]he reference to disclosures specifically prohibited by law is meant to refer to statutory law and court interpretations of those statutes," is removed absolutely by the very next, clarifying sentence: "It [the reference] does not apply to agency rules and regulations." H.R. Rep. No. 95-1717 (1978) (Conf. Rep.), 1978 U.S.C.C.A.N. 2860, 2864. This clarifying statement admits of only one interpretation and that is that agency rules and regulations promulgated through agency discretion do not qualify as "law" under the WPA.

Because 49 U.S.C. § 40119 did not specifically prohibit MacLean's disclosure and because 49 C.F.R. § 1520.5(b)(8)(ii) is nothing more than an agency regulation promulgated through the exercise of agency discretion, MacLean's disclosure was not prohibited by law within the meaning of 5 U.S.C. § 2302(b)(8)(A). Congress is free to change the statutory scheme if it

finds it unworkable, just as the President is free to issue an Executive order prohibiting the disclosure of SSI. But the President has not issued an Executive order, and whenever Congress has changed the WPA's statutory scheme it has done so with an eye toward expanding, not diminishing the act's protection.

Finally, giving effect to the statute's plain language will not have the dire consequences that the petitioner threatens. Successful claims of whistleblower reprisal are not merely there for the taking.

> Pursuant to 5 U.S.C. § 2302(b), to establish reprisal for whistleblowing, the employee must establish four elements: (1) the acting official has the authority to take, recommend, or approve any personnel action; (2) the aggrieved employee made a protected disclosure; (3) the acting official used his authority to take, or refuse to take, a personnel action against the aggrieved employee; and (4) the protected disclosure was a contributing factor in the agency's personnel action. *See Lachance*, 174 F.3d at 1380. If the employee makes this showing, there is still no violation of the WPA if the agency can prove by clear and convincing evidence that it would have taken the same personnel action(s) in the absence of the protected disclosure. 5 U.S.C. § 1221(e)(2).

Chambers v. Dep't of the Interior, 602 F.3d 1370, 1376 (Fed. Cir. 2010). On top of this rigorous framework, the test for determining whether an employee's disclosure of a "substantial and specific danger" to public safety is protected is not so easily overcome. The disclosure may not be vague or speculative. The employee must have "specific allegations or evidence either of actual past harm or of detailed circum-

stances giving rise to a likelihood of impending harm." *Id*. Most claims will fail.

But the petitioner never comes to grips with the gravity of TSA's mistake. The issue here was never a mere policy disagreement. It was a profound lapse in agency judgment that left air passengers and the general public unguarded and vulnerable to imminent attack in the face of an uncontested hijacking alert. Withholding the WPA's protection in this case will therefore have an undeniable chilling effect on future whistleblowers. The next TSO or air marshal who is confronted with a substantial and specific danger to public safety that her agency would prefer she ignore will be in the exact bind that Congress thought it had eliminated with the passage of the WPA: 100% vulnerable to agency retaliation for doing the right thing. The same may be said of employees at other agencies, such as those at the Department of Veterans Affairs who face documented retaliation for disclosing critical lapses in patient care. *See*, *e.g.*, VA Employees Testify About Retaliation Against Whistleblowers, Washington Post (July 9, 2014), available at http://www.washingtonpost.com/blogs/federal-eye/wp/2014/07/09/va-employees-testify-about-retaliation-against-whistleblowers/ (last visited Sept. 25, 2014). All of these federal employees will be far less likely to come forward if the scope of the WPA's protection is narrowed, which is not what Congress intended.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

DAVID A. BORER
General Counsel

ANDRES M. GRAJALES*
Deputy General Counsel
American Federation Of
Government Employees,
AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
Grajaa@afge.org
(202) 639-6426

* Counsel of Record for
AFGE

September 2014