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 THE UNITED STATES OFFICE OF SPECIAL COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

CAROLYN N. LERNER
Special Counsel
Counsel of Record
BRUCE D. FONG
Associate Special Counsel
ELISABETH R. BROWN
Attorney
U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W.
Washington, D.C. 20036
(202) 254-3600
briefs@osc.gov

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

STATUTES Page(s)

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

LEGISLATIVE MATERIALS Page(s)

INTEREST OF THE UNITED STATES OFFICE OF SPECIAL COUNSEL

Amicus curiae, the United States Office of Special Counsel (OSC), is an independent federal agency charged with, *inter alia*, protecting federal employees from "prohibited personnel practices" as defined in 5 U.S.C. § 2302(b). 5 U.S.C. §§ 1212-1214. One such prohibited personnel practice bars retaliation against whistleblowers—that is, employees who disclose information that they reasonably believe evidences specific types of wrongdoing, including "a substantial and specific danger to public health or safety." 5 U.S.C. § 2302(b)(8)(A)(ii). This protection extends to qualified disclosures except when they are "specifically prohibited by law" or Executive order. 5 U.S.C. § 2302(b)(8)(A).[1]

Congress granted OSC amicus curiae authority "to present the views of the Special Counsel with respect to compliance with section 2302(b)(8) * * * and the impact court decisions would have on the enforcement of such provision[ ] of law." 5 U.S.C. § 1212(h)(1).[2] Because this case concerns the scope of the "specifically prohibited by law" proviso in 5 U.S.C. § 2302(b)(8)(A), the outcome bears directly on OSC's enforcement of the statute. Thus, OSC offers its views for consideration. As the agency responsible for enforcing 5 U.S.C. § 2302(b)(8), OSC has special

---

[1] The full text of the proviso is "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." 5 U.S.C. § 2302(b)(8)(A).

[2] The Solicitor General authorizes the filing of this brief. Likewise, on June 27, 2014, Respondent MacLean consented to the filing of amicus curiae briefs.

experience interpreting the statute. *See United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001) (explaining deference is appropriate when an agency has specialized experience construing a statute that the agency administers).

SUMMARY OF THE ARGUMENT

The key issue in this case is whether respondent's disclosure of sensitive security information (SSI), a form of controlled unclassified information, constituted a whistleblower disclosure specifically prohibited by law for purposes of 5 U.S.C § 2302(b)(8)(A). Respondent disclosed an agency decision to cancel all overnight missions for federal air marshals only days after he received a warning of potential terrorist attacks involving commercial airplanes on long-distance flights. J.A.91-94. Transportation Security Agency (TSA) regulations prohibit such disclosures of SSI. 49 C.F.R. § 1520.9.

The Federal Circuit appropriately concluded that Congress intended the narrow "specifically prohibited by law" limitation to apply only to disclosures explicitly prohibited by statute. A contrary result would frustrate a central purpose of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1116: to encourage disclosures by protecting whistleblowers from agency retaliation.

1. The CSRA's plain language and legislative history confirm that agency regulations, including the SSI regulation at issue here, are not laws for purposes of 5 U.S.C. § 2302(b)(8)(A). What is more, the Air Transportation Security Act of 1974 (ATSA), Pub. L. No. 93-366, 88 Stat.

417, as amended,[3] while unquestionably a law, does not *specifically* prohibit protected disclosures because it leaves too much uncertainty and grants too much discretion to the agency to prohibit disclosures by regulation.

2. A clear statutory purpose of the CSRA is to encourage disclosures of government misconduct and genuine threats to public safety by safeguarding whistleblowers from retaliation. Allowing agencies to prohibit whistleblower disclosures by regulation would affirmatively thwart that principal aim because it would empower agencies to circumvent the very restraints placed on them.

    a. Congress struck a careful balance in the CSRA: encouraging robust whistleblowing while protecting sensitive information. To maintain this balance, Congress has repeatedly intervened to dismantle judicially-constructed obstacles that weakened whistleblower protections and to restore its original broad intent to encourage disclosures.

    Congress was mindful, however, that legitimate reasons exist for shielding certain information from the public. To that end, Congress withheld protection in the narrow circumstances where the disclosures are

[3] The ATSA, which originally authorized the Federal Aviation Administration to promulgate SSI regulations, was amended by the Aviation and Transportation Security Act of 2001, Pub. L. No. 107-71, 115 Stat. 597, and the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2178, to transfer this regulatory authority to the TSA. For convenience, OSC refers to this authority, currently codified at 49 U.S.C. § 114(r), as the ATSA.

"specifically prohibited by law." Congress also understood that agencies require discretion to perform their missions and allocate resources. Thus, with regard to disclosures of threats to public safety, the CSRA affords agencies the freedom to make security decisions without second-guessing by only protecting disclosures that evidence *substantial* and *specific* dangers.

b. The chilling effect on whistleblowers is real. Congress enacted these protections because government officials do not always act in the best interests of the people they serve. As the Court acknowledged this past term, "[t]here is considerable value * * * in encouraging, rather than inhibiting, speech by public employees. For '[g]overnment employees are often in the best position to know what ails the agencies for which they work.'" *Lane v. Franks*, __ U.S. __, 134 S. Ct. 2369, 2377 (2014) (citation omitted). Allowing agencies to restrict whistleblowers through agency regulations will discourage employees from making potentially life-saving disclosures.

ARGUMENT

I. THE "SPECIFICALLY PROHIBITED BY LAW" PROVISO IN THE CSRA DOES NOT ENCOMPASS AGENCY REGULATIONS

Since its enactment over 35 years ago, the CSRA has been enforced in a way that protects any disclosure that otherwise meets the statutory requirements, except in the narrow circumstance where a statute or Executive order specifically prohibits the disclosure.

Until the Merit Systems Protection Board's (MSPB) decision in *MacLean v. Department of Homeland Security*, 112 M.S.P.R. 4 (2009), this interpretation had remained undisturbed for more than three decades. The Federal Circuit rightly rejected the MSPB's ruling that a regulation is a law for purposes of the "specifically prohibited by law" proviso.

Congress intentionally withheld the power from agencies to undermine whistleblower protections through regulations. *See Kent v. Gen. Servs. Admin.*, 56 M.S.P.R. 536, 542 (1993) (finding Congress clearly intended to omit regulations from the "specifically prohibited by law" proviso). Although a presumption exists that a properly promulgated, substantive regulation carries the force and effect of law, this presumption yields to a clear legislative intent that the term "law" excludes such regulations from its meaning. *Chrysler Corp. v. Brown*, 441 U.S. 281, 295-296 (1979). Here, the CSRA's plain language and legislative history evidence a clear intent that the SSI regulation is not a law for purposes of the "specifically prohibited by law" proviso.

A. The Plain Language of the CSRA Confirms That the "Specifically Prohibited by Law" Proviso Refers to Statutory Law Only

Section 2302(b)(8)(A) of title 5, United States Code, verifies that Congress intended to omit agency regulations from the phrase "specifically prohibited by law." The proviso is surrounded by seven instances of language employing the broader phrase "law, rule or regulation." *See* 5 U.S.C. §§ 2302(b)(1)(E), (6), (8)(A)(i), 8(B)(i), (9)(A), (12), (d)(5). "[W]here 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) (citation omitted). Thus, Congress's pointed exclusion of "rule or regulation" from the proviso was intentional.

The separate prohibition for disclosures of information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs" further confirms that the proviso does not include regulations. 5 U.S.C § 2302(b)(8)(A). Executive orders rooted in the President's constitutional powers or in congressional grants of authority carry the full force and effect of law. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952) (explaining that the President's power to issue an Executive order "must stem either from an act of Congress or from the Constitution itself"); *Armstrong v. United States*, 80 U.S. 154, 156 (1871) (courts are bound to give effect to the President's Executive order pardoning all participants in the rebellion). If "specifically prohibited by law" encompassed legal authority beyond statutes, then Congress would not have required an additional exception for disclosures prohibited by Executive order. For this separate exclusion to have meaning, the term "law" must be limited to statutes. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, __ U.S. __, 132 S. Ct. 2065, 2071 (2012) ("[I]f possible, effect shall be given to every clause and part of a statute.") (citation omitted).

B. The Structure and Legislative History of the CSRA Reinforce Its Plain Meaning

The prohibition against retaliation for making a protected disclosure (5 U.S.C. § 2302(b)(8)) is located

in a section of the statute that restricts agencies from taking improper personnel actions. As originally drafted in the CSRA, section 2302(b) listed 11 specific prohibited personnel practices to prevent agencies from engaging in various categories of misconduct and abuse. Pub. L. No. 95-454 § 101, 92 Stat. 1116. The placement of whistleblower protections in a section designed to restrain agency action bolsters the common sense conclusion that Congress did not empower agencies to evade these protections by issuing their own regulations.

The CSRA's legislative history reinforces that Congress intended to include only statutory law. The original CSRA, as introduced in the House and Senate, provided a broader exception than appears in the statute. The earlier versions required employees to make disclosures prohibited by "law, rule or regulation" through confidential channels to qualify for protection. *See* H.R. 11280, 95th Cong. (2d Sess. 1978) ("any employee who has authority to take * * * personnel action shall not * * * take action against any employee * * * for the disclosure, *not prohibited by law, rule or regulation*, of information concerning violations of law, rules or regulations") (emphasis added); S. 2640, 95th Cong. (2d Sess. 1978). The CSRA, as enacted, however, narrowed that exception to disclosures "specifically prohibited by law." 5 U.S.C. § 2302(b)(8)(A)(ii).

Thus, Congress affirmatively removed the words "rule or regulation" from the statute. Indeed, the Senate bill even amended the proviso to "prohibited by statute." H.R. Conf. Rep. No. 95-1717, at 130 (1978); *see also* S. Rep. No. 95-1272, at 130 (1978). Although the enacted version of the CSRA did not adopt the Senate's phrasing, the House Conference Report that

reconciled the competing House and Senate provisions explained the intent: "[T]he 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. Conf. Rep. No. 95-1717, at 130 (1978) (emphasis added); *see also* S. Rep. No. 95-1272, at 130 (1978).

That Congress had intended the provision "prohibited by law" to apply only to statutes was reinforced when the legislation was amended almost a decade later by the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16. The House Committee Report accompanying the 1989 amendments reaffirmed that the "prohibited by law" proviso referred to statutory law:

> For the disclosure of information the public release of which is barred *by statute* or by executive order due to national security considerations, whistleblowers are still protected if they make the disclosure to the head of the agency, the Inspector General or the Special Counsel of the Merit Systems Protection Board.

H.R. Rep. No. 100-274, at 18 (1987) (emphasis added). *See Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980) (views of a Congress amending an existing law as to the intent behind the law are "entitled to significant weight").

C. The ATSA Lacks the Specificity Required to Qualify as a "Law" Under the CSRA

While the ATSA certainly is a law, it does not qualify under the CSRA's "specifically prohibited by law"

proviso because the use of the term "specifically" is assumed to carry meaning. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (explaining that statutory terms are assumed to have nonsuperfluous meaning). Nowhere in the ATSA does the statute "specifically" prohibit the disclosure of SSI. Indeed, the ATSA is at least one step removed from a specific prohibition; it only directs the head of the TSA to prescribe non-disclosure regulations following an agency determination that such disclosures would be "detrimental to the security of transportation." 49 U.S.C § 114(r). The statute does not provide criteria for this determination; rather, it leaves these decisions entirely to the discretion of the TSA. *Id.* For purposes of the CSRA, this discretion undermines the goal of preventing agencies from stifling or discouraging whistleblowers. In short, if the discretionary grant in the ATSA suffices for a specific prohibition, then any statute authorizing an agency to adopt non-disclosure regulations would qualify, leaving the door open for agencies to sidestep whistleblower protections by regulation.

If Congress had wanted the SSI regulations to preempt whistleblower disclosures under 5 U.S.C. § 2302(b)(8)(A), it could have done so. It did not. By contrast, the ATSA does permit the SSI regulations to supersede the public disclosure requirements of the Freedom of Information Act (FOIA). *Id.* Congress's silence with respect to section 2302(b)(8)(A) further militates against the ATSA qualifying as a "law" that specifically prohibits whistleblower disclosures.

II. REVERSAL WOULD FRUSTRATE THE CLEAR STATUTORY PURPOSE TO ENCOURAGE DISCLOSURES AND RESTRAIN AGENCIES

A reversal of the Federal Circuit's decision seriously threatens OSC's ability to enforce the CSRA's whistleblower protections and deter agencies from retaliating against employees who make disclosures. *See Marano v. Dep't of Justice*, 2 F.3d 1137, 1142 (Fed. Cir. 1993) ("As long as employees fear being subjected to adverse actions for having disclosed improper governmental practices, an obvious disincentive exists to discourage such disclosures. A principal office of the WPA is to eliminate that disincentive and freely encourage employees to disclose that which is wrong with our government."). Accordingly, the Court should reject a construction of the CSRA that is "inconsistent with the statutory mandate or that frustrate[s] the policy that Congress sought to implement." *See FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981).

A. The CSRA, Including Its Amendments, Represents a Careful Balance Of Encouraging Robust Whistleblowing While Protecting Sensitive Information

Although petitioner raises concerns about national security, a reversal is unnecessary to protect those interests. The CSRA reflects a considered decision by Congress to balance agencies' needs while creating space for robust whistleblowing that enhances the nation's security. A reversal will upset this balance by weakening whistleblower protections and empowering agencies—the very entities from which Congress intended to protect employees—to promulgate

regulations that chill disclosures of substantial and specific threats to public safety.

1. Congress has Intervened When Necessary to Ensure the CSRA Encourages Robust Whistleblowing and Prevents Agency Retaliation

Since the passage of the CSRA, Congress has acted on multiple occasions to reaffirm its intent to encourage disclosures and prevent agency retaliation. To that end, Congress has rejected constrictive judicial interpretations and strengthened the statute's protections to foster a more favorable environment for whistleblowers. This history confirms that Congress intended to encourage disclosures and make protections robust.

In amending the CSRA, a central concern was dismantling judicial decisions that had unduly narrowed whistleblower protections. For example, Congress was disturbed by court decisions that evaluated a whistleblower's motive before deciding whether a disclosure deserved protection. S. Rep. No. 100-413, at 13 (1988) (criticizing *Fiorillo v. Dep't of Justice*, 795 F.2d 1544 (Fed. Cir. 1986), *superseded by statute*, WPA, Pub. L. No. 101-12, 103 Stat. 16, for considering an employee's motives "despite the lack of any indication in the CSRA that [motives were] supposed to be considered in determining whether a disclosure is protected"). To correct this error, Congress amended the statute to clarify that "a disclosure" meant "any disclosure." WPA, Pub. L. No. 101-12 § 4(a)(5), 103 Stat. 16 (1989).

In 1994, while reauthorizing OSC, Congress criticized judicial decisions that "represented a steady attack on achieving the legislative mandate for

effective whistleblower protection." H.R. Rep. No. 103-769, at 16-18 n.15 (1994) (referencing restrictive interpretations in ten MSPB and four Federal Circuit decisions). In so doing, the House Report emphasized that the *only* permissible restrictions on protected disclosures were for classified information (which SSI is not) or disclosures "specifically prohibited by *statute*." *Id.* at 18 (emphasis added).

Most recently, in the Whistleblower Protection Enhancement Act (WPEA) of 2012, Congress overturned Federal Circuit decisions that withheld protection for disclosures made to the wrongdoer (*Horton v. Dep't of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995), *cert. denied*, 516 U.S. 1176 (1996)); disclosures made in the performance of an employee's duties (*Willis v. Dep't of Agriculture*, 141 F.3d 1139, 1144 (Fed. Cir. 1998)); and disclosures of information that were already known (*Meuwissen v. Dep't of Interior*, 234 F.3d 9, 12-13 (Fed. Cir. 2000)). *See* Pub. L. No. 112-199 § 101(b)(2)(C), 126 Stat. 1465-76; 5 U.S.C. § 2302(f).

In addition to correcting limiting and counter-textual judicial decisions, Congress's amendments have sought to encourage disclosures by making it easier for whistleblowers to win retaliation cases. The WPA lightened the burden in proving a prima facie case of retaliation by requiring only that the disclosure be a "contributing factor" in a retaliatory personnel action. WPA, Pub. L. No. 101-12 § 3, 103 Stat. 16 (amendments adding 5 U.S.C. § 1214(b)(4)(B)(i) and 5 U.S.C. § 1221(e)(1)). Conversely, the WPA placed a heavier evidentiary burden on the employer to defend itself, requiring clear and convincing evidence to overcome a prima facie case. *Id.* (adding 5 U.S.C. § 1214(b)(4)(B)(ii)). Congress also created a new legal

presumption, enabling an employee to prove a causal nexus between a whistleblowing disclosure and a retaliatory action by merely demonstrating that a responsible agency official knew of the disclosure and that "the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action." An Act to Reauthorize The Office of Special Counsel, And For Other Purposes, Pub. L. No. 103-424 § 4, 108 Stat. 4361 (amending 5 U.S.C. § 1221 (e)(1)).

In short, the history of whistleblower legislation, from the CSRA through the WPEA, reflects Congress's resolve to protect its plain directive from overly narrow interpretations and to strengthen the statute to better realize its underlying purpose.

2. The CSRA Contains Sufficient Safeguards to Protect Sensitive Information

Congress constructed safeguards within the CSRA to protect against *security-degrading* disclosures on national security matters, while at the same time encouraging *security-enhancing* disclosures.

First and foremost, if the information is classified or prohibited from disclosure by statute, then the employee must make the disclosure through the prescribed procedures identified in 5 U.S.C. § 2302(b)(8)(B). Thus, if Congress disagrees with the Federal Circuit's conclusion regarding SSI, the CSRA provides a solution: Congress could either: (1) amend the ATSA to specify that SSI regulations issued under the statute trump the protections for whistleblower disclosures, as Congress did in specifying that SSI regulations trump the protections for disclosures

under FOIA; or (2) specifically prohibit SSI material from disclosure.

For his part, the President could prohibit whistleblower disclosures of SSI material by Executive order if he were to determine that this was necessary for national security. Notably, the President has done the opposite. The President has issued an Executive order regulating disclosures of SSI that favors whistleblowing and transparency. That order provides that the mere designation of information as "controlled unclassified information" (CUI), which includes SSI, will not insulate the information from disclosure under "any" applicable law. Exec. Order No. 13556 § 2(b), 75 Fed. Reg. 68675 (Nov. 4, 2010) ("The mere fact that information is designated as CUI shall not have a bearing on determinations pursuant to any law requiring the disclosure of information or permitting disclosure as a matter of discretion * * *").

Second, in all other circumstances, including where the information is sensitive but unclassified, an employee may make a security-enhancing disclosure, but only when the danger disclosed is both substantial and specific, not speculative and distant. The "substantial and specific" standard in 5 U.S.C. § 2302(b)(8)(A)(ii) reflects a balance that Congress struck between the government's need to conduct its business and the public's need to learn of information concerning threats to public health or safety, when such information is unclassified and not specifically prohibited from disclosure by statute. The CSRA achieves this balance by withholding protection from disclosures of only speculative or theoretical dangers, and extending protection in those circumstances where the public is most at risk and, therefore, most

likely to benefit from an immediate public warning. *See, e.g.*, *Chambers v. Dep't of Interior*, 515 F.3d 1362, 1369 (Fed. Cir. 2008) (*Chambers I*) (explaining, "revelation of a negligible, remote, or ill-defined peril that does not involve any particular person, place, or thing, is not protected") (citation omitted).

The rigorous standard for protected disclosures is clear from the Federal Circuit's decision in *Chambers v. Department of Interior*, 602 F.3d 1370 (Fed. Cir. 2010) (*Chambers II*) and the MSPB decision that followed. In *Chambers II*, the chief of the National Park Service Police challenged her removal from service as retaliation for disclosures that she had made to a newspaper and a congressional staffer concerning the detrimental effect of budgetary cuts on the Park Police's ability to protect monuments and park visitors in the Washington, D.C. area. *Id.* at 1373-74.

The Federal Circuit found one of the employee's disclosures concerning the inadequate deployment of officers on the Baltimore-Washington Parkway to be protected. *Id.* at 1379. The court analyzed several factors, including: (1) the likelihood of harm resulting from the danger; (2) when the alleged harm may occur; and (3) the nature of the harm. *Id.* at 1376. The Federal Circuit concluded that the employee's disclosure was protected because: (1) traffic accidents constituted a threat to public health and safety; (2) the disclosure did not describe a speculative harm but rather a specific consequence—increased accidents—because such accidents had *already* happened; and (3) the disclosure contained the specific cause of the increased danger. *Id.* at 1379.

On remand, the MSPB distinguished the employee's disclosures that satisfied the substantial and specific

danger requirement from her disclosures that did not. *Chambers v. Dep't of Interior*, 116 M.S.P.R. 17, ¶¶19-24 (2011) (*Chambers III)*. The MSPB protected disclosures that specifically linked personnel reductions to adverse consequences (*i.e.*, traffic accidents and drug-dealing in National Parks). *Id.* at ¶24. By contrast, the MSPB held that the employee's nonspecific disclosures that low staffing at the national monuments had placed those monuments and human life in jeopardy were too vague to constitute a substantial and specific danger to public safety under the statute. *Id.* at ¶23.

Here, *Chambers II* and *III* provide a framework for evaluating respondent's disclosure of a danger to public safety under the "substantial and specific" clause in the specific context of budgetary allocations. Under the *Chambers* framework, the MSPB would hear evidence and develop a full record on the seriousness of the danger that respondent disclosed and the likelihood of harm. Specifically, the key issue would be whether the agency's resource allocation decision to restrict coverage from overnight missions created a substantial and specific danger to public safety beyond the ordinary risk attendant to the fact that not all flights have a marshal.

B. Empowering Agencies to Avoid the CSRA Will Chill Whistleblowers

A reversal of the Federal Circuit's decision risks chilling whistleblowers from coming forward and would undermine OSC's mandate to prevent and address whistleblower retaliation by agencies. As a general matter, when judicial decisions whittle away at the protections afforded to whistleblowers, a concomitant chilling effect occurs. A case in point is the Federal Circuit's decision in *Hesse v. Department*

of State, 217 F.3d 1372, 1377-80 (Fed. Cir. 2000), *cert. denied,* 531 U.S. 1154 (2001). In *Hesse*, the Federal Circuit extended the Court's ruling in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), to preclude OSC and MSPB jurisdiction over the merits of a whistleblower retaliation claim where the challenged adverse action results from an agency determination that an employee is ineligible to hold a security clearance. *Id.* The *Hesse* decision has resulted in OSC having to turn away countless complainants who allege retaliation for whistleblowing where the challenged personnel action (*i.e.*, removal) results from a security clearance revocation, which itself could be retaliatory.

While it is impossible to calculate how many potential whistleblowers have refrained from bringing wrongdoing to light because of *Hesse*, it stands to reason that employees who hold security clearances will not come forward to report government misconduct, knowing that they could suffer retaliation and lose their livelihoods without any external recourse to challenge their removal.

Here, the danger is similar. A reversal will insulate from outside review any retaliatory personnel actions taken against employees who make disclosures in violation of an agency regulation. This, in turn, will discourage employees, who may be in the best position to protect the public from imminent threats to safety, from disclosing these dangers for fear of losing their jobs.

The chilling effect is mitigated somewhat by section 2302(b)(8)(B), which does create confidential channels —an agency's Inspector General and OSC—for employees to bring information that is prohibited from public disclosure by law or Executive order.

Nonetheless, those channels are a less expeditious means of addressing the risks of harm presented by a substantial and specific danger to public health and safety. As this case shows, the respondent's disclosure to the media elicited an immediate agency response, whereas his disclosure to management and the Inspector General prompted none. J.A.71, 96-98. Although respondent could also have made his disclosure to OSC, OSC's only recourse would have been to send the disclosure back to the agency for investigation—OSC has no independent authority to investigate the underlying disclosure.[4] 5 U.S.C. § 1213. With good reason, Congress requires the use of this more cumbersome channel only in circumstances where Congress or the President specifically prohibits a public disclosure.

Of grave concern to OSC is that agencies could abuse their regulatory power to over-designate the information that is to be prohibited from disclosure as a means of suppressing a broad swath of information and stifling whistleblowers. Likewise, agencies may selectively enforce such broad regulations to punish and deter whistleblowing. This danger is not far-fetched. After all, whistleblower protection laws exist because government officials do not always act in the nation's best interests. In light of Congress's central goal to encourage disclosures and restrain agencies, it is doubtful that Congress would vest agencies with the power to eliminate the very restraint it placed on agencies' own actions.

---

[4] OSC's authority to receive whistleblower disclosures and refer them to agencies for investigation is distinct from its authority to investigate claims of retaliation against employees who make disclosures. *Compare* 5 U.S.C. § 1213 *with* 5 U.S.C. § 1214.

Such agency overreach is not uncommon in OSC's experience. For example, agencies have misused nondisclosure policies in employee handbooks, confidentiality provisions in settlement agreements, and other policies as a basis for punishing employees who make disclosures. Indeed, this problem prompted Congress to add a new prohibited personnel practice in the WPEA that requires agencies to cross-reference whistleblower protections, among other laws, whenever inserting nondisclosure provisions into a policy, form, or agreement. 5 U.S.C. § 2302(b)(13). This new prohibited personnel practice ensures that employees are on notice that these agency nondisclosure policies do not supersede or infringe the employees' rights under the whistleblower laws, so that they will not be deterred from making disclosures. *Id.*

OSC does not suggest that the TSA overreached in its designation of SSI here. Nonetheless, the general chilling effect of agency regulations is exacerbated by the extraordinary fact that it took petitioner three years to issue a final order that the information respondent disclosed was SSI. *See MacLean v. Dep't of Homeland Sec.*, 543 F.3d 1145, 1149 (9th Cir. 2008). If the Court reverses, potential whistleblowers will have to weigh whether their agency might one day retroactively determine that the information they disclosed is SSI, thereby exposing them to discipline. Moreover, in fear that such retroactive designations are possible, whistleblowers may refrain from alerting the public to dangers that could have been averted or mitigated. This result is plainly contrary to the CSRA's purpose and would be a dire consequence Congress never intended.

The Senate Committee on Governmental Affairs framed the risk succinctly: "Often, the Whistle Blower's reward for dedication to the highest moral principles is harassment and abuse. Whistle Blowers frequently encounter severe damage to their careers and substantial economic loss." S. Rep. No. 95-969, at 8 (1978). When such harassment and damage ensues, it almost invariably comes at the hands of the whistleblower's own agency. Given that reality, it is all the more implausible that Congress intended to vest agencies with the power to regulate around whistleblower protections.

CONCLUSION

For the foregoing reasons, OSC respectfully requests that the Court affirm the Federal Circuit's decision.

Respectfully submitted,

CAROLYN N. LERNER
Special Counsel
Counsel of Record
BRUCE D. FONG
Associate Special Counsel
ELISABETH R. BROWN
Attorney
U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W.
Washington, D.C. 20036
(202) 254-3600
briefs@osc.gov