No. 13-894

In The
Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,

Petitioner,

vs.

ROBERT J. MACLEAN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICUS CURIAE* FLYERSRIGHTS.ORG IN SUPPORT OF RESPONDENT

RAYMOND BRESCIA
Counsel of Record
Associate Professor of Law
ALBANY LAW SCHOOL
80 New Scotland Avenue
Albany, NY 12208
(518) 445-2328
rbres@albanylaw.edu

ROBERT A. HEVERLY
Associate Professor of Law
ALBANY LAW SCHOOL
80 New Scotland Avenue
Albany, NY 12208
(518) 445-2379
rheve@albanylaw.edu

COCKLE LEGAL BRIEFS (800) 225-6964
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

INTEREST OF THE *AMICUS CURIAE*[1]

FlyersRights.org writes in support of the Respondent, Robert J. MacLean.

FlyersRights.org was founded in 2007 and currently has more than 40,000 members. It is the largest non-profit consumer organization representing airline passengers in the United States. Focused on consumer activism for airline passengers, the organization advocates for legislation in support of consumers who fly and for improved conditions in air travel more generally.

Amicus have a strong interest in this case based on their familiarity with the issues confronted by air travelers. While advocating for a Bill of Rights for Airline Passengers, FlyersRights.org has worked on a variety of air travel related issues. Of critical concern to its members is air travel safety. This includes both mechanical and operational aspects of safety, as well as concerns regarding airline security. The decision in this case will affect the future safety of airline travelers, as the release of travel related security

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

information will continue to affect the well-being and security of airline passengers over the long term.

SUMMARY OF THE ARGUMENT

Citizens interact with disclosures made by whistleblowers protected by the Whistleblower Protection Act in two ways. The first is a well-established and well-understood response: citizens are part of the feedback loop that puts pressure on government to revise and correct the procedures or actions that led to the disclosed problem. The second interaction is less recognized and has been the subject of less discussion: citizens are actors who have choices as to which risks they encounter and how they encounter them. In this case, that means that the Respondent's disclosures not only led to pressure on the TSA from the media, legislators and the public, but might have also led individuals not to travel because of their perception of additional risk had the TSA not changed course and reversed its decision.

Congress has explicitly recognized the interest that citizens as travelers, as opposed to citizens as citizens, have in disclosures of the kind made by Respondent here, that is, disclosures of potential threats to civil aviation.[2] This recognition, in the form of requirements for guidelines to be issued regarding the

[2] *See* 49 U.S.C. §§ 44905(c), (d) and (e).

appropriate release of threats to civil aviation to citizens, explicitly acknowledges the importance of providing information to citizens as travelers.

The release of this information to citizens is likely to have an effect on how those citizens act in their role as travelers. Research shows that citizens react to perceptions of risk in making and altering their travel plans. Receipt of information regarding specific threats to, or systemic failings in, the aviation travel system, will undoubtedly allow those citizens to alter their plans and exercise some level of control over their perceived exposure to risk in these situations.

This interest, not yet explicitly discussed in this appeal, supports the decision of the United States Court of Appeals for the Federal Circuit in this case. The interests of citizens as travelers push the calculation toward one that favors disclosure, rather than one that disfavors it. Thus, while not determinative, these interests support the holding of the Court of Appeals that the phrase "specifically prohibited by law" does not include administrative regulations. The lower court's holding thus makes more information available, in a manner provided for by Congress, and is supported by citizens' interests in confronting the risks of their own air travel.

ARGUMENT

I. The Interests of Citizens who are Air Travelers Should Play a Role in Determining the Scope of Whistleblower Protection in Relation to Air Safety Concerns

Between July 1, 2013 and June 30, 2014, an average of 1.8 million passengers flew domestically in the United States each day.[3] This number does not include those flying on international flights, and also does not include airline pilots, flight attendants, and other employees who work in the air each day. While these groups of individuals are only loosely joined by their common presence aboard airplanes, for the time they are preparing for flight or are on board our nation's airliners they share a common interest in the safety of their aircraft and the security of the air travel system, as well as a gratitude for the dedication of those who support that system. Where there are dangerous, illegal or wasteful practices that relate to the air travel system, this group of travelers and travel employees has a distinct and recognizable interest in ensuring those situations are both exposed and ultimately corrected. Their very lives may depend on it.

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[3] Bureau of Transportation Statistics, http://www.transtats.bts.gov/ (last visited September 22, 2014). The total number of passengers flying domestically in the United States during this period was 651 million.

The structures in place to identify, prevent, and neutralize threats to air safety are extensive.[4] A variety of agencies and instrumentalities are potentially involved in air safety each and every day. From the Federal Aviation Administration (FAA) to the Transportation Security Administration (TSA), the Federal Bureau of Investigation (FBI), the Department of Homeland Security (DHS), the National Transportation Safety Board (NTSB), the airlines, local law enforcement authorities, intelligence officials and others all work in tandem to gather information and respond to what is discovered in an effort to keep air travelers safe each and every day.

Mistakes happen, however, within the many public and private entities that are dedicated to the pursuit of air safety. Not all of the information concerning threats to civilian air safety is properly handled, not all of the threats to air safety are properly evaluated, and not all of the contingencies are properly addressed. In this context of potential failure, Congress has provided an escape hatch for information that otherwise may remain hidden – intentionally or unintentionally – within the enormity of the federal bureaucracy and the interactions

[4] *See, e.g.*, Brian F. Havel and Gabriel S. Sanchez, The Principles and Practice of International Aviation Law, Chapter 5: The international law regime for aviation safety and security, Cambridge University Press (New York, 2014); *see also*, Shirlyce Manning, *The United States' Response to International Air Safety*, 61 J. Air L. & Com. 505 (1996).

of the myriad entities involved. The Whistleblower Protection Act (WPA)[5] protections applicable to whistleblowers are intended to provide those with knowledge of dangerous, illegal or wasteful practices in government protection when they release information regarding those practices to the public.

Disclosures by whistleblowers, whether through internal procedures or by release of information to responsible media outlets, may force government to try to fix the perceived breach, often under pressure from the media, the public, and other branches of government. If a public disclosure does occur, an important part of the process is the pressure that citizens bring to bear on government to correct its failures, improve its administration of the law, or halt its abusive practices. Much has been written in this context about the importance of whistleblowers by the media, courts, and scholars.[6] This narrative is almost always a part of events that involve a leak by a whistleblower to the press or to the public.

An account of whistleblowing that assigns it value only as a trigger for the democratic process,

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[5] Whistleblower Protection Act of 1989, Pub. L. No. 101-112, 103 Stat. 16; *see also,* Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1471.

[6] *See*, *e.g.*, Amanda C. Leiter, *Whistle . . . and You've Got an Audience*, 36 Fordham Urb. L.J. 747 (2009). *See also*, Frederick D. Lipman, Whistleblowers: Incentives, Disincentives, and Protection Strategies, John Wiley & Sons, Inc., 169-189 (Hoboken, N.J., 2012).

however, is incomplete. Whistleblowing causes another significant and important outcome: it causes citizens to take action to protect themselves from injuries that may otherwise have followed from the disclosed government action or inaction. In such cases, the citizen acts on leaked information not in the context of the democratic process – that is, by putting pressure on government to change through the media, public expressions of dissatisfaction, direct contact with legislators, and voting – but rather applies the leaked information in a determination of whether to proceed with or halt a personal course of action. Regardless of his or her ultimate contribution to political discourse resulting from a whistleblower's disclosure, the citizen who learns of disclosed information may use the information to inform immediate, personal decisions, and may base a decision to act or refrain from acting solely on the information disclosed.

It is the potential for personal action in this case that *Amicus* argues should not be overlooked in deciding whether an administrative regulation is a law for purposes of the WPA. The relationship between a disclosure and a potential threat to air safety is relevant to the determination of whether the disclosure is protected under the WPA because air travelers change their travel plans based on information concerning threats to air travel. To the extent that there is room for interpretation, the interests of travelers as travelers – or, in other arenas, investors

as investors, automobile drivers as drivers, farmers as farmers – should be considered when determining that disclosures of information ostensibly prohibited by Transportation Safety Administration regulations are not "specifically prohibited by law," and thus are protected by the Whistleblower Protection Act's provisions. As such, the potential for travelers to act to protect themselves with the information that Mr. MacLean released supports the conclusion of the Court of Appeals for the Federal Circuit that Mr. MacLean's disclosures regarding the air marshal system were not "specifically prohibited by law."

II. Congress Has Recognized the Importance of Air Travelers in Security Related Information Disclosures

As the U.S. Court of Appeals for the Ninth Circuit has noted, the Whistleblower Protection Act's purpose, in relevant part, is to "eliminate wrongdoing within the government. . . ."[7] If elimination of wrongdoing is the motivating factor in protecting employees from retaliatory actions for whistleblowing, then this Court need not concern itself with the effects such disclosures have on the personal actions of those outside of the employment relationship or unable to influence it. The history of Congressional legislation, however, tells a different story. In

[7] *Rivera v. United States*, 924 F.2d 948, 953 (9th Cir. 1991).

advancing legislation relating to the provision of aviation threat information to travelers, the legislature has explicitly noted the positive effects of notifying travelers of threats so as to allow those travelers to decide whether and under what circumstances to travel.

The public record reflects that Congress recognizes that air transportation safety policy directly impacts individual choices. For example, in considering 2001's Aviation and Transportation Security Act, enacted as Pub. L. No. 107-171, 115 Stat. 597, Representative Pascrell stated: "The American people can be assured that the status quo will not be tolerated . . . because if people do not feel secure, they are not going to get on the planes."[8]

The provisions of federal law that require the President to develop and implement guidelines on notifying the public of threats to civil aviation,[9] and that generally prohibit selectively notifying travelers of threats,[10] also provide strong support for the argument that the disclosure of threats to air safety is intended to inform individual travelers' personal safety decisions.

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[8] Congressional Record, H8303 (Nov. 16, 2001).

[9] 49 U.S.C. § 44905(c). *See* Recodification of Certain U.S. Transportation Laws as Title 49, Pub. L. No. 103-272, 108 Stat. 1207, § 1(e).

[10] 49 U.S.C. § 44905(e). *See* Pub. L. No. 103-272, 108 Stat. 1207, § 1(e).

It is useful at this point to set out the statutory requirement related to the release of threats to civil aviation. 49 U.S.C. § 44905 provides, in relevant part, as follows:

> (c) Guidelines on Public Notice. – (1) The President shall develop guidelines for ensuring that public notice is provided in appropriate cases about threats to civil aviation. The guidelines shall identify officials responsible for –
>
> (A) deciding, on a case-by-case basis, if public notice of a threat is in the best interest of the United States and the traveling public;
>
> (B) ensuring that public notice is provided in a timely and effective way, including the use of a toll-free telephone number; and
>
> (C) canceling the departure of a flight or series of flights under subsection (b) of this section.
>
> (2) The guidelines shall provide for consideration of –
>
> (A) the specificity of the threat;
>
> (B) the credibility of intelligence information related to the threat;
>
> (C) the ability to counter the threat effectively;

(D) the protection of intelligence information sources and methods;

(E) cancellation, by an air carrier or the Under Secretary, of a flight or series of flights instead of public notice;

(F) the ability of passengers and crew to take steps to reduce the risk to their safety after receiving public notice of a threat; and

(G) other factors the Under Secretary considers appropriate.

(d) Guidelines on Notice to Crews. – The Under Secretary shall develop guidelines for ensuring that notice in appropriate cases of threats to the security of an air carrier flight is provided to the flight crew and cabin crew of that flight.

(e) Limitation on Notice to Selective Travelers. – Notice of a threat to civil aviation may be provided to selective potential travelers only if the threat applies only to those travelers.

This law requires that the President develop guidelines for civil aviation threat disclosure to travelers in appropriate circumstances, and forbids disclosure to some travelers and not others unless the disclosure is limited to those specifically subject to a particular threat. This provision does not compel government disclosure of threats in all cases, but instead

encourages such disclosure and requires the adoption of procedures designed to ensure that it occurs in appropriate cases. The background of the law provides the context for these requirements.

On December 21, 1988, Pan American Airlines flight 103 was destroyed in midair by a terrorist bomb over Lockerbie, Scotland. The events leading up to plane's destruction involved a number of key security failures,[11] especially on the part of the airline company, Pan Am.[12] Particularly relevant here, however, is that a particular aviation threat was called in to U.S. authorities in the weeks preceding the attack:

> On December 5, 1988, an anonymous caller telephoned the American Embassy in Helsinki, Finland, stating that sometime within the next two weeks a Finnish woman would carry a bomb aboard a Pan Am aircraft flying from Frankfurt to the United States. The caller, who spoke with a Middle Eastern accent, provided names of two individuals who he said would engineer the bombing and who had ties to the Abu Nidal terrorist organization.[13]

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[11] *See, e.g.*, Allan Gerson and Jerry Adler, The Price of Terror, Harper-Collins (New York, 2001); Peter Watson, *In Pursuit of Pan Am*, 2 ILSA J. Int'l & Comp. L. 203 (1995).

[12] *See* Nancy J. Strantz, *From Technology to Teamwork: Aviation Security Reform Since Pan Am Flight 103*, 3 Alb. L.J. Sci. & Tech. 235 (1993).

[13] Report of the President's Commission on Aviation Security and Terrorism, May 15, 1990, at 8.

While the validity of the threat itself remains controversial to this day,[14] how the threat was handled has been thoroughly documented. In the wake of the Lockerbie bombing, as part of the review process ordered by the President, the President's Commission on Aviation Security and Terrorism held hearings and investigated the events leading up to the bombing, including the Helsinki phone call.[15] The Commission found that the threat information was provided to limited persons, including persons in government, who had the opportunity to use the information to alter their travel plans. The information was not provided to the general public or to Pan Am's passengers.[16] "The Victims of Pan Am Flight 103," an organization made up of the family members of the victims of the disaster, lobbied for the adoption of the provisions ultimately contained in 49 U.S.C. § 44905.

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[14] *See* Ms. Aphrodite Thevos Tsairis, *Lessons of Lockerbie*, 22 Syracuse J. Int'l L. & Com. 31 (1996).

[15] *See* Executive Order No. 12686 (August 4, 1989), forming the Commission and charging it with investigating the events that led to the Lockerbie tragedy.

[16] *See* Tsairis, *supra*, note 12.

As part of its review, the Commission proposed[17] and Congress enacted[18] provisions that had, among

[17] Report of the President's Commission on Aviation Security and Terrorism, May 15, 1990, at 83.

[18] The relevant provisions were originally included in the Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, 104 Stat. 3066 (1990), codified as Federal Aviation Act of 1958, § 321 (49 U.S.C. § 1358d). As originally enacted, the provisions provided as follows:

(c) NOTIFICATION GUIDELINES. –

(1) PUBLIC NOTIFICATION GUIDELINES. – Not later than 180 days after the date of the enactment of this section, the President shall develop guidelines for ensuring notification to the public of threats to civil aviation in appropriate cases.

(2) FLIGHT AND CABIN CREW NOTIFICATION GUIDELINES. – Not later than 180 days after the date of the enactment of this section, the Administrator shall develop guidelines for ensuring notification of the flight and cabin crews of an air carrier flight of threats to the security of such flight in appropriate cases.

(d) RESPONSIBILITIES. – The guidelines developed under subsection (c)(1) shall identify officials responsible for –

(1) determining, on a case-by-case basis, if public notification of a threat is in the best interest of the United States and the traveling public;

(2) ensuring that public notification, when considered appropriate, is made in a timely and effective manner, including the use of a toll-free telephone number; and

(3) canceling the departure of a flight or series of flights under subsection (b).

(Continued on following page)

others, two primary effects: 1) to require that guidelines be developed to address releases of specific aviation threat information to the public; and, 2) to prohibit releasing information to one group of people – such as government officials – while not also releasing that information to the public. Selective release of threat information was no longer to be allowed under the new law,[19] but release was encouraged in appropriate circumstances.

(e) CRITERIA. – The guidelines developed pursuant to subsection (c)(1) shall provide for the consideration of –

(1) the specificity of the threat;

(2) the credibility of intelligence information related to the threat;

(3) the ability to effectively counter the threat;

(4) the protection of intelligence information sources and methods;

(5) cancellation, by an air carrier or the Administrator, of a flight or series of flights instead of public notification;

(6) the ability of passengers and crew to take steps to reduce the risk to their safety as a result of any notification; and

(7) such other factors as the Administrator considers appropriate.

(f) SELECTIVE NOTIFICATION PROHIBITED. – In no event shall there be notification of a threat to civil aviation to only selective potential travelers unless such threat applies only to them.

[19] Aviation Security Improvement Act of 1990, Pub. L. No. 101-604, 104 Stat. 3066 (1990), § 109(f).

There can be little doubt about the policy behind the civil aviation threat notification provisions: passengers should be told, where appropriate, about specific threats to civil aviation so that those passengers can make their own choices, given the risks, about when, how and even if they want to fly. With this statement of federal policy, it is appropriate to consider the implications it holds for situations in which whistleblowers disclose information regarding threats to aviation safety. This is *Amicus's* primary point: where appropriate, passengers should be provided with the information they need to gauge the risks they take when they fly, especially where credible threats containing specific information about airline safety can be provided to them.

Amicus does not argue that the government has a duty to release information regarding all threats to the flying public,[20] nor even a large majority of them. Nor is there any assertion that the civil aviation threat provisions are directly applicable to the situation confronted by Mr. MacLean. Rather, the assertion instead is that where information can be so released, it should be, and this is the policy of the federal government as contained in existing federal legislation.

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[20] *Cf.*, Cynthia Dokas, *A Duty to Warn in Aviation Law: A New Tort Theory in the Aftermath of Pan American Flight 103*, 8 N.Y.L. Sch. J. Hum. Rts. 227 (1990).

III. Travelers Change their Behavior Based on Knowledge of Risks of the Kinds Disclosed by Whistleblowers

Common sense tells us that when air travelers are given information regarding threats to aviation safety, whether these are threats targeted at specific flights or routes, or whether they are more generalized threats that develop from the implementation of administrative policy decisions, a portion of those air travelers will change their plans in an attempt to avoid the risks presented by flying under those circumstances. We need not, however, rely on common sense. The research provides evidence as to how individuals handle travel-related risks, and this data shows that this intuition is, in fact, the case.

Making information available to travelers actually has real world effects, effects that show that information releases can benefit air travelers. While general social pressures, the need for travel, and general perceptions of risks have been shown to affect travel decisions[21] – that is, threat information alone is not necessarily going to be determinative of whether to travel or not to travel in most cases – the logical conclusion is that more direct, specific information

[21] M.F. Floyd, H. Gibson, L. Pennington-Gray and B. Thapa (2009), *The Effect of Risk Perceptions on Intentions to Travel in the Aftermath of September 11, 2001*, 25, *in*, C.M. Hall, D.J. Trimothy & D.T. Duval (Eds.), Safety and Security in Tourism Relationships, Management and Marketing (pp. 19-38). Mumbai: Jaico Publishing House.

will have an even greater effect on decision-making by travelers.

For example, travelers will avoid destinations that are known terrorist hot spots.[22] Source credibility affects travel decisions,[23] implying that governmental information will have a greater effect than will general news or Internet-based information. While concerns about terrorism can be ameliorated by perceptions of institutional competency, the research makes clear that individuals will do exactly what we expect them to do: change their travel plans when they believe their travel plans are at risk because of the threat of a terrorist attack.

IV. The Interest of Citizens as Air Travelers Supports a Reading of the Term "Law" in the Whistleblower Protection Act that Does Not Include Administrative Regulations or Rulings

The primary issue on this appeal is whether the word "law" as used in the Whistleblower Protection Act includes regulations promulgated by a federal

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[22] Yvette Reisingera and Felix Mavondob, *Cultural Differences in Travel Risk Perception*, 20 J. of Travel and Tourism Marketing 13 (2008).

[23] Lori Pennington-Gray, Ashley Schroeder and Kiki Kaplanidou, *Examining the Influence of Past Travel Experience, General Web Searching Behaviors, and Risk Perceptions on Future Travel Intentions*, 1 Int'l J. of Safety and Security in Tourism/Hospitality 64 (2011).

agency pursuant to Congressional mandate. The United States Circuit Court of Appeals for the Federal Circuit held that the regulations promulgated pursuant to the Aviation and Transportation Security Act are not "laws" as defined in the Whistleblower Protection Act, and that therefore Mr. MacLean's release of information to the media was not "specifically prohibited by law."[24]

The Federal Circuit reasoned as follows:

> We agree with Mr. MacLean that the ATSA does not "specifically prohibit" the disclosure at issue in this case. The ATSA's plain language does not expressly prohibit employee disclosures, and only empowers the Agency to prescribe regulations prohibiting disclosure of SSI "*if the Secretary decides* disclosing the information would be detrimental to public safety." 49 U.S.C. § 40119(b) (emphasis added). Thus, the ultimate source of prohibition of Mr. MacLean's disclosure is not a statute but a regulation, which the parties agree cannot be "law" under the WPA.[25]

The Circuit Court's reasoning reaches the correct conclusion from the perspective of textual analysis and principles of statutory interpretation. Nevertheless, Appellant continues to assert that some ambiguity remains as to whether disclosure of information is

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[24] *MacLean v. Dep't of Homeland Security*, 714 F.3d 1301, 1309 (Fed. Cir. 2013).

[25] *Id.*

"specifically prohibited by law." In response to this assertion, *Amicus* here argues that the federal government's policy encouraging the release of appropriate information regarding specific aviation safety threats to the traveling public provides additional authority that, here, disclosure of such information was not specifically prohibited.

If the release involved information specifically identified in a statute, this argument would not bring its release within the WPA's protections. In a case such as this, however, where the question is whether a regulation should count as "law" for WPA purposes, the public good that results from providing information to travelers pushes the calculation in the direction of protecting that release.

Individual travelers have a recognized interest in receiving information regarding specific threats to airline safety. They act on that information, as well they should. Where there is a choice that allows for the release of specific information, and that choice is consistent with the relevant legislative texts, Congressional intent, and our behavioral understandings, the choice should be made to protect that release under the WPA.

CONCLUSION

The United States Court of Appeals for the Federal Circuit was correct in holding that the ATSA does not "specifically prohibit" the information

released by Mr. MacLean because the prohibition on that release was contained in a regulation and not in a statute. This decision is supported not only by the context and text of the WPA itself, but additionally by the interest of travelers in determining their own destinies. The *Amicus* respectfully requests that the Judgment of the United States Court of Appeals for the Federal Circuit be affirmed, and judgment entered for the Respondent, Robert J. MacLean.

Respectfully submitted,

RAYMOND BRESCIA
Counsel of Record
Associate Professor of Law
ALBANY LAW SCHOOL
80 New Scotland Avenue
Albany, NY 12208
(518) 445-2328
rbres@albanylaw.edu

ROBERT A. HEVERLY
Associate Professor of Law
ALBANY LAW SCHOOL
80 New Scotland Avenue
Albany, NY 12208
(518) 445-2379
rheve@albanylaw.edu