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 AMICUS CURIAE
Project On Government Oversight
In Support of Affirmance

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IDENTITY AND INTEREST OF THE AMICUS

The Project On Government Oversight (POGO), founded in 1981, is a nonpartisan independent watchdog organization that champions good government reforms. POGO's investigations into corruption, misconduct, and conflicts of interest achieve a more effective, accountable, open, and ethical federal government. Working with whistleblowers and Congressional oversight Committees for such purposes is an integral part of POGO's mission, and ensuring strong whistleblower protections is therefore one of its core policy priorities. Since its inception, POGO has been in the forefront of efforts to strengthen whistleblower protection laws, most recently working to pass the Whistleblower Protection Enhancement Act ("WPEA"). POGO frequently testifies before Congress in support of open government legislation, lobbies for the strongest possible provisions, urges the public to take action, and organizes critical support.[1] POGO is also working with the National Archive and Records Administration to curtail the proliferation of "controlled unclassified information", also known as "sensitive but unclassified", designations and create a uniform system for using such markings.

Upholding Congress' intent underlying the Whistleblower Protection Act (WPA) is of great concern to POGO as a primary method of informing Members of Congress and the public about waste, fraud, and misconduct within government agencies that would otherwise go undetected. The Whistleblower Protection Act was created to

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[1] Pursuant to Rule 37.6, undersigned Counsel certifies that neither Counsel for the parties authored, in whole or in part, or contributed monetarily to the preparation of this Brief. This Brief was paid for by the amicus.

protect the public interest, and serves as a critical bulwark against abuses of authority and excessive secrecy in the interest of bureaucratic self-preservation. It should not be eviscerated.

SUMMARY OF ARGUMENT

In addition to the arguments made and authorities cited in the Respondent's Brief on the Merits, support for affirming the Federal Circuit Court's decision can be found in Executive Order 13566 (E.O. 13556), and in the public policy imperatives recognized by Congress when it enacted and repeatedly strengthened protections for federal employees under the Whistleblower Protection Act (WPA). Despite ample authority and opportunity, neither the President, as Commander in Chief, nor Congress has seen the need to include sensitive but unclassified information in the category of information subject to a complete ban on disclosure. The WPA drew a bright line between information protected by law and that covered by agency rule or regulation. A critical component of this distinction has historically been that of providing clear notice to federal employees what information they encounter on the job is prohibited from public disclosure in all instances, and which information is not. Without such certainty and notice, no regime for protecting information can be functional, much less serve as a basis for an exemption by law from the protection afforded by the Whistleblower Protection Act.

In addition, the public policy underlying the Whistleblower Protection Act is reflected in the First Amendment and the federal oath of office taken by every federal employee. These principles are reflected in the

"freedom to warn" and in the repeated action by Congress to strengthen statutory protection in the WPA.

ARGUMENT

A. Executive Order 13556 – Controlled Unclassified Information Provides Additional Support for Affirming the Federal Circuit's Finding that Sensitive Security Information is Not Prohibited from Disclosure Under the Whistleblower Protection Act

Executive Order (E.O.) 13556 was issued on November 4, 2010. Its stated purpose was to "establish[es] an open and uniform program for managing information that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Government-wide policies, excluding information that is classified under Executive Order 13526 of December 29, 2009, or the Atomic Energy Act, as amended," the type of information previously designated "Sensitive Security Information" (SSI) by the Transportation Security Administration.[2] E.O. 13556, Nov. 4, 2010, Section 1. Purpose. The President issued this E.O. in response to the apparent lack of specificity, openness, and consistency across government agencies in how unclassified but sensitive information is to be identified and protected, and in some cases, disclosed. *Id.*, Section 1. The E.O. specifically noted that, "This…confusing patchwork has resulted in inconsistent marking and safeguarding of documents, led to unclear or unnecessarily restrictive

[2] This E.O called for renaming all controlled unclassified information "CUI." For clarity, this Brief will refer to such information, including the information disclosed by federal air marshal MacLean in 2003, and later retroactively designated "SSI," as "CUI/SSI."

dissemination policies and created impediments to authorized information sharing." *Id.*

This Order is relevant to the question presented in two distinct ways. First, on its face, the E.O. states that it "shall serve as the exclusive designation for identifying unclassified information…pursuant to and consistent with applicable law, regulations and government wide policies." *Id.*, Section 2(a). As argued in Respondent's brief, Congress enumerated two exceptions to the protections provided by the Whistleblower Protection Act (WPA), one for disclosures "specifically prohibited by law," the other for disclosing information specifically required by executive order to be kept secret in the interest of national security or the conduct of foreign affairs." Respondent's brief at 20, (quoting 5 U.S.C. § 2302(b)(8)(A)). The E.O. is entirely consistent with Respondent's arguments that WPA protections cannot be denied unless the disclosure falls squarely within these two exceptions. Section 2(b) of the E.O. specifically states that "The mere fact that information is designated CUI shall not have any bearing on determinations pursuant to any law requiring the disclosure of information, or permitting disclosure as a matter of discretion…." This sentence reflects the intent of the Order that designating information CUI/SSI has no legal effect under disclosure statues, or the ability of an agency to voluntarily disclose that information.

The U.S. National Archives and Records Administration, the agency charged with implementing and ensuring compliance with the E.O., makes clear on its public website that designation as CUI/SSI has no effect on whether information is subject to disclosure under the Freedom of Information Act (FOIA). (see http://www.archives.gov/cui/faqs.html). Petitioner's

contention that designation as CUI/SSI has the effect of a prohibition by law that eliminates protection for disclosing that information under the WPA is in direct conflict with the stated effect of designation in the President's Order. If the Petitioner's reasoning is adopted, it raises the bizarre prospect that an employee would be subject to termination for disclosing the same information that the Agency could be required to release in response to a FOIA request.

This understanding, that a designation of information as CUI/SSI is *not* based on statutory authority, but is to be implemented "consistent with" applicable law rather than to create an exception to, or exclusion from, disclosure statutes, is reflected in the Presidential Memoranda which preceded the Order dating back to before air marshal MacLean was terminated in 2006. (*See* "Memorandum for the Heads of Executive Departments and Agencies, Subject: Classified Information and Controlled Unclassified Information" issued May, 27, 2009, describing the procedural history of implementing the system for protecting "sensitive but unclassified" information under various labels, dating back to December, 2005.) Petitioners ask this Court to ignore this long held, publicly stated understanding by the Commander in Chief, and give CUI/SSI designation the effect of law in one context, when the Commander himself has explicitly stated that it shall not have that effect in other closely related statutes.

Second, the Executive Order and Presidential directives related to the CUI/SSI designation is analogous to the statutory construction and legislative history arguments made throughout Respondent's Brief. The fact that this E.O., and all of the memoranda leading up to its issuance addressing CUI/SSI designation fail to affirmatively state that

CUI/SSI information is prohibited from disclosure by law or Executive Order begs the question: Why?

Following the same logic applied to legislative action by Congress, the Executive is presumed to know the extent and limits of his authority, and how to use it. As explained in the Respondent's Brief, an Executive Order is one of two methods Congress created to exempt disclosures of information from protection under the WPA. *See* 5 U.S.C. § 2302(b)(A). If the President, who as Commander in Chief has the Authority to do so, does not designate CUI/SSI as protected by Executive Order, it can be assumed that he did not intend to. The President easily could have included language that would have prohibited CUI/SSI from disclosure under the WPA in E.O. 13556, or any other Order, dating back to the creation of this designation in the aftermath of the September 11, 2001 attacks. No President has seen fit to do so.

In fact, if the Commander in Chief felt disclosing CUI/SSI information needed to be exempted from protection under the Whistleblower Protection Act, he has an even more appropriate E.O. with which to do it. E.O. 13526, "Classified National Security Information," issued on December 29, 2009, revises and replaces previous Orders dealing with national security information. If the Commander in Chief felt CUI/SSI information deserved an absolute bar against disclosure, he surely could have included it in E.O. 13526. But again, he did not. This indicates that the Department of Homeland Security and the Commanders in Chief actually disagree on the need to exempt CUI/SSI information from disclosure in the context of 5 U.S.C. § 2302(b)(8), the WPA. This Court should not, at the patently self-serving request of the Petitioner, circumvent the will of Congress and the two

Commanders in Chief who have served since this category of information was created to eviscerate the boundaries for disclosures protected under the WPA.

B. Even if CUI/SSI Regulations Barring Disclosure are Deemed to be Prohibitions "by Law" Under the WPA, They Lack the Specificity Required Under that Statute

If, as the Petitioner urges, this Court accepts the argument that the regulations promulgated by the Aviation Transportation Security Act qualify as "prohibitions by law," those regulations are so vague and confusing that they fail the statutory requirement that they be "specific." The Respondent eloquently argues this point in part "B" of the Argument section of its Brief. There is ample argument supporting this contention.

In *MacLean v. DHS,* 543 F.3d 1145 (9th Cir. 2008), the court held that the text message received by air marshal MacLean canceling all overnight flights qualified as SSI dispute the lack of markings. While the holding did not concern Mr. MacLean's employment rights, the court's qualifier was an indirect finding that the message lacked the specificity necessary to cancel WPA public free speech rights. The Court instructed:

> "MacLean may still contest his termination before the MSPB, where he may raise the Whistleblower Protection Act and contend that the lack of clarity of the TSA's 2003 'sensitive security information' regulations is evidence MacLean disseminated the text message under a good faith belief the

> information did not qualify as 'sensitive security information.'" *Id.*, at 1152.

The court would not have made that reference, if the boundaries for restricted speech were sufficiently specific and provided clear notice.

The Ninth Circuit's qualifier was necessary because it had ruled that SSI did not require markings.[3] For far more dangerous classified information, it is mandatory under the Intelligence Identities Protection Act to have specific markings, so an employee has clear notice of its restricted status. Since 1988, "unmarked but classified" information has been insufficient to cancel WPA public free speech rights. Under the appropriations "anti-gag statute" just codified in the Whistleblower Protection Enhancement Act, Pub. L. No. 101-12, 103 Stat., 16, it is illegal even to spend money trying to seek sanctions against a whistleblower for disclosing "unmarked but classified" material. (See "Anti-Gag statute," Pub.L. No. 109-115, § 820, 119 Stat. 2396, 2500-2501 (2005)). There is no national security basis, and it would be irrational if employees could be fired for disclosing unmarked SSI.

The source of clarity for ATSA transparency limits is its statutory language specifically overriding the FOIA. 49 U.S.C. § 114r. The statute does not contain any similar restriction for WPA disclosures, although the two are sister statutes. Clearly, Congress specifically chose not to limit the WPA through the aviation law. DHS argues that the overview

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[3] Although not at issue in this appeal, the Amicus disagrees with this holding. If employees are required to guess whether unmarked information is restricted, they will hesitate to make disclosures, especially where the liability for error could be the loss of livelihood.

language in section 114r has broad applicability. That is not the point, and begs the question of specificity. To prove specificity, DHS's argument depends on adding a new item, the WPA, to the restrictions listed in section 114r. The same statutory construction principles cited throughout the Respondent's Brief disqualify even this Court from adding a new item to a statute in this manner.

C. Government Employees Have The Freedom To Warn When The Employee Reasonably Believes There Is A Substantial And Specific Danger To Public Safety

MacLean exercised the freedom to warn to protect public safety and our homeland. His actions prevented the government from canceling all Federal Air Marshal (FAM) coverage, yet he was terminated three years later for making a disclosure to warn Congress and the public about the possible consequences of removing FAM protection on long distance flights—a decision based on saving money on overnight hotel stays, overtime, and travel allowances.

The Court held in *Lane v. Franks*, 134 S.Ct. 2369, 2380 (2014) that speech is entitled to First Amendment protections "if an employee speaks as a citizen on a matter of public concern" and that public concern outweighs the government's '"justification for treating the employee differently from any other member of the public' based on the government's needs as an employer." Citations omitted. The Court further "recognized that government employers often have legitimate 'interest[s] in the effective and efficient fulfillment of [their] responsibilities to the public,' including "'promot[ing] efficiency and integrity in the discharge of official duties,'" and "'maintain[ing] proper discipline in public service.'" *Id.*, at 2381. The Court also

cautioned, however, that "a stronger showing [of government interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern." *Id*. Citations omitted.

As noted, this principle—that federal employees should be protected against reprisal for lawful disclosure of information which the employee reasonably believes evidences a substantial and specific danger to public health or safety—is the primary rationale for the statutory protection afforded in the WPA. 5 U.S.C. § 2302(b)(8)(A). Additionally, the oath of office codified at 5 U.S.C. § 3331 requires that public servants "support and defend the Constitution of the United States against all enemies … and that [they] will well and faithfully discharge the duties of the office on which I am about to enter."

Those laws provide essential protections to government employees who are retaliated against for reporting flaws in national or homeland security, public health and safety, or waste, fraud and mismanagement of public funds. The government should protect those in government who honor their duties to serve and warn the public.

Unlike strict security for the terrorist briefings, MacLean received a text message without any warnings, restrictions, or markings that it contained classified or SSI. air marshal MacLean was deeply troubled about the consequences of abandoning defenses against terrorists during an emergency alert, and he was unwilling to give up so easily. He felt it was necessary to report his concerns to his superiors and the Inspector General. Only after being told that "nothing could be done" and to "just walk away", air

marshal Maclean decided to go public. Respondent's Brief at 11. Enough time had passed since air marshal MacLean had raised the issue internally and the threat of an attack was looming ever larger, so he decided to warn Congress by contacting a reporter known to cover air transportation safety issues on Capitol Hill in an effort to keep the flight cancelation plan from taking effect. The information he had been given by his supervisors was more than sufficient to form a reasonable belief that canceling FAM coverage during an anticipated terrorist hijacking was dangerous and jeopardized public health and safety.

The government's subsequent admission that terminating the program was a "mistake" adds validation to air marshal MacLean's actions. Respondent's Brief at 12. He did not force anything directly; it was the power of the truth. Air marshal MacLean disclosed that the government would be off duty during the terrorist attack. He made a difference, because the facts exposed an indefensible government action. He was exercising the freedom to warn of a substantial and specific danger to public health and safety, and threat to the national security of the United States.

The Court should find that air marshal Maclean acted in good faith and hold that public servants have a right to make a difference, without reprisal, through the First Amendment protection of speech and freedom to warn in cases involving imminent threats to public health and safety.

CONCLUSION

For the reasons stated above, as well as the arguments made and authorities cited throughout Respondent's Brief,

the Court should reject this attempt by Petitioner, the Department of Homeland Security to circumvent Congress and the President's established will, and affirm the Court of Appeals' judgment. Not to do so would eviscerate the WPA protections for conscientious federal employees who, at great peril to their own interests, speak out against waste, fraud, violations of law, rule or regulation, or as here, a substantial and specific threat to public health and safety.

Respectfully Submitted,

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