No. 13-894

IN THE
Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,
Petitioner,

v.

ROBERT J. MACLEAN,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

ROBERT K. KRY
Counsel of Record
LUCAS M. WALKER
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
rkry@mololamken.com

Counsel for Amici Curiae

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

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INTEREST OF *AMICI CURIAE*[1]

Amici are six Members of Congress from both parties who have taken leading roles in protecting whistleblowers. *Amici* have worked with whistleblowers to root out waste, fraud, abuse, and mismanagement within Execu-

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici* or their counsel made such a contribution. All parties have filed letters granting blanket consent to the filing of *amicus* briefs with the Clerk.

tive Branch departments and agencies. And they serve on committees with significant oversight responsibilities that frequently rely on information from government employees to discover agency malfeasance. *Amici* have a firsthand understanding of the invaluable role whistleblowers play in helping Congress monitor the federal bureaucracy and guard the public fisc. They know that whistleblowers are more likely to come forward when they can do so without fear of reprisal. *Amici* have thus been active in ensuring that our Nation's laws protect government employees who come forward with information about agency misconduct.

Senator Chuck Grassley (R-Iowa) is a co-author and original co-sponsor of the Whistleblower Protection Act of 1989, as well as the Whistleblower Protection Enhancement Act of 2012. In the next Congress, he will chair the Senate's newly formed Whistleblower Protection Caucus.

Senator Ron Wyden (D-Ore.) will serve as Vice-Chair of the Whistleblower Protection Caucus. He is a co-author of the whistleblower protections granted to members of the intelligence community in the 2014 Intelligence Authorization Act.

Representatives Darrell Issa (R-Cal.) and Elijah Cummings (D-Md.) are the Chair and Ranking Member of the House Committee on Oversight and Government Reform, which has jurisdiction over whistleblower issues. Together they introduced the House version of what became the Whistleblower Protection Enhancement Act of 2012, as well as the All Circuit Review Extension Act.

Representatives Blake Farenthold (R-Tex.) and Stephen F. Lynch (D-Mass.) are the Chair and Ranking Member of the House Oversight Committee's Subcom-

mittee on the Federal Workforce, U.S. Postal Service, and the Census. The Subcommittee has jurisdiction over whistleblower issues.

The legislation *amici* have sponsored reinforced the protections Congress first afforded whistleblowers in 1978. Regrettably, much of that legislation was necessary to overturn decisions by the Merit Systems Protection Board and the Federal Circuit that curtailed whistleblower protections by imposing limitations Congress never authorized.

This time, the Federal Circuit got it right. The decision below properly refused to adopt a new extrastatutory restriction that would allow agencies to shield their own misconduct by exempting certain disclosures from whistleblower protections. In rejecting that anomalous result, the Federal Circuit honored not only the statutory text but also Congress's consistent understanding of the provision in question.

The Department of Homeland Security nonetheless asks this Court to impose the limitation that Congress and the Federal Circuit rejected, and hold that agencies may unilaterally deny whistleblower protections by administratively declaring a disclosure "specifically prohibited." That interpretation would allow agency regulations to erode the statutory protections Congress created for whistleblowers. It would deter disclosure of government misconduct and impair Congress's oversight role. *Amici* have a strong interest in preventing that result.

SUMMARY OF ARGUMENT

By exposing agency illegality, waste, and corruption, whistleblowers provide invaluable assistance to Congress in the exercise of its oversight responsibilities. To ensure that agency employees feel free to come forward, Con-

gress has afforded whistleblowers robust protections against retaliation. Any disclosure of any legal violation, abuse of authority, gross waste or mismanagement, or danger to public health or safety is protected against reprisal unless the disclosed information is classified or the disclosure is "specifically prohibited by law." 5 U.S.C. §2302(b)(8)(A). A disclosure is "specifically prohibited by law" only if it is barred by *statute*, not merely by agency regulations. Allowing agencies to declare disclosures "specifically prohibited" by regulation would defy Congress's design and undermine its oversight role.

I.A. Congress deliberately crafted §2302(b)(8)(A) to exclude agency rules and regulations. It rejected language that would have withheld whistleblower protection from public disclosures that are prohibited by "law, rule, or regulation," out of concern that it would "enable an agency to discourage an employee from coming forward with allegations of wrongdoing." S. Rep. No. 95-969, at 21 (1978). Congress instead adopted a more whistleblower-protective approach, shielding disclosures unless specifically prohibited by *law*. As Congress explained in 1978, "specifically prohibited by law" refers "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).

Congress has stood by that understanding ever since. It significantly revised the whistleblower statutes in the Whistleblower Protection Act of 1989 ("WPA"), the 1994 amendments to the WPA, and the Whistleblower Protection Enhancement Act of 2012. At every point, Congress reiterated its understanding that exceptions to whistleblower protections must be created by Congress via statute, not by agencies via regulation. Indeed, the whole point of the WPA regime is to subject agencies to search-

ing scrutiny, not to defer to their judgments about what information Congress—and the public —should receive.

B. The tribunals responsible for interpreting the whistleblower statutes—the Merit Systems Protection Board and the Federal Circuit—have agreed that a disclosure must be prohibited by statute, not regulation, to be denied protection under §2302(b)(8)(A). The Board first adopted that view in 1993. Since then, Congress has repeatedly amended the WPA to overturn Board and Federal Circuit interpretations of other elements of the statute, but it has consistently left that construction of §2302(b)(8)(A) in place. Those actions confirm that Congress approves of the construction.

C. Both the statutory text and the legislative history show that, for a disclosure to be "specifically prohibited by law," Congress must have barred the disclosure with sufficient specificity to give whistleblowers fair notice. Put simply, a whistleblower must be able to tell from reading the statute whether he will be shielded from retaliation if he publicly discloses particular information. The statute the Department invokes here, 49 U.S.C. §114(r)(1), fails that test. Far from providing the requisite specificity, it prohibits, at most, disclosures that would be "detrimental to the security of transportation." That criterion provides no meaningful guidance to a whistleblower who exposes a security shortcoming in order to fix it. The fact that the Under Secretary decides whether a disclosure would be "detrimental" only underscores that it is the agency, not Congress, deciding whether to prohibit the disclosure.

II. The Department's interpretation would interfere with Congressional oversight. Federal agencies have always found ways to keep information under wraps. If agencies could decide which disclosures receive whistle-

blower protections, they would inevitably abuse that power. The result would be to deter whistleblowers and restrict the flow of information to Congress.

A. The Department's interpretation would shrink the universe of information whistleblowers may bring to light. The TSA's Sensitive Security Information ("SSI") designation is but one of dozens of categories of so-called "Sensitive But Unclassified" information ("SBU") whose disclosure is restricted by agency regulations. Under the Department's interpretation, most if not all of those categories would be exempt from §2302(b)(8)(A)'s protections. But significant uncertainty would remain, as SBU designations are often poorly and inconsistently defined.

B. The Department's interpretation would impede Congressional oversight. The burden of confirming that no regulation prohibits disclosure will deter untold numbers of whistleblowers. Allowing regulations to trump whistleblower protections will also increase the risk that employees will be discouraged from disclosing information to Congress. And it will prevent disclosures to the media and other outlets from which Congress often learns of agency misconduct. Congress's pipeline of information would dry up, impairing its ability to oversee the federal bureaucracy.

C. The risk of agency overreach is apparent. Time and again, agencies have found ways to suppress inconvenient information. The TSA itself has misused its SSI designation to withhold embarrassing information. The potential for such abuse is precisely why Congress denied agencies the power to carve out exceptions to the laws that keep agencies in check.

ARGUMENT

Whistleblowers play a vital role in Congressional oversight of the federal bureaucracy. Members of Congress cannot station themselves or their staffs in agency offices to watch for evidence of malfeasance. Nor can they depend on agency officials to candidly self-report all problems arising under their watch. Congress thus relies on individuals working within agencies to supply the information it needs to guard the public purse and give effect to the checks and balances that are essential to the separation of powers. By blowing the whistle, those individuals perform an invaluable public service. They save taxpayers billions of dollars, enhance government efficiency and transparency, and safeguard the public welfare.

Whistleblowing has been a civic virtue for centuries. More than 200 years ago, the Continental Congress resolved:

> That it is the duty of all persons in the service of the United States, as well as all other the inhabitants thereof, to give the earliest information to Congress or other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the services of these states, which may come to their knowledge.

Legislation of July 30, 1778, reprinted in Gov't Printing Office, *Journals of the Continental Congress, 1774-1789*, at 732 (W.C. Ford et al. eds., 1908).

That duty has grown all the more important as our Nation and its government have grown. Modern whistleblowing likely began with Ernie Fitzgerald, "probably the most famous whistleblower of all time." 152 Cong. Rec. S1780 (Mar. 6, 2006) (Sen. Grassley). In 1968, Fitzgerald testified before Congress about the C-5 transport

aircraft program. He revealed that it had run $2 billion over budget, a fact the Air Force had tried to keep quiet. *Ibid.* Fitzgerald was later instrumental in helping Congress crack down on "spare parts overpricing"—*e.g.*, paying $900 for a 34¢ part—saving taxpayers millions. *Ibid.*; see P. Carlson, *A. Ernest Fitzgerald: His Commitment to Cutting Costs Has Made Him No. 1 on the Pentagon's Hate List*, People, Dec. 9, 1985, http://www.people.com/people/archive/article/0,,20092407,00.html.

Valuable as whistleblower disclosures are to helping Congress keep tabs on the bureaucracy, they are often embarrassing to agencies. Rather than celebrate whistleblowers, agencies are apt to treat them "like a skunk at a picnic." 152 Cong. Rec. S1780 (Mar. 6, 2006) (Sen. Grassley). Ernie Fitzgerald, for example, was fired for (as he put it) "committing truth" before Congress. 160 Cong. Rec. S2366 (Apr. 10, 2014) (Sen. Grassley). Regrettably, the reward for rooting out waste and abuse at one's workplace may be a forced search for a new workplace.

Because employees are understandably reluctant to jeopardize their careers, Congress has afforded whistleblowers robust protections. Most significantly, the Whistleblower Protection Act ("WPA") forbids adverse agency action against an employee because of his public disclosure of information he reasonably believes to show "any violation of any law, rule, or regulation," or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 5 U.S.C. §2302(b)(8)(A)(i), (ii). That protection admits only two narrow exceptions: disclosures "specifically prohibited by law" and disclosures of classified information. *Id.* §2302(b)(8)(A).

Whistleblower protections thus serve as a twofold check on agencies: They directly restrain agencies from retaliating against whistleblowers. And, by doing so, they encourage whistleblowers to come forward with information that helps Congress and the public hold agencies accountable. Those checks would work very poorly indeed if agencies could extricate themselves from §2302(b)(8)(A)'s strictures by administratively declaring certain disclosures "specifically prohibited by law." That arrangement would perversely entrust the scope of whistleblower protection to the very entities against which those protections are directed. That makes about as much sense as a traffic code that lets bad drivers decide which roads police may patrol—none at all.

There is no reason to think Congress created such an ineffectual system. To the contrary, the WPA means what it says—that disclosures are protected unless specifically prohibited by "law," not merely by "rule" or "regulation."

I. Disclosure Is "Specifically Prohibited By Law" Only If It Is Prohibited By Statute

Section 2302(b)(8)(A) is commonly, and properly, understood as a cornerstone of the Whistleblower Protection Act of 1989. But its foundations go deeper. Congress first enacted §2302(b)(8)(A) as part of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111. Over the years, Congress has amended §2302(b)(8)(A) and related provisions repeatedly, often to overturn administrative and judicial decisions that diluted whistleblower protections. One thing, however, has remained constant. Congress has long understood that a disclosure is "specifically prohibited by law"—and therefore exempt from §2302(b)(8)(A)'s protections—only where the disclosure has been forbidden by *Congress* via

statute, and not merely by the *agencies* the provision is designed to check.

A. Congress Has Consistently Understood §2302(b)(8)(A) To Require That Disclosure Be Prohibited by Statute

1. *Civil Service Reform Act of 1978*

The Civil Service Reform Act of 1978 ("CSRA") overhauled the federal civil service to be "consistent with merit system principles and free from prohibited personnel practices." CSRA §3(1), 92 Stat. 1112 (5 U.S.C. §1101 note). To ensure fair notice of what is expected of employees and managers alike, Congress declared it "the policy of the United States" that "prohibited personnel practices should be *statutorily defined* to enable Federal employees to avoid conduct which undermines * * * the integrity of the merit system." CSRA §3(2), 92 Stat. 1112 (5 U.S.C. §1101 note) (emphasis added).

Most important here, the CSRA created the first anti-retaliation protections for federal-employee whistleblowers. It forbade agency reprisal against an employee for disclosure of information he "reasonably believes evidences" either "(i) a violation of any law, rule, or regulation" or "(ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." CSRA §101(a), 92 Stat. 1116 (codified as amended at 5 U.S.C. §2302(b)(8)(A)). Congress qualified that protection in just two small ways. Under §2302(b)(8)(A)'s proviso, whistleblowers were protected so long as "disclosure is not specifically prohibited by law" and "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." *Ibid.*

Congress carefully considered §2302(b)(8)(A)'s proper scope. The original Senate bill contained a broader proviso: It would have barred reprisal "against an employee who publicly disclosed a violation of a law, rule, or regulation, as long as the disclosure itself was not prohibited by any *law, rule, or regulation*." S. Rep. No. 95-969, at 21 (1978) ("*1978 Senate Report*") (emphasis added). That proposal had the virtue of symmetry. But it sparked concerns that limiting protection "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." *Ibid.* The Senate Governmental Affairs Committee thus amended the proviso to deny agencies that power. Under the revised bill, disclosures would be protected unless "prohibited by *statute* or Executive Order 11652 [concerning classified information], or any related amendments thereto." *Id.* at 154 (emphasis added).

The House bill always took an asymmetric approach. It protected disclosures of "violation[s] of any *law, rule, or regulation*" but withheld protection only for disclosures "specifically prohibited by *law*" (as well as disclosures of information classified pursuant to Executive Order). H.R. Rep. No. 95-1403, at 146 (1978) ("*1978 House Report*") (emphasis added).

Congress ultimately adopted the House version of the proviso. It did so, however, on the understanding that there was no difference between disclosures prohibited "by statute" and disclosures prohibited "by law." In sending the final bill to the two chambers, the Conference Report explained that "[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) ("*1978 Conference Report*") (emphasis added). Congress thus understood that the use of the term "law" rather than "statute" had no impact on § 2302(b)(8)(A)'s scope. In this context, both mean the same thing.[2]

The Conference Report merely made explicit what was already apparent from the provision's text. Section 2302(b)(8)(A) takes an asymmetric approach to whistleblowing. It *protects* whistleblowers in a broad array of cases, including disclosures of violations of any "law, rule, or regulation." But the section's proviso *denies* protection only in the narrower circumstance where the disclosure is a violation of "law," omitting reference to rules and regulations. The clear implication is that the proviso

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[2] The adoption of the House version likely had more to do with the exemption for classified information than with the exemption for disclosures prohibited by law. The Senate version would have denied whistleblower protection for public disclosures prohibited by "Executive Order 11652, or any related amendments thereto." *1978 Senate Report* 154. Executive Order 11652, in turn, provided for classification of "information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States." Executive Order 11652, § 1 (Mar. 8, 1972), 37 Fed. Reg. 5209 (Mar. 10, 1972). The House version did essentially the same thing, but referred generally to disclosures of information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." *1978 House Report* 146. The House's language was likely chosen because it would better accommodate new Executive Orders concerning classified information. Case in point: Executive Order 11652 had itself been revoked and replaced in June 1978, two months before the House and Senate passed their versions of the bill. See Executive Order 12065, § 6-203 (June 28, 1978), 43 Fed. Reg. 28,949 (July 3, 1978).

does not apply to disclosures forbidden by rule or regulation, but only to disclosures prohibited by "law." And if "law" excludes rules and regulations, it can only mean statutes.

"'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, 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) (brackets omitted). Here, the legislative record confirms that that presumption is correct. The Senate affirmatively *deleted* a reference to rules and regulations, to avoid "enabl[ing] an agency to discourage an employee from coming forward with allegations of wrongdoing." *1978 Senate Report* 21. And the Conference Committee memorialized its understanding that "law" means statutes and "does not refer to agency rules and regulations." *1978 Conference Report* 130. The Department's interpretation ignores all that, and grants agencies precisely the power Congress sought to deny them.

2. *Whistleblower Protection Act of 1989*

The CSRA unfortunately "did little to encourage Federal employees' confidence in their ability to reveal problems in their agencies." 135 Cong. Rec. 4516 (1989) (Sen. Cohen). One of the chief "impediments," Congress concluded, was "a string of restrictive Merit Systems Protection Board and federal court decisions" that had made it "unduly difficult for whistleblowers * * * to win redress." *Id.* at 4512 (Joint Explanatory Statement). Congress thus enacted the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 ("WPA"), to "modify or overturn inappropriate administrative or judicial determinations and make it more likely that whistleblow-

ers * * * will win their cases," 135 Cong. Rec. 4512 (Joint Explanatory Statement).

a. The WPA did *not* revisit §2302(b)(8)(A)'s "specifically prohibited by law" proviso. It had no need to. No judicial or administrative decision had read the proviso as referring to anything other than disclosures prohibited by *statute*. And Congress's understanding remained unchanged. The Conference Committee declared: "It is obvious, but worth noting, that no Executive order, *regulation*, or contract can extinguish the rights provided under section 2302 of title 5." 135 Cong. Rec. 4514 (Joint Explanatory Statement) (emphasis added). Committee reports for early versions of the bill reaffirmed that §2302(b)(8)(A)'s proviso concerns "disclosure of information the public release of which is barred *by statute*." H.R. Rep. No. 99-859, at 16 (1986) (emphasis added); accord H.R. Rep. No. 100-274, at 17-18 (1987).

The WPA did amend §2302(b)(8) in a small but meaningful way. Where the statute had previously protected "*a* disclosure" of agency misconduct, it now protected "*any* disclosure" of agency misconduct. WPA §4(a)(3), (5), 103 Stat. 32 (5 U.S.C. §2302(b)(8)(A), (B)) (emphasis added). By using the word "any," Congress emphasized that the statute's protections are meant to be "expansive." *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008).

b. More substantively, the WPA tilted the playing field sharply in favor of whistleblowers and against agencies. It provided that, when a whistleblower alleges retaliation before the Merit Systems Protection Board, the Board generally must order appropriate corrective action so long as a protected disclosure was a "contributing factor" in the challenged agency action. WPA §3(a)(13), 103 Stat. 26, 30 (5 U.S.C. §§1214(b)(4)(B)(i), 1221(e)(1)). That

lenient standard was "specifically intended to overrule" cases demanding proof that the disclosure was a "'significant,' 'motivating,' 'substantial,' or 'predominant' factor." 135 Cong. Rec. 4509 (Sen. Levin). Agencies, by contrast, shoulder a far heavier burden: To avoid corrective action, an agency must show "by *clear and convincing evidence* that it would have taken the same personnel action in the absence of such disclosure." WPA §3(a)(13), 103 Stat. 26, 30 (5 U.S.C. §§1214(b)(4)(B)(ii), 1221(e)(2)) (emphasis added).[3]

Those asymmetric burdens are of a piece with §2302(b)(8)(A)'s asymmetric approach to defining protected disclosures. See pp. 11-13, *supra*. Both reflect Congress's deep-seated concern that agencies empowered to administer the whistleblower laws are apt to turn them into tools for exonerating, rather than exposing, agency misconduct.[4] It would have achieved little to make it so easy for whistleblowers to establish retaliation for protected disclosures—and so hard for agencies to justify their actions on other grounds—if Congress had

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[3] That standard was intended to increase the level of proof applicable under *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), which allows an employer to escape liability by showing "by a preponderance of the evidence" that it would have taken the same action "even in the absence of the protected conduct," *id.* at 287; see 135 Cong. Rec. 4513 (Joint Explanatory Statement).

[4] See *1978 Senate Report* 21 (expressing concern that exempting disclosures prohibited by rule or regulation would "enable an agency to discourage an employee from coming forward with allegations of wrongdoing"); 135 Cong. Rec. 4509 (Sen. Levin) (explaining that an "agency bears a heavy burden to justify its actions" because, "when it comes to proving the basis for an agency's decision, the agency controls most of the cards," such as documents and witnesses).

also given agencies the trump card of deciding what disclosures are protected in the first place.

c. The WPA continued to observe the distinction between "law" (meaning statutes) and "rules and regulations." Several provisions illustrate the point:

- One paragraph authorizes the Special Counsel to review "disclosures of violations of any *law, rule, or regulation*." WPA § 3(a)(13), 103 Stat. 19 (5 U.S.C. § 1212(a)(3)) (emphasis added).
- The next paragraph authorizes the Special Counsel to "review *rules and regulations* issued by the Director of the Office of Personnel Management." *Ibid.* (5 U.S.C. § 1212(a)(4)) (emphasis added).
- The paragraph after that directs the Special Counsel to investigate "violations of other *laws* within the jurisdiction of the Office of Special Counsel (as referred to in section 1216)." *Id.* § 3(a)(13), 103 Stat. 19-20 (5 U.S.C. § 1212(a)(5)) (emphasis added).
- Section 1216, in turn, identifies various *statutory* provisions, such as the Hatch Act and Freedom of Information Act.[5]

Thus, in the WPA, as in the CSRA, Congress carefully distinguished between different kinds of legal authority. It understood that, in the whistleblower context, agencies

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[5] See 5 U.S.C. § 1216(a) (103 Stat. 28) (referring to "subchapter III of chapter 73," "chapter 15," and "section 552" of Title 5, United States Code). Section 1216's lone reference to non-statutory authority appears in a catch-all provision referring to "activities prohibited by any civil service *law, rule, or regulation*." *Id.* § 1216(a)(4) (emphasis added). Section 1216 itself thus demonstrates that the term "law" in the whistleblower statutes does not encompass rules and regulations.

make "rules" and "regulations," while Congress makes "law."

3. *The 1994 Amendments*

Congress amended the WPA in 1994, again taking aim at unduly restrictive interpretations of the law. See Pub. L. No. 103-424, 108 Stat. 4361 (1994) ("1994 Amendments"). The House Report criticized the Board's "inability to understand that 'any' means 'any,'" and that the "WPA protects 'any' disclosure evidencing a reasonable belief of specified misconduct." H.R. Rep. No. 103-769, at 18 (1994). It reiterated Congress's understanding that "[t]he only restrictions are for classified information or material the release of which is *specifically prohibited by statute*." *Ibid.* (emphasis added); see also S. Rep. No. 107-349, at 14-15 (2002) (quoting this statement). As before, however, Congress had no occasion to address the scope of § 2302(b)(8)(A); no court or administrative tribunal had read that provision differently from Congress. Indeed, the Board had adopted the same interpretation as Congress. See p. 20, *infra*.

But Congress did seek to "restore the balance intended in the Whistleblower Protection Act" by correcting other, erroneous interpretations of the law. S. Rep. No. 103-358, at 8 (1994). It overturned a Federal Circuit decision restricting whistleblowers' use of circumstantial evidence to prove retaliation. See *ibid.*; 1994 Amendments § 4(b), 108 Stat. 4363 (5 U.S.C. § 1221(e)(1)). Congress also rejected the Office of Special Counsel's view that it had unfettered "authority to 'utilize' information about whistleblowers during the course of an investigation in any way it pleases"—including by disclosing that information to the agency accused of retaliation. S. Rep. No. 103-358, at 6; see 1994 Amendments § 3(b), 108 Stat. 4362 (5 U.S.C. § 1212(g)(1)).

4. *Whistleblower Protection Enhancement Act of 2012*

Congress again amended the WPA in the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 ("WPEA"). As before, Congress was concerned that "the Federal Circuit and the [Board] have continued to undermine the WPA's intended meaning by imposing limitations on the kinds of disclosures by whistleblowers that are protected." S. Rep. No. 112-155, at 4-5 (2012) ("*2012 Senate Report*"). Congress reiterated its "long-held view that the WPA's plain language covers *any* disclosure." *Id.* at 4. And it reaffirmed that "'[t]he only restrictions are for classified information or material the release of which is *specifically prohibited by statute*.'" *Ibid.* (quoting H.R. Rep. No. 103-769, at 18) (emphasis added).

Again, there was no need to revisit §2302(b)(8)(A)'s proviso. As discussed below, see pp. 20-21, *infra*, in 2009 the Board interpreted the proviso to extend to disclosures prohibited by any regulation with the force of law. But the Board retreated from that position two years later, and in 2012 the matter was on appeal to the Federal Circuit. Amending the WPA to clarify that a disclosure must be prohibited by statute thus might have erroneously implied that the existing language did not already say that. At the same time, Members of Congress recognized that "[i]f the Federal Circuit Court [were to] broaden[] the 'prohibited by law' exemption to include anything that an agency tries to keep secret under any of their regulations," Congress would have to close that "new loophole." 158 Cong. Rec. E1664 (Sept. 28, 2012) (Rep. Platts). Representative Platts, a WPEA co-author, thus sought "to once again make it clear: 'Prohibited by law' has long been understood to mean statutory law and

court interpretations of those statutes, not * * * agency rules and regulations. * * * That has been the law since 1978, and it continues to be the law." *Ibid.*

In the WPEA, Congress had its hands full addressing decisions that had interpreted other aspects of the WPA "contrary to congressional intent." *2012 Senate Report* 5. It overturned Federal Circuit decisions denying protection to "disclosures to the alleged wrongdoer," "disclosure[s] made as part of an employee's normal job duties," and "disclosures of information already known." *Ibid.* (citing cases); see WPEA § 101(b)(2)(C), 126 Stat. 1466 (5 U.S.C. § 2302(f)). And it once again "underscore[d] the breadth of the WPA's protection by changing the term '*a* violation [of any law, rule, or regulation]' to the term '*any* violation [of any law, rule, or regulation]' " in § 2302(b)(8). *2012 Senate Report* 8 (emphasis added); see WPEA § 101(a), 126 Stat. 1465 (5 U.S.C. § 2302(b)(8)(A)(i), (B)(i)).

The WPEA also expressly granted TSA employees full whistleblower protections. WPEA § 109(a)(2), 126 Stat. 1470 (5 U.S.C. § 2304(a)(1)); contrast 5 U.S.C. § 2303 (affording lesser protection to FBI whistleblowers). In doing so, Congress again observed the distinction between "law" (meaning statutes) and "rules and regulations" that it embraced in 1978.[6]

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[6] Paragraphs (1) and (2) of 5 U.S.C. § 2304(a) state that TSA employees are covered by (1) "the provisions of section 2302(b)(1), (8), and (9)," and (2) "any provision of *law* implementing" those three statutory provisions. 5 U.S.C. § 2304(a)(1), (2) (emphasis added). Paragraph (3) then states that TSA employees are also covered by "any *rule or regulation* prescribed under any provision of *law referred to in paragraph (1) or (2)*." *Id.* § 2304(a)(3) (emphasis added). Paragraph (3) would be redundant if rules and regulations qualified as "law," for they would already be encompassed within paragraph (2).

B. Congress Has Relied on Administrative and Judicial Decisions Requiring That Disclosure Be Prohibited by Statute

As the above history makes clear, Congress has been extraordinarily attentive to judicial and administrative decisions interpreting the whistleblower protection laws. It has not been shy in amending those laws when it disagrees with how a tribunal has interpreted them. Indeed, the 1989, 1994, and 2012 amendments were all designed to overturn decisions that Congress believed misunderstood the proper scope of whistleblower protections.

Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso, however, has not been misunderstood. While case law interpreting the proviso is relatively scarce (and most of it stems from this case), what decisions there are confirm Congress's understanding that disclosure must be prohibited by a statute, not a mere regulation.

The first decision construing the proviso appears to be *Kent* v. *General Services Administration*, 56 M.S.P.R. 536 (1993). There, the Board carefully examined "the statutory language, coupled with the legislative history of the CSRA, subsequently amended by the WPA." *Id.* at 542. It found "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*." *Ibid.* (emphasis added).

The Board adhered to that view for 16 years. It briefly reversed course in an earlier iteration of this case, reasoning that Congress's "selection of the broader phrase 'by law'" instead of the purportedly narrower phrase "by statute" "evidences Congressional intent to expand the scope of the exemption beyond mere statutes to include all 'law,'" including agency regulations. *MacLean* v. *Dep't of Homeland Sec.*, 112 M.S.P.R. 4, 16 (2009). But

that interpretation was short-lived. The Board repudiated it just two years later, recognizing that allowing agency regulations to dictate the scope of whistleblower protections in the absence of "an explicit Congressional mandate" would be "inconsistent with the policies that Congress embodied in the Whistleblower Protection Act." *MacLean* v. *Dep't of Homeland Sec.*, 116 M.S.P.R. 562, 570 (2011). In the decision below, the Federal Circuit agreed that a "disclosure must be prohibited by a statute rather than by a regulation" to fall within the proviso—indeed, that proposition was "not dispute[d]." 714 F.3d 1301, 1308 (Fed. Cir. 2013).

Thus, starting with *Kent* in 1993, the tribunals responsible for construing the whistleblower laws have interpreted §2302(b)(8)(A)'s proviso to encompass only disclosures prohibited by statutes, not regulations. Since then, Congress has twice amended the WPA—in 1994 and 2012—with the express purpose of overturning those tribunals' interpretations of other parts of the statute. All the while, §2302(b)(8)(A)'s "specifically prohibited by law" language has remain unchanged.

That is powerful evidence that Congress approves of the interpretation attached to those words. See *Microsoft Corp.* v. *i4i Ltd. P'ship*, 131 S. Ct. 2238, 2252 (2011) (inferring Congressional satisfaction with existing interpretation where relevant text "has gone untouched" despite other amendments). It is, after all, "well established that 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." *Commodity Futures Trading Comm'n* v. *Schor*, 478 U.S. 833, 846 (1986) (quotation marks omitted). And this

Court has recognized that the presumption that Congress intends to adopt "an administrative or judicial interpretation of a statute" is "particularly appropriate" where "in enacting [later legislation] Congress exhibited both a detailed knowledge of the [existing] provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable." *Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978). That is exactly what Congress did here.

C. Section 114(r)(1) Does Not "Specifically Prohibit" Disclosure of the Information Here

For a disclosure to be "specifically prohibited by law," *Congress* must have barred the disclosure with *meaningful specificity*. That is not only what the text requires; it is also necessary to ensure fair notice and avoid deterring legitimate disclosures. A statutory prohibition is sufficiently specific only if it "leave[s] no discretion on the issue," "establishes particular criteria for withholding," or "refers to particular types of matters to be withheld." *1978 Senate Report* 21. Put simply, a prospective whistleblower must be able to tell from reading the statute whether or not he will be shielded from retaliation if he publicly discloses particular information.

The Department argues that 49 U.S.C. § 114(r)(1) specifically prohibited MacLean's disclosure here. Pet. Br. 28.[7] But that statute fails to provide the requisite specificity, at least on the facts of this case. "[D]isclosure[s] * * * detrimental to the security of transportation," 49 U.S.C. § 114(r)(1)(C), is a broad and general category.

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[7] Although the decisions below focused on § 40119(b), the parties agree that § 114(r) is the relevant statute. See Pet. Br. 10 n.2; Resp. Br. 7 n.2. We follow the parties' lead and focus on § 114(r), although the analysis would be the same under both.

Just from reading the statute, it is far from clear whether the particular information MacLean disclosed is included.

Indeed, such ambiguity may be unavoidable where a disclosure concerns a "specific danger to public health or safety." 5 U.S.C. §2302(b)(8)(A). A disclosure might be seen as "detrimental" because it reveals a vulnerability in our Nation's infrastructure that could be exploited. But the same disclosure could be seen as *beneficial* because it calls attention to the vulnerability and expedites its correction. That is why the WPA generally protects such disclosures. Cf. *1978 Senate Report* 8 ("What is needed is a means to protect * * * the nuclear engineer who questions the safety of certain nuclear plants."); 6 U.S.C. §133(c) (permitting whistleblower disclosure of independently obtained "critical infrastructure information").

Nothing in §114(r)(1) clearly indicates that Congress placed the information MacLean disclosed on the "detrimental" side of the line. And the fact that "the Under Secretary decides" which disclosures are prohibited, 49 U.S.C. §114(r)(1), underscores that the *statute* does not answer that question; the *agency* makes the call. That is precisely what §2302(b)(8)(A) declares insufficient to withdraw whistleblower protection.

II. Allowing Agencies To Create Exceptions To Whistleblower Protections Would Undermine Congress's Oversight Role

Allowing agencies to "specifically prohibit" disclosures under §2302(b)(8)(A) would compromise whistleblower protections and Congressional oversight. Agencies have barred disclosure of vast swaths of information by rules and regulations. Under the Department's interpretation, public disclosure of much (if not all) of that information would be "specifically prohibited by law." That would dramatically shrink the universe of information whistle-

blowers may expose to public scrutiny—a problem exacerbated by the haphazard approach many agencies take toward designating sensitive information. It would also chill *non*-prohibited disclosures, including disclosures to Congress. And it would open the door to agency overreach in suppressing inconvenient information, as decades of experience confirms.

A. Agency Rules and Regulations Create Dozens of Categories of Unclassified Information That Are Often Poorly Defined

This case concerns the TSA's Sensitive Security Information ("SSI") designation. But SSI is just one subset of a much broader group known as "Sensitive But Unclassified" information, or "SBU." SBU is "[i]nformation that does not meet the standards established by executive order for classified national security information but that an agency nonetheless considers sufficiently sensitive to warrant restricted dissemination." Gov't Accountability Office, *Information Sharing* 13 (Mar. 2006) (GAO-06-385) ("*Information Sharing*").

There are dozens of categories of SBU used across the federal bureaucracy. A 2006 survey found "a total of 56 different designations," *Information Sharing* 21; see *id.* at 22-23 tbl.2, while a 2009 report counted *117* categories, *Report and Recommendations of the Presidential Task Force on Controlled Unclassified Information* 33-34 (Aug. 2009) ("*Task Force*"). A single label, moreover, might refer to multiple kinds of information. For example, while 13 agencies use the designation "For Official Use Only," "there are at least five different definitions of FOUO." *Information Sharing* 24. Similarly, "[a]t least seven agencies or agency components use the term Law Enforcement Sensitive" but define it differently. *Ibid.*

The standards for designating information as SBU are often vague or arbitrarily applied. For example, the GAO found in 2005 (after MacLean's disclosure here) that the "TSA does not have written policies and procedures, beyond its SSI regulations, providing criteria for determining what constitutes SSI." Gov't Accountability Office, *Transportation Security Administration: Clear Policies and Oversight Needed for Designation of Sensitive Security Information* 3 (June 2005) (GAO-05-677). The TSA itself acknowledged that "'[i]dentification of SSI has often appeared to be ad-hoc, marked by confusion and disagreement depending on the viewpoint, experience, and training of the identifier.'" *Id.* at 5. And while the TSA urged in 2005 that "its new SSI Program Office will ultimately be responsible for ensuring that staff are consistently applying SSI designations," *id.* at 6, a 2014 investigation concluded that "the TSA Administrator repeatedly neglected to consult with the SSI Office when making SSI determinations," effectively "render[ing] the SSI Office powerless," House Comm. on Oversight & Gov't Reform, *Pseudo-Classification of Executive Branch Documents: Problems with the Transportation Security Administration's Use of the Sensitive Security Information (SSI) Designation* 22 (July 24, 2014) ("*Pseudo-Classification Report*").

The TSA is not alone in its ill-defined approach to SBU. "[M]ost agencies do not have limits on who and how many employees have authority to make designations." *Information Sharing* 6. And agencies that do have SBU policies may "lack sufficient clarity" in their policies or may "not routinely conduct oversight" to ensure that policies are properly applied. Gov't Accountability Office, *Managing Sensitive Information: DOE and DOD Could Improve Their Policies and Oversight* 3, 7

(Mar. 14, 2006) (GAO-06-531T). As one example, the Department of Energy restricted public access to time and cost estimates for a radioactive waste cleanup project plagued by delays and budget overruns. *Id.* at 7. The withheld document was "marked Business Sensitive by DOE"—even though "Business Sensitive is not a recognized marking in DOE." *Ibid.*

In short, the designation of SBU is governed by a mélange of "ad hoc, agency-specific policies." Executive Order 13556, §1 (Nov. 4, 2010), 75 Fed. Reg. 68,675 (Nov. 9, 2010). As the President has recognized, "[t]his inefficient, confusing patchwork has resulted in inconsistent marking and safeguarding of documents, led to unclear or unnecessarily restrictive dissemination policies, and created impediments to authorized information sharing." *Ibid.*[8]

SBU stands in marked contrast to classified information, which Congress *did* exempt from the WPA. There are only three categories of classified information: Top Secret, Secret, and Confidential. Executive Order 13526, §1.2 (Dec. 29, 2009), 75 Fed. Reg. 707 (Jan. 5, 2010). Information can be classified only according to specific criteria, *id.* §1.4, only by certain officials, *id.* §1.3, and only for a limited duration, *id.* §1.5. And once material is classified, it must be marked so that its classification status—as well as its reason for classification—is "immediately apparent." *Id.* §1.6. While those rules may

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[8] While there have been efforts to improve management of SBU, see Executive Order 13556; Nat'l Archives, *Controlled Unclassified Information (CUI): CUI Chronology*, http://www.archives.gov/cui/chronology.html, there are still "currently over 100 different ways of characterizing SBU information," Nat'l Archives, *Controlled Unclassified Information (CUI): Frequently Asked Questions*, http://www.archives.gov/cui/faqs.

leave some room for judgment, Congress determined that "the interest of national defense or the conduct of foreign affairs" outweighed such concerns. 5 U.S.C. §2302(b)(8)(A). But Congress made no such determination for SBU, where the risk of arbitrary application is much greater and the need for secrecy much less.

Allowing agencies' disparate SBU regimes to trump whistleblower protections thus would not only shrink the universe of information subject to public scrutiny, but would do so in a thoroughly unpredictable and arbitrary manner. That is not the system Congress designed.

B. Agency-Created Exceptions Would Deter Whistleblowing and Impair Congressional Oversight

The Department's interpretation would chill protected whistleblowing and block the flow of information to Congress.

1. Under the Department's interpretation, whistleblowers would have to review (or hire counsel to review) not only the relevant statutes, but also a plethora of potentially vague or ambiguous regulations. SBU is often poorly defined and inconsistently applied, and it may not be apparent whether an agency has declared something nondisclosable, much less done so through a regulation with the force and effect of "law." That determination may turn on a subtle legal analysis of whether a regulation "affect[s] individual rights and obligations"; whether its "promulgation * * * conform[s] with any procedural requirements imposed by Congress"; and whether some statute "can 'reasonably' be said to have 'contemplate[d]' the regulation." Pet. Br. 21 (quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302, 303, 308 (1979)). Most federal employees are not lawyers, and Congress did not expect them to have to undertake that analysis before blowing the whistle. Instead, Congress required them to answer

only the much simpler question of whether *a statute specifically prohibits* their anticipated disclosure.

Faced with the obstacles the Department's interpretation would introduce, some employees will doubtless conclude that blowing the whistle is not worth the trouble. As a result, many valuable and lawful disclosures will go unmade. The regime Congress designed, by contrast, avoids many of those difficulties. All statutes have the force and effect of law—they *are* law. And all information classified pursuant to Executive Order must be conspicuously labeled as such. See Executive Order 13526, § 1.6.

2. The Department's interpretation would impair Congress's ability to gather information about agency misconduct. Many SBU designations do include exemptions for disclosures to Congress. See, *e.g.*, 49 U.S.C. § 114(r)(2); see also 5 U.S.C. § 2302(b) (WPA does not "authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress"). But agency employees may fail to appreciate carve-outs for Congressional disclosures when virtually every other kind of disclosure is forbidden. They may instead assume that a disclosure "specifically prohibited by [regulation]" is categorically out of bounds, even if made to Congress.

That is no idle worry. *Amici* routinely hear from federal employees who want to blow the whistle but are unwilling to share specific allegations out of fear of violating agency regulations—or giving superiors an excuse to claim that they violated such regulations. Potential whistleblowers also often fear that a protected disclosure to Congress may lead to subsequent *public* disclosures for which they could be blamed and punished. In other instances, whistleblowers are willing to share particular

concerns, but believe they cannot provide substantiating evidence because of SBU markings on documents. *Amici* see this phenomenon among whistleblowers who are nevertheless willing to put themselves at risk by making limited contact with Congress. Almost certainly, many more are deterred from making even that effort.

Even in official agency settings, "the markings [of information as SBU] are sometimes misunderstood as providing an independent basis for withholding documents from the public, Congress, or the courts." *Task Force* 6. That can occur even when an SBU designation has no basis in statute. *Ibid.* While a Congressional office may be able to overcome improper withholding by elevating a request within the agency, whistleblowers face obvious obstacles to doing so—especially if they seek to make disclosures confidentially to avoid retaliation. The risk of confusion about the scope of agency regulations thus underscores the importance of cabining §2302(b)(8)(A)'s proviso to its proper—limited—scope.

3. As a practical matter, moreover, Congress commonly learns of agency misconduct indirectly, when employees blow the whistle to the media or other intermediaries first. Some whistleblowers may view Congress as too politicized or intimidating. But they may see the media as a disinterested Fourth Estate willing to take up a cause in the public interest, or as the quickest and surest way to impose accountability. Other whistleblowers may want to convey information to Congress but not see a clear route to the right offices or committees. In such cases, disclosure to the press is an effective way to disseminate information widely to Members of Congress and their staffs. It can also attract public attention and generate momentum for Congressional oversight in a

way that contacting Congressional offices privately might not.

This case illustrates the value of such disclosures. MacLean blew the whistle by contacting the media. When his story was published, Members of Congress from both parties condemned the TSA's directive the very next day. See Resp. Br. 11-12. And once Congress weighed in, the Department immediately branded the directive a "mistake" and rescinded it. *Ibid.*

Similar cases abound. For example, online postings spurred Congress's investigation into the Bureau of Alcohol, Tobacco, Firearms, and Explosives' controversial "gun-walking" operation. Within days of Border Patrol Agent Brian Terry being killed near the Arizona-Mexico border, a post appeared on an online message board frequented by ATF agents, stating that ATF had "[a]llegedly approved more than 500 AR-15 type rifles from Phoenix and Tucson cases to be 'walked' into Mexico" and that one of those rifles had been linked to Terry's death. See Joint Staff Report, House Comm. on Oversight and Gov't Reform & Senate Comm. on the Judiciary, *Fast and Furious: The Anatomy of a Failed Operation*, Part I, App. I, Ex. 201 (July 31, 2012), http://oversight.house.gov/wp-content/uploads/2012/07/7-31-12-FF-Part-I-FINAL-Appendix-I-3-of-3.pdf (Jan. 5, 2011 ATF e-mail quoting post). The post caught the attention of bloggers and other media outlets (as well as senior ATF officials, who discussed whether the post violated ATF disclosure policies, *ibid.*).

Shortly thereafter, another website posted an "Open Letter to Senate Judiciary Committee staff on 'Project Gunwalker.'" See D. Codrea, *Open Letter to Senate Judiciary Committee Staff on 'Project Gunwalker,'* Examiner.com (Jan. 19, 2011), http://www.examiner.com/article/

open-letter-to-senate-judiciary-committee-staff-on-project-gunwalker. The letter stated:

> ATF employees are looking to come forward and provide testimony and documentation about guns being illegally transported to Mexico, with management cognizance * * * . * * * In order for these people to come forward, they require whistleblower protection.

Ibid. That letter led directly to Congressional staff getting in contact with ATF whistleblowers, and subsequent Congressional oversight.

That roundabout path to contacting Congress is not unusual. Many whistleblowers make several disclosures before getting their information to someone able and willing to address the problem being disclosed. Congressional oversight thus benefits from disclosures to a variety of audiences, including the media and public interest groups. That is one reason the WPA is not limited to disclosures to Congress. Under the Department's interpretation of §2302(b)(8)(A), however, that conduit of information would dry up.

C. The Risk of Agency Overreach Is Apparent

Common sense counsels that allowing agencies to decide the protections available to employees who expose agency misconduct is "like putting the fox in charge of the henhouse." 160 Cong. Rec. S2367 (Apr. 10, 2014) (Sen. Grassley). Experience bears that out. Agencies have excelled at finding ways to suppress inconvenient information where the opportunity has arisen.

1. Congress enacted the Lloyd-LaFollette Act in 1912 to "guarantee[] that the right of civil servants 'to furnish information to either House of Congress, or to any committee or member thereof, shall not be denied or

interfered with.'" *Bush* v. *Lucas*, 462 U.S. 367, 383 (1983). In 1971, however, the Postal Service directed "that the Congressional Liaison Office be the sole voice of the Postal Service in communicating with the Congress" and ordered employees to "immediately cease [any] direct or indirect contacts with congressional officers on matters involving the Postal Service." Gov't Accountability Office, *Department of Health and Human Services—Chief Actuary's Communications with Congress* 5 (2004) (B-302911). The Postmaster General dismissed objections that the directive violated the Lloyd-LaFollette Act, urging that employees could petition Congress "about their own matters," but that he would "have to have control of" matters concerning the Postal Service. *Ibid.* Unsatisfied, Congress barred the use of appropriated funds to pay the salary of any postal official who prevented an employee from communicating with Congress. *Id.* at 4-6. As the legislation's sponsor observed, "the law that this amendment attempts to enforce has been on the books * * * since 1912." *Id.* at 6.

2. In the 1980s, the Department of Defense sought to silence whistleblower Ernie Fitzgerald by having him sign an agreement not to disclose "classifiable" (not classified) information without authorization. 160 Cong. Rec. S2366 (Apr. 10, 2014) (Sen. Grassley). The agreement would have barred even disclosures to Congress, hindering oversight over defense procurements (and likely violating the Lloyd-LaFollette Act). *Ibid.* Congress again responded swiftly. It enacted an "anti-gag" rider—now codified in the WPA—making agency non-disclosure agreements unenforceable unless they expressly state that they do not alter employees' rights relating to (among other things) "communications to Congress" and

"other whistleblower protection." 5 U.S.C. §2302(b)(13); see *2012 Senate Report* 16-17.

3. Agencies charged with defining whistleblower protections have failed to do so. In the CSRA, Congress protected FBI whistleblower disclosures made to the Attorney General or his designate, but not those made to the public. CSRA §101(a), 92 Stat. 1117 (5 U.S.C. §2303). Congress directed the Attorney General to "prescribe regulations" to ensure that reprisals do not occur, and directed the President to provide for enforcement mechanisms "consistent with" those available to other whistleblowers. *Ibid.* But nothing happened to implement those protections for nearly *20 years*.

The Justice Department was finally impelled to act by Frederic Whitehurst, who made repeated disclosures to Congress and the Inspector General regarding the FBI Crime Lab. In 1996, Whitehurst brought suit to require the Attorney General to develop the anti-retaliation regulations the CSRA required. But he was suspended in January 1997—without any regulations outlining how he could appeal that decision. See *Activities of the Federal Bureau of Investigation: Hearing Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 105th Cong. (May 13, 1997) (statement of Dr. Frederic Whitehurst, through his attorney Stephen M. Kohn), http://fas.org/irp/congress/1997_hr/h970513w.htm; R. Suro & P. Thomas, *FBI Suspends Internal Critic of Its Crime Lab Procedures*, Wash. Post, Jan. 28, 1997, at A11, http://www.washingtonpost.com/wp-srv/national/longterm/oklahoma/stories/ok012897.htm. Not until the Inspector General issued a report substantiating Whitehurst's allegations—resulting in significant public pressure on the FBI and Justice Department—did the Executive Branch take steps to prescribe the regulations mandated 20 years ear-

lier. See U.S. Dep't of Justice, Office of Inspector General, *The FBI Laboratory: An Investigation into Laboratory Practices and Alleged Misconduct in Explosives-Related and Other Cases* (Apr. 1997), http://www.justice.gov/oig/special/9704a; Delegation of Responsibilities Concerning FBI Employees Under the Civil Service Reform Act of 1978, 62 Fed. Reg. 23,123 (Apr. 17, 1997).[9]

4. One of the most sobering examples of agency overreach is the TSA's experience with its SSI regime. A 2014 House Oversight and Government Reform Committee investigation found "significant problems with TSA's application of the SSI designation," with TSA officials "sometimes choosing to release information the SSI Office determined to be sensitive security information while in other instances refusing to release potentially embarrassing information the SSI Office did not consider to merit the SSI designation." *Pseudo-Classification Report* 12. SSI, the investigation concluded, was labeled in a "seemingly arbitrary manner," making it "easy for Administrators to play politics with sensitive information." *Id.* at 22.

The former director of the TSA's SSI Office, Andrew Colsky, described "*extreme pressure*" to mark as SSI information that "was either embarrassing or was something that they just didn't want the other side to know." *Pseudo-Classification Report* 12. Conversely, there was surprising willingness to release information about the presence of air marshals on flights: "[W]henever there were any events that were newsworthy and dealt with an

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[9] In October 2012, President Obama ordered the Attorney General to submit, within 180 days, a report assessing the existing FBI whistleblower regulations and proposing any necessary revisions. Presidential Policy Directive 19, § E, at 5 (Oct. 10, 2012). The report was finally delivered June 2, 2014.

airline, Public Affairs would be in touch with the news media and couldn't wait to tell them * * * there were air marshals aboard * * * or this is a regular route that air marshals fly or air marshals * * * never travel alone." *Id.* at 17. Eventually, Colsky refused to sign "court documents confirming SSI decisions" because he did not "know what to honestly call SSI anymore." *Id.* at 18.

The investigation did find some recent improvements. *Pseudo-Classification Report* 28-29. But what's past is prologue. History is liable to repeat itself at agencies that have not been subject to the same scrutiny. The TSA's troubling experience aptly illustrates why Congress chose not to condition whistleblower protections on agency discretion.

* * *

The WPA's basic premise is that agencies do not always act responsibly. Congress needs whistleblowers to expose misconduct and keep agencies in check. Whistleblowers, in turn, need protection from agencies displeased with having their shortcomings exposed. The Department's interpretation would turn that regime upside down. It would grant agencies unprecedented power to decide when employees may expose misconduct—power that is prone to abuse. Nothing in the WPA's text, structure, history, or purpose suggests that Congress intended to facilitate such agency overreach. To the contrary, Congress sought to *restrain* agencies. The Department's interpretation would defy that mandate.

CONCLUSION

The Federal Circuit's judgment should be affirmed.

Respectfully submitted.

ROBERT K. KRY
Counsel of Record
LUCAS M. WALKER
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
rkry@mololamken.com

Counsel for Amici Curiae

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