No. 16-301

In the Supreme Court of the United States

TIMOTHY ALLEN RAINEY, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether, notwithstanding 5 U.S.C. 2302(b)'s repeated use of the phrase "law, rule, or regulation," Section 2302(b)(9)(D)'s standalone reference to "a law" encompasses a regulation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 824 F.3d 1359. The final decision of the Merit Systems Protection Board (Pet. App. 14-21) is reported at 122 M.S.P.B. 592. The initial decision of an administrative judge (Pet. App. 22-29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 2016. The petition for a writ of certiorari was filed on September 2, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an employee of the Department of State who previously served as a contracting officer representative. Pet. App. 2. While petitioner had that role, the Department reprimanded him for, *inter alia*,

creating a climate of fear among various contract employees by threatening them with termination. Dep't of State C.A. Br. 3. Petitioner ultimately agreed to remedial measures under which he would have to consult with a supervisor before removing any contract personnel. *Id.* at 3-4.

Very shortly thereafter, petitioner notified his supervisor of his involvement in an altercation with a contract employee. Dep't of State C.A. Br. 4. Petitioner told the supervisor that the contractor wanted to fire that employee and that petitioner wanted to concur in the removal. *Ibid.* The supervisor asked that any action be postponed pending further discussion. *Ibid.* Two days later, however, petitioner informed the supervisor that the contractor had already dismissed the employee. *Ibid.* Based on that incident, the supervisor relieved petitioner of his responsibilities as a contracting officer representative, although petitioner's other duties remained unchanged. *Ibid.*

2. Petitioner subsequently filed a complaint with the Office of Special Counsel, alleging a violation of 5 U.S.C. 2302(b)(9)(D), which provides that an agency may not "take * * * any personnel action against any employee * * * for refusing to obey an order that would require the individual to violate a law." *Ibid.* (footnote omitted); see Pet. App. 2-3. According to petitioner, his duties had been reduced because he had refused his supervisor's order to direct a contractor to rehire a terminated subcontractor. *Id.* at 2. Petitioner contends that giving such an instruction to a contractor would violate the Federal Acquisition Regulation, 48 C.F.R. 1.602-2(d), under which a contracting officer representative "has no authority" to change the terms of the contract or to "direct the

contractor or its subcontractors to operate in conflict with the contract terms and conditions." 48 C.F.R. 1.602-2(d)(5); see Pet. App. 2-3. Petitioner also cited materials from a training course that cautioned contracting officer representatives not to become involved in contractors' personnel decisions. See Dep't of State C.A. Br. 7. The Office of Special Counsel closed his case without granting relief. Pet. App. 3.

Petitioner then sought relief from the Merit Systems Protection Board, "an independent Government agency that operates like a court," 5 C.F.R. 1200.1, and that has authority to take "corrective action," 5 U.S.C. 1221(a), when an employee can show a violation of Section 2302(b)(9)(D). The Board ultimately determined that petitioner had not properly alleged a violation of Section 2302(b)(9)(D). Pet. App. 3-4, 14-21. The Board observed that this Court's recent decision in *Department of Homeland Security* v. *MacLean*, 135 S. Ct. 913 (2015), held that the term "law" in a nearby subparagraph—Section 2302(b)(8)(A)—refers only to statutes, and "exclude[s] rules and regulations." *Id.* at 921; see Pet. App. 16-17. The Board concluded, "[i]n light of *MacLean*," that Section 2302(b)(9)(D)'s reference to orders requiring violation of "a law" referred only to orders requiring violation of a statute. Pet. App. 19; see *id.* at 16-19.

3. Petitioner sought judicial review, and the court of appeals affirmed. Pet. App. 1-13. The court found it "difficult to reconcile the Supreme Court's analysis in the *MacLean* case with [petitioner's] position in this one." *Id.* at 6. The court observed, in particular, that *MacLean* had placed "great weight" on the contrast between the phrase "any law, rule, or regulation" and the term "law" in isolation, in concluding that the

latter does not encompass regulations. *Ibid.* The court reasoned that the "same analysis applies here," as the two phrases are juxtaposed not only in Section 2302(b)(8), which was at issue in *MacLean*, but also in Section 2302(b)(9). *Id.* at 6-7.

The court of appeals additionally observed that departing from *MacLean*'s interpretation of "law" in Section 2302(b)(8)(A) to give a much broader construction to the term "a law" in Section 2302(b)(9)(D) would run counter to the "principle * * * that normally 'identical words used in different parts of the same act are intended to have the same meaning.'" Pet. App. 8 (quoting, *inter alia*, *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 342 (1994)). The court viewed deviation from that principle to be particularly inappropriate in this case, because "[w]hile the term 'law' might be deemed, in some circumstances, to refer to any source of legal authority, including rules, regulations, or court orders, the term 'a law' is less readily construed in that manner." *Id.* at 10. The court further reasoned that limiting Section 2302(b)(9)(D)'s protections for employees who disobey orders to circumstances involving orders that would require violation of a statute was consistent with legislative history illustrating Congress's efforts "to achieve a balance between the right of American citizens to a law-abiding government and the desire of management to prevent insubordination." *Id.* at 12 (quoting 134 Cong. Rec. 27,855 (1988)).

ARGUMENT

Petitioner renews (Pet. 9-32) his contention that the term "a law," as used in 5 U.S.C. 2302(b)(9)(D), encompasses every source of legal authority, including rules and regulations. The court of appeals correctly

rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Section 2302(b)(9)(D) protects federal employees from retaliation for disobeying orders that would require violating "a law." 5 U.S.C. 2302(b)(9)(D). Petitioner's contention that the term "a law" includes regulations like the Federal Acquisition Regulation cannot be squared with *Department of Homeland Security* v. *MacLean*, 135 S. Ct. 913 (2015).

a. In *MacLean*, this Court considered the scope of the term "law" in 5 U.S.C. 2302(b)(8)(A), a neighboring provision of the same statute at issue here. 135 S. Ct. at 916. Section 2302(b)(8)(A) provides protections for federal employees who act as whistleblowers, but eliminates those protections when the whistleblowing takes the form of a disclosure "specifically prohibited by law." The Court held in *MacLean* that regulations "do not qualify as 'law'" in that context. 135 S. Ct. at 921. The Court observed that "[t]hroughout Section 2302, Congress repeatedly used the phrase 'law, rule, or regulation.'" *Id.* at 919. Applying the interpretive canon that "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another," the Court reasoned that "Congress's choice" to employ narrower language ("by law") in Section 2302(b)(8)(A) "suggests that Congress meant to exclude rules and regulations." *Ibid.*

As the court of appeals correctly recognized (Pet. App. 4-13), the result and reasoning of *MacLean* control this case. First, "the normal rule of statutory interpretation" is that "identical words used in different parts of the same statute are generally presumed

to have the same meaning." *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005). It would be highly unusual for Congress to use the term "law" in Section 2302(b)(8)(A) to refer only to statutes, as *MacLean* held, and then to use the term "a law" in the next statutory paragraph to refer to any source of legal authority, including regulations, as petitioner contends. Deviating from *MacLean*'s interpretation would be particularly unsound because, as the court of appeals observed, the phraseology of Section 2302(b)(9)(D) ("a law") is, if anything, *narrower* than the phraseology of Section 2302(b)(8)(A) ("by law"). See Pet. App. 10 ("While the term 'law' might be deemed, in some circumstances, to refer to any source of legal authority, including rules, regulations, or court orders, the term 'a law' is less readily construed in that manner.").

Second, *MacLean*'s textual analysis of Section 2302(b)(8)(A) applies with similar force to Section 2302(b)(9)(D). Both provisions appear in Section 2302, which, as *MacLean* observed, "use[s] the broader phrase 'law, rule, or regulation' repeatedly—nine times." 135 S. Ct. at 919. And in both provisions, that broader phrase appears "in close proximity," *ibid.*, to the disputed term. The Court in *MacLean* specifically noted that the phrase "law, rule, or regulation" appears in Section 2302(b)(9) as well as Section 2302(b)(8), observing that Section 2302(b)(9)(A) prohibits an agency from retaliating against an employee for "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation." *Ibid.* (quoting 5 U.S.C. 2302(b)(9)(A)). Accordingly, here, as in *MacLean*, "Congress's choice to use the narrower term 'law' seem[s] quite deliberate." *Ibid.*

b. Petitioner's arguments for interpreting the reference to "a law" in Section 2302(b)(9)(D) more expansively than the reference to "law" in Section 2302(b)(8)(A) are misconceived.

Some of petitioner's arguments—*e.g.*, that "law" is a generic term (Pet. 9-11), or that regulations have "the force and effect of law" (Pet. 20 (quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295-296 (1979)))—were expressly considered and rejected in *MacLean*. See 135 S. Ct. at 920-921. Other arguments advanced by petitioner—*e.g.*, attempts to draw inferences from Section 2302(b)(10) or (11) (Pet. 12-13), or suggestions that alternatives to the word "law" would have been unavailing (Pet. 16-17)—imply that *MacLean* was wrongly decided.

Petitioner suggests (Pet. 22-23) that *MacLean*'s textual reasoning can be distinguished on the ground that *MacLean* addressed a circumstance in which the terms "law" and "law, rule, or regulation" appeared not just in the same statutory *paragraph*, as is the case here, but in the same statutory *sub*paragraph. But petitioner provides no reason to believe that terminological juxtaposition within a single statutory paragraph fails to qualify as sufficiently "close proximity," *MacLean*, 135 S. Ct. at 919, to give rise to an inference that the distinction was deliberate, see *ibid.* To the contrary, *MacLean* itself cited a decision, *Department of the Treasury, IRS* v. *Federal Labor Relations Authority*, 494 U.S. 922 (1990), that drew such an inference from contrasting phraseology in two different *sections* of a statute (5 U.S.C. 7103(a)(9)(c)(ii) and 7106(a)(2)). See *MacLean*, 135 S. Ct. at 920; *Department of the Treasury*, 494 U.S. at 931-932. The Court there "held that a statute that referred to 'laws'

in one section and 'law, rule, or regulation' in another 'cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places.'" *MacLean*, 135 S. Ct. at 920 (quoting *Department of the Treasury*, 494 U.S. at 932). Here, as in *MacLean*, the "inference is even more compelling," *ibid.*, in light of the terms' proximity, as well as the "repeated[]" recurrence overall of the phrase "'law, rule, or regulation'" in "Section 2302," in which both Section 2302(b)(8)(A) and (9)(D) appear, *id.* at 919.

Petitioner also notes (Pet. 22-23) that the provision in *MacLean*, unlike the provision here, specifically referenced "Executive order[s]." But the textual distinction between "law" and "Executive order" simply reinforced the narrow definition of "law" at which the Court in *MacLean* had already arrived. See 135 S. Ct. at 920 (noting, near the end of the Court's discussion of the issue, that "[a]nother part of the statutory text points the same way"). In any event, petitioner provides no sound reason why any inferences drawn from Congress's explicit reference to executive orders should be limited to Section 2302(b)(8), and would not also bear upon the proper interpretation of Section 2302(b)(9). See *id.* at 919-920 (relying on other portions of Section 2302 to interpret Section 2302(b)(8)(A)). Petitioner's contention (Pet. 11-12) that Section 2302(b)(9) is special because (in his view) it consistently uses the term "law" in a generic fashion relies on question-begging assertions about the scope of various terms in Section 2302(b)(9) and ignores that Section 2302(b)(9) itself contains the phrase "law, rule, or regulation."

Finally, petitioner contends (Pet. 23-32) that that this case can be distinguished from *MacLean* because

a sweeping interpretation of "a law" in the context of Section 2302(b)(9)(D) would further certain employee-protective policy goals. See *MacLean*, 135 S. Ct. at 920 (noting that "a broad interpretation of the word 'law' could defeat the purpose of the whistleblower statute"). But "no legislation pursues its purposes at all costs," *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam), and petitioner provides no meaningful response to the court of appeals' determination that the limited scope of Section 2302(b)(9)(D) can be viewed as striking a balance "between the right of American citizens to a law-abiding government and the desire of management to prevent insubordination." Pet. App. 12 (quoting 134 Cong. Rec. at 27,855).

2. Petitioner acknowledges (Pet. 33) that no disagreement exists among the courts of appeals on the question presented. Petitioner wrongly suggests (*ibid.*), however, that "[t]he potential of circuit conflict in this matter is minimal." Although the Federal Circuit may be particularly influential in this area, Congress has temporarily expanded jurisdiction over appeals in cases like this to include the regional circuits as well. See Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, § 108(a), 126 Stat. 1469; All Circuit Review Extension Act, Pub. L. No. 113-170, 128 Stat. 1894 (2014) (5 U.S.C. 7703(b)(1)(B)). Congress intended this expanded jurisdiction "to encourage diverse appellate review—which leads to circuit splits (facilitating Supreme Court review)." *Aviles* v. *Merit Sys. Protection Bd.*, 799 F.3d 457, 460 (5th Cir. 2015).

Furthermore, this particular case would be an unsuitable vehicle for further review because it is far

from clear that the question presented would be outcome-determinative. Petitioner has never clarified precisely how following the order he allegedly received, to direct a contractor to rehire an employee, would actually have required him to violate a regulation. The regulation cited by petitioner states only that a contracting officer representative "has no authority" to change the terms of the contract, or to "direct the contractor or its subcontractors to operate in conflict with the contract terms and conditions." 48 C.F.R. 1.602-2(d)(5); see Dep't of State C.A. Br. 7; see also Pet. C.A. Br. 4-5, 34-35. Even assuming petitioner was trained not to get involved in contractors' personnel matters, see Dep't of State C.A. Br. 7, an admonishment in the context of training would not constitute "a law" even under petitioner's expansive reading of that term.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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