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 FOR RESPONDENT

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QUESTION PRESENTED

Recognizing the crucial role federal employees play in uncovering unlawful, wasteful, and dangerous government activity, Congress has enacted strong protections for government whistleblowers. One such provision establishes that agencies may not retaliate against employees who disclose information revealing, among other things, "any violation of any law, rule, or regulation" or "a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A). There is an exception, however, for "disclosure[s] * * * specifically prohibited by law" or by certain Executive orders. *Id.*

By regulation, the Department of Homeland Security has prohibited the disclosure of certain unclassified information. *See* 49 C.F.R. Pt. 1520. The question presented is whether the agency may take action against an employee who, in order to prevent a substantial and specific danger to public safety, discloses that information.

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BRIEF FOR RESPONDENT

INTRODUCTION

This case shows why Congress created the whistle-blower protections at issue here. Respondent Robert MacLean, a federal air marshal, learned that Petitioner Department of Homeland Security planned to save money by eliminating air-marshal protection on long-distance flights that required marshals to stay overnight in hotels, even though DHS had just discerned an imminent Al Qaeda plot targeting long-distance flights. MacLean brought this potentially catastrophic decision to the attention of his supervisor and the Inspector General, but they told him nothing could be done. As a last resort, MacLean went to a reporter, hoping to head off the dangerous policy before it went into effect. It worked. Members

of Congress criticized the agency's decision, and DHS rescinded the policy, acknowledging that it was "a mistake."

That did not stop DHS from eventually turning its sights on MacLean. When, two years later, it learned that MacLean was the source of this embarrassing revelation, DHS fired him, then issued an order declaring the information he had disclosed to be "Sensitive Security Information."

The law protects whistleblowers like MacLean from such retaliation so that Congress, and ultimately the public, can benefit from their willingness to bring to light serious problems that government agencies would prefer not to talk about. That is not to say Congress believes that government employees should be free to publicize *any* information. Congress recognized that the government must be able to protect some information no matter how strongly a government employee believes the public would benefit from its disclosure. But Congress also recognized that if agencies had the power to declare which pieces of information were off-limits to whistleblowers, they could use that authority to choke off the very safety valve that whistleblower protections seek to keep open.

So Congress placed that power elsewhere. The Whistleblower Protection Act shields those who disclose information concerning (among other things) "violation of *any law, rule, or regulation*," making an exception only if the disclosure is "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) (emphasis added). By distinguishing

"law" from "rule" and "regulation," Congress made clear that only a statute enacted by Congress or an order signed by the President suffices to deprive whistleblowers of protection. The purpose and history of the Act—not to mention common sense—explain why that is so: If agencies could regulate their way around the whistleblower protections meant to restrain them, those safeguards would have little value.

DHS thus attempts to do here exactly what Congress forbade—punish a whistleblower based on its own regulations. And it is trying to do so under exactly the circumstances Congress had in mind when withholding that power—an agency was embarrassed by the disclosure of information that neither Congress nor the President had declared off-limits to whistleblowers. This Court should not countenance the agency's effort to circumvent Congress's command.

STATEMENT

A. Whistleblower Protection Laws

In 1978, amidst ongoing expansion of the administrative state and mounting concern over concealed government misconduct, Congress recognized the limits of its own ability to uncover wrongdoing within "the vast Federal bureaucracy." S. Rep. No. 95-969, at 8 (1978). So it turned for help to those individuals best positioned to bring illegal, wasteful, and dangerous government activity to light: government employees. Congress understood, though, that employees who "summon[ ] the courage to disclose the truth" are often rewarded only with "harassment and abuse." *Id.* Encouraging employees to come forward, it recognized, would require "a means to assure them

that they will not suffer if they help uncover and correct administrative abuses." *Id.*

Congress began with the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. That law established the core protections for government whistleblowers. Over the years, Congress has continually strengthened those protections as agencies have predictably resisted them. In 1989, Congress unanimously passed the Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat. 16. The WPA sought "to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government." *Id.* at § 2(b), 103 Stat. 16. Just five years later, Congress again reinforced whistleblower 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, Pub. L. No. 112-199, 126 Stat. 1465. This law again aimed "to reform and strengthen several aspects of the whistleblower protection statutes in order to achieve the original intent and purpose of the laws," and in particular to "overturn[ ] several court decisions that narrowed the scope of protected disclosures." S. Rep. No. 112-155, at 3-5 (2012). The Senate Report accompanying the law also emphasized that protecting whistleblowers helps protect the nation against terrorist threats: "In a post-9/11 world, we must do our utmost to ensure that those with knowledge of problems at our nation's airports, borders, law enforcement agencies, and nuclear facilities are able to reveal those problems without fear of retaliation or harassment." *Id.* at 1.

This case concerns one of the most important whistleblower protections established and continually reaffirmed through this series of laws, 5 U.S.C. § 2302(b)(8)(A).[1] That section prohibits agencies from taking specified actions, such as firing someone, in retaliation for:

> any disclosure of information by an employee * * * which the employee * * * reasonably believes evidences—
>
> (i) any violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs * * * .

§ 2302(b)(8)(A). The idea is simple: Except where Congress or the President has determined that the costs of any disclosure would outweigh its benefits, government employees should be encouraged to reveal illegal, dangerous, or grossly wasteful agency acts. And when they do so, the agencies that employ them should be prevented from retaliating.

Congress was mindful that agencies themselves would not always welcome whistleblowers' contributions to transparency, safety, and efficiency. Agencies and their officers often have strong incentives to conceal wrongdoing, and employees who expose that

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[1] This provision was first enacted in the Civil Service Reform Act, but it is commonly referred to as part of the WPA, and this brief adopts that terminology.

misconduct are not always treated kindly, which is why whistleblowers need protection in the first place. *See* S. Rep. No. 95-969 at 8 ("Whistle blowers frequently encounter severe damage to their careers and substantial economic loss."). Congress therefore ensured that agencies could not regulate their way out of the public scrutiny whistleblower-protection laws facilitate. Although Congress considered enacting versions of the provision that would exempt disclosures "prohibited by law, rule or regulation," Congress settled on language exempting only those disclosures "specifically prohibited by law" or certain Executive orders. *Compare* H.R. 11280, 95th Cong. (2d Sess. 1978); S. 2640, 95th Cong. (2d Sess. 1978) *with* 5 U.S.C. § 2302(b)(8)(A). As the Conference Report on the very language enacted by Congress in this provision explained, "specifically prohibited by law * * * does *not* refer to agency rules and regulations." H.R. Rep. No. 95-1717, at 130 (1978) (Conf. Rep.) (emphasis added).

B. Sensitive Security Information Regulations

Regulations governing the disclosure of information related to air-transportation security predate the whistleblower protection statutes. *See, e.g.*, 14 C.F.R. Pt. 191 (1976). These regulations were originally promulgated by the Federal Aviation Administration and subsequently transferred to the jurisdiction of the Transportation Security Administration, which has been part of DHS since DHS's creation in 2002. *See* 67 Fed. Reg. 8340, 8351 (Feb. 22, 2002).

TSA's authority to promulgate the regulations at issue in this case stems from a statutory provision initially enacted in the 1974 Air Transportation Se-

curity Act, Pub. L. No. 93-366, § 316, 88 Stat. 417 (1974). That provision granted authority to the Federal Aviation Administration, but was transferred to the newly-created TSA as part of the Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. IV, Subtit. A, § 403(a), 116 Stat. 2178 (2002). The resulting provision was codified at 49 U.S.C. § 114(r), and is referred to throughout this brief as § 114(r). It provides, as relevant:

> Notwithstanding section 552 of title 5, the Under Secretary shall 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.

49 U.S.C. § 114(r)(1)(C); *see also* 49 U.S.C. § 40119(b)(1).[2] Section 552 of title 5 is the Freedom of Information Act, and Congress included that language out of concern that ill-intentioned members of the public would gain access to sensitive information through FOIA requests. *See Public Citizen, Inc.* v. *FAA*, 988 F.2d 186, 194-96 (D.C. Cir. 1993) (analyzing the predecessor statute to § 114(r)).

Congress has amended § 114(r) several times since the WPA's enactment—including after September 11, 2001—never adding a similar "notwithstanding" clause to address the WPA. *See* Pet. Br. 2-4. It did, however, expressly forbid the agency from using

[2] Section 40119(b) grants the Secretary of Transportation substantially the same authority that § 114(r) grants TSA. *See* Pet. Br. 2-4. Although § 40119(b) appears frequently in the proceedings below, MacLean follows DHS in citing to § 114(r).

§ 114(r) "to conceal a violation of law, inefficiency, or administrative error" or "to prevent embarrassment to a person, organization, or agency." § 114(r)(4); Department of Homeland Security Appropriations Act, Pub. L. No. 111-83, 123 Stat. 2142 (2009). And Congress ensured that DHS could not argue that the Homeland Security Act somehow rendered the WPA inapplicable to the agency, specifying that "[n]othing in this Act shall be construed as exempting the Department from requirements * * * to provide whistleblower protections for employees of the Department (including pursuant to the provisions in section 2302(b)(8) * * *)." Homeland Security Act § 883.[3]

The regulations enacted under § 114(r) create a category of "Sensitive Security Information," or "SSI," and restrict its use and dissemination. *See* 49 C.F.R. Pt. 1520. SSI is not classified information; it can be shared with the over 60,000 TSA personnel and private employees of airlines and airports, from pilots to baggage handlers, without the need for a security clearance or even a background check. *See* Pet. Br. 6, 17; 49 C.F.R. §§ 1520.7, 1520.11(c).

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[3] When the Office of Law Revision Counsel subsequently codified this provision at 6 U.S.C. § 463, it changed "Act" to "chapter" because the Act was "principally classified" in Chapter 6. *See* Office of the Law Revision Counsel, United States Code, http://uscode.house.gov/browse.xhtml (Jump to: Title 6, Section 463). The actions of that administrative body do not, however, affect the actual scope of the original language Congress enacted and the President signed. *See Nashville Milk Co.* v. *Carnation Co.*, 355 U.S. 373, 379-80 (1958) (where the Statutes at Large and the Code conflict "Congress has specifically provided that the underlying statute must prevail").

C. Underlying Facts

Robert MacLean was a public servant with a fourteen-year record of federal service. After four years' active duty in the Air Force, he worked as a border patrol agent from 1996 to 2001. C.A. App. A184. After September 11, 2001, MacLean volunteered to serve his country in a new way. He applied to work for the organization that became the Federal Air Marshals Service—a federal law-enforcement agency currently within TSA—and became a member of the Service's first post-9/11 graduating class. JA81-82.

As an air marshal, MacLean's job was "to detect, deter, and defeat hostile acts targeting U.S. air carriers, airports, passengers, and crews." *Federal Air Marshals,* TSA*, available at* http://www.tsa.gov/about-tsa/federal-air-marshals. Marshals operate independently and aim to blend in with ordinary travelers. *See id.* They are trained in "investigative techniques, criminal terrorist behavior recognition, firearms proficiency, aircraft specific tactics, and close quarters self-defense measures." *Id.* MacLean served without incident until 2003, compiling an "exemplary" record. Pet. App. 104a.

In late July of that year, DHS issued an emergency, non-public notice of a specific and imminent terrorist threat focused on long-distance flights—a more ambitious, broader-scale version of the 9/11 plot. Pet. App. 2a; JA16-17, 91-93. Every air marshal, including MacLean, was given an unprecedented face-to-face briefing about the threat. Pet. App. 2a; JA91-92. MacLean and the other marshals were informed about special measures being implemented to thwart the attack and were told to be especially on their guard. JA91-93.

But within 48 hours of that secret briefing, MacLean received a text message cancelling "all overnight missions." Pet. App. 75a; JA93-94.[4] The text message was not marked as sensitive information; it was unencrypted; and it was sent to MacLean's unsecure cell phone, not the secure personal digital assistant he had been provided for SSI transmission. *See* Pet. App. 2a; JA86-91, 93-94, 99-101. MacLean at first thought the message must have been a mistake. After all, TSA is statutorily required to station a marshal on flights that "present high security risks," and marshal deployment on "nonstop, long distance flights * * * should be a priority." 49 U.S.C. § 44917(a). The looming hijacking threat only made marshal coverage of long-distance flights all the more imperative.

After confirming that other marshals had received the same message, MacLean went to his supervisor to express his concern. Pet. App. 2a; JA95-96. The supervisor told him that overnight missions had been eliminated to save money on hotels, overtime, and travel allowances, and that "nothing could be done." Pet. App. 2a; JA30, 95. MacLean then called the Of-

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[4] DHS describes this message as specific to Las Vegas flights. *See* Pet. Br. 7. But although MacLean himself worked in the Las Vegas office, the message he received concerned *all* overnight flights. *See, e.g.*, Pet. App. 59a ("Las Vegas [Federal Air Marshals] were sent a text message that all RON (remain overnight) missions up to August 9 would be canceled."); 65a (explaining that MacLean was assigned to Las Vegas); 78a ("I knew there were Air Marshals across the country that were getting the same message."). That is why the ensuing press coverage, congressional uproar, and DHS rescission all addressed long-distance flights generally, not simply Las Vegas-based flights. *See* JA36-39, 50-53, 59-73.

fice of the Inspector General, as he was encouraged to do by posters on display throughout his office building. JA96-97. His call was transferred from one Inspector General field office to another, and he was ultimately advised to think about the "years left in [his] career" and "just walk away." JA97.

Only then did MacLean look outside for help. He firmly believed that the new policy was contrary to law and extraordinarily dangerous to public safety. *See* Pet. App. 53a-54a, JA101. And time was running out before it took effect. So MacLean blew the whistle. He contacted a reporter with a history of responsible reporting about TSA who maintained close connections with Congress, telling him about the plan to remove marshals from long-distance flights. *See* Pet. App. 2a; JA98, 121.[5]

When the story was published, congressional leaders reacted immediately. Pet. App. 2a. They expressed concern and even outrage about DHS's decision to pull air marshals from the most threatened

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[5] DHS describes these events in artificially nefarious terms, claiming that MacLean "testified that it did not matter to him, in formulating that scheme, whether the information he planned to reveal was SSI." Pet. Br. 8. But MacLean actually testified that "it did not matter" when he was discussing this question with his supervisor, who, of course, would be privy to the information anyway. *See* C.A. App. 283-84. Moreover, the Court of Appeals subsequently agreed that "it did not matter" whether agency regulations considered the information "SSI" if MacLean reasonably believed that information concerned "breaking the law and * * * endangering life." *Id.* at 284; Pet. App. 11a-17a. It is thus hardly fair to suggest that disregarding the SSI regulations would show bad faith when the question before this Court is whether the WPA *encourages* whistleblowers to disregard such regulations in certain situations.

flights "to save on hotels," and urged the agency to reconsider. JA68; *see also, e.g.*, JA59 (statement of Sen. Clinton); JA65 (statement of Sen. Lautenberg); JA72 (statement of Sen. Schumer); *see generally* Stephen Power, *Board Overseeing Air Marshals Asks to Divert Program's Funds*, The Wall Street Journal (July 31, 2003) ("Given new warnings from [DHS] about possible hijacking attempts, it is foolish to even consider cutting back the number of air marshals on commercial flights." (quoting Rep. Rogers (R-Ky)).

Within 24 hours, DHS rescinded the directive, announcing that it had been "premature and a mistake." JA155. Marshal coverage was uninterrupted, and the potential hijacking threat was averted. JA71-72. Senator Boxer specifically thanked the anonymous "air marshals who came forward and told the truth." JA41.

Initially, no one identified MacLean as the source of the anonymous disclosure, and he went back to work protecting air travelers. In the ensuing years, MacLean became actively involved with the efforts of the Federal Law Enforcement Officers Association to reform agency policies and practices that the Association believed hurt the air marshal program and endangered the public. Pet. App. 22a. As part of these efforts, MacLean appeared anonymously on a television news broadcast to criticize dress code policies that rendered marshals easily identifiable to would-be terrorists. *Id.*

As Congress had anticipated when it instituted whistleblower protections, DHS was less than pleased with the public criticism. When agency personnel recognized MacLean's voice during his televi-

sion appearance, the agency seized the opportunity to initiate an internal investigation. In May 2005, MacLean was interviewed by DHS investigators, and he confirmed that he had made the appearance in question. Pet. App. 2a-3a, 22a; JA23. MacLean was not directly asked about the July 2003 text message and ensuing news story, but nonetheless offered the details of his involvement in response to questions about his prior media contacts. Pet. App. 22a.

The information MacLean volunteered ended up costing him his job. In September 2005, DHS proposed to fire him on three grounds: (1) his television appearance had been unauthorized, (2) his release of information to the media was unauthorized, and (3) the text message he disclosed to the reporter contained SSI. *See id.* at 22a-23a. In April 2006, the agency sustained his removal on the third charge only. *See* Pet. App. 23a.

D. Procedural History

MacLean challenged his removal before the Merit Systems Protection Board on several grounds—chief among them, that the text message did not contain SSI and, even if it did, his disclosure was protected by the WPA. But before the MSPB could rule on these issues, TSA issued a two-page, ex parte order declaring the text message MacLean had disclosed years earlier to be SSI. *See MacLean* v. *DHS*, 543 F.3d 1145, 1149 (9th Cir. 2008).

MacLean appealed the order to the U.S. Court of Appeals for the Ninth Circuit, and the MSPB dismissed his initial action without prejudice pending the court's ruling. *See id.* Emphasizing the considerable deference afforded to an agency's interpretation of its own regulations, the Ninth Circuit upheld

DHS's determination that the text message contained SSI. *See id.* at 1150. It stressed, however, that MacLean could "still contest his termination before the MSPB, where he [could] raise the Whistleblower Protection Act" and "contend that the lack of clarity of the TSA's 'sensitive security information' regulations is evidence MacLean disseminated the information under a good faith belief the information did not qualify as sensitive security information." *Id.* at 1152.

So MacLean went back to the MSPB. The full Board eventually affirmed his removal. *See* Pet. App. 19a-55a. Clarifying an earlier ruling in this case, the Board held that because the SSI regulations had been "promulgated pursuant to an explicit Congressional mandate," those regulations qualify as an exception to the WPA. *Id.* at 32a.

The U.S. Court of Appeals for the Federal Circuit reversed. The court began by observing that "[t]he parties do not dispute that, in order to fall under the WPA's 'specifically prohibited by law' proviso, the disclosure must be prohibited by a statute rather than by a regulation." *Id.* at 12a. It thus found "the core of the disagreement" to be whether § 114(r) "specifically prohibits disclosure of information concerning coverage of flights by Marshals within the meaning of the WPA." *Id.* (internal quotation marks and alterations omitted).

The court explained that the "plain language" of § 114(r) "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.' " *Id.* at 13a. (ci-

tation omitted; quoting 49 U.S.C. § 40119(b)). "Thus," the court continued, "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." *Id.* The court found further support for this conclusion in the legislative history showing that Congress wished to disable agencies from using their own regulatory authority, or broadly-worded grants of statutory discretion, to punish and intimidate whistleblowers. *Id.* at 13a-14a. And it contrasted § 114(r) with statutes that did have sufficient specificity to satisfy the WPA. *Id.* at 14a-15a. The court held out the possibility that some statutes could supply the requisite specificity even while directing an agency to promulgate the precise prohibitions, but found that "given the clarity of the statutory language and legislative intent behind the WPA's specificity requirement," § 114(r) did not qualify. *Id.* at 15a-16a.

The court concluded by debunking DHS's "parade of horribles." *Id.* at 16a. It observed that Congress remained free to enact specific prohibitions that would override the WPA. And it noted that its decision did not defeat the purpose of § 114(r) or nondisclosure statutes like it. Instead, the court explained that under its interpretation, § 114(r) accomplishes the ends for which it was enacted, enabling DHS to prohibit all sorts of disclosures—including the statute's "paramount goal" of blocking FOIA requests. *Id.* at 17a. But because § 114(r) lacked the specificity needed to overcome the WPA's focused protections, the court vacated the MSPB's decision and remanded for further proceedings. *Id.* at 17a-18a. DHS sought panel rehearing and rehear-

ing en banc. The agency's petition was denied without opinion and without dissent. Pet. App. 165a-66a.

SUMMARY OF THE ARGUMENT

1. The Court of Appeals correctly determined that DHS could not retaliate against MacLean for disclosing information embarrassing to the agency, so long as he held a reasonable belief that he was identifying a "specific danger to public health and safety," and neither a statute nor an Executive order prohibited his disclosure. 5 U.S.C. § 2302(b)(8)(A).

a. DHS maintains that in lieu of a statute or an Executive order, it could rely on its own regulations to punish MacLean's actions. The text of the WPA forecloses that argument. The key sentence of the WPA authorizes whistleblowers to disclose "any violation of any law, rule, or regulation," but allows punishment of such disclosures only if they are "specifically prohibited by law" or by certain Executive orders. *Id.* Under both precedent and logic, Congress's choice to distinguish between "law" and "law, rule, or regulation" makes clear that "prohibited by law" cannot mean "prohibited by regulation." The structure, purpose, and history of the WPA not only confirm that Congress intended that reading, but also explain why that is so. Whistleblower protections seek to prevent agencies from retaliating against employees who expose dangerous or illegal agency practices that the agencies themselves would prefer to keep secret. If agencies could use their own regulations to block such disclosures, then these protections would offer no protection at all.

DHS argues that the word "law" encompasses its regulations absent a clear showing of congressional intent to the contrary. Here, however, the showing is

crystal clear: "A statute that in one section refers to 'law, rule or regulation,' and in another section to only 'laws' cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places." *Dep't of Treasury, I.R.S.* v. *Fed. Labor Relations Auth.*, 494 U.S. 922, 932 (1990). That reasoning has all the more force where, as here, the purpose and history of the Act clearly explain why Congress chose to distinguish between laws it enacted and regulations an agency created. Nor does DHS help its case by observing that § 114(r) authorizes the regulations here. *All* valid regulations are authorized by a statute, yet remain regulations nonetheless. There is no sound basis to believe that a requirement for a specific statute or an Executive order can be fulfilled by a specific statute, an Executive order, or a certain variety of regulation.

b. Arguing in the alternative, DHS suggests that if a specific statutory prohibition is necessary, it has one in § 114(r). But that law does not prohibit anything at all—it merely allows DHS "to prescribe regulations prohibiting the disclosure of information." And even if § 114(r) were somehow a prohibition, its broad authorization for TSA to shield information if the agency decides disclosure would be "detrimental to the security of transportation" could not possibly qualify as the *specific* prohibition the WPA requires. Preventing occurrences it deems "detrimental to the security of transportation" is, after all, little more than a restatement of the *Transportation Security* Administration's overall mission.

DHS does not try to explain how the actual words of § 114(r) could "specifically prohibit" MacLean's revelations, or anything else. It instead examines how FOIA affected non-disclosure statutes that pre-

dated FOIA, citing *FAA* v. *Robertson*, 422 U.S. 255 (1975). *Robertson*, however, relied entirely on the Court's understanding of FOIA's legislative history and purpose. Because FOIA and the WPA do not share the same purpose or history, *Robertson* and the other FOIA-related analysis DHS invokes say little about how this Court should interpret the WPA—much less how § 114(r) could do something its text plainly does not do.

2. DHS's policy arguments cannot substitute for statutory authority. MacLean agrees with DHS that the WPA strikes a considered balance between the benefits of allowing whistleblowers to reveal agency misdeeds and the need to keep some information secret no matter how strongly a would-be whistleblower believes it should be disclosed. Where they part company is with DHS's notion that an agency itself can determine where that balance lies. Congress chose *not* to delegate that power to the agencies, reserving it to itself and the President. There is nothing problematic about that; the classification system established by Executive order will continue to bar employees from revealing the nation's vital secrets, and Congress will continue to exempt other information from the WPA as it sees fit. If DHS wants to put more of its own information entirely off-limits, it need only persuade Congress or the President that doing so is in the country's best interest. What the agency bureaucracy cannot do is use its own regulations to hide mistakes that elected officials would prefer to see revealed and corrected.

ARGUMENT

I. THE WHISTLEBLOWER PROTECTION ACT BARS THE AGENCY FROM RETALIATING AGAINST MACLEAN.

Assuming—as the MSPB did—that MacLean "reasonably believe[d]" he was revealing a terrible mistake that posed "a substantial and specific danger to public * * * safety," DHS may take action against MacLean only if his disclosure was "specifically prohibited by law." 5 U.S.C. § 2302(b)(8)(A). The Court of Appeals correctly concluded that it was not.

A. DHS Cannot Use Its Own Regulations to Create Exceptions to the WPA.

1. **Text.** In this Court, DHS primarily argues that its own regulations provide the specific prohibition required by the WPA. The plain text of the WPA forecloses that argument. The phrase "law, rule, or regulation" appears more than 20 times throughout the WPA—no fewer than seven times in § 2302(b) alone. *See* §§ 2302(b)(1)(E), (6), (8)(A)(i), (8)(B)(i), (9)(A), (12), (13). By contrast, Congress chose not to provide whistleblower protections only where revealing information is "specifically prohibited by law" or certain Executive orders. § 2302(b)(8)(A). The two different phrases even appear in the same sentence: The WPA protects a disclosure of "any violation of any *law, rule, or regulation* * * * if such disclosure is not specifically prohibited by *law.*" *Id.* (emphases added).

Congress's repeated reference to "law, rule, or regulation" shows that when "law" stands in isolation, it does not include rules and regulations. As this Court has explained, a "statute that in one section refers to 'law, rule or regulation,' and in another section to only 'laws' cannot, unless we abandon all pretense at pre-

cise communication, be deemed to mean the same thing in both places." *Dep't of Treasury,* 494 U.S. at 932.

The same conclusion also follows from the more general principle that "where Congress includes particular language in one section of a statute but omits it in another * * * it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v. *United States,* 464 U.S. 16, 23 (1983) (internal quotation marks omitted). Where, as here, the variation occurs within a single sentence, it becomes even clearer that the two phrases cannot have the same meaning.

Structure. The WPA's structure further confirms that "law" does not, in this context, include regulations. The WPA establishes a general rule that agencies may not punish whistleblowers' disclosures, then enumerates two specific exceptions: Employees may be disciplined for disclosing information "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." § 2302(b)(8)(A). If the word "law" in the first exception had a broad, general meaning such as "any legally-binding authority," the second exception would be superfluous. Executive orders—like rules and regulations—often have the force of law. *See, e.g.*, *Chrysler*, 441 U.S. 304-12 (examining whether an Executive order and a regulation had the force of law); *HHS* v. *FLRA*, 844 F.2d 1087, 1096 (4th Cir. 1988) ("A Presidential order may have the force and effect of law when it is issued pursuant to statutory mandate or a delegation from Congress of lawmak-

ing authority.").[6] And there is no reason to doubt that the types of Executive orders contemplated by the WPA have the force of law, given the President's ample constitutional and statutory authority to protect secrets in national defense and foreign affairs. *See generally Dep't of Navy* v. *Egan*, 484 U.S. 518, 527-28 (1988).

The WPA's separate enumeration of certain Executive orders thus indicates that the statute uses "law" in a sense that does not encompass such orders. Statutes (and the judicial decisions interpreting them) surely qualify as "law." But to ensure the WPA also exempted another legally-binding authority—the specified Executive orders—Congress provided a separate exception. And because Congress provided one such exception, there is no basis to infer another exception for regulations. *See TRW Inc.* v. *Andrews*, 534 U.S. 19, 28-29 (2001) (" 'Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.' " (quoting *Andrus* v. *Glover Constr. Co.,* 446 U.S. 608, 616-17 (1980))); *Comm'r* v. *Clark*, 489 U.S. 726, 739 (1989) ("In construing provisions * * * in which a general statement of policy is qualified by an exception, we usually

[6] DHS suggests that *Chrysler* shows Executive orders do not always qualify as law. *See* Pet. Br. 25. That is true, but *Chrysler* also shows that regulations do not always qualify as law, and in fact concluded that the regulation in question lacked the force of law. *See* 441 U.S. at 304-12. *Chrysler* thus cannot support the theory that Congress listed Executive orders but not regulations in § 2302(b)(8)(A) because Congress was concerned that only Executive orders, and not regulations, might lack the force of law.

read the exception narrowly in order to preserve the primary operation of the provision").

Purpose. That the WPA excludes regulations becomes clearer still "considering the statute's purpose and context." *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006); *see Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1169-70 (2014) (rejecting, in light of the statute's purpose "to ward off another Enron debacle," an interpretation that would have narrowed the whistleblower provision of the Sarbanes-Oxley Act). The WPA, at its core, forms a check on the predictable tendency of bureaucrats to protect themselves from embarrassment. Section 2302(b)(8) applies to employees of an "agency" or "government corporation." 5 U.S.C. § 2302(a). It restricts those agency employees from taking "a personnel action" against another employee (or job applicant) for revealing abuses that the public would want to know about, but which would embarrass the agency's management, such as "gross mismanagement," "gross waste of funds," and endangering public safety. § 2302(b)(8)(A)(ii). The statute's text thus makes plain that the "purpose of the WPA" is to allow employees to make such disclosures "without fearing retaliatory action by their supervisors or those who might be harmed by the disclosures." *Willis* v. *Dep't of Agric.*, 141 F.3d 1139, 1143 (Fed. Cir. 1998).

If, however, an agency's management could use the agency's regulatory powers to prohibit such disclosures, it could close off the very openness the WPA seeks to create. Congress therefore kept the power to create exceptions to whistleblower protections for itself and the President, and did not allow agencies to use their regulatory authority to the same end. That choice helps ensure that whistleblowers can bring to light waste, fraud, abuse, and threats to public safety without fear of re-

prisal from their agencies. *See* S. Rep. No. 95-969, at 8 (Because "often the whistleblower's reward for dedication to the highest moral principles is harassment and abuse * * * protecting [whistleblowers] is a major step toward a more effective civil service.").

Moreover, the WPA qualifies as a remedial statute intended to solve the problem of agencies stifling employees who would reveal their misdeeds; it therefore "should be construed not technically and restrictively, but flexibly to effectuate its remedial purposes." *SEC* v. *Zandford*, 535 U.S. 813, 819 (2002) (internal quotation marks omitted). This Court has applied that well-established canon to protect employees from retaliation for their disclosures before. *See NLRB* v. *Scrivener*, 405 U.S. 117, 122-24 (1972) ("the approach * * * generally has been a liberal one in order fully to effectuate the section's remedial purpose"). Reading the WPA with an eye toward its remedial purpose is vital to achieving its ends, because if would-be whistleblowers cannot confidently rely on the Act's protections, they will never come forward in the first place. As a recent Senate report explains: "It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward." S. Rep. No. 112-155, at 5.

Of course, "no legislation pursues its purposes at all costs," *Rodriguez* v. *United States,* 480 U.S. 522, 525-26 (1987). But here the limits Congress intended appear on the WPA's face: The law expressly states that Congress and the President can place information entirely outside the would-be whistleblower's purview. Expanding that discretion to agencies would impose a new, atextual limit on the WPA, and affirmatively un-

dermine its purpose by giving agencies the key to unlock the restraints intended to bind them. After all, if Congress believed that agencies should be the ultimate arbiters of what information government employees can disclose, protecting agency whistleblowers would be unnecessary.

History. The legislative history clearly shows that Congress did not intend "specifically prohibited by law" to mean "specifically prohibited by regulation." The conference report—examining the final language enacted by both Houses and signed by the President—said so in no uncertain terms:

> 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 and regulations.

H.R. Rep. No. 95-1717, at 130.

Congress came to that conclusion quite deliberately. The Carter administration's initial draft of what became § 2302(b)(8) excluded disclosures prohibited by "law, rule or regulation." H.R. 11280, 95th Cong. (2d Sess. 1978); S. 2640, 95th Cong. (2d Sess. 1978). The Senate, however, removed the references to "rule or regulation." As its committee report explained, "there was concern that the limitation of protection in [the original draft] 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." S. Rep. No. 95-969, at 21. The House agreed that "rule or regulation" should be removed. *See* H.R. Rep. No. 95-1403, at 146 (1978).

Even absent explanations why Congress has removed particular language from a draft bill, this Court consistently rejects efforts to read back into a statute the language that Congress culled. *See, e.g.*, *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (internal quotation marks omitted). Here, Congress not only removed "regulation" from the statute, its members explained that it did so for the exact reason at issue in this case: to prevent agencies from regulating their way around whistleblower protections.

The subsequent Congresses that amended the whistleblower protection laws also operated on the understanding that "law" does not include regulations. In 1989, Congress amended § 2302(b)(8)(A) to expand its protections. *See* Whistleblower Protection Act § 4. These amendments left "specifically prohibited by law" unchanged, but the committee reports leading up to them reaffirm that this language means "barred by *statute* or by executive order due to national security considerations." H.R. Rep. No. 100-274, at 18 (1987); H.R. Rep. No. 99-859, at 16 (1986) (emphasis added). In 1994, Congress again expanded whistleblower protections, and again a committee report reaffirmed that "the only restrictions [on disclosures] are for classified information or material the release of which is specifically prohibited by *statute*." H.R. Rep. No. 103-769, at 18 (1994) (emphasis added). Most recently, Congress enacted the Whistleblower Protection Enhancement Act of 2012. It amended § 2302(b)(8)(A) so that it would protect employees revealing "*any* violation of a law, rule, or regulation," rather than the previous "*a*

violation of a law, rule, or regulation."[7] Once again a committee explained that "specifically prohibited by law" excludes regulations, this time quoting earlier legislative history. *See* S. Rep. No. 112-155, at 4 (" 'The only restrictions are for classified information or material the release of which is specifically prohibited by statute.' ") (quoting H.R. Rep. No. 103–769, at 18). Although they cannot change the meaning of words enacted in 1978, "the views of a Congress engaged in the amendment of existing law as to the intent behind that law are 'entitled to significant weight.' " *Bufferd* v. *Comm'r*, 506 U.S. 523, 530 n. 10 (1993) (quoting *Seatrain Shipbuilding Corp.* v. *Shell Oil Co.,* 444 U.S. 572, 596 (1980)). It is thus worth considering that for 35 years Congress has amended the whistleblower statutes multiple times, and each time with the consistent understanding that § 2302(b)(8)(A) does not recognize regulatory prohibitions as exceptions to the WPA.

Moreover, in 1993 the MSPB—the agency responsible for adjudicating WPA cases—recognized "that the statutory language, coupled with the legislative history of the * * * WPA, evidences a clear legislative intent to limit the term 'specifically prohibited by law' in section 2302(b)(8) to statutes and court interpretations of those statutes." *Kent* v. *Gen. Servs. Admin.,* 56 M.S.P.R. 536, 542–43 (1993) (rejecting agency contention that statutorily authorized regulations with "the force and effect of law" qualify as an exception to the WPA). Thus although Congress has amended the

[7] Congress made this change to underscore "the breadth of the WPA's protections" and to stress "the intentionally broad scope of protected disclosures." S. Rep. No. 112-155, at 8. Like DHS, MacLean cites to the current version of the law. *See* Pet. Br. 9 n.1.

WPA several times to reverse MSPB and Federal Circuit decisions that improperly narrowed whistleblower protections, *see supra* at 4, it had no need to amend this portion of the Act, because it knew the MSPB would enforce that part of the law consistent with its intent. *Cf. Sebelius* v. *Auburn Reg'l Med. Center*, 133 S. Ct. 817, 827-28 (2013) ("When Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." (quoting *Commodity Futures Trading Comm'n* v. *Schor,* 478 U.S. 833, 846 (1986) (alteration omitted)).[8]

2. DHS argues that absent a " 'clear showing of contrary legislative intent,' " the word "law" encompasses regulations. Pet. Br. 20 (quoting *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 295 (1979)). MacLean has no quarrel with that proposition. But for all the reasons just given, the showing of legislative intent here could scarcely be clearer. So clear, in fact, that DHS did not even try to convince the Court of Appeals otherwise, telling it:

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[8] When Congress enacted the Whistleblower Protection Enhancement Act of 2012, the MSPB had issued its decision in this case, receding from *Kent*. *See* Pet. App. 19a. But Congress had no need to correct that decision, because it was under review by the Court of Appeals, where DHS had conceded that agency regulations did not satisfy the "specifically prohibited by law" requirement. *See infra* at 27-28; 158 Cong. Rec. E1664-01 (2012) (Statement of Rep. Platts) (urging "the Federal Circuit" not to "broaden[] the 'prohibited by law' exemption" to include SSI regulations, and reminding the court that "[p]rohibited by law has long been understood to mean statutory law and court interpretations of those statutes, not * * * agency rules and regulations").

> Amici argue that in order to exempt certain disclosures from WPA protection, "Congress must have explicitly prohibited such a disclosure via legislative enactment." Am. Br. at 9. *We do not disagree*. The only dispute is whether 49 U.S.C. § 40119 serves as that legislative enactment.

Gov't C.A. Br. at 46-47 (emphasis added). *See also* C.A. Oral Arg. Rec. 22:33-23:17 (Question: "I thought I understood your brief to concede that that can't be a rule or regulation, it means statute. Am I wrong?" Answer: "You're not wrong your honor. I'll be as clear as I can. '*Specifically prohibited by law' here means statute.*") (emphasis added).[9]

DHS's concession was wise. The last time an agency told this Court that "laws" and "law, rule, or regulation" meant the same thing in a statute where both appeared side-by-side, the Court rejected the argument as "simply contrary to any reasonable reading of the statutory text." *Dep't of Treasury*, 494 U.S. at 932. And here the Court also has the benefit of legislative history stating in the plainest possible terms that "specifically prohibited by

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[9] The Court of Appeals accepted that concession. *See* Pet. App. 12a ("The parties do not dispute that, in order to fall under the WPA's 'specifically prohibited by law' proviso, the disclosure must be prohibited by a statute rather than by a regulation."). DHS claims the court nonetheless passed upon the question because it suggested, in a single sentence of dicta, that other regulations could satisfy the WPA. *See* Pet. Reply Br. 10 (quoting Pet. App. 15a ("Regulations promulgated pursuant to Congress's express instructions would qualify as specific legal prohibitions.")). None of the cases DHS now cites, *see* Pet. Br. 19 n.3, establish that this Court must consider a previously-conceded argument under these circumstances. The Court is free to decide only the question actually examined below: whether § 114(r) specifically prohibits MacLean's disclosure. *See infra* at 35-47.

law is meant to refer to statutory law and court interpretations of those statutes. It does not refer to agency rules and regulations." H.R. Rep. No. 95-1717, at 130. In short, whatever showing *Chrysler* requires, it is more than satisfied here.

DHS cannot change this by appealing to capacious dictionary definitions of "law." *See* Pet. Br. 20. Those definitions help explain why *Chrysler* presumes that the term typically includes regulations. But they should not be double-counted in examining whether a particular statute overcomes that presumption. Here the text, structure, purpose, and history of the WPA all show that Congress could not have meant "law" to be synonymous with "law, rule, or regulation." *See supra* at 19-27. In such circumstances, appeals to general definitions found in dictionaries have little force. *See, e.g.*, *Dolan*, 546 U.S. at 486 (rejecting reliance on dictionary definition where statutory context indicated that word did not "extend to the outer limits of its definitional possibilities"). Indeed, Congress could not have understood "law" in the WPA to mean, for example, "[t]he body of rules governing the affairs of man within a community." Pet. Br. 20 (quoting *American Heritage Dictionary of the English Language* 741 (1976)). Such definitions sweep so broadly as to cover any agency directive prohibiting disclosures. But if every memo, order, and policy forbidding embarrassing revelations sufficed to render a disclosure "specifically prohibited by law," the WPA would protect few if any whistleblowers.

3. DHS mainly contends that "specifically prohibited by law" covers some, but not all, regulations. *See* Pet. Br. 22-28. That contention fails at every level of analysis.

Text. Whatever else may be said for DHS's position, it plainly has no basis in the statutory text. Absent the clear juxtaposition of "law" and "law, rule, or regulation" in the WPA, "law" could include both statutes and regulations, as *Chrysler* and DHS's dictionary definitions indicate. But with that juxtaposition, the statute makes clear that "law" and "regulation" are distinct categories, as *Department of Treasury* shows. There is no textual indication whatsoever that "law" is distinct from "regulation," yet nonetheless includes some unspecified subset of regulations.

DHS points out that in *Department of Treasury*, the Court found it "a permissible (though not an inevitable) construction of the statute that the term 'applicable laws' * * * applies to some, but not all, rules and regulations." 494 U.S. at 932-33. That makes sense in that context; "applicable laws" could, for example, mean some but not all statutes and some but not all regulations. But where, as here, the contrast is solely between "law" and "law, rule, or regulation," it is difficult to see what "law" standing alone could signify other than "law" but not "rule" or "regulation." That leaves "law" to mean exactly what the Conference Report says it means: "statutory law and court interpretations of those statutes" but not "agency rules and regulations." H.R. Rep. No. 95-1717, at 130.[10]

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[10] *Department of Treasury* also explained that "applicable" did not cause "laws" to mean "*all* rules and regulations," because the statute sometimes used the phrase "applicable laws, rules, and regulations." 494 U.S. at 932. That "applicable" could not somehow *expand* the scope of "laws" to cover all rules and regulations does not, however, mean that "applicable" did not *modify* "laws" so that "applicable laws" means something such as "applicable statutes and applicable regulations." *See id.* at 932-33.

It also adds nothing to suggest—as DHS does—that the presence of "rule" in the statutory phrase "law, rule, or regulation" muddies the waters. *See* Pet. Br. 23-24. There is no dispute that the categories of rule and regulation sometimes overlap, just as there is no dispute that law and regulation sometimes overlap. The point here is that using only "law" in one place and consistently using "law, rule, and regulation" elsewhere shows that *in this statute* "law" means something different from both rule and regulation—exactly as it did in *Department of Treasury*, which also distinguished "law" from "law, rule, and regulation." *See* 494 U.S. at 931.

Structure. The statutory context offers no support for DHS's view. The agency asserts that § 114(r) required it to issue the regulations in question. *See* Pet. Br. 23-25. Whether that is so has nothing to do with whether Congress intended those regulations to be exceptions to whistleblower protections. Congress enacted § 114(r) for several reasons; most obviously, the first six words of the statute allow DHS to promulgate regulations that will defeat FOIA requests. *See* § 114(r)(1) ("Notwithstanding Section 552 of Title 5 * * * ."). Section 114(r) also enables DHS to prohibit—and punish—employee disclosures for personal gain, inadvertence, or any other reason not protected by the WPA. But nothing in § 114(r) suggests that it requires DHS to promulgate regulatory exceptions to whistleblower protections. Nor does describing the regulations here as "congressionally mandated" imply that they would qualify as exceptions to the WPA when other regulations would not. Every valid regulation derives from a congressional grant of authority, often using the same mandatory language found in § 114(r)(1). *See, e.g.*, *Young* v. *Cmty. Nutrition Inst.*, 476 U.S. 974, 979-81

(1986) (deferring to FDA's interpretation of statute directing that it "shall promulgate regulations" concerning food safety to mean that the agency shall promulgate those regulations to the extent it finds necessary).

DHS confuses the issue by discussing it in the context of whether a particular regulation has the force of law under *Chrysler*. *See* Pet. Br. 21-23. In that case, Chrysler argued that the Trade Secrets Act barred the government from disclosing the company's business information in response to a FOIA request. The court of appeals had rejected Chrysler's position, because the Trade Secrets Act allows disclosures that are "authorized by law," and an agency regulation allowed the disclosure. *See* 441 U.S. at 294-95. This Court first asked whether *any* regulatory authorization could qualify as "authorized by law" in the context of that statute. Finding nothing like the textual and contextual indicia present in the WPA, the Court answered that preliminary question by holding that it was possible for regulations to satisfy the Trade Secrets Act's "authorized by law" requirement. *See id.* at 295-301. The Court then asked whether the *particular* regulation at issue did so. *Id.* at 301. In undertaking that second inquiry, the Court examined whether the regulation had several characteristics necessary to give it "the force and effect of law," including "whether the grant of [statutory] authority contemplates the regulations issued." *Id.* at 301, 308. But whether DHS's regulations could surmount the second step of *Chrysler*'s inquiry has nothing to do with whether they get past the first. If the WPA does not recognize any regulation as a valid limit on whistleblower protections—and it does not—then the particular characteristics of DHS's regulations are irrelevant.

Purpose. DHS finds it inconsistent with "language and logic" that a regulatory prohibition would not satisfy the WPA's "specifically prohibited by law" requirement even if a statute told the agency exactly what to prohibit. Pet. Br. 24. But there is nothing logically or linguistically problematic about a statute that does not count regulations as "law" refusing to recognize any regulation as law. Nor does that present a practical problem. A Congress that took the trouble to determine exactly what information should be off-limits to whistleblowers could just issue the requisite prohibition itself. And a Congress that wished to delegate to an agency the task of identifying that information could just authorize the agency to prohibit disclosures "notwithstanding the WPA," just as § 114(r) overrides FOIA by allowing TSA to prohibit disclosures "notwithstanding" that statute.

Moreover, the two cases on which DHS principally relies further illustrate why the WPA's purpose militates against reading it to allow regulations to trump its protections. As just discussed, *Chrysler* holds that the Trade Secrets Act allows certain regulations to authorize disclosures that would otherwise be prohibited under that Act. In that case, the Court explained that the Act "was primarily concerned with unauthorized disclosure of business information by feckless or corrupt revenue agents." 441 U.S. at 296. The Act's purpose of preventing rogue employees from revealing trade secrets for personal gain thus would not be impaired by an agency's decision to allow beneficial disclosures of certain classes of information. *See id.* at 296-300. The WPA, by contrast, is founded on the opposite premise: Individual employees *should* disclose some information even if that would make them rogues in the eyes of the federal bureaucracy. *See supra* at 22.

Department of Treasury illustrates a different point. In that case, the Court chose not to resolve the question whether "applicable law" could cover some regulations. *See supra* at 30-31. Instead, the Court left it up to the FLRA to determine whether "that extension should be made," after which courts could review the agency's determination under the deferential *Chevron* standard. 494 U.S. at 933. Given that Congress had assigned administration of the statute in question to the FLRA, that flexibility made sense. There is no reason to adopt a similarly lenient approach to interpreting the WPA, because DHS cannot plausibly claim *Chevron* deference for its interpretation of that statute. And DHS does not help its case by emphasizing that TSA is the assigned "expert" in determining what information is " 'detrimental to the security of transportation.' " Pet. Br. 17 (quoting § 114(r)(1)(C)). The notion that TSA could take the wide latitude accorded to expert agencies in other contexts and use it to define what information is exempt from whistleblower protections is anathema to the WPA's purpose of restraining agencies.

History. The use of legislative history has been criticized as "looking over a crowd and picking out your friends." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (internal quotation marks omitted). In this case, however, the agency has no friends in the crowd. DHS cites the conference report, which shows that Congress enacted the House's proposed "specifically prohibited by law" rather than the Senate's proposed "specifically prohibited by statute," in § 2302(b)(8)(A). *See* Pet. Br. 26. But both the House and the Senate came to those proposals by deleting "rule or regulation" from the initial draft of that provision. *See supra* 24. And the same conference report

DHS cites could not more clearly state that "specifically prohibited by law * * * does not refer to agency rules and regulations." H.R. Rep. No. 95-1717, at 130. To the extent Congress's use of "law" instead of "statute" was anything but stylistic, the conference report shows that Congress used "law" in order to refer both "to statutory law *and* court interpretations of those statutes." *Id.* (emphasis added).

DHS cannot explain that language away by citing congressional concerns with "internal procedural regulations against disclosure" and regulations "specif[ying] which agency employ[ee]s can talk to the press." Pet. Br. 27 (internal quotation marks, citation, and added emphasis omitted). Those statements help explain *why* Congress chose to exclude regulations from WPA exemptions. But they provide no reason to believe the particular types of regulation named were the only types of regulation Congress feared. And even if they were, that would not change the fact that Congress sought to defeat the threat of certain regulations by excluding all regulations, as it has consistently affirmed. *See supra* at 24-27.

B. Section 114(r) Does Not "Specifically Prohibit" MacLean's Disclosure.

DHS argues in the alternative that even if its regulations do not create an exception to whistleblower protections, MacLean's disclosure was "specifically prohibited" by § 114(r) itself. *See* Pet. Br. 28-34. To succeed in this fallback argument, DHS must show both that § 114(r) "prohibited" MacLean's disclosure and that it did so "specifically." *See Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) ("It is * * * a cardinal principle of statutory construction that we must give effect, if possible,

to every clause and word of a statute.") (internal quotation marks omitted). The agency does neither.

1. Section 114(r)(1) provides, as relevant:

> IN GENERAL.--Notwithstanding section 552 of title 5, the Under Secretary [of TSA] shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security * * * if the Under Secretary decides that disclosing the information would—
>
> * * *
>
> (C) be detrimental to the security of transportation.[11]

As the Court of Appeals explained, that language does not prohibit anything; it "only empowers the Agency to prescribe regulations prohibiting disclosure." Pet. App. 13a. "Thus, the ultimate source of the prohibition of MacLean's disclosure is not a statute but a regulation." *Id.* Put another way, MacLean's disclosure could not possibly have contravened any prohibition in § 114(r) (since there are no prohibitions in the statute), which is presumably why the agency cited its own regulations—not this statute—as the basis for firing him. *See* Pet. App. 156a-57a.

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[11] Section 114(r)(1) also authorizes regulations prohibiting the disclosure of two other categories of information. Section 114(r)(1)(A) addresses disclosures that would constitute "an unwarranted invasion of personal privacy" and § 114(r)(1)(B) addresses trade secrets and financial information. DHS seeks rhetorical support by describing § 114(r) as concerning "three particular categories of information." *See* Pet. Br. 20. But the agency does not contend—nor could it plausibly do so—that § 114(r)(1)(A) or § 114(r)(1)(B) applies to MacLean's disclosure. And whether those provisions specifically prohibit other, unrelated disclosures has no bearing on whether § 114(r)(1)(C) specifically prohibited MacLean's.

That it is not a prohibition in no way renders § 114(r) unimportant. The statute still fulfills the purposes for which Congress enacted it, such as enabling TSA to place information outside the reach of FOIA (that is, "section 552 of title 5") and to punish any employee disclosure not covered by the WPA. *See supra* at 31. But it does show that § 114(r) was not intended to establish an exception to the WPA's protections.

2. Even if § 114(r) could somehow be construed to constitute a prohibition, it would still lack the specificity demanded by the text of the WPA. At most, § 114(r) "provides only general criteria for withholding information." Pet. App. 14a. There are no guideposts to define what is "detrimental to the security of transportation," § 114(r)(1)(C), and the sweep of that phrase is potentially vast. Maintaining "the security of the nation's transportation system" is TSA's entire mission. *See* Pet. Br. 2 (internal quotation marks omitted). So telling the agency to forbid disclosures "detrimental to the security of transportation" comes perilously close to telling it to block any disclosure with which it disagrees.[12] There is no reason Congress cannot provide such broad grants of authority to agencies, but there is good reason to believe Congress would not want any such grants to constitute exceptions to the WPA.

When Congress wants to specifically prohibit DHS employees from disclosing certain information, it knows how to do so. Congress enacted 6 U.S.C. § 133 as part

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[12] Perhaps sensitive to the breadth of § 114(r), Congress did tell TSA not to use that provision "to conceal a violation of law, inefficiency, or administrative error" or to "prevent embarrassment." § 114(r)(4). But forbidding an agency to use a broad grant of authority in a few plainly improper ways only tells the agency how it may *not* regulate; it does not specifically prohibit any disclosure.

of the Homeland Security Act of 2002—the same law that gave TSA authority under § 114(r). Section 133(a) specifies that "critical infrastructure information" voluntarily submitted to the government cannot be disclosed except under narrowly delineated circumstances, "[n]otwithstanding any other provision of law." The meaning of "critical infrastructure information" is not left to an agency, but specifically defined by statute. *See* 6 U.S.C. § 131(3). And the law does not rely on an agency to enact the necessary prohibition; § 133 itself creates serious criminal penalties for employees who violate its restrictions. *See* § 133(f).

Congress has recognized that this provision satisfies the WPA. As part of the Whistleblower Protection Enhancement Act of 2012, Congress amended § 133. *See* Pub. L. No. 112-199 § 111, 126 Stat. 341 (2012). Section 133(c) now makes clear that critical infrastructure information that was not voluntarily submitted to the government, but was "independently obtained," can be disclosed under "section 2302(b)(8) of title 5"—that is, the WPA provision at issue in this case. As the Senate report confirms, this revision served to clarify that although voluntarily submitted critical infrastructure information may not be disclosed by whistleblowers, the same kind of information can be disclosed under the WPA if the information was obtained by other means. *See* S. Rep. No. 112-155, at 44-45. Section 114(r) not only looks nothing like § 133(a), it has never received similar treatment—presumably because Congress would never have imagined that it could be mistaken for a specific prohibition.[13]

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[13] Section 133 is by no means the only specific prohibition against disclosure applicable to TSA employees. *See also, e.g.*, 49 U.S.C. § 46311(a) (providing that a long list of government officials

Section 114(r)'s "insufficient specificity becomes even more apparent when it is contrasted with statutes that have been determined to fall under the WPA's 'specifically prohibited by law' proviso." Pet. App. 14a. The Court of Appeals examined two cases to demonstrate that point. In one, the MSPB concluded that the WPA "does not protect the disclosure of confidential information to unauthorized persons where such disclosure is specifically prohibited by the Trade Secrets Act." *Kent*, 56 M.S.P.R. at 540-46.[14] That statute's specificity is clear on its face: The Act defines the information that cannot be disclosed directly, not by delegating to an agency. And it defines the information using a detailed and comprehensive list—prohibiting, for example, disclosure of a company's "profits" and "expenditures." That is far more specific than § 114(r)(1)(C), which identifies information only by the prospective

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and employees "shall be fined under title 18, imprisoned for not more than 2 years, or both, if the [official] or employee knowingly and willfully discloses information that * * * the [official] or employee acquires when inspecting the records of an air carrier").

[14] The Trade Secrets Act, 18 U.S.C. § 1905, provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, * * * publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties * * * which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association * * * shall be fined no more than $1000, or imprisoned not more than one year or both; and shall be removed from office or employment.

effect its disclosure would have, forcing a would-be whistleblower to speculate as to whether revealing it would be "detrimental to transportation security."

In the second case, the Ninth Circuit found the WPA satisfied by § 6103 of the Internal Revenue Code. *See Coons* v. *Sec'y of Treasury*, 383 F.3d 879, 890–91 (9th Cir. 2004).[15] Here again, the statute bears the hall-

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[15] 26 U.S.C. § 6103(a) provides that "no officer or employee of the United States * * * shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section." Section 6103(b) defines "return" and "return information":

> (1) Return.--The term "return" means any tax or information return, declaration of estimated tax, or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed.
>
> (2) Return information.--The term "return information" means--
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> (A) a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,
>
> (B) any part of any written determination or any background file document relating to such written determina-

marks of specificity: It identifies certain types of information, which the statute defines in detail directly by the qualities of the information, not by the predicted effect its disclosure would have. A potential whistleblower need only refer to the statutory definition to know in advance whether she will qualify for whistleblower protections.

Because the WPA requires *specific* prohibitions to defeat its protections, general statutes like § 114(r) cannot also defeat those protections. *See Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 257-58 (1993) (refusing to adopt a broad definition of "equitable relief" where interpretation "would limit the relief *not at all.*"). Of course, the WPA does not set a particularly high bar for Congress when it wishes to render the WPA inapplicable. As the above examples demonstrate, Con-

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tion (as such terms are defined in section 6110(b)) which is not open to public inspection under section 6110,

(C) any advance pricing agreement entered into by a taxpayer and the Secretary and any background information related to such agreement or any application for an advance pricing agreement, and

(D) any agreement under section 7121, and any similar agreement, and any background information related to such an agreement or request for such an agreement, but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used or to be used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

gress knows how to legislate specific prohibitions when it wants to. Nor did Congress disable itself from delegating the task of promulgating specific prohibitions to agencies. The WPA is Congress's creation, and Congress can override it whenever it wants. As previously noted, nothing prevents Congress from allowing an agency to prohibit disclosures "notwithstanding the Whistleblower Protection Act," and § 114(r) already contains identical language overriding FOIA. *Supra* at 31. That Congress chose not to include similar language with respect to the WPA is simply further evidence that Congress did not intend § 114(r) to defeat whistleblower protections.

3. DHS's primary response hinges on *FAA* v. *Robertson*, 422 U.S. 255 (1975). In that case, the Court considered whether a statute allowing the FAA to restrict public access to information satisfied an exception to FOIA for information "specifically exempted from disclosure by statute." 5 U.S.C. § 552(b)(3) (1970). Because that language resembles § 2302(b)(8)(A), DHS argues that the WPA's exceptions must be just as broad as *Robertson*'s reading of the FOIA exemption, "[a]s a textual matter." Pet. Br. 29.

The problem with that theory is that the *Robertson* Court did not analyze the statutory text, beyond finding it "unclear and ambiguous, compelling resort to the legislative history." 422 U.S. at 263. Having considered that history, the Court explained that Congress had manifested an exceedingly clear intent not to disturb a host of earlier statutes allowing agencies to withhold information from the public, notwithstanding the disclosure provisions of the Administrative Procedure Act. *Id.* at 263-65. The Court then noted that FOIA could be read to trump the particular withholding statute at issue "only if [FOIA] is to be read as re-

pealing by implication all existing statutes which restrict public access to specific Government records." *Id.* at 265 (internal quotation marks omitted). Emphasizing the principle that "repeals by implication are disfavored," the Court held that FOIA did not compromise agencies' ability to withhold information under the pre-FOIA statutes. *Id.* at 265-66 (internal quotation marks omitted).

That reasoning offers no support for DHS's interpretation of the WPA. DHS cites nothing in the legislative history of the WPA suggesting that Congress believed general withholding statutes like § 114(r) would defeat whistleblower protections. And the canon against implied repeals has no relevance here. In *Robertson*, finding that FOIA covered the pre-existing withholding statutes would have effectively repealed them, because FOIA allows any member of the public to obtain information, so anyone can access information not subject to a FOIA exemption. But the WPA allows disclosures only by government employees who already have the information in question, and only under a few specific circumstances. That means that § 114(r) performs largely the same functions—allowing the agency to defeat FOIA requests and prohibit the vast majority of possible employee disclosures—even if it is not an exception to the WPA.

Indeed, to the extent *Robertson* has any weight here, it hurts DHS's case. "As a textual matter," Pet. Br. 29, it could stand only for the proposition that the WPA is "unclear and ambiguous, compelling resort to the legislative history." 422 U.S. at 263. And as discussed previously, the WPA's legislative history runs directly counter to DHS's interpretation. *See supra* at 24-27.

DHS gains even less by comparing Congress's post-*Robertson* amendment of FOIA to its enactment of § 2302(b)(8)(A). To begin with, the purpose of that amendment was to *overrule* the decision in *Robertson*, precisely because it allowed an agency to withhold information based on too general a statute. *See Consumer Prod. Safety Comm.* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 121 n.18 (1980). But even assuming that Congress believed courts would use *Robertson* as a guide to interpreting § 2302(b)(8)(A) despite Congress having overturned that decision, that odd assumption would not—contrary to DHS's assertion—have suggested that courts would read § 2302(b)(8)(A) in the same manner as *Robertson* read pre-amendment FOIA. As just discussed, *Robertson* disavowed any reliance on text, instead using legislative history. Congress could thus have had no reason to think that courts relying on *Robertson*'s interpretation of FOIA would reach the same result in interpreting the WPA, given the two statutes' very different legislative history. Indeed, the Senate report accompanying § 2302(b)(8)(A) explains that the provision should be interpreted not as *Robertson* read FOIA, but rather using the very same words that Congress used when overturning *Robertson*. *Compare* S. Rep. No. 95-969 at 21 (whistleblowers' disclosures protected except when prohibited "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 matters to be withheld") *with* 5 U.S.C. § 552(b)(3) (1976) (exempting information from FOIA if a "statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria

for withholding or refers to particular types of matters to be withheld").[16]

The committee that drafted the Senate's initial version of § 2302(b)(8)(A) did suggest that one existing statute would satisfy an earlier version of that provision. Section 102(d)(3) of the National Security Act of 1947 provides that "the director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." Pub. L. No. 80-253, 61 Stat. 498 (1947). DHS asserts that § 114(r) "compares favorably" to that language. Pet. Br. 33.

Section 102(d)(3) is, however, a more specific law than § 114(r), because the former statute identifies categories of information—intelligence sources and the methods of collecting intelligence—that are protected, rather than requiring a would-be whistleblower to work backwards from the potential results of a release to determine whether it would be "detrimental to the security of transportation." *See CIA* v. *Sims*, 471 U.S. 159, 167 (1985) ("Section 102(d)(3), * * * which calls for the Director of Central Intelli-

[16] DHS contends that Congress did not intend the Senate's interpretation because it adopted the House's language—"specifically prohibited by law"—rather than the Senate's "specifically prohibited by statute." That contention simply ignores the Conference Report's explanation of this drafting choice. *See supra* at 24. But it also makes no sense here: Whether § 114(r) specifically prohibited MacLean's disclosure does not turn on whether § 114(r) is a law or a statute; it is unquestionably both. The issue is whether § 114(r) constitutes a specific prohibition. Because the wording of the House and Senate bills is identical on that score ("specifically prohibited"), DHS cannot plausibly describe the House version as "more broadly worded," Pet. Br. 32, on this question.

gence to protect intelligence sources and methods, clearly refers to particular types of matters * * * ." (internal quotation marks omitted)). And rather than telling the agency to enact new regulatory prohibitions, § 102(d)(3) assigns responsibility for preventing disclosures that are already "unauthorized." That makes sense, because disclosing sources and methods was already prohibited by other authorities that would satisfy the WPA. *See, e.g.*, Exec. Order No. 11905, 41 Fed. Reg. 7703 (Feb. 18, 1976); Exec. Order No. 11652, 37 Fed. Reg. 5209 (Mar. 8, 1972).

In fact, § 102(d)(3) forms part of a series of interlocking measures making abundantly clear that whistleblower protections do not apply to intelligence matters. For instance, the WPA expressly denies its protections to employees of the CIA, FBI, NSA, and several other intelligence-focused agencies. *See* 5 U.S.C. § 2302(a)(2)(C). It is therefore unsurprising that a Senate committee assumed the WPA would not disturb § 102(d)(3) or other pre-existing measures protecting sources and methods from disclosure. *Cf. Robertson*, 422 U.S. at 263-65 (relying on Congress's intent to grandfather in withholding statutes that predate FOIA).[17] By contrast, when Congress created DHS, it went out of its way to spec-

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[17] DHS also gains nothing by noting that § 102(d)(3) qualifies as a FOIA exemption. *See* Pet. Br. 34 (citing *Sims*, 471 U.S. at 167-168). That § 102(d)(3) trumps both FOIA and the WPA does not imply that § 114(r) must also do so, given that the text of § 114(r) expressly renders FOIA inapplicable, but says nothing at all about the WPA.

ify that the new agency was *not* exempt from whistleblower protections. *See* Homeland Security Act § 883 ("Nothing in this Act shall be construed as exempting the Department from requirements * * * to provide whistleblower protections for employees of the Department (including pursuant to the provisions in section 2302(b)(8) * * * ."). In short, Congress's careful and express exemption of intelligence matters from the WPA only further proves that Congress did not intend, sub silentio, to make § 114(r) an exemption for DHS.

II. DHS'S POLICY ARGUMENTS CONTRADICT THE STATUTE'S CLEAR TEXT AND PURPOSE.

The balance Congress struck in the WPA is not only clear, it is also entirely reasonable: By allowing an express statutory prohibition or an Executive order to place disclosures off-limits to whistleblowers, Congress ensured that the government could protect information that ought never to be disclosed. For the remaining information, Congress chose to make the default rule simple: whistleblower protections are available so long as the disclosures comply with the WPA's requirements. *See* 5 U.S.C. § 2302(b)(8). That does not deprive agencies like DHS of the ability to protect their legitimate secrets. It simply means that agencies must persuade at least one elected official of their need to keep something secret.

DHS disagrees with this allocation of responsibility, urging that it can decide on its own what information should be hidden from public view with less oversight from the public's representatives. *See* Pet. Br. 34-41. That is hardly surprising; oversight is

seldom something enjoyed by the overseen. But it begs the question for DHS to insist that the Court of Appeals' decision disregards the balance Congress struck. The Court of Appeals simply applied the text Congress enacted. If the court interpreted that text correctly—and, for all the reasons given above, it did—then it is DHS's effort to punish MacLean that "undermines the careful line that Congress drew." Pet. Br. 34.

Nor is the agency correct that Congress "could not have intended" the WPA to protect disclosures of what DHS deems "Sensitive Security Information." *Id.* at 37. To begin with, it is important to remember what "SSI" is not: classified information. The WPA provides no protection at all for those who disclose anything "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." § 2302(b)(8)(A). Anyone who discloses that information can not only be fired without giving the WPA a second thought, but convicted of a felony and thrown in prison. *See, e.g.*, 18 U.S.C. § 798.

SSI, by contrast, is what one bipartisan congressional report recently called "pseudo-classification." 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* (May 29, 2014) at 3 [hereinafter "*SSI Report*"]. As DHS notes, "each of the TSA's more than 60,000 employees" has access to SSI, Pet. Br. 37—meaning everyone from air marshals to the "screeners" who tell airline passengers to take off their shoes and put their laptops in a separate bin. SSI is also shared with private airline and

airport employees, who need not even have undergone a basic background check. *See* 49 C.F.R. § 1520.11(c). It is scarcely surprising that such loosely-kept secrets seldom remain secret. Various air marshals, for example, have revealed SSI for reasons such as to ensure that a spouse knew when to pick him up and "to coordinate meetings with * * * flight attendants in his hotel room, for personal reasons." Pet. App. 73a, 107a. These marshals, however, kept their jobs.[18]

That gets to the heart of why Congress excluded agency-made regimes like SSI from the specific prohibitions exempted by the WPA. Their vague nature and flexible enforcement render them "vulnerable to misuse." *SSI Report* at 3. For example, of the 16 categories of SSI enumerated by regulation, number 16 is simply "Other information." 49 C.F.R. § 1520.5(b)(16). And the agency need not even identify specific information as SSI in advance. Classified information is defined in part by being marked as such, so employees will know in advance whether information is classified, and agencies cannot punish whistleblowers by retroactively designating infor-

[18] In the Court of Appeals, DHS distinguished these cases because MacLean had not "showed remorse" for his disclosure. Pet. App. 8a. That, however, is inherent in the nature of a whistleblower: The employee revealing agency abuses believes she is doing the right thing, so there is no reason she would feel remorse. That is especially true where, as here, the agency admits its mistake and individuals such as United States Senators praise the whistleblower's courage. *See supra* at 12. DHS may prefer that whistleblowers confess their sins and repent from ever again subjecting the agency's errors to public scrutiny, but that only highlights the disparity between the goals of DHS and the goals of the WPA.

mation as classified after a disclosure occurs.[19] TSA, however, maintains that certain information is "born" SSI, meaning that it is inherently SSI even if not labeled as such. *See* Mitchel A. Sollenberger, Cong. Res. Serv., RL32425, *Sensitive Security Information and Transportation Security: Issues and Congressional Options* (2004). TSA can thus wait until *after* a whistleblower discloses information, then, ex post facto-like, declare that the information had been SSI all along. *See MacLean* v. *DHS*, 543 F.3d 1145, 1149, 1152 (9th Cir. 2008).

The sweeping flexibility TSA has given itself is not merely theoretical. When TSA issued its 2006 order retroactively declaring the 2003 text message MacLean disclosed to be SSI, its director of SSI was Andrew Colsky. Mr. Colsky signed that order and was deposed in this case. Pet. App. 141a; Brief for Petitioner at 25-26, *MacLean* v. *DHS*, 543 F.3d 1145 (2008) (No. 06-75112), 2007 WL 903924. Mr. Colsky has since stated, "I am unable to assist [TSA's counsel] with any testimony in future cases as I don't

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[19] *See* 50 U.S.C. § 3126(1) ("The term 'classified information' means information or material designated and clearly marked or clearly represented * * * as requiring a specific degree of protection against unauthorized disclosure for reasons of national security."); Exec. Order No. 13526 § 6.1(i), 75 Fed. Reg. 707, 727 (Dec. 29, 2009) (" '[C]lassified information' means information that * * * is marked to indicate its classified status when in documentary form."). This means that would-be whistleblowers should not have to guess whether information cannot be disclosed because it could be "classifiable," even if not actually classified. H. R. Rep. No. 100-991 at 10 & n.36. (1988).

know what to honestly call SSI anymore. I also cannot sign my name to court documents confirming SSI decisions because I may find the very same information on the news the same day." *SSI Report* at 18. And in an apparent reference to this case, he even admitted, "I am very uncomfortable in that I have personally given a deposition under oath in a very similar case supporting the fact that this is SSI and a man lost his job over it." *Id.*[20]

In short, the current SSI regime is exactly the sort of ill-defined, discretion-based system that Congress feared when enacting the WPA. *See supra* at 24-27. That is not to say that much of the information labeled as SSI does not warrant protection. But to a great extent, it already is protected: Section 114(r) achieves not only its primary purpose of enabling TSA to block FOIA requests for SSI, it allows the agency to prohibit any disclosure of SSI except where the WPA's narrow strictures are met. That means an employee can reveal SSI only in rare, dire, and carefully enumerated circumstances, such as when an agency is breaking the law or creating "a substan-

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[20] This flexible use of the SSI designation is neither new nor unique to this case. From its inception, the SSI regime prompted concerns that it was used to avoid embarrassment and to "muzzle debate of security measures." Mitchel A. Sollenberger, Cong. Res. Serv., RS21727, *Sensitive Security Info. (SSI) & Transp. Security: Background & Controversies* 6 (2004), *available at* http://fas.org/sgp/crs/RS21727.pdf. And a bipartisan committee of Congress has catalogued several questionable uses of SSI unrelated to this case, such as TSA using the SSI label to hide an embarrassing incident involving the search of a congressman, yet releasing other information designated as SSI in order to reap public relations benefits. *See SSI Report* at 12-19.

tial and specific danger to health and public safety." § 2302(b)(8)(A). Nor is DHS unable to fire employees who reveal SSI unnecessarily, then hide behind irrational or disingenuous claims of whistleblowing. The WPA affords protection only if the employee "reasonably believe[s]" the enumerated abuses are present, *id.*, meaning that courts apply an objective standard to determine whether the WPA covers the employee's actions. *See Lachance* v. *White*, 174 F.3d 1378, 1380 (Fed. Cir. 1999).

Where those statutory safeguards do not suffice, the remedy has already been mentioned: DHS can persuade Congress or the President to approve a more specific prohibition that overrides the WPA. Indeed, DHS maintains that a significant amount of SSI qualifies for classification under existing authorities. Pet. Br. 3.[21] Placing truly vital secrets behind such specific barriers would satisfy both the text of the WPA and its purpose, ensuring agency accountability by requiring elected officials' blessing in place

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[21] DHS states that TSA chooses not to classify this information so that it can be quickly shared with airline and airport employees who may lack security clearances. Pet. Br. 6. But there is no constitutional or statutory impediment preventing the Executive from authorizing the release of classified information where it deems necessary. In fact, similar authorizations already exist. *See, e.g.*, Exec. Order 13526 § 4.2(b) (authorizing agency heads to designate personnel who may disclose classified information "to an individual or individuals who are otherwise not eligible for access" in emergency situations); 6 C.F.R. § 7.23(a) ("The DHS Undersecretary for Management has delegated to certain DHS employees [authority] * * * to disclose classified information to an individual or individuals not otherwise eligible for access in emergency situations * * * .").

of possible employee reporting. It would also clearly tell would-be whistleblowers which information cannot be disclosed while creating the predictability needed to encourage them to come forward with the sort of information Congress wants brought to light.

For information that remains outside those specific prohibitions, DHS is correct: Whether that information becomes public may sometimes depend on the judgment of an individual employee. Congress, however, clearly contemplated that result. Some degree of trust in individual employees is inherent in the concept of a whistleblower, who by definition is someone who disregards an agency's decision not to reveal information. That trust in individual judgment inevitably accepts the possibility that some employees will make mistakes, even if, as DHS points out, *see* Pet. Br. 38-39, those mistakes could have serious costs. But government agencies have no claim to perfect judgment either, and their mistakes can have consequences just as severe. Indeed, although DHS posits *theoretical* harms that could ensue from employees revealing information that the Executive and Legislative branches have chosen not to classify, the costs of *actual* agency scandals—from the recent Veterans Administration debacle to the TSA misdeeds chronicled by the *SSI Report*—have been considerable. It is thus far from unthinkable that Congress would accept whatever risks result from denying DHS's pseudo-classification system the power to deter and punish whistleblowers. And again, if DHS believes some information—including air marshal deployments—truly should never be revealed, it need only justify that conclusion to the Executive or Congress.

Nor is it any answer to suggest that whistleblowers should be limited to contacting the Inspector General's Office or the Office of Special Counsel. *See* Pet. Br. 35. Congress passed the Inspector General Act of 1978 shortly *before* it promulgated the first laws protecting whistleblowers, which also created the Office of Special Counsel. *See supra* at 4; Pub. L. No. 95-452, 92 Stat. 1101 (1978). Yet Congress nonetheless enacted—and reenacted—laws protecting *public* disclosures. This case helps illustrate why. Going to the Inspector General first—as MacLean did—is surely preferable, but sometimes even the Inspector General fails, as it did when it told MacLean to think about his career and "just walk way." JA97-98. And the Office of Special Counsel could only have ordered DHS to investigate its own policy *after* a 15-day review period. *See* 5 U.S.C. § 1213(b). Where, as here, a government employee seeks to warn of a dangerous policy before it has catastrophic effects, such internal reporting options may be inadequate. For those circumstances, Congress chose to establish and protect a final safety valve of individual, public reporting.

If that choice is unwise, Congress can revisit it. But this case does not suggest that Congress should. Here, it was the *agency* that was forced to acknowledge that its policy was "a mistake" once MacLean went forward. JA72. Pulling air marshals from the flights most threatened by a looming terrorist plot in order to save money on hotels is not, it turns out, a policy that either the Executive or Congress supports. *See id.* at 59-72.[22] Precisely to pre-

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[22] DHS suggests that the Court of Appeals agreed with its litigation position that MacLean's disclosure " 'compromised flight

serve government employees' freedom to warn of such potentially disastrous bureaucratic errors, both the text and the purpose of the WPA protect MacLean from DHS's effort to punish his good deed.

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safety.' " Pet. Br. 39 (quoting Pet. App. 8a). Not exactly. The court merely summarized DHS's claims, stating: "The government *contends* that * * * Mr. MacLean's disclosure compromised flight safety * * * ." Pet. App. 8a (emphasis added). The same is true of DHS's other selective quotations on this issue. *Compare* Pet. Br. 39 (quoting Pet. App. 8a) *with* Pet. App. 8a. At best, the court merely "agree[d] with the government" that DHS's arguments supported—under a very deferential standard of review—the MSPB's decision to uphold firing MacLean rather than imposing a lesser penalty, assuming any action against him was not prohibited by the WPA. *See* Pet. App. 8a ("The Board analyzed the relevant * * * factors and did not abuse its discretion in concluding that Mr. MacLean's removal was not a disparate penalty.").

CONCLUSION

For the foregoing reasons, the Court of Appeals' judgment should be affirmed.

Respectfully submitted,

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