No. 13-894

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, PETITIONER

v.

ROBERT J. MACLEAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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The Federal Circuit recognized that respondent's public disclosure of particular passenger flights that would not be protected by federal air marshals "compromised flight safety," was a "threat to public safety" and "could have had catastrophic consequences." Pet. App. 8a. The Federal Circuit also recognized that Congress has mandated the promulgation of regulations that prohibit disclosures deemed "detrimental" to transportation security, *id.* at 11a (citation omitted); see 49 U.S.C. 114(r)(1)(C); that regulations implementing that congressional mandate expressly designated information about federal-air-marshal deployments as "Sensitive Security Information" (SSI) Pet. App. 6a, see 49 C.F.R. 1520.7(j) (2002); and that respondent's disclosure of such deployment information was accordingly unlawful, Pet. App. 5a-7a. The Federal Circuit nevertheless held that respond-

ent's disclosure was not "specifically prohibited by law." 5 U.S.C. 2302(b)(8)(A); see Pet. App. 10a-17a. Under that holding, neither respondent nor any other federal employee can be disciplined for publicly exposing vulnerabilities in transportation security, so long as the disclosure was motivated by "reasonabl[e]" (but not necessarily meritorious) disagreement with the government's decision to give higher priority to other security concerns. 5 U.S.C. 2302(b)(8)(A).

The Federal Circuit's decision is wrong, dangerous, and warrants this Court's immediate review. Although respondent characterizes the decision as "exceedingly narrow," Br. in Opp. 30, the decision will, if left undisturbed, embolden further disclosures of SSI and could put lives at risk. Respondent's merits argument largely repeats the Federal Circuit's errors, giving short shrift to Congress's express intent both to prohibit disclosure of SSI and to handle grievances about confidential matters through confidential channels. This case is a suitable—and, likely, the only foreseeable—vehicle for correcting the Federal Circuit's serious legal mistake and avoiding the potentially serious consequences. This Court should accordingly grant certiorari and reverse.

A. The Question Presented Is Exceptionally Important

As the petition explains (Pet. 22-26), this case presents a question of exceptional importance that this Court should promptly resolve. Respondent's suggestion (Br. in Opp. 30) that the decision below addresses only "an exceedingly narrow category of disclosures" fundamentally misunderstands the decision and the legal framework within which it operates. Under the Federal Circuit's interpretation of Section 2302(b)(8)(A), a federal employee will be immunized from *any* "per-

sonnel action" (not just "remov[al]," Br. in Opp. 30) in response to "*any* disclosure" of SSI (not just disclosures "to an appropriate person," *ibid.*), so long as the employee "*reasonably believes*" that the disclosure "evidences," for example, "a substantial and specific danger to public health or safety." 5 U.S.C. 2302(b)(8)(A) (emphasis added). For reasons explained in the petition (at 23-24), even that last requirement is no real "limit[]" (Br. in Opp. 30) in the context of SSI, because SSI by its nature involves public-safety matters; its content frequently reflects difficult choices about how best to allocate finite security resources; those difficult choices will often be subject to plausible objections; and employees will thus frequently have a basis for claiming to "reasonably believe[]" that disclosing SSI will be beneficial.

This Court, rather than the Federal Circuit, should decide the important question whether Congress has in fact invited federal employees to unilaterally expose security vulnerabilities publicly whenever their employing agency has allocated finite security resources in a manner different from what an individual employee might reasonably have preferred. Respondent asserts (Br. in Opp. 29) that because "the sky has not fallen" in the past, any suggestion that an employee will make dangerous disclosures in the future is "unfounded." But prior to the Federal Circuit's decision in this case, the SSI regulations were apparently understood to mean what they say and to prohibit disclosures that would "be detrimental to the security of transportation." 49 U.S.C. 114(r)(1)(C). Employees who had concerns about agency action involving SSI could raise those concerns to the Inspector General or the Special Counsel pursuant to 5 U.S.C. 2302(b)(8)(B),

thereby furthering *both* an interest in oversight of government operations *and* the interest in protecting sensitive security information. See Pet. 21-22. Now, however, employees have a green light to disregard the latter interest completely.[*]

Respondent's suggestion (Br. in Opp. 28-29), that the petition be denied due to the absence of a circuit conflict is misconceived. As the petition explains (at 24-26), no circuit conflict is likely to develop. The statutory provision giving courts outside the Federal Circuit jurisdiction over these sorts of cases will expire at the end of this year, Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, Tit. I, § 108, 126 Stat. 1469-1470; no cases are on track to be decided in that timeframe, Pet. 25; and even before the time window expires, employees can, and presumably would, appeal their cases to the Federal Circuit, *ibid.* Furthermore, as the petition additionally explains (at 25-26), and respondent nowhere refutes, another vehicle is unlikely to arise in *any* court, because in light of the Federal Circuit's decision, a federal supervisor would risk serious *personal* sanctions (including termination) if he ever disciplined an employee in circumstances that could lead to judicial review of the question presented here. Even this case itself may not provide another opportunity for

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[*] Another reason why the past is no predictor of the future is that Transportation Security Officers, who make up about 80% of the TSA's workforce, received statutory protection under Section 2302(b)(8) only in November 2012. See Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, Tit. I, § 109, 126 Stat. 1470. And it would take only one of the agency's roughly 60,000 employees to make a disclosure that could cause serious and irreparable harm.

the Court to address the question presented, depending on how the further proceedings contemplated by the Federal Circuit's decision unfold. See Br. in Opp. 30-31 & n.2. In any event, even if some future opportunity for review in this Court were assured, the continuing potential for a harmful disclosure in the interim and the inadequacy of later reversal of the Federal Circuit's decision to undo the consequences of such a disclosure counsel strongly in favor of immediate review.

B. The Federal Circuit's Decision Is Incorrect

On the merits, respondent cannot meaningfully dispute that (as two circuit courts have recognized) his disclosure of information about federal-air-marshal deployments was legally prohibited under the nondisclosure regime mandated by Congress. See Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101(e), 115 Stat. 603 (49 U.S.C. 40119); Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. XVI, § 1601(b), 116 Stat. 2312; 67 Fed. Reg. 8351 (Fed. 22, 2002); 49 C.F.R. 1520.7(j) (2002); Pet. App. 5a-9a; Pet. 2-7; see *MacLean* v. *Department of Homeland Sec.*, 543 F.3d 1145, 1149-1150 (9th Cir. 2008) (per curiam) (upholding TSA's determination that the disclosed information was SSI). The question in this case is whether that legal prohibition rendered respondent's disclosure "specifically prohibited by law" for purposes of Section 2302(b)(8)(A). For reasons explained in the petition (at 12-22), it did.

1. Respondent's contrary argument largely disregards the evident limits on the circumstances in which Congress wanted to encourage government employees to go to the media or other members of the public with reports of perceived government missteps. In enact-

ing Section 2302(b)(8), Congress balanced the utility of disclosures with the potential harm of exposing sensitive information to public view. Pet. 20-22. It crafted a scheme that encourages public disclosure of nonsensitive information that provides particular cause for concern, 5 U.S.C. 2302(b)(8)(A), but maintains the confidentiality of sensitive information by requiring employees to raise any concerns involving such information through established intragovernmental channels, 5 U.S.C. 2302(b)(8)(B). Respondent's focus (Br. in Opp. 20) on the asserted "central purpose" of Section 2302(b)(8) to encourage public reporting by government employees disregards the principle that "[n]o legislation pursues its purposes at all costs." *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990) (citation omitted). "Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Ibid.* (citation omitted).

Respondent, and the Federal Circuit, would frustrate Congress's intent in precisely that way by reading the phrase "by law" so narrowly as to exclude nondisclosure regulations enacted pursuant to an express congressional directive that such regulations "shall" be prescribed. Respondent correctly acknowledges (Br. in Opp. 22-23) that, as this Court recognized in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), a "clear showing of * * * legislative intent" is required to overcome the presumption that the term "by law" includes "properly promulgated, substantive

agency regulations." *Id.* at 295-296. Contrary to respondent's suggestion (Br. in Opp. 19-23), Congress's separate use of the phrase "*any violation of any* law, rule, or regulation," 5 U.S.C. 2302(b)(8)(A) (emphasis added), does not clearly show that it intended to depart from the "traditional understanding," *Chrysler Corp.*, 441 U.S. at 296, of the syntactically different phrase "*by* law," 5 U.S.C. 2302(b)(8)(A) (emphasis added). And even assuming that Congress intended the phrase "by law" to have an atypically narrow scope that would exclude *some* regulations, nothing in the text or legislative history of Section 2302(b)(8)(A) shows an intent by Congress to exclude nondisclosure regulations that Congress *itself* directly instructed an agency to promulgate. The legislative history of Section 2302(b)(8)(A) reflects a concern that agencies not circumvent that provision by promulgating "*internal procedural* regulations" that would prohibit disclosure of potentially embarrassing information. S. Rep. No. 969, 95th Cong., 2d Sess. 21 (1978) (Senate Report) (emphasis added); see Pet. 15. It contains no indication of any concern about agencies' promulgating regulations that prohibit disclosure of sensitive security information when Congress has expressly directed the agency to do so.

2. Even assuming the term "law" excludes the SSI regulations, 49 U.S.C. 114(r) itself "specifically prohibit[s]" respondent's disclosure. That statute imposes upon the TSA a mandatory duty, providing that TSA "shall prescribe regulations prohibiting" the "disclosure of information obtained or developed" in carrying out certain transportation-security functions, if the agency "decides" that "disclosing the information would (A) be an unwarranted invasion of per-

sonal privacy; (B) reveal a trade secret or privileged or confidential commercial or financial information; or (C) be detrimental to the security of transportation." 49 U.S.C. 114(r)(1). Respondent, like the court of appeals, takes the view (Br. in Opp. 23-27) that Section 114(r) vests too much discretion in the agency to itself be construed as "specifically prohibit[ing]" the disclosure of SSI. For two independent reasons, that view is incorrect.

First, as the petition explains (at 17-18), when Congress enacted Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso, Congress was aware of the broad construction this Court had given to a similar phrase, "specifically exempted from disclosure by statute." In particular, this Court had construed information to be "specifically exempted from disclosure by statute" even when a statute merely vested an agency with discretion to decide whether the information should be kept confidential. See *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975). Congress nevertheless decided to include the even broader phrase "specifically prohibited by law" in Section 2302(b)(8)(A), strongly indicating that a statute like Section 114(r) would be covered, even if it relies on the TSA's expertise to implement the details of the SSI nondisclosure scheme. Contrary to respondent's characterization (Br. in Opp. 26-27), this point is neither "complicated" nor a "legislative-history argument that turns on a completely different statutory provision." It is, instead, a straightforward application of the cardinal principle that Congress is presumed to incorporate preexisting interpretations of statutory language that it adopts. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006).

Second, Section 114(r) would still be covered even on respondent's much more cramped reading of the "specifically prohibited by law" proviso. Citing a Senate Report accompanying a version of Section 2302(b)(8) that Congress did *not* adopt, Pet. 19, respondent suggests that the proviso applies only to a statute that "'requires that matters be withheld from the public in such a manner as to leave no discretion of the issue,' 'establishes particular criteria for withholding,' *or* 'refers to particular types of matters to be withheld.'" Senate Report 21 (emphasis added) (quoted in Br. in Opp. 24). Those are the same conditions under which a statute "specifically exempt[s]" information "from disclosure" for purposes of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(3). This Court has recognized that a statute similar to Section 114(r)—namely, Section 102(d)(3) of the National Security Act of 1947, which stated that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure," 50 U.S.C. 403(d)(3) (1976)—satisfies the "specifically exempted from disclosure by statute" proviso in FOIA. *CIA* v. *Sims*, 471 U.S. 159, 167-168 (1985). And the Senate Report on which respondent relies expressly anticipated that Section 102(d)(3) would also satisfy the Senate's proposed version of Section 2302(b)(8)(A)'s proviso. Senate Report 21-22.

Respondent does not even address the comparison to Section 102(d)(3), let alone offer a sound interpretation of the "specifically prohibited by law" proviso that would include Section 102(d)(3) while excluding Section 114(r). Respondent briefly suggests (Br. in Opp. 27) that Section 114(r) should be treated differently under the FOIA proviso than under the Section

2302(b)(8)(A) proviso, because Section 114(r)'s preamble expressly mentions FOIA but not Section 2302(b)(8)(A). That suggestion is unsound. As respondent himself appears to recognize (*id.* at 6-8, 30), Section 114(r)'s preamble, which clarifies that the TSA shall promulgate nondisclosure regulations "[n]otwithstanding section 552 of title 5," does not limit the effect of those regulations to the context of FOIA requests, but instead is consistent with the promulgation of regulations that prohibit unauthorized disclosures more generally. See Pet. App. 5a-9a; Pet. 2-7; *MacLean*, 543 F.3d at 1149-1150. And nothing would suggest that a nondisclosure statute must expressly mention Section 2302(b)(8)(A) in order to qualify as "law" for purposes of that provision's "specifically prohibited by law" proviso.

3. Respondent errs in contending (Br. in Opp. 14-18) that the government has waived its argument that regulations enacted pursuant to Section 114(r) constitute "law" for purposes of the Section 2302(b)(8)(A) proviso. As a threshold matter, respondent is wrong to the extent he suggests that waiver concerns should lead this Court to deny certiorari even if the decision below decided an exceptionally important national-security issue incorrectly. Any asserted deficiencies in the government's presentation below neither prejudiced respondent's own ability to present his view of the statute nor affected the court of appeals' decision, which expressly accepted that "[r]egulations promulgated pursuant to Congress's express instructions would qualify as specific legal prohibitions." Pet. App. 15a. This Court can and does grant certiorari to review questions "pressed *or* passed upon below," *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (emphasis

added), and it also generally permits a petitioner to raise new arguments in support of an issue that was litigated in the lower court, see *Yee* v. *City of Escondido*, 503 U.S. 519, 534-535 (1992). It would, moreover, be particularly inadvisable to deny further review in this case on the basis of respondent's asserted waiver concerns when it is unclear when, how, or whether the Court will again have the opportunity to resolve the extraordinarily important question that this case presents. See pp. 4-5, *supra*.

In any event, although the statements highlighted by respondent illustrate that the government could have been clearer in its presentation to the Federal Circuit, they fall short of showing waiver. As the petition acknowledged (at 15-16), the government's argument in the court of appeals focused primarily on the contention that the statute itself is the relevant "law" for Section 2302(b)(8)(A) purposes. But the government also argued that "when an agency has adopted non-disclosure regulations pursuant to a specific Congressional mandate to do so, the agency may discipline the employee who violates that non-disclosure regulation." Gov't C.A. Br. 48; see Pet. 16 (citing similar statements in the government's brief). And oral argument in the Federal Circuit included the following exchange:

> COURT: Is it the government's position that "specifically prohibited by law" includes rules and regulations?
>
> GOVERNMENT ATTORNEY: Generally, no.
>
> COURT: So what is the dividing line? What is it, certain types of rules and regulations but not others?

> GOVERNMENT ATTORNEY: *It's only rules and regulations if a statute says that an agency has to pass that rule or regulation.* So the "specifically prohibited by law" is statute, really, it's saying specifically prohibited by a statute that's saying nondisclosure.

Oral Argument at 25:17 to 25:49, 714 F.3d 1301 (No. 2011-3231) (emphasis added).

The government is making that same argument now. See Pet. 12-16, pp. 5-7, *supra*. The government's position is, and has always been, that a scheme in which Congress directs an agency to promulgate nondisclosure regulations constitutes "law" for purposes of the Section 2302(b)(8)(A) proviso. The argument that the regulations are the relevant "law" because the statute mandates them and the argument that the statute is the relevant "law" because it directs the promulgation of the regulations are simply flip sides of the same coin. There is no sound reason why the Court cannot consider in this case both of those arguments—each of which shows that the Federal Circuit made a serious error on a question of exceptional importance.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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