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 OF THE RUTHERFORD INSTITUTE, *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Congress has directed that the Transportation Security Administration "shall prescribe regulations prohibiting" the "disclosure of information obtained or developed" in carrying out certain transportation-security functions, if the agency "decides" that "disclosing the information would * * * be detrimental" to transportation security. Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101(e), 115 Stat. 603; Homeland Security Act of 2002, Pub. L No. 107-296, Tit. XVI, § 1601(b), 116 Stat. 2312. Such information is referred to in the regulations as "Sensitive Security Information." *See*, *e.g.*, 67 Fed. Reg. 8351 (Feb. 22, 2002).

The question presented is whether certain statutory protections codified at 5 U.S.C. § 2302(b)(8)(A), which are inapplicable when an employee makes a disclosure "specifically prohibited by law," can bar an agency from taking an enforcement action against an employee who intentionally discloses Sensitive Security Information.

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INTEREST OF *AMICUS CURIAE*[1]

The Rutherford Institute is an international nonprofit civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed and in educating the public about constitutional and human rights issues.

Amicus is interested in the instant case because of the potential impact it will have on the protections provided to whistleblowers nationwide. By disclosing instances of waste, fraud, and abuse to the public, whistleblowers act as an important check on government officials, keeping them accountable to the voting public. In exposing government abuse, whistleblowers often risk their own personal and professional security in order to serve the greater public good. *Amicus* is interested in this case in order to ensure that the protections afforded to whistleblowers under the Whistleblower Protection

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[1] Pursuant to Sup. Ct. R. 37.3(a), counsel of record for the parties have filed with the Court letters granting blanket consent to the filing of *amicus curiae* briefs on behalf of either party or neither party. Pursuant to Sup. Ct. R. 37.6, *amicus* certifies that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* and their counsel have contributed monetarily to its preparation or submission.

Act ("WPA") continue to adequately protect them from retaliation for making protected disclosures.

SUMMARY OF THE ARGUMENT

To confirm the need for strong protections for whistleblowers, one need not look further than the facts of this case. Robert MacLean witnessed activity at his agency that endangered public safety, and he disclosed that information to individuals that he knew were capable of shedding light on the matter. The outcry was immediate and decisive, the problem was remedied, and the flying public was made safer by MacLean's action.

The agency, however, was publicly embarrassed by the disclosure, and predictably sought its revenge by the means most accessible to executive agencies: through the use of its rulemaking powers. It designated the information MacLean had disclosed as "Sensitive Security Information," over two years after the fact, through a process that has little to no external oversight, and used the disclosure as a pretext to have MacLean removed.

Whistleblowing, by its very nature, results in embarrassment for an agency. It alerts the public to the wrongs that an agency had, until then, been successful at concealing, and it makes the source of a disclosure an immediate target for retaliation. Knowing this, Congress drafted the WPA and the

later 2012 amendment broadly, excepting only very specific categories of information as unprotected. DHS's reading of the disclosure exceptions would eviscerate the meaning and intention of the WPA, and would once again tip the balance toward agencies, allowing them to exploit their rulemaking powers to target legitimate whistleblowers.

Therefore, given the very weak protections that the WPA currently affords whistleblowers, it could not have been Congress's intention to completely eviscerate the Act's protections by allowing agencies to effectively regulate their way out of any accountability through the use of internal agency rules. Further, DHS's preferred expansive reading of WPA's exception provision is wholly unnecessary given the government's extensive use of the classification system to protect its most sensitive information from unlawful disclosure.

ARGUMENT

I. GRANTING DHS'S INTERPRETATION OF THE WHISTLEBLOWER PROTECTION ACT'S (WPA) "SPECIFICALLY PROHIBITED BY LAW" EXCEPTION TO INCLUDE AGENCY REGULATIONS WOULD UNDERMINE CONGRESS'S STATED PURPOSE IN ENACTING THE WPA

Despite DHS's attempts to characterize the Federal Circuit's decision as dangerous and

unprecedented, the instant case only addresses a threshold question, but one which will profoundly affect the rights of government whistleblowers in all agencies of the federal government. Given DHS's alarmism, it is worth highlighting what is *not* at issue in the instant case. What is not at issue at this stage of the litigation is the ultimate resolution of Robert MacLean's employment status with the agency. As Respondent aptly noted, even with MacLean's success on appeal, the Federal Circuit did not reverse the ALJ's findings in favor of his removal, and did not find in favor of his WPA affirmative defense claim. Resp. Br. in Opposition at 14.

Indeed, in its decision, the Federal Circuit did not even determine that the WPA applies in MacLean's case at all, or in any other similar such case where SSI is disclosed. Resp't. Br. in Opp'n at 30; *MacLean v. Department of Homeland Sec.*, 714 F.3d 1301, 1309 (Fed. Cir. 2013). The only determinations that the Federal Circuit made in reaching its decision were: 1) that the WPA means exactly what it says, and that only disclosures "specifically prohibited by law" are exempted from its coverage, and 2) that by extension, SSI disclosures are not *categorically* exempt from WPA coverage. *Id.*

For its own part, DHS significantly understates the certain effect of a contrary ruling, and the reason it does so is immediately evident when considering the facts of the instant case. Without the affirmative defense provisions of the WPA to protect potential whistleblowers, agencies embarrassed by the disclosure of unfavorable and embarrassing information would do exactly what the

DHS did in MacLean's case: they would invoke one of the many internal regulatory rulemaking powers at their disposal as a means to intimidate potential whistleblowers into silence, preventing them from speaking out for fear of removal or other retaliation, thereby undermining the core purpose of the WPA.

When Congress enacted the WPA in 1989, it did so through the adoption of unmistakably strong language. The Act's terms are unequivocal: the WPA protects an employee against retaliation for disclosures he or she makes of a "violation of any law, rule, or regulation," excepting only a disclosure "specifically prohibited by law" or "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).

In the 25 years since its passage, courts chipped away at the WPA's strong protections through increasingly narrow interpretations of the Act, and through a general "judicial reluctance to apply an expansive definition of protected disclosures" that Congress intended. S. Rep. No. 108–392, at 4 (2004). In response, Congress revised the WPA in 2012 through the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465, in order to "overturn[] several court decisions that narrowed the scope of protected disclosures." S. Rep. No. 112-155, at 3-5 (2012).

A. In Its Current Form, The WPA Does Not Adequately Protect Whistleblowers, And Enabling Agencies To Legislate Through Regulation Would Only Further Undercut The WPA's Weak Protections

As noted, the instant case is a perfect illustration of the dangers inherent in granting DHS's preferred interpretation of 5 U.S.C. § 2302(b)(8)(A). The statutory direction from Congress cited as the source for the claimed exception from WPA coverage in this case is found at 49 U.S.C. § 114(s)(1)(C), and provides that the agency is to "prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security ... if the Under Secretary decides that disclosing the information would ... be detrimental to the security of transportation."

Without belaboring the point, the cited language of 49 U.S.C. § 114(s)(1)(C) does not provide anywhere near the level of specificity demanded by the WPA's exemption provisions (this argument is covered at great length by Respondents. Resp't. Br. in Opp'n at 24-27). Instead, by statute, Congress granted DHS wide latitude to create regulations prohibiting the disclosure of information that it, in its sole discretion, determines to be "detrimental to" transportation security. To argue that Congress

intended to provide DHS with this broad authority, but then intended to entirely remove agency accountability by exempting *abuses of* this authority from coverage under the WPA runs counter to the purpose and history of the WPA and the 2012 amendment.

Additionally, a decision in DHS's favor would have a broader reach than just the agency. To be sure, nothing in DHS's arguments indicate that it believes this power – to effectively legislate through regulation – is limited only to DHS or to this particular implementing statute. The logic of DHS's argument could be broadly applied to other agencies or other implementing statutes, empowering agencies to carve out large swathes of exemptions from WPA coverage in a manner not contemplated by Congress. Indeed, in its briefing, the government has implied as much, arguing for an even more expansive reading of the § 2302(b)(8)(A) exception, asserting that "SSI, by its very nature, concerns security matters," as a part of its argument in favor of barring MacLean from even raising a WPA affirmative defense. Pet'r. Br. at 24.

There is little doubt that, if given additional tools to do so, agencies determined to intimidate whistleblowers would take advantage of the opportunity to enact regulatory rules that would allow them to target whistleblowers, circumventing the stated purpose of the WPA.

Indeed, even under the current regime, agencies can – and do – successfully target whistleblowers through the use of internal agency rules and through exploiting the structural limitations of the WPA's protections. In one such case, former Environmental Protection Agency nuclear security expert Richard Levernier exposed unaddressed security vulnerabilities at nuclear weapons sites, first by complaining to his supervisor. The supervisor responded by withdrawing his security clearance – effectively removing Levernier from his position. *National Security Whistleblowers In The Post-September 11th Era: Lost In A Labyrinth And Facing Subtle Retaliation*, *Hearing on H.R. 1317 Before the Subcomm. On National Security, Emerging Threats, And International Relations of the H. Comm. On Government Reform*, 109th Cong. 177-78 (2006) (Statement of Richard Levernier).

As required by the WPA, Levernier next approached the Office of Special Counsel alleging whistleblower retaliation for his protected disclosures. *Id.* After over five years, the OSC finally ruled in Levernier's favor, finding that his disclosures were protected under the WPA. *Id.* However, because OSC did not have the authority to review security clearance determinations, and because successful completion of Levernier's former position required a valid security clearance, his position with the agency was never reinstated, effectively ending his career. *Id.*

Cases like Levernier's demonstrate the powerful pushback that whistleblowers face in making disclosures, even under a favorable reading of the WPA's protected disclosures provision, and the ease with which agencies can undermine the purpose of the WPA's protections. Granting DHS's preferred interpretation would only further expand the ability of agencies to silence whistleblowers by providing them with a new set of regulatory tools to fall back on.

B. The Existing Classification Scheme Adequately Protects Against The Disclosure Of The Kind Of Sensitive Information Worried About By DHS

In addition to the potential abuse of regulatory rulemaking that would result if the DHS's preferred interpretation of the WPA is adopted, another reason for rejecting that interpretation is that there is simply no need for such an expansive reading of the WPA exceptions.

In addition to excluding disclosures "specifically prohibited by law" from the WPA's coverage, the Act carves out another exception for information "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). At the very least, this would include all information designated as "Top Secret," "Secret,"

and "Confidential" under the Executive branch's current classification system.[2]

Given that the government already extensively uses the classification system to protect against the public disclosure of sensitive information, it is entirely unnecessary to empower agencies to designate another broad category of information (SSI, in this case) as outside the scope of the WPA.

By the government's own estimates, in 2012 alone executive branch agencies made over 95 million "classification decisions"[3] – a fourfold increase from the more than 23 million classification decisions by the agencies a decade earlier in 2002.[4] Indeed, the concerns about rampant overclassification became so severe that in 2010 Congress ordered the Justice Department to conduct a comprehensive audit of the Executive branch's classification system to assess whether the stated policies and procedures were being properly followed and effectively administered and to address how the

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[2] Executive Order No. 13526 (2009) contains the most recent definitions and requirements of the current classification system.

[3] Information Security Oversight Office, The National Archives and Records Administration, "2012 Annual Report To The President," at 1. http://fas.org/sgp/isoo/2012rpt.pdf.

[4] Information Security Oversight Office, The National Archives and Records Administration, "Report To The President, 2002," at 4. http://fas.org/sgp/isoo/2012rpt.pdf.

agency should go about remedying the perpetual problem of overclassification.[5] Further, according to a 2011 ODNI report, that year there were nearly 5 million holders of active security clearance, over 1.4 million of whom held the highest level "Top Secret" clearance.[6]

Through the use of the classification system, along with the threat of felony criminal penalties for disclosing classified information,[7] the government is already able to strike an appropriate balance, adequately preventing the disclosure of the most sensitive information without further undercutting the effectiveness WPA.

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[5] REDUCING OVER–CLASSIFICATION ACT, P.L. 111-258, October 7, 2010.

[6] The Office of the Director of National Intelligence, "2011 Report on Security Clearance Determinations," at 3, Table 1, http://fas.org/sgp/othergov/intel/clear-2011.pdf.

[7] *See* 18 U.S.C. § 798.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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