

employee who discloses wrongdoing unless 1) the individual made the disclosure to the “right” type of party; 2) “the individual made a report that is either (a) outside of the employee’s course of duties[,] or (b) communicated outside of normal channels”; and 3) “the individual made the report to someone other than the wrongdoer.” Merit Sys. Protection Bd., *Whistleblower Protections for Federal Employees: Report to the President and the Congress* (2010), at 51.

The *MacLean* decisions create yet another loophole that will further narrow the scope of CSRA protected whistleblowing and deter would-be whistleblowers. Indeed, the Board’s own recent report on the scope of whistleblower protections for federal employees expressly acknowledges the impact of *MacLean I*:

The *MacLean* decision means that, in some cases, the disclosure is protected only if it is made to the agency’s Inspector General, to another employee designated by the heads of the agency to receive such disclosures, or to the Office of Special Counsel. In other cases, however, a disclosure to a different party, such as the media, would still be protected. *The employee might not know which category applies – and therefore to whom a protected disclosure may be made – at the time the disclosure seems important to make . . . As MacLean demonstrated, making the disclosure to some entities versus others can carry a greater risk that the disclosure may not be protected.*

*Id.*, at 20-21 (emphasis added).

Given the current state of the law, a federal employee who is contemplating blowing the whistle on a substantial threat to public safety needs to perform legal research or consult with an attorney to determine how to make a disclosure without losing the protection of the CSRA. But in enacting the CSRA's whistleblower protection provision, Congress never intended to create obstacles for federal employees to surmount prior to blowing the whistle. Instead, Congress intended to provide robust protection to whistleblowers by seeking to avoid agencies using rules and regulations to impede the disclosure of government wrongdoing. *See Kent*, 56 M.S.P.R., at 542.

While *MacLean II* narrows *MacLean I* by clarifying that not every regulation that meets certain conditions should be accorded the full force and effect of law, *MacLean II*, slip op. at ¶ 18, *MacLean II* nonetheless leaves the door wide open for agencies to regulate around the CSRA's whistleblower protection provision. If ATSA's broad and vague standard governing TSA nondisclosure rules<sup>5</sup> qualifies as a "specific" prohibition against disclosure, then almost any statute authorizing an agency to withhold information from public disclosure would enable an agency to circumvent CSRA whistleblower protection. Indeed, under the *MacLean* decisions, an agency head acting pursuant to a broad

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<sup>5</sup> 49 U.S.C. § 40119(b)(1)(C).

Congressional mandate to protect sensitive information could issue nondisclosure regulations that would prohibit employee disclosures concerning violations of laws, rules and regulations by the agency head.

Finally, whistleblowers should not have to guess whether information that they reasonably believe evidences waste, fraud, abuse, illegalities or public dangers might be later designated as SSI and therefore should not be disclosed. Rather than making the wrong guess, a would-be whistleblower will likely choose to remain silent to avoid risking the individual's employment. As the Board has cautioned that the CSRA should not be interpreted in a way that would “have a serious ‘chilling effect’ on would-be whistleblowers,” *Ward v. Dept. of Army*, 67 M.S.P.R. 482, 488 (1995), this Court should reverse the Board’s *MacLean* decisions, which pose a substantial risk of chilling would-be whistleblower.

## CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the rulings in *MacLean I* and *MacLean II* and conclude, as Congress intended and as the CSRA's plain meaning mandates, that *only* those disclosures which Congress explicitly prohibits by statute or Executive order, and not substantive agency regulations, are exempt from whistleblower protection within the meaning of 5 U.S.C. § 2302(b)(8).

Respectfully submitted,



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March 19, 2012 \_\_\_\_\_  
Date

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March 19, 2102

(Date)



United States Court of Appeals  
for the Federal Circuit

*MacLean v DVA*, No. 2011-3231

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I, F. Douglas Hartnett, Jr., being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

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