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 *AMICI CURIAE* FOR THE BLACKS IN GOVERNMENT (BIG), THE EMERALD SOCIETY OF THE FEDERAL LAW ENFORCEMENT ASSOCIATIONS (ESFLEA), AND THE FEDERAL LAW ENFORCEMENT OFFICERS ASSOCIATION (FLEOA) IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST

The *amici* herein are the Blacks in Government (BIG), the Emerald Society of the Federal Law Enforcement Associations (ESFLEA), and the Federal Law Enforcement Officers Association (FLEOA).[1] BIG was established in 1975 and incorporated in 1976 to address and support the need for African Americans in public service to organize around issues of mutual concern and use their collective strength to address workplace and community concerns. ESFLEA is an organization of American Federal law enforcement officers of Irish heritage. FLEOA is the largest nonpartisan, nonprofit professional association, exclusively representing Federal law enforcement officers. FLEOA represents more than 25,000 Federal law enforcement officers from over 65 different agencies. FLEOA is a charter member of the Department of Homeland Security (DHS) Federal Law Enforcement Working Group, holds two seats on the Congressional Badge of Bravery Federal Board, and serves on the Executive Board of the National Law Enforcement Officers Memorial Fund and the National Law Enforcement Steering Committee. All three organizations have a distinguished and proud history of representing and protecting aggrieved Federal employees before the vast array of government agencies.

The *amici* are compelled to submit this brief to thwart what could be a dangerous and irresponsible attempt by the Petitioner, DHS, to erode and evis-

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[1] Pursuant to this Court's Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than the BIG, the ESFLEA, and the FLEOA or its members made any monetary contribution to the preparation or submission of the brief.

cerate the sound policies that gave rise to the Whistleblower Protection Act (WPA), Pub. L. 101-12, 103 Stat. 165 (1989) (codified at U.S.C. § 2302(b)(8)), as amended. The importance of robust protections for government employees in a position to expose waste, fraud, abuse, violations of law, and dangers to public safety cannot be overstated. Indeed, the actions of those individuals who avail themselves of the WPA are often the last stalwarts against corruption, malfeasance, and waste in the government. The present appeal is nothing less than a direct attack on the WPA, with the aim of impermissibly limiting the scope of protection afforded by the Act.

It is the Petitioner's intention to expand the definition of what is "specifically prohibited by law," 5 U.S.C. § 2302(b)(8)(A), to deprive the Respondent, Robert J. Maclean, of WPA protections for his disclosures. Petitioner's position is not only unavailing, but further is in complete contravention of both the plain meaning of the WPA and the intent of its drafters. It is imperative that the WPA be sufficiently concrete to allow potential whistleblowers to know in advance whether their actions are protected. Extending the exceptions to agency-promulgated regulations will not provide potential whistleblowers with the adequate notice that they require and deserve, and it will undercut the WPA's laudable purpose. Without the assurances offered by that blanket of protection, employees will not only be discouraged from exposing waste, fraud and abuse, but will also become the unprotected targets of the retaliation, attacks, and reprisal that the WPA was designed to prevent.

The *amici*, therefore, encourage this Court to affirm the Federal Circuit's decision, holding that

MacLean's disclosure was not "specifically prohibited by law" within the meaning of the WPA.[2]

STATEMENT OF THE CASE

We respectfully refer the Court to the Petitioner's and Respondent's briefs, which succinctly supply the full factual and procedural history of this litigation.

SUMMARY OF ARGUMENT

The present appeal offers a critical opportunity for this Court to clarify and reinforce the underlying protections afforded to whistleblowers pursuant to the WPA. Petitioner DHS asks this Court to expand the definition of what is "specifically prohibited by law," 5 U.S.C. § 2302(b)(8)(A), to include "regulations," effectively eviscerating the protections afforded to whistleblowers.

Petitioner's argument, however, is without merit because it is in complete contravention of the plain meaning of the statute and the congressional intent underlying the WPA. The statute is clear on its face, providing that disclosures are protected if not "specifically prohibited by law." Nevertheless, even if there was some ambiguity as to the intent of the statutory language, the legislative history of the WPA erases any doubts and clearly supports the contention that "specifically prohibited by law" must be narrowly construed to encompass only "statutes" enacted by Congress, and not, as Petitioner wrongfully suggests, "regulations" that are promulgated by agencies. Moreover, any post-enactment activity which has

[2] This brief is filed with blanket consent of the Petitioner and the Respondent pursuant to this Court's Rule 37.3. Copies of the requisite consent letter have been filed with the Clerk.

been cited by the Petitioner, such as 49 U.S.C. § 114(r)(1), is irrelevant and not a proper consideration when assessing the legislative intent of the WPA.

Additionally, Petitioner's contentions run counter to the crucial fact that the WPA must be sufficiently concrete to give potential whistleblowers ample notice with regard to whether their disclosures are duly protected. Extending the exceptions to regulations will not provide potential whistleblowers with the adequate notice that is required and that they rightfully deserve. Instead, expanding the meaning of "law" to include regulations will undoubtedly leave potential whistleblowers guessing as to whether their disclosure is protected. Potential whistleblowers must be afforded the benefit of knowing — before blowing the whistle — whether their disclosures are protected under the statute. Depriving prospective whitsleblowers of this concrete notice will discourage such individuals in coming forward, and render them more vulnerable to the retaliation, attacks, and reprisal that the WPA was designed to prevent.

Further, Respondent in this case was well within his rights to blow the whistle to the press because his disclosure was not prohibited by law. Even if it was, Respondent was justified in his actions because he, in an abundance of caution, first raised his concerns internally prior to going to the press.

Finally, Petitioner's alarmist arguments as to the public policy considerations are not only contrary to the intent of the WPA, which is to protect whistleblowers and not their employers, but also completely unsupported by any legislative history or findings. Petitioner's allegations are designed to distract this Court from what is essentially a straightforward interpretation of the WPA.

Accordingly, the Court of Appeals for the Federal Circuit's decision must be affirmed.

ARGUMENT

I. THE WHISTLEBLOWER PROTECTION ACT IS CLEAR ON ITS FACE AND ANY DOUBT IS ERASED BY THE LEGISLATIVE HISTORY WHICH SUPPORTS THE CONTENTION THAT THE "SPECIFICALLY PROHIBITED BY LAW" PROVISO DOES NOT ENCOMPASS REGULATIONS.

1. At issue is whether the use of the phrase "specifically prohibited by law," as used in 5 U.S.C. § 2302(b)(8)(A), is broad enough to encompass regulations promulgated by the Transportation Security Administration (TSA) under the authority of the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597 (2001).

The inquiry necessarily starts with the plain language of the statute. *See United States v. Ron Pair Enters., Inc.,* 489 U.S. 235, 241 (1989). Where the language and purpose of the questioned statute is clear on its face, there is no need to look to the legislative intent but, rather, courts follow the legislative direction embedded in the statue itself. Where the words are ambiguous, the judiciary may properly look to legislative history to reach a conclusion. *See United States v. Pub. Utilities Comm'n*, 345 U.S. 295, 315-16 (1953); *see also Johansen v. United States*, 343 U.S. 427, 432 (1952); *Int'l Longshoremen's & Warehousemen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 243 (1952); *Feres v. United States*, 340 U.S. 135 (1950).

When interpreting a statute, however, courts must consider not only the plain meaning of each word, but also the placement and purpose of the language within the statutory scheme. *See Bailey v. United States*, 516 U.S. 137, 145 (1995). The meaning of statutory language, plain or not, thus depends on context. *See Brown v. Gardner*, 513 U.S. 115, 118 (1994). Here, "specifically prohibited by law" follows "violation of any law, rule or regulation." 5 U.S.C. § 2302(b)(8)(A). In the context of the statute, it is clear and unambiguous that "law" is not as broad as "law, rule, or regulation." *Id.* Any other reading would render the use of "rule" and "regulation" superfluous. Equally clear is the fact that Congress, in enacting the statute, was consciously distinguishing between the phrases "specifically prohibited by law" and "violation of any law, rule, or regulation." Therefore, any interpretation of the WPA which purports to include the regulations promulgated under the ATSA within the coverage "specifically prohibited by law" is clearly contrary to the plain language of the statute.

In *United States v. Missouri Pacific Railroad Co.,* 278 U.S. 269, 277-78 (1929), this Court made the following observation when urged to construe a statute which, like the one in the present case, contained no ambiguity:

> The language of [the] provision is so clear and its meaning so plain that no difficulty attends its construction in this case. Adherence to its terms leads to nothing impossible or plainly unreasonable. We are therefore bound by the words employed and are not at liberty to conjure up conditions to raise doubts in order that resort may be had to construction. It is elementary that where no ambiguity exists there is no room for construc-

> tion. Inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation.

It is clear from the statutory language that "specifically prohibited by law" does not include regulatory prohibitions and, therefore, no presentation of legislative history or investigation of congressional intent is needed. Cannons of interpretation require that when a law's meaning is clear on its face, that meaning is determinative. Statutory language is written, debated, revised, passed by Congress, and then signed into law by the President. It is not the place of the judiciary to redefine or reinterpret the clear meaning of statutory language. As such, the courts should only turn to legislative history when presented with ambiguity in a law's meaning.

2. Petitioner, without basis, appears to have magically intuited a congressional intent to limit the protections afforded to whistleblowers under the WPA by including disclosures prohibited by regulation in the language "specifically prohibited by law." Pet'r Br. 13. Claims of congressional intent to include disclosures prohibited by regulation are completely unsupported by the relevant legislative history. Petitioner goes so far as to state that absent a "'clear showing' of contrary congressional intent, the phrase 'by law' is presumed to include both statutes and substantive regulations..." Pet'r Br. 13 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-96 (1979)).

Petitioner's woefully inaccurate interpretation of legislative history renders it necessary to delve into the legislative history of the WPA's use of the phrase "specifically prohibited by law." The extensive legislative history from the statute's predecessor, the Civil Service Reform Act of 1978, Pub. L. 95–454, 92

Stat. 1111 (1978), clearly, unequivocally, and most adamantly states that the purpose of the law is to offer broad protections for whistleblowers and exclude regulations from the inclusion in the phrase "specifically prohibited by law." *See* S. Rep. No. 95-969, at 22 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743.

Two of the specific goals cited in the 1978 Senate report were: (1) developing broad categories of protected disclosures, and (2) "narrow[ing] the proviso for those disclosures not protected" under the statute. *Id.* Indeed, these intentions are reflected in the statutory language itself. Specifically, the WPA's protected disclosures are evidence of "any violation of any law, rule, or regulation." Disclosures which are not protected include those that are "specifically prohibited by law" and those "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. § 2303(b)(8). As the Federal Circuit noted, the Senate specifically rejected broadening the statutory language to include regulations. *See MacLean v. Dep't of Homeland Security*, 714 F.3d 1301, 1301 (Fed. Cir. 2013). The Senate Committee was concerned:

> That the limitation of protection in S. 2640 to those disclosures 'not prohibited by law, rule or regulation,' would encourage the adoption of internal procedural regulations against disclosure, and thereby enable an agency to discourage an employee from coming forward with allegations of wrongdoing. As modified the limitation has been narrowed. Those disclosures which are specifically exempted from disclosure by a statute which requires that matters be withheld from the public

> in such a manner as to leave no discretion on the issue, or by a statute which establishes particular criteria for withholding or refers to particular types of matter to be withheld, are not subject to the protections of this section.

S. Rep. No. 95-969, at 22, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743.

Undoubtedly, Petitioner has seized upon the fact that the Senate report includes the words "prohibited by statue" and erroneously interprets the substitution of "prohibited by law" in the actual statute as evidence of a congressional intent to broaden the scope of prohibitions to include regulatory prohibition. Pet'r Br. 11, 26, 32. The legislative history clearly indicates this would be a misinterpretation.

On October 5, 1978 the House of Representatives and the Senate issued a joint explanatory statement addressing the use of the word "law" in lieu of "statute" in 5 U.S.C. § 2302(b)(8)(A). This statement emphatically supports Respondent's interpretation of the WPA. The joint report offers great insight into Congress' intent. There is no question that in this instance the words "statute" and "law" are synonymous. *See* H.R. Conf. Rep. No. 95-1717, at 5 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864. The Senate bill provided that it was "prohibited to take or fail to take a personnel action as a reprisal for disclosure of a certain information if such disclosure is not specifically prohibited by statute or Executive order;" whereas the House provision stated that "an employee would not be protected against reprisal for a disclosure of information if such disclosure is specifically prohibited by law or if such information is specifically required by Executive order to be kept secret in the interest of national defense of the

conduct of foreign affairs." *Id.* In commenting upon the use of the House version of the bill with regards to the language "specifically prohibited by law," the joint report states:

> The conference substitute in Section 2302(B)(8)… adopts the House provision concerning disclosures not specifically prohibited by law in the interest of national defense or the conduct of foreign affairs. The reference to disclosures specifically prohibited by law is meant to refer to statutory law and Court interpretations of those statutes. It does not refer to agency rules or regulations.

H.R. Conf. Rep. No. 95-1717, at 5, *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864.

Accordingly, the congressional intent to protect disclosures, such as those made by Respondent, is stated outright. The Senate and House both declare that prohibited by "law" means exclusion from whistleblower protection under the WPA for disclosure of information prohibited by a congressionally-passed statute and not an agency-promulgated regulation. Therefore, both the plain language of the statute and the legislative history support Respondent's assertion and the Federal Circuit's conclusion that Respondent's disclosures were not "specifically prohibited by law."

3. Petitioner's complete failure to properly acknowledge Congress' true intent as to the scope of WPA's protection reaches an even higher level of desperation with its flawed and dubious reliance on a 2009 amendment of 49 U.S.C. § 114(r)(1). DHS suggests that another statutory development, by a different Congress, years after WPA was passed, can and should comfort this Court that Congress was

cognizant at all times as to the breadth of protection under WPA and when appropriate did something about it: "To the extent any concern exists that the TSA might apply Section 114(r) in an overbroad manner calculated to deter legitimate disclosures, Congress can address—and has, in fact, addressed—that concern." Pet'r Br. 41.

Such a contention is beside the point. The issue is not whether Congress can and should be trusted to act when needed to ensure the continual vitality of the WPA. Rather, the question before the Court is whether Congress already has addressed the issue through the "specifically prohibited by law" exclusion clause when the WPA was enacted.

Petitioner's reliance on a 2009 amendment ignores this Court's often articulated observation that post-enactment legislative history is a suspect means of elucidating the intent of a law. *See e.g., Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011) ("Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.") (citing *Jones v. United States*, 526 U.S. 227 (1999); *United States v. Mine Workers*, 330 U.S. 258, 281-82 (1947)); *see also Bruesewitz*, 131 S. Ct. at 1092 ("To be sure, postenactment legislative history created by a subsequent Congress is ordinarily a hazardous basis from which to infer the intent of the enacting Congress.") (Sotomayor, J., dissenting) (citing *Sullivan v. Finkelstein*, 496 U.S. 617, 631-32 (1990)).

Moreover, if post-enactment activity were to be of any guidance, it would actually undermine Petitioner's central position. After the enactment of the WPA in 1989, Congress has repeatedly acted in a manner to strengthen and further the protections afforded to

whistleblowers. For example, in 1994, Congress reinforced WPA protections by unanimous vote. *See* An Act To Reauthorize The Office Of Special Counsel, And For Other Purposes, Pub. L. No. 103-424, 108 Stat. 4361 (1994). Most recently, Congress passed the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, 126 Stat. 1465 (2012), "to reform and strengthen several aspects of the whistleblower protection statutes in order to achieve the original intent and purpose of the laws." S. Rep. No. 112-155, at 3-4 (2012), *reprinted in* 2012 U.S.C.C.A.N. 589, 591-92. Notably, according to the remarks by the Hon. Todd Russell concerning the WPEA, "agencies must not be allowed to circumvent whistleblower protections through so-called 'secrecy' regulations, such as a new category of information (labeled 'Sensitive Security Information') created by the Department of Homeland Security." 158 Cong. Rec. E1664-01 (daily ed. Sept. 28, 2012) (statement of Hon. Todd Russell).

Hence, each legislative history contention raised by the Petitioner undercuts not only its position, but also its credibility. Ultimately, however, this Court need not concern itself with the 2009 amendment of Section 114(r) or any other post-enactments of the WPA. The language of the law is sufficiently clear and the exclusion sought to be imposed by the Petitioner is improper.

II. PETITIONER'S CONTENTIONS PLACE AT RISK THE PROSPECTIVE WHISTLEBLOWER'S RIGHT TO NOTICE OF WHETHER HIS OR HER DISCLOSURES WILL BE PROTECTED.

1. When preparing to blow the whistle on government wrongdoing, the whistleblower must be afforded the opportunity to know, before disclosure of the information, whether he or she will enjoy whistleblower protection. A whistleblower, reading the plain language of 49 U.S.C. § 114(r)(1)(C), could not understand that disclosure of information marked "SSI" would fall outside the bounds of whistleblower protection.

The phrase "specifically prohibited by law" follows language referring to "a violation of any law, rule, or regulation." 5 U.S.C. § 2302(b)(8)(A). The whistleblower's reading of the plain language of the statute would evidence that a regulation was both different from law and not a valid prohibition against whistleblowing, as the only other exception to the protection afforded such disclosures is where the information disclosed is "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." *Id.* It is clear that Congress directed the government employee to consult two specific sources — statutory law and Executive orders — before making a decision about whether to blow the whistle on agency wrongdoing. To interpret the plain language of 5 U.S.C. § 2302(b)(8)(A) to mean that the employee must also consult the agency's own regulations beforehand is both counterintuitive and in contradiction with Congress' communicated concerns with internal agency-promulgated rules designed to punish gov-

ernment employees who expose corruption. 135 Cong. Rec. H750 (daily ed. Mar. 21, 1989) ("It is obvious, but worth noting, that no Executive order, regulation, or contract can extinguish the rights provided under section 2302 of title 5.")

2. It is axiomatic that, not only must a law exist to prohibit the disclosure, but that law must also be "specific" as to the prohibition. According to the Senate report, the prohibiting statute must describe the prohibited disclosures in such a way "as to leave no discretion on the issue, or by a statute which established particular criteria for withholding or refers to particular types of matters to be withheld." S. Rep. No. 95-969, at 22, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743.

Contrary to Petitioner's argument, 49 U.S.C. § 114(r)(1) does not prohibit any specific disclosures, it merely affords the Under Secretary of TSA the authority to prescribe regulations prohibiting disclosure. Pet'r Br. 13. The law does not state that the forthcoming regulations will be afforded the force and effect of "law" for purposes of the WPA, nor does it list the information that will be covered by the forthcoming regulation. Congress' intentional phrasing of "specifically prohibited by law" means just that; the law must specify what the would-be whistleblower cannot disclose. Here, the law empowers DHS to create regulations; but the law itself does not set forth any restriction against disclosure.

Even assuming for the sake of argument that the SSI regulation promulgated by Petitioner could be afforded the same force and effect as a "law," both 49 U.S.C. § 114(r)(1) and 49 C.F.R. § 1520 fail to rise to the level of specificity required to place the employee on clear notice of the information he or she cannot

disclose. If one were to accept Petitioner's petition that "regulation" can mean "law" for purposes of the WPA, before blowing the whistle, a prospective whistleblower would have to first read the statute, then cross-reference TSA's regulations (promulgated pursuant to 49 U.S.C. § 114(r)(1)) and its implementing policy to determine whether the subject matter of his or her disclosures would run afoul of the agency's categorization of SSI.

In this case, Respondent's applicable guidance at the time of his disclosure was a TSA publication entitled: "Interim Sensitive Security Information (SSI) Policies and Procedures for Safeguarding Control" (Interim Policies).[3] Respondent (and any similarly situated TSA employee) would have consulted this document (which sets forth and purports to clarify the categorizations of SSI found at 49 C.F.R. § 1520) before making the decision to disclose. Indeed, this was the only information that could shape Respondent's understanding of what fell within the agency's newly-designated scope of SSI.

Review of DHS' own scant Interim Policies only bolstered Respondent's belief that the subject text message did not qualify as SSI. DHS sent Respondent the unencrypted subject text message through an unsecure cell phone (as opposed to his secure Personal Digital Assistant), in violation of Section 4(23)(c) of the Interim Policies. At the time of transmission, DHS did not mark this information as SSI, nor did it safeguard the information through password protection or include a limited distribution

[3] *See TSA Interim Sensitive Security Information (SSI) Policies and Procedures for Safeguarding Control* (November 13, 2002). Entire document available at http://fas.org/sgp/othergov/ssi-safeguard.pdf.

statement with the transmission, in violation of Interim Policies Sections 23(a), 23(c), and 1. In this circumstance, where the statute itself does not specify how the employee should distinguish the information that cannot be disclosed, he must be able to examine and apply the guidance his agency has provided in order to make a decision about whether to disclose. DHS failed to follow at least four of its own policies governing dissemination of SSI in 2003 when it disseminated the text (which purportedly contained SSI) to Respondent, demonstrating that even DHS did not categorize this information as SSI.

Petitioner, now, however, argues that Respondent should have disregarded DHS' failure to treat the information as SSI and made his own independent determination that the information did, in fact, contain SSI. Placing this onerous judgment call squarely on the prospective whistleblower is a far cry from the "specific prohibition" called for by 5 U.S.C. § 2302(b)(8)(A).[4] Congress' intent was to avoid placing the prospective whistleblower in the position of having to guess whether his disclosures would be protected and against permitting an agency to exempt disclosures from protection in order to facilitate

[4] Notably, misidentification of SSI has been a long-standing, systematic problem within TSA. On October 14, 2004, TSA issued a memorandum stating, in relevant part, as follows: "identification of SSI has often appeared to be ad-hoc, marked by confusion and disagreement depending on the viewpoint, experience, and training of the identifier." We believe this statement speaks to the need for specialized training for all those who designate materials as SSI. *See* U.S. Government Accountability Office Report to Congressional Requestors, *Clear Policies and Oversight Needed for Designation of Sensitive Security Information* at Page 11 (June 2005). Entire report available at http://www.gao.gov/assets/250/246897.pdf.

employee retaliation. Allowing the Petitioner to categorize disclosures (concerning its own wrongdoing) as disclosures not protected by the WPA creates a situation where the agency is at liberty to mark nearly any information as SSI, at any time, in order to ensure that its wrongdoing is not brought to light.[5] Moreover, even if wrongdoing is exposed (as was in this case), treating 49 C.F.R. § 1520 as a "law" for purposes of the WPA will allow DHS to punish a whistleblower while hiding behind the guise of protecting disclosure of SSI.

As such, Respondent's disclosure was not specifically prohibited by law. Even assuming, *arguendo*, that the disclosure was prohibited by law, such a prohibition was not sufficiently clear so as to place Respondent on notice that it was prohibited. According-

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[5] On May 29, 2014, Andrew Colsky, former TSA Director of the Office of SSI, testified before the Committee on Oversight and Government Reform, concerning TSA's overuse of SSI in order to avoid disclosure of information that may be embarrassing to the TSA. Colsky testified, in part, as follows: "[T]here was information in the responsive documents that was not by any stretch of the imagination at all SSI, but was either embarrassing or was something that they just didn't want the other side to know. And there was **extreme pressure** from again I'll use the term 'front office' to mark it as SSI." *See* Committee on Oversight and Government Reform, *Pseudo-Classification of Executive Branch Documents: Problems With the Transportation Security Administration's Use of the Sensitive Security Information (SSI) Designation,* Joint Staff Report at 12 (May 29, 2014) (emphasis in original). Entire report available at http://www.scribd.com/doc/230834546/Bipartisan-full-congressional-oversight-committee-calls-Robert-MacLean-a-whistleblower-and-cites-TSA-abuse-of-SSI-May-29-2014.
Notably, Mr. Colsky was the individual who issued the Order marking the text message at issue in MacLean's case as SSI, some three years after it was disseminated.

ly, Respondent was under no obligation to remain silent or report internally under the provisions of the WPA.

III. RESPONDENT WAS JUSTIFIED IN GOING TO THE PRESS IMMEDIATELY, BUT VOLUNTARILY COMPLIED WITH THE INTERNAL COMPLAINT PROCESS EVEN THOUGH HE WAS NOT OBLIGATED TO DO SO UNDER THE WPA.

1. DHS overstates the Respondent's obligations to follow through or comply with any internal complaint process. It is undisputed, and Petitioner has expressly conceded, that if the disclosure of information is not specifically prohibited by law, any employee "may go public with the information." Pet'r Br. 35 (citing 5 U.S.C. § 2302(b)(8)(A)). It is the Respondent's position that the disclosure was not specifically prohibited by law for the reasons outlined above (a position also supported by the *amici* herein). Hence, if the Court is in agreement, any contentions that pertain to the necessity of any partial or complete exhaustion of internal complaint procedures are rendered moot and irrelevant.

Even assuming, *arguendo*, that an internal complaint had to be first maintained, Petitioner has failed to proffer any proof or substantiate any argument that such a requirement was not fulfilled. Section 2302(b)(8) states that any employee who wishes to avoid disciplinary action may go either "to the Inspector General of the [Agency] or another employee designated by the head of the Agency to receive such disclosures" or "to Special Counsel," who

operates independently of the agency. 5 U.S.C. § 2302(b)(8)(B).

Here, Respondent was well within his rights and the WPA's protection to go directly to the press. However, in an abundance of caution and presumably out of respect for the Agency, it is undisputed that Respondent did report his concerns internally before going to the press. As such, Respondent acted in concert with his conscience, common sense, and the provisions of the WPA. Respondent was briefed on a potential plot to hijack the U.S. Airliners in July 2003. Soon after that briefing, the Agency sent the unencrypted text at issue to air marshals. The text cancelled "all overnight missions" for several days. Resp't Br. 10, n. 4. Respondent, though undoubtably concerned and distraught, did not immediately run to the press. Instead, MacLean expressed to his supervisor his fear at leaving so many flights vulnerable during a period of heightened danger. Resp't Br. 10. Respondent was told that "nothing could be done." *Id.* When the supervisor did not adequately address the issue, Respondent then went to the Office of Inspector General (OIG), an option available under the WPA. Respondent's call to that office was transferred to another OIG field office where he was, for all intents and purposes, told to simply "walk away" and think about "the years left in [his] career." *Id.* at 11.

Petitioner has not identified how these actions were insufficient under Section 2302(b)(8). Indeed, it has not stated what further steps should have been taken to meet the requirements of the law. Instead, Respondent did exactly what he was supposed to do under the WPA — not turn a blind eye to the threat posed to the flying public — even though he was

encouraged to. Rather than identify a required course of action, DHS in its brief reminds the Court of a completely irrelevant fact; that the Respondent's efforts "apparently did not include any attempt to contact the Office of Special Counsel." Pet'r Br. 37. However, as set forth above, contacting the Office of Special Counsel is only one of many ways of disclosing under Section 2302(b)(8). It is an alternative, but not a requirement. These statements by DHS were not happenstance or gratuitous. It is submitted that, instead, they were clearly included so as to create a fiction that there was still some unresolved issue regarding non-compliance with the internal complaint process. Furthermore, it is submitted that they were intended to create, out of whole cloth, a policy argument that heretofore did not exist. In a conclusory fashion, without citation or any support in any legislative history, DHS further remarks that permitting employees to come forward, essentially under any circumstance, would grant to such employees a delegation of authority that Congress would never have intended: "Congress could not have intended the confidentiality of sensitive security information to depend so precariously on the idiosynchratic [sic] individual judgments of each of the TSA's more than 60,000 employees." Pet'r Br. 37.

The irony is that Petitioner has, in making these arguments, substituted its own judgment for that of Congress in exactly the same way that it is criticizing. By attempting to overstate the requirements of internal complaint processes, and imposing and inferring conditions that do not exist under any law, it has undermined WPA protection. Congress has already clearly considered the issue. Its consideration and judgment is set forth in the requirements

under Section 2302(b)(8). Petitioner has not demonstrated that the complaint procedures, even if applicable, were insufficiently followed. In the absence of a demonstrated failure, DHS cannot reasonably contend that the Respondent is not entitled to WPA defense and protection, even if its statutory contentions as to the breadth of the law were valid.

IV. THE PETITIONER IS WRONG TO ASSUME THAT CONGRESS DID NOT CONSIDER ANY PERCEIVED HARM OR POTENTIAL IMPACT OF DISCLOSURES.

1. Petitioner argues that "permitting an employee who discloses SSI to invoke Section 2302(b)(8)(A) as a defense to a resulting employment action would embolden federal employees to disclose SSI and gravely endanger public safety." Pet'r Br. 38. In making this argument, DHS asks the Court to substitute its judgment for the decision Congress made when it struck a balance between statutory limitations on disclosures and whistleblower protections. "In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *United States v. American Trucking Assns., Inc.*, 310 U.S. 534, 542 (1940).

Here, the Court need not balance the risks involved because Congress fully considered the implications of limiting disclosures that are not protected to those specifically prohibited by statute. "It is the Committee's understanding that Section 102(D)(3) of the National Security Act of 1947, which authorizes protection of national intelligence sources and methods, has been held to be such a statute. In addition,

disclosures which are specifically prohibited by Executive Order 11652 (relating to classified material) are exempted from the coverage of this section." S. Rep. No. 95-969, at 22, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743-44.

Indeed, Congress was aware that it had the power to specifically prohibit future disclosures under Section 2302(b)(8)(A) and reserved, for itself, that authority because Congress considered the risks inherent in a regime where the agency is both the subject of potential disclosures and the arbiter of which disclosures may be permitted. Thus, the Court should "leave it to Congress to alter that scheme." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 198 (1994).

Section 2302(b)(8)(A) "balanc[es] the need for legitimate protections for whistleblowers and potential whistleblowers with the concern that Government not be endlessly tied up by unfounded complaints from employees with less-exalted motives." 124 Cong. Rec. 27548 (daily ed. Aug. 24, 1978) (statement of Sen. Sasser). As the Federal Circuit observed, the government may "discipline employees who reveal SSI for personal gain or due to negligence, or who disclose information that the employee does not reasonably believe evidences a substantial and specific danger to public health or safety." *MacLean*, 714 F.3d at 1310.

Petitioner makes the assumption that the disciplinary threat under Section 114(r) is a "cold comfort." Pet'r Br. 39. However, Petitioner can find warmth in the fact that Congress, in enacting Section 2302(b)(8)(A), incorporated its own judgment about the benefits of disclosures versus deterring disclosures that the employee does not "reasonably believe

evidences a substantial and specific danger to public health or safety."

Petitioner's alarmist concerns are clearly calculated to create hesitation in the Court from applying straightforward statutory construction principles, as set forth above. It is critical, yet again, to point out that DHS has failed to cite any legal or factual support for its professed fear that the entirety of TSA would fall to its knees if the WPA was given its proper due. No legislative history or findings were proffered to support its fictionalized assessment as to the harms that would spring forth if the Respondent's position was affirmed. DHS' perceived scenarios were literally created out of thin air. For example: "Even information that might not appear on its face to expose a particular security vulnerability (say, the fact a particular federal air marshal will be on a particular flight) could potentiality be exploited to create one. (say, by interfering with the air marshal's ability to make the flight)." Pet'r Br. 39. How this hypothetical scenario could be "exploited" is not articulated, except in an abstract speculative manner and, even more suspect, not identified as an actual concern that Congress considered as part of its assessment of the WPA.

Adopting the Petitioner's tunnel vision approach to the implications of a ruling of this Court in favor of the Respondent, in effect, would leave agencies with blanket authority to retaliate without repercussion, thus forcing potential whistleblowers to choose either their morals or their livelihood, but not both.

When the Respondent's disclosures were published, congressional leaders not only reacted immediately, but in a manner that vindicated the Respondent. Resp't Br. 11. They expressed concern and even

outrage about DHS' decision to pull air marshals from the most threatened flights "to save on hotels," and urged the agency to reconsider. *Id.* at 11-12; *see also* JA59 (statement of Sen. Clinton); JA65 (statement of Sen. Lautenberg); JA72 (statement of Sen. Schumer). In fact, DHS not only rescinded the directive, but they also publically acknowledged that their actions — which MacLean helped disclose — had been "premature and a mistake." Resp't Br. 12. Marshal coverage was uninterrupted, and the potential hijacking threat was averted. *Id.* These actions by Congress were not those of an entity seeking to deter whistleblowers, but one of gratitude and encouragement.

If Congress' intent was to deter, rather than encourage disclosures under the WPA, it certainly could have acted more decisively. If *deterrence* was indeed what Congress was truly focused on when weighing the applicability of the WPA, criminal repercussions would clearly have been available to complete its calculus of cost/benefit. To support this proposition, one need only look to the litany of Federal laws providing criminal liability for breaches of Federal law or for breaches of classified information. *See e.g.*, Counterintelligence and Security Enhancement Act of 1994, Title VIII of Pub. L. 103-359 (codified at 50 U.S.C. §§ 435 *et seq.*).

The illegitimacy of DHS' argument is further confirmed by the Petitioner's comments as to the consequences of a finding in favor of the Respondent. In that regard, it incredulously claims that: "If the Federal Circuit's decision is allowed to stand, the MSPB may well conclude… that the TSA must reinstate Respondent to a position where he will again have access to SSI." Pet'r Br. 41. Contrary to

DHS' contention, that is exactly the type of remedy that should be considered because that is precisely the reason why the WPA was enacted. Stated differently, DHS, in astounding fashion, fails to appreciate that the central tenet of the WPA is to protect whistleblowers; not the agencies or governmental entities for which they work.

There can be no dispute that Congress, in enacting the WPA, recognized the limitations of its own ability to uncover wrongdoing within the "the vast Federal bureaucracy." S. Rep. No. 95-969, at 8, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2730. That is why protections were afforded to employees; to protect those individuals who come forward with disclosures of dangerous activity that otherwise would have fallen through the sieve of that vast bureaucracy that Congress acknowledged existed. For example, this Court has applied remedies such as reinstatement and back pay on numerous occasions when faced with violations of other whistleblower statutes. *See e.g., Lawson v. FMR LLC*, 134 S. Ct. 1158, 1158 (2014) (An employee prevailing in a proceeding under 18 U.S.C. § 1514A(c) is entitled to all relief necessary to make the employee whole, including reinstatement with the same seniority status that the employee would have had, but for the discrimination); *English v. General Elec. Co.*, 496 U.S. 72, 76 (1990) (If a violation is found Energy Reorganization Act of 1974, 42 U.S.C. § 5851, the Secretary of Labor may order reinstatement with back pay, award compensatory damages). These remedies exist to deter agencies that improperly retaliate against whistleblowers, not the other way around. Congress has reviewed and considered these issues. The statutory language reflects this. As such, the Peti-

tioner's contentions lack merit and the Court of Appeals for the Federal Circuit's decision should be affirmed.

* * *

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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