No. 13-894

IN THE
Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY,
Petitioner,
v.
ROBERT J. MACLEAN,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

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

Disclosure of certain kinds of sensitive but unclassified information, referred to as "Sensitive Security Information," is prohibited by regulation. *See* 49 C.F.R. Pt. 1520. Those regulations are promulgated pursuant to a general statutory delegation of authority. *See* 49 U.S.C.A. § 114(r)(1).

The question presented is whether a disclosure of Sensitive Security Information is "specifically prohibited by law" within the meaning of Section 2302(b)(8)(A).

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INTRODUCTION

Respondent Robert MacLean was a federal air marshal who spoke up about the consequences of a dangerous and possibly unlawful government decision. Because he blew the whistle, the government changed policy and a potential tragedy was averted. But Mr. MacLean paid a hefty price. MacLean's employer, Petitioner Department of Homeland Security ("DHS"), fired him.

Whistleblower-protection laws were enacted to prevent exactly this result. Government employees who come forward with information about dangerous or unlawful government activity are statutorily protected against retaliation unless their disclosure was "specifically prohibited by law" or by certain Execu-

tive orders. Attempting to get around this broad protection against retaliation, DHS maintained that MacLean's disclosure of information related to transportation security was "specifically prohibited by law."

The Court of Appeals rejected DHS's argument. DHS had conceded that "law" in this context means statute, not regulation. And the only statute DHS relied on, the court concluded, was not a "specific[ ]" prohibition. That decision was unanimous. And no judge dissented from denial of DHS's petition for rehearing *en banc*.

DHS's petition for *certiorari* should be denied. Most importantly, DHS's primary argument is clearly waived. DHS expressly and repeatedly conceded in prior proceedings that a disclosure must be prohibited by statute—not merely by regulation—to be "specifically prohibited by law." It now contends the exact opposite, attempting to reclaim the ground it conceded and argue that "law" includes regulations. That argument is not properly before this Court.

In any event, it is meritless. The Court of Appeals correctly held that MacLean's disclosure was not "specifically prohibited by law" within the meaning of the statute at issue. The text, structure, purpose, and legislative history of that provision make two things absolutely clear: The exception applies only to disclosures that are prohibited by statute, and it applies only when that prohibition is "specific[ ]." The only statute on which DHS relies, the Court of Appeals rightly concluded, did not "specifically prohibit" MacLean's disclosure.

DHS acknowledges that there is no circuit split on this issue. Indeed, not a single circuit judge has adopted DHS's view of the statute. DHS nevertheless insists that this Court's review is necessary. Letting the decision below stand, it claims, would threaten transportation security. But as Congress has long recognized, protecting whistleblowers serves, rather than undermines, public safety. MacLean is a case in point: Air travel is safer, not less safe, because he came forward. The decision below, moreover, is far narrower than DHS would make it seem. It applies only to the very limited set of employee disclosures that meet all of the requirements for whistleblower protection, and it does not even finally resolve this case.

The petition should be denied.

STATEMENT

A. Whistleblower Protection

In 1978, amidst ongoing expansion of the administrative state and mounting concern over concealed government misconduct, Congress recognized the limits of its own ability to uncover wrongdoing within "the vast Federal bureaucracy." S. Rep. No. 95-969, at 8 (1978) ("Senate Report"). So it turned for help to those individuals best able to bring illegal, wasteful, and dangerous government activity to light: government employees. Congress realized, though, that employees who "summon[ ] the courage to disclose the truth" are often rewarded only with "harassment and abuse." *Id.* Empowering employees to come forward, it recognized, would require "a means to assure them that they will not suffer if they help uncover and correct administrative abuses." *Id.*

And with that recognition, protection for government whistleblowers—"[f]ederal employees who disclose illegal or improper government activities," *id.*—was born.

It began with the Civil Service Reform Act of 1978 ("CSRA"), Pub L. No. 95-454, 92 Stat. 1111, which established what would prove to be the core protections for government whistleblowers. And over the years, Congress has continually strengthened those protections as agencies have inevitably resisted them. In 1989, Congress unanimously passed the Whistleblower Protection Act of 1989 ("WPA"), Pub L. No. 101-12, 103 Stat. 16, "to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government." *Id.* at § 2(b), 103 Stat. 16. Just five years later, Congress again reinforced whistleblower protections by unanimous vote. *See* An Act To Reauthorize The Office Of Special Counsel, And For Other Purposes, Pub. L. No. 103-424, 108 Stat. 4361 (1994). And most recently, Congress passed the Whistleblower Protection Enhancement Act of 2012 ("WPEA"), Pub. L. No. 112-199, 126 Stat. 1465, "to reform and strengthen several aspects of the whistleblower protection statutes in order to achieve the original intent and purpose of the laws." S. Rep. No. 112-155, at 3-4 (2012). In particular, the WPEA aimed to "overturn[ ] several court decisions that narrowed the scope of protected disclosures." *Id.* at 5.

This case is about one of the most important whistleblower protections established and continually reaffirmed through this series of Acts: 5 U.S.C. § 2302(b)(8)(A). Section 2302(b)(8)(A)—which,

though first enacted in the CSRA, is commonly referred to as part of the WPA—prohibits agencies from taking specified "personnel action[s]" against an employee in retaliation for:

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

5 U.S.C. § 2302(b)(8)(A). The idea is simple: Except in limited circumstances where Congress or the President has determined that the costs of disclosure outweigh its benefits, government employees should be encouraged to make disclosures that serve the public welfare. And when they do so, the agencies that employ them should be prevented from retaliating. The result is a safer, more law-abiding, and more efficient administrative state.

Of course, the agencies themselves are not always on board. Agencies and their officers often have strong incentives to conceal wrongdoing, and employees who spill the beans are not always treated kindly. *See* Senate Report at 8 ("Whistle blowers frequently encounter severe damage to their careers

and substantial economic loss."). That is why whistleblowers need protection in the first place.

So it makes perfect sense that Section 2302(b)(8)(A) only exempts disclosures prohibited by congressional or presidential decree. Agency regulations are not included in the exception. Otherwise, agencies could regulate their way out of the public scrutiny whistleblower-protection laws were meant to facilitate. Indeed, Congress rejected an initial draft of this provision that would have created a broader exception to whistleblower protection. Instead of exempting disclosures "prohibited by law, rule or regulation," as the original versions of the CSRA provided, *see* H.R. 11280, 95th Cong. (2d Sess. 1978); S. 2640, 95th Cong. (2d Sess. 1978), the final version of statute exempts only those disclosures "specifically prohibited by law" or certain Executive orders, 5 U.S.C. § 2302(b)(8)(A). "[S]pecifically prohibited by law," the Conference Report explains, "does not refer to agency rules and regulations." H.R. Rep. No. 95-1717, at 130 (1978) (Conf. Rep.) ("Conference Report").

B. Sensitive Security Information

Regulations governing the disclosure of information related to air-transportation security predate the CSRA. *See, e.g.*, 14 C.F.R. Pt. 191 (1976). These regulations were originally promulgated by the Federal Aviation Administration and subsequently transferred to the jurisdiction of the Transportation Security Administration ("TSA"), which has been part of DHS since DHS's creation in 2002. *See* 67 Fed. Reg. 8351 (Feb. 22, 2002). TSA's authority to promulgate SSI regulations stems from a statutory provision that provides:

> Notwithstanding section 552 of title 5, the Under Secretary shall prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security * * * if the Under Secretary decides that disclosing the information would * * * be detrimental to the security of transportation.

49 U.S.C. § 114(r)(1); *see also* 49 U.S.C. 40119(b)(1).

The first five words of the statute illuminate its primary purpose. Section 552 of title 5 is the Freedom of Information Act ("FOIA"), and Congress enacted Section 114(r) out of concern that ill-intentioned individuals would gain access to sensitive information through FOIA requests. *See Public Citizen, Inc.* v. *FAA*, 988 F.2d 186, 194-96 (D.C. Cir. 1993) (analyzing the predecessor statute and explaining that blocking FOIA requests was a driving force behind its passage). To this end, Section 114(r) authorizes TSA to promulgate regulations prohibiting the disclosure of certain air-security information. But the statute itself neither directly prohibits disclosures nor specifically defines what information is covered.

Regulations impose detailed restrictions that fill in these statutory gaps. They provide a comprehensive framework defining the scope of covered information—generally referred to as "Sensitive Security Information" or "SSI"—and restrict its use and dissemination. *See* 49 C.F.R. Pt. 1520. During the time period relevant to this case, the regulations defined SSI to include, among other things, "information concerning specific numbers of Federal Air Marshals, deployments or missions, and the methods

involved in such operations." 49 C.F.R. § 1520.7(j) (2003).

C. Underlying Facts

Robert MacLean was a government servant with a fourteen-year record of exemplary federal service. After four years' active duty in the Air Force, he worked as a border patrol agent from 1996 through 2001. *See* C.A. App. A184. When the planes hit the towers on September 11, MacLean was inspired to serve his country in a new way. *Id.* at A185-86. He applied to work for the organization that would shortly become the Federal Air Marshals Service ("FAMS")—a federal law-enforcement agency currently within TSA—and became a member of the Service's first post-9/11 graduating class. *Id.*; Pet. App. 2a, 20a.

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

In late July of that year, DHS issued an emergency, non-public notice of a specific and imminent terrorist threat focused on long-distance flights—a more ambitious, broader-scale version of the 9/11 plot. Pet. App. 2a; C.A. App. A98-99, A187-89.

Every air marshal, including MacLean, was given an unprecedented face-to-face briefing about the threat. Pet. App. 2a; C.A. App. A187-89. MacLean and the other marshals were informed about special measures being implemented to thwart the attack and were told to be especially on their guard. C.A. App. A187-89.

So imagine MacLean's alarm when, within forty-eight hours of the secret briefing, he received an unencrypted text message that cancelled "all overnight missions" for several days. Pet. App. 2a; C.A. App. A187-95. The text message was not marked as sensitive information; it was unencrypted; and it was sent to MacLean's unsecure cell phone, not the secure personal digital assistant TSA had provided for SSI transmission. C.A. App. A189-90, A196-200. MacLean at first thought the message must have been a joke or mistake. After all, TSA is statutorily required to station a marshal on flights that "present high security risks," 49 U.S.C. § 44917(a)(1)-(2), and marshal deployment on "nonstop, long distance flights * * * should be a priority." 49 U.S.C. § 44917(b). The looming hijacking threat only made marshal coverage of long-distance flights all the more imperative.

After confirming that other marshals had received the same message, MacLean went to his supervisor for answers. Pet. App. 2a; C.A. App. A204-05. All the supervisor could tell him, however, was that overnight missions had been eliminated due to a budget shortfall and there was nothing that could be done about it. C.A. App. A206, A211. But with lives hanging the balance, MacLean did not give up so easily. His office was full of posters exhorting that

violations of the law should be reported to the Office of the Inspector General ("OIG"), so that was where he went next. *Id.* at A211-12. His call was transferred from one OIG field office to another, and he was ultimately advised to think about the "years left in [his] career" and simply "walk away." *Id.* at A212-13.

Only then did MacLean look outside the administration for help. He firmly believed that FAMS's directive was contrary to law and presaged catastrophe. And time was running out. If no one within the administration would listen, MacLean would have to find a way to get Congress's attention. So he blew the whistle. MacLean contacted a reporter with a history of responsible reporting on TSA and connections with Congress. *Id.* at A213, A216-17. MacLean told the reporter about the text message, but he did not reveal details about any specific flight or any marshal's identity. *Id.* at A191-93. The reporter promised to contact members of Congress immediately and to publicize the issue. *Id.* at A216-17.

It worked. The story was published and congressional leaders reacted immediately. Pet. App. 2a; C.A. App. A135, A148-54. They expressed deep concern and outrage about DHS's decision and urged the Agency to reconsider. *See, e.g.*, C.A. App. A148 (statement of Sen. Hillary Clinton); *id.* at A149 (statement of Sen. Frank Lautenberg); *id.* at A150 (statement of Sen. Charles Schumer); *id.* at A152-53 (statement of Rep. Carolyn Maloney). And it did. Within 24 hours, DHS rescinded the directive, announcing that its issuance had been "premature and a mistake." *Id.* at A155. Marshal coverage was uninterrupted, and a potential hijacking threat was

averted—all because MacLean had the courage to blow the whistle. Senator Barbara Boxer specifically thanked the anonymous air marshal "who came forward and told the truth." *Id.* at A154.

MacLean's good deed ultimately did not go unpunished. He was not in it for the publicity, and he did not draw attention to himself as the source that Senator Boxer and others had praised. Initially, no one identified him as the source of the anonymous disclosure, and he went back to work protecting air travelers. In the ensuing years and as result of his experience, MacLean became actively involved with the Federal Law Enforcement Officers Association ("FLEOA") and its efforts to reform dangerous FAMS practices and to prevent recurring security breaches. Pet. App. 22a. As part of these efforts, he appeared anonymously on a television news broadcast to criticize FAMS policies that rendered marshals easily identifiable to would-be terrorists. *Id.* FLEOA's and MacLean's efforts eventually prompted a congressional committee report and an investigation by the Office of Special Counsel into these issues.

Needless to say (and just as Congress had anticipated when it instituted whistleblower protections), DHS was less than pleased with the public criticism. When MacLean's voice was recognized during his anonymous news appearance, the Agency took the opportunity to initiate an internal investigation. In May 2005, MacLean was interviewed by DHS investigators, and he confirmed that he had made the appearance in question. Pet. App. 2a-3a, 22a. MacLean was not directly asked about the July 2003 text message and news story. But thinking he had

done nothing wrong and wanting to be fully candid, he offered the details of his involvement in response to questions about his prior media contacts. *See id.* at 22a.

The information MacLean had volunteered would end up costing him his job. In September 2005, DHS proposed to remove him from his post on three grounds: (1) his news appearance had been unauthorized, (2) other media communications had been unauthorized, and (3) the text message he disclosed to the reporter contained SSI. *See id.* at 22a-23a; C.A. App. A27-29. In April 2006, the Agency sustained his removal on the third charge only. Pet. App. 23a.

D. Procedural History

MacLean challenged his removal before the Merit Systems Protection Board ("MSPB") on several grounds—chief among them, that the text message did not in fact contain SSI and, even if it did, his disclosure was protected by the WPA. But before the MSPB could rule on these issues, TSA issued an *ex post*, conclusory, two-page order formally designating the text message MacLean had disclosed as SSI. TSA issued the order *three years* after the text message was sent, and it provided neither notice nor opportunity to comment. *See MacLean* v. *DHS*, 543 F.3d 1145, 1149 (9th Cir. 2008).

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

text message contained SSI. *See id.* at 1150. It stressed, however, that MacLean could "still contest his termination before the MSPB, where he [could] raise the Whistleblower Protection Act" or argue that he held "a good faith belief that the information did not qualify as 'sensitive security information.' " *Id.* at 1152.

So MacLean went back to the MSPB, again challenging his removal on numerous grounds. The administrative judge ("AJ") issued an initial order concluding, among other things, that SSI disclosures are not protected by the WPA. Pet. App. 160a-63a. The full Board affirmed that ruling on interlocutory appeal. *See id.* at 128a-39a. Because MacLean's disclosure was prohibited by the "regulations governing SSI," the Board reasoned, it was specifically "prohibited by law" within the meaning of the WPA. *Id.* at 139a. Having decided this preliminary question, the Board remanded for the AJ to resolve the remaining issues. *Id.*

The AJ ultimately upheld MacLean's removal. *Id.* at 57a-112a. The case came back to the full Board on appeal, and the Board affirmed. *Id.* 19a-55a. But in so doing, the Board reconsidered and modified its interlocutory ruling. *See* Pet. App. 32a-37a. Although the interlocutory decision might be read to hold that all regulations count as "law" for purposes of Section 2302(b)(8)(A)'s exception, the Board explained that such a result would be inconsistent with the WPA's purpose. *Id.* at 32a. Only disclosures prohibited by regulations "promulgated pursuant to an explicit Congressional mandate," the Board clarified, qualify under the WPA exception. *Id.*

MacLean appealed the Board's decision to the Court of Appeals for the Federal Circuit, which reversed. The court began its WPA analysis by emphasizing that "[t]he parties do not dispute that, in order to fall under the WPA's 'specifically prohibited by law' proviso, the disclosure must be prohibited by a statute rather than by a regulation." *Id.* at 12a. And it went on to conclude that no statute "specifically prohibited" MacLean's disclosure. *Id.* at 13a. The court thus vacated the MSPB's decision and remanded for further proceedings. *Id.* at 17a.

DHS sought panel rehearing and rehearing *en banc*. DHS's petition was denied without opinion and without dissent. Pet. App. 165a-66a. The instant petition for *certiorari* followed.

Notably, this case is still pending on remand before the MSPB. The Court of Appeals decided only that MacLean's disclosure does not fall within the Section 2302(b)(8)(A) exception; it remains to be seen whether he meets the other criteria for whistleblower protection. In order to ultimately prevail, MacLean still must demonstrate, among other things, that he "reasonably believed that the content of his disclosure evidenced a substantial and specific danger to public health or safety." *Id.* at 17a.

REASONS FOR DENYING THE WRIT

I. DHS WAIVED ITS PRIMARY ARGUMENT.

1. The petition's first and primary argument is that MacLean's disclosure was "specifically prohibited by law"—and thus outside the scope of whistleblower protection—because it was barred by the SSI regulations. Pet. 12-16. "[T]he term 'law,' " DHS argues, "is not limited to congressional enactments." *Id.* at

14. This argument was not merely waived below, it was expressly and repeatedly conceded.

The Court of Appeals certainly saw it that way. The court began its analysis by emphasizing that "[t]he parties *do not dispute* that, in order to fall under the WPA's 'specifically prohibited by law' proviso, the disclosure must be prohibited by a statute rather than a regulation." Pet. App. 12a (emphasis added). "[T]he parties *agree*," the court went on, that "a regulation * * * cannot be 'law' under the WPA." *Id.* at 13a (emphasis added). The only issue on appeal, accordingly, was "whether [a statute] 'specifically prohibit[s]' disclosure of information concerning coverage of flights by Marshals within the meaning of the WPA." *Id.* at 12a (second alteration in original).

That has always been the only issue in this case. As DHS itself explained in its Court of Appeals brief, that is how the MSPB conceived of the question. "The best way to understand the Board's holding," DHS emphasized, "is that the 'law' that specifically prohibits the disclosure of SSI is the *statute* passed by Congress and codified at 49 U.S.C. § 40119 and 49 U.S.C. § 114(r)." Gov't C.A. Br. 45 (emphasis added). And DHS defended the MSPB's decision on the ground that it "maintains the limit upon the applicability of the 'specifically prohibited by law' provision to statutes." *Id.* at 45-46. The scope of DHS's argument could not have been clearer:

> *Amici* argue that in order to exempt certain disclosures from WPA protection, "Congress must have explicitly prohibited such a disclosure via legislative enactment." Am. Br. at 9. *We do not*

> *disagree. The only dispute is whether 49 U.S.C. § 40119 serves as that legislative enactment.*

Id. at 46-47 (emphasis added). DHS reiterated that concession at oral argument:

> Question: * * * I thought I understood your brief as conceding that when this particular portion of the WPA says "not specifically pro[hibit]ed by law"—I thought I understood your brief to concede that that can't be a rule or regulation, it means statute. Am I wrong?
>
> Answer: You're not wrong your honor. I'll be as clear as I can. *"Specifically prohibited by law" here means statute*. But it doesn't mean that the statute can't direct the agency to pass regulations. So we think "specifically prohibited by" means that the statute is specifically saying you can't disclose something. It's nondisclosure statutes is what it's getting at.

C.A. Oral Arg. Rec. 22:33-23:17 (emphasis added).

Even after the panel took DHS at its word and noted the parties' agreement at multiple points in its opinion, *see* Pet. App. 12a-13a, DHS did not object. To the contrary, DHS's petition for rehearing continued to argue that MacLean's disclosure was prohibited by statute. It did not dispute the panel's characterization of the parties' agreement or the question in dispute. This notwithstanding that the Federal Rules of Appellate Procedure provide that petitions for rehearing "must state with particularity *each* point of law or fact that the petitioner believes the court has overlooked or misapprehended." Fed. R. App. P. 40(a)(2) (emphasis added).

2. DHS acknowledges that its "argument in the court of appeals did focus principally on the statute as the relevant source of 'law.' " Pet. 15-16. Indeed, DHS's petition characterizes its own lower-court brief as "*agreeing* that the proviso applies only when Congress has 'explicitly prohibited' a particular disclosure 'via legislative enactment' and characterizing the dispute as 'whether 49 U.S.C. § 40119 serves as that legislative enactment.' " *Id.* at 16 (quoting Gov't C.A. Br. 46-47) (emphasis added). Nevertheless, DHS attempts to evade its repeated concession by quoting portions of its lower court briefs that refer to regulations adopted "pursuant to a specific Congressional mandate to do so." *Id.* (quoting Gov't C.A. Br. 48).

But DHS cannot distinguish its primary position here from the position it disclaimed below. In pages 12 through 16 of its petition, DHS stakes out its main argument. Relying on this Court's decision in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), which construed the phrase "authorized by law" to cover regulations, DHS now argues simply that "the regulations in this case can be 'law' for purposes of the Section 2302(b)(8)(A) proviso." Pet. 15; *see also id.* at 14 ("[T]he term 'law' is not limited to congressional enactments."). This is the exact opposite of the position it took below: " 'Specifically prohibited by law' here means statute." C.A. Oral Arg. Rec. 22:33-23:17; *see also* Gov't C.A. Br. at 46-48; Pet. App. 12a-13a.

Waiver rules are central to the integrity of our justice system. *See Greenlaw* v. *United States*, 554 U.S. 237, 243-44 (2008) ("Our adversary system is designed around the premise that the parties know

what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." (internal quotation marks and alteration omitted)). And it is axiomatic that a party cannot take one position in a lower court and then, unhappy with the result, come to this Court with the opposite theory. *See Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981) (noting that an issue "not raised [in the lower court] is not properly before" this Court); E. Gressman et al., Supreme Court Practice § 6.31(i)(3), at 506 (9th ed. 2007) (presenting issues "not decided by the court below because they were not raised" is "ordinarily fatal to the petition"); Br. of U.S. Opp. Cert., *Arena* v. *United States*, 2000 WL 34014451, at *6 (U.S. Jun. 23, 2000) ("This Court should * * * decline to review an issue explicitly conceded below."). This Court is not a forum for do-overs, and it does not ordinarily permit "a petitioner to assert new substantive arguments attacking * * * the judgment when those arguments were not pressed in the court whose opinion [this Court is] reviewing." *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001). DHS's central argument was squarely conceded below, and *certiorari* should be denied.

II. THE DECISION BELOW WAS CORRECT.

DHS concedes "the absence of a circuit conflict on the question presented," Pet. 24, and instead rests on the claim that *certiorari* is necessary to correct the error of the court below. But the Court of Appeals correctly interpreted the WPA when it held that MacLean's disclosure is not subject to the "specifically prohibited by law" exception to Section 2302(b)(8)(A). Its decision properly reflected the statute's plain text, structure, purpose, and legisla-

tive history. And it ensures that agencies—the very entities from which the WPA affords whistleblowers protection—cannot circumvent whistleblower protections merely by adopting regulations prohibiting disclosures.

Neither of DHS's contrary arguments holds water. Even if it were not waived, DHS's regulation-based argument is irreconcilable with the WPA. And the Agency's statute-based argument fails for an even simpler reason: The statute on which DHS relies does not itself prohibit *any* disclosures, let alone does it do so with sufficient specificity.

A. The WPA's "Specifically Prohibited By Law" Exception Does Not Encompass Regulations.

The WPA's "specifically prohibited by law" provision is unambiguous: It does not exempt disclosures barred only by regulation. That is perhaps most obvious from the marked distinction between that language and the broader phrase "law, rule, or regulation," which appears no fewer than seven times in Section 2302(b) alone. *See* 5 U.S.C. §§ 2302(b)(1)(E), (6), (8)(A)(i), (8)(B)(i), (9)(A), (12), (13). Indeed, the broader phrase occurs once as part of the *very same sentence* that contains the "specifically prohibited by law" exception: Section 2302(b)(8)(A) protects a disclosure of "any violation of *any law, rule, or regulation* * * * if such disclosure is not *specifically prohibited by law*." *Id.* § 2302(b)(8)(A) (emphases added).

"[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) (internal quotation marks omitted). Where the variation occurs within a single sentence, the inference of intentionality is even stronger. *See Corley* v. *United States*, 556 U.S. 303, 315 (2009) (inferring intentionality where Congress used the two terms in the same subsection). The repeated references to "law, rule, or regulation" establish that Congress knew how to cover regulations when it wanted to so. But instead, Congress chose to exclude them from the "specifically prohibited by law" exception.

That reading coheres with the WPA's broader structure. Section 2302(b)(8) establishes a class of protected conduct and enumerates a few limited exceptions. "[T]he explicit listing of exceptions," this Court has explained, "indicate[s] * * * that Congress did not intend courts to read other unmentioned * * * exceptions into the statute that it wrote." *United States* v. *Brockamp*, 519 U.S. 347, 352 (1997); *see also Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980). That principle fits this statute to a "T." Congress exempted both disclosures "specifically prohibited by law" and information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C. § 2302(b)(8)(A). The latter exception is particularly noteworthy: Inclusion of a limited category of Executive branch authority suggests intentional exclusion of the rest.

2. Section 2302(b)(8)(A) must be construed, moreover, to give effect to the WPA's central purpose: protecting government whistleblowers from the agencies that would retaliate against them. *Cf.*

Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952) (emphasizing that a statute "should be interpreted so as to effect its purpose"). Whistleblower protection, at its core, is a check on federal agencies; it prevents them from taking actions they would otherwise be able to take. Naturally, agencies are not always happy to go along. (Were it otherwise, whistleblowers would hardly need protecting.) So it is entirely unsurprising that Congress enabled itself and the President to create exceptions to whistleblower protections through statutes and Executive orders but withheld that power from agencies themselves. Expanding the "specifically prohibited by law" exception to include regulations would undermine the entire enterprise by giving agencies the key to unlock the very restraints intended to bind them.

That is precisely why Congress changed the language in the first draft of the CSRA—"prohibited by law, rule, or regulation"—to the much narrower phrase "specifically prohibited by law." *Compare* H.R. 11280, *and* S. 2640, *with* 5 U.S.C. § 2302(b)(8)(A). "Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello*, 464 U.S. at 23-24. That presumption, of course, applies equally to broadening language like the "rule or regulation" text omitted from the final version of the CSRA.

The drafting history of the CSRA is enough by itself to reject DHS' interpretation. And here, the import of the drafting change is only confirmed by other indicia of legislative intent. As the Senate Report explains:

> The committee narrowed the proviso for those disclosures not protected. There was concern that the limitation of protection in S. 2640 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.

Senate Report at 19. Although DHS emphasizes that the word "statute" was removed from an early draft, the Conference Report confirms the meaning of the final language: "The reference to disclosures specifically prohibited by law is meant to refer to statutory law and court interpretations of those statutes. It does not refer to agency rules and regulations." Conference Report at 130.

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of Congress." *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542 (1940). And here, Congress's intent could not have been clearer. In the context of Section 2302(b)(8)(A), "law" means statutes.

3. Against this text, structure, purpose, and legislative history, DHS offers up a single precedent that was not even on the books when the CSRA was enacted. In *Chrysler Corp.* v. *Brown*, this Court held that the phrase "authorized by law" in the Trade Secrets Act, 18 U.S.C. § 1905, includes authorizations by "properly promulgated, substantive agency regulations." 441 U.S. at 295. Because such regulations "have the force and effect of law," the Court reasoned, "[i]t would * * * take a clear showing of

contrary legislative intent" to read "authorized by law" to exclude them. *Id.* at 295-96 (internal quotation marks omitted). Finding nothing in the text of the Act or its legislative history "to support the respondents' suggestion that § 1905 does not address formal agency action," the Court adopted the broader reading of that statute. *Id.* at 298.

To be sure, the word "law" sometimes—perhaps even usually—encompasses regulations. No one disputes that proposition. But as *Chrysler Corp.* itself recognizes, the word "law" can also refer only to statutes. *See id.* at 296 (suggesting that "narrower" reading would be justified by a "clear showing of legislative intent"). And unlike the statute at issue in that case, this one bears all the hallmarks of that more limited meaning. Just as courts do not look to dictionaries to interpret statutorily defined terms, *see, e.g.*, *Ledbetter* v. *United States*, 170 U.S. 606, 611 (1898) ("If [C]ongress had not defined [a term] it would be proper to resort to a dictionary for a definition * * * ."), neither does ordinary meaning control when the text of a statute renders Congress's intention clear. *See, e.g.*, *Fox* v. *Standard Oil Co.*, 294 U.S. 87, 95 (1935) (emphasizing that appeals to ordinary meaning have "force * * * if [a] statute ha[s] left the meaning of its terms to the test of popular understanding," not when the text is clear).

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

1. DHS argues in the alternative that MacLean's disclosure was "specifically prohibited by law" within the meaning of the WPA "[e]ven if the relevant inquiry were restricted to the four corners of the statute." Pet. 16. 49 U.S.C. § 114(r), it claims,

constitutes a "specific[ ] prohibit[ion]" of MacLean's disclosure. *See id.* at 16-22.

But Section 114(r)—which is substantially similar to an earlier statute, 49 U.S.C. § 40119(b)—does not actually prohibit *anything*, let alone does it do so "specifically." As the Court of Appeals recognized, the statute "does not expressly prohibit employee disclosures" at all; it "only empowers the Agency to prescribe regulations prohibiting disclosure." Pet. App. 13a. "Thus, the ultimate source of the prohibition of Mr. MacLean's disclosure is not a statute but a regulation." *Id.* In the absence of regulations, in other words, MacLean's disclosure would not have been prohibited in the first place.

But even if Section 114(r) could be read to constitute a prohibition (it cannot be), it does not approach the level of specificity the WPA requires. The WPA exempts only those disclosures that are "*specifically* prohibited by law." 5 U.S.C. § 2302(b)(8)(A) (emphasis added). "It is * * * a cardinal principle of statutory construction that we must give effect, if possible, to every clause and word of a statute." *Williams* v. *Taylor*, 529 U.S. 362, 404 (2000) (internal quotation marks omitted). And when Congress said "specific[ ]" that is exactly what it meant. *See* Senate Report at 21 (suggesting that statutes "require[ ] that matters be withheld from the public * * * as to leave no discretion on the issue," "establish[ ] particular criteria for withholding," or "refer[ ] to particular types of matters to be withheld"). Although agencies can help *implement* bright-line prohibitions that Congress specifically defines, it cannot *supplement* them. Government employees should not have to guess whether disclosing information in the name

of public safety will cost them their jobs. That guesswork is eliminated when Congress sets specific, bright-line rules for employees to follow.

Section 114(r) does not come close to the specificity required. At best, it "provides only general criteria for withholding information." Pet. App. 14a. Regulations will prohibit disclosures, it states, "if the Under Secretary decides that disclosing the information would * * * be detrimental to the security of transportation." 49 U.S.C. § 114(r)(1). What kind of information is "detrimental to the security of transportation" if disclosed? The statute gives no answer. What criteria will TSA use to so "decide"? Again, silence. The provision is entirely subjective, setting no guideposts for the exercise of the Agency's discretion. It beggars belief to claim that that this language "specifically" prohibited MacLean's disclosure. After all, MacLean had good reason to believe that his disclosure was necessary to ensuring "the security of transportation," not "detrimental" to it. Certainly the members of Congress who responded to the news story thought so. And given that DHS rescinded its order after MacLean came forward, it must have thought so too.

Section 114(r)'s "insufficient specificity becomes even more apparent when it is contrasted with statutes that have been determined to fall under the WPA's 'specifically prohibited by law' proviso." Pet. App. 14a (distinguishing 18 U.S.C. § 1905 and 26 U.S.C. § 6013)). And a comparison to the SSI regulations is similarly illuminating. On the one hand, there is the statute's vague reference to information "detrimental to security of transportation." 49 U.S.C. § 114(r)(1). On the other, there is the regula-

tions' detailed rendering of the categories, subcategories, and sub-subcategories of information that qualify. *See* 49 C.F.R. § 1520.5(b). It is the difference between night and day, and exactly the distinction Congress intended to capture when it used the word "specifically." The regulations are specific, but reading "specifically prohibited by law" to cover the kind of general criteria enumerated in the statute would render the word "specifically" entirely superfluous.

2. DHS's contrary arguments are meritless. The Agency does not even try to defend the proposition that Section 114(r) itself prohibits any disclosures. It merely falls back on the regulations: "Section 114(r) 'prohibit[s]' the disclosure of * * * information," DHS reasons circularly, "by providing that the TSA 'shall prescribe regulations' to that effect." Pet. 17.

And on specificity, DHS simply declares that the Section 114(r) establishes "specific[ ]" categories of information to be disclosed. *See* Pet. 17. Its only response to the Court of Appeals' reasoned analysis is a complicated legislative-history argument that turns on a completely different statutory provision. After a decision by this Court interpreting FOIA's "specifically exempted from disclosure by statute" language broadly, *see FAA* v. *Robertson*, 422 U.S. 255 (1975) (quoting 5 U.S.C. § 552(b)(3) (1970)), Congress amended that provision to expressly apply only where a statute "leave[s] no discretion on the issue" or "establishes particular criteria for withholding." 5 U.S.C. § 552(b)(3) (1976). Because Section 2302(b)(8)(A) contains language similar to the pre-amendment version of FOIA, DHS reasons, Congress must have intended "specifically interpreted by law"

to be at least as broad as the Court's reading of FOIA in *Robertson*.

But whatever the value of legislative history in general may be, it is at its nadir when it relates to some other statute, particularly when the text (and, yes, even the legislative history) of the relevant statute is clear. There is no need to look to FOIA's drafting history in an effort to read Congress's mind about Section 2302(b)(8)(A). And in any event, there is no dispute that SSI is exempt from disclosure under FOIA. Section 114(r), after all, expressly exempts SSI from FOIA's coverage. *See* 49 U.S.C. § 114(r)(1) (providing for the issuance of SSI regulations "[n]otwithstanding section 552 of title 5"—*a.k.a.*, FOIA). That it contains no such exemption from the WPA is merely another reason to believe that Congress did not intend to create one.[1]

III. THIS COURT'S REVIEW IS UNWARRANTED.

DHS offers no compelling justification for granting *certiorari*. It does not attempt to identify a split of

[1] The Court of Appeals' interpretation of the WPA was the correct one. But even if this Court were to disagree, there are alternative grounds for affirmance that militate against granting *certiorari*. In particular, even if the WPA does not apply, MacLean's removal was still improper because (1) it constituted retroactive decisionmaking that violated fundamental tenets of due process as well as the *Chenery* doctrine; (2) it violated the CSRA's prohibition against discrimination on the basis of non-performance related conduct, *see* 5 U.S.C. § 2302(b)(10); (3) it constituted retaliation on the basis of speech in violation of the First Amendment; and (4) removal was an inappropriate penalty. The Court of Appeals rejected some of these arguments, but they constitute alternative grounds for affirming its judgment.

authority, and there is not even a divergence of opinion—all three panelists reached the same conclusion, and no judge dissented from denial of rehearing *en banc*. In the absence of any conflict, DHS contends that the Court must intervene in the name of public safety. But the scope of the Court of Appeals' decision is overblown and the supposed tension between protecting whistleblowers and protecting the public is contrived. As Congress has long recognized, protecting whistleblowers promotes, rather than threatens, public safety.

1. DHS acknowledges the absence of any split among lower courts on the question presented. Pet. at 24. But this should not stop the Court from weighing in, DHS contends, because the Federal Circuit exercises "outsized influence" on this area of law. *Id.* To be sure, this Court's review of Federal Circuit decisions is sometimes justified even in the absence of a circuit split where the lower court (1) has exclusive jurisdiction and (2) is itself divided on the issue. *See* E. Gressman *et al.*, *Supreme Court Practice* § 4.21, at 286-88 (9th ed. 2007).

But for one thing, a provision of the WPEA makes Section 2302(b)(8) cases appealable to "any court of appeals of competent jurisdiction" through the end of 2014. 5 U.S.C. § 7703(b)(1)(B). And as DHS recognizes, the MSPB does not consider itself bound by Federal Circuit precedents in these cases. *See* Pet. at 25 (citing *Day* v. *DHS*, 119 M.S.P.R. 589, 595 n.5 (2013)). For another, the kind of intra-circuit disagreement that can sometimes warrant *certiorari* is entirely absent. *Cf., e.g.*, *Warner-Jenkinson Co., Inc.* v. *Hilton Davis Chem. Co.*, 520 U.S. 17, 21 (1997) (granting *certiorari* to resolve a "significant disa-

greement" within the Federal Circuit, which had had split 7-5); *Festo Corp.* v. *Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 727 (2002) (granting *certiorari* when the Federal Circuit's "holding departed from its own cases"). *Not one* Article III judge has adopted the view of Section 2302(b)(8)(A) DHS now advances. The decision below was unanimous, and DHS's petition for *en banc* review was denied without dissent. *See* Pet. App. 165a-66a. Even at the administrative level, DHS points to no prior decisions that came out differently. There are none.

2. Without a divergence of authority—or even of opinion—to rely on, DHS attempts to justify *certiorari* by conjuring up a parade of horribles it claims will result from the lower court's decision. Interpreting the WPA as it was written, DHS claims, will endanger the public and "erode the SSI scheme's deterrent effect." Pet. at 24.

These fears are unfounded. Section 2302(b)(8)(A) has protected government whistleblowers since 1978, *see* CSRA, Pub L. 95-454, 92 Stat. 1111, and regulations prohibiting the disclosure of air-safety information are even older than that, *see* 14 C.F.R. Pt. 191 (1976). In the more than thirty-five years that these regimes have coexisted, the sky has not fallen. Indeed, DHS does not point to a single other instance where they have come into conflict. Moreover, it acknowledges that there seems to be no such case on the horizon. *See* Pet. 25 ("[T]he government is unaware of any case involving the question presented that is on track to be decided before [the end of 2014].").

More broadly—and contrary to the picture DHS would paint—SSI-disclosure regulations and whistleblower-protection laws do not work at cross-purposes. Far from pitting public safety against employee protection, *both* regimes play crucial and complimentary roles in protecting the public. SSI rules do it by prohibiting disclosures that create danger; the WPA does it by encouraging disclosures that prevent danger.

And in most cases, of course, the WPA does not protect employees who disclose sensitive information. The WPA applies *only* when an employee reasonably believes that the disclosed information reveals unlawful, grossly wasteful, abusive, or substantially dangerous activity; *only* when the information is disclosed to an appropriate person; and *only* when an employee is removed for that reason. *See* 5 U.S.C. § 2302(b)(8)(A). In this limited circumstance—and this circumstance only—Congress has determined that the benefits of disclosure outweigh its risks. And in retrospect, MacLean's actions demonstrate that Congress calculated correctly: If he had remained silent, DHS's "mistake" would have gone uncorrected, and terrorist organizations would have had the skies to themselves for a potentially devastating attack.

The decision below thus applies to an exceedingly narrow category of disclosures. Indeed, it is not yet clear that the WPA applies even *in this case*. The Board has not yet had occasion to resolve that issue. And the Court of Appeals held only that SSI disclosures are not categorically exempt from WPA coverage; it did not decide whether MacLean actually qualifies for whistleblower protection. As the deci-

sion below recognizes, MacLean will not be eligible for whistleblower protection unless he can demonstrate on remand that all of the Act's requirements are fully satisfied. *See* Pet. App. 17a. If he fails to do so, the WPA will not protect him—just as it will not bear on most SSI disclosures.[2]

3. At the end of the day, DHS's attempt to elevate its SSI regulations over the WPA is unsurprising. Indeed, it is exactly what Congress foresaw when it enacted and repeatedly strengthened Section 2302(b)(8)(A). The truth is that federal agencies are not likely to thank employees who step forward to expose unlawful or improper government conduct. If it were otherwise, whistleblowers would not need protecting and Robert MacLean would still be at work. But agencies have strong incentives to "conceal wrongdoing," and employees like MacLean who "summon[ ] the courage to disclose the truth" are often rewarded with "severe damage to their careers and substantial economic loss." Senate Report at 8. That is exactly why whistleblower protection is so crucial to "keeping our government honest and efficient." S. Rep. No. 112-155, at 1-2. And that is exactly why Congress narrowed the exemption from disclosures specifically "prohibited by law, rule, or

[2] The remand both demonstrates the narrowness of the Court of Appeals' ruling and suggests yet another reason *certiorari* should be denied: The decision below is not a final resolution of this case. *Cf., e.g.*, *Brotherhood of Locomotive Firemen and Enginemen* v. *Bangor & Aroostock R.R. Co.*, 389 U.S. 327, 328 (1967) (denying *certiorari* "because the Court of Appeals remanded the case [and thus it] is not yet ripe for review by this Court").

regulation" to disclosures "specifically prohibited by law." *See* Senate Report at 21. Congress knew that agencies would try to circumvent whistleblower protections through regulation—just as DHS seeks to do now.

Of course, if Congress wants to exempt SSI disclosures from whistleblower protections, it can certainly do so. Indeed, the President, by way of Executive order, may well be able to do so too. *See* 5 U.S.C. § 2302(b)(8)(A) (exempting disclosures of information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs"). But far from prohibiting the disclosure of SSI, the President has issued an Executive Order affirmatively stating that "[t]he mere fact that information is designated as [Controlled Unclassified Information]"—a category that includes SSI, as well as other kinds of unclassified but protected information—"shall *not* have a bearing on determinations pursuant to any law requiring the disclosure of information or permitting disclosure as a matter of discretion." Exec. Order No. 13,556 § 2(b), 75 Fed. Reg. 68,675 (Nov. 4, 2010) (emphasis added). And the text, structure, purpose, and legislative history of Section 2302(b)(8)(A) make clear that in enacting whistleblower-protection laws Congress intended exactly the result the Court of Appeals reached.

Congress reaffirmed that intent as recently as 2012 when it enacted the WPEA. With that Act, Congress confirmed that whistleblower protection extends into the TSA generally and air-security issues specifically. *See* WPEA, 126 Stat. at 1470 ("Notwithstanding any other provision of law, any individual holding

* * * a position within the Transportation Security Administration shall be covered by * * * the provisions of section 2302(b) (1), (8), and (9)."); S. Rep. No. 112-155, at 1 (emphasizing that whistleblower protection must extend to "those with knowledge of problems at our nation's airports"). "[I]n a post-9/11 world," Congress has recognized, "we must do our utmost to ensure that those with knowledge of problems at our nation's airports, borders, [and] law enforcement agencies * * * are able to reveal those problems without fear of retaliation or harassment." *Id.* MacLean knew of a problem, revealed it, and was retaliated against. Congress has made clear that this is precisely the evil whistleblower-protection laws are intended to prevent.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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March 2014