No. 13-894

In the Supreme Court of the United States

DEPARTMENT OF HOMELAND SECURITY, PETITIONER

v.

ROBERT J. MACLEAN

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

REPLY BRIEF FOR PETITIONER

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In the course of protecting the Nation's transportation network, the Transportation Security Administration (TSA) "obtain[s] or develop[s]" a great deal of information, the disclosure of which would "be detrimental to the security of transportation," 49 U.S.C. 114(r)(1), and which cannot practicably be classified. Such "sensitive security information" (SSI) includes information about the deployment of federal air marshals, the procedures for screening passengers and baggage, potential transportation-related vulnerabilities, and a host of other security-related matters. See 49 C.F.R. Pts. 15, 1520. Recognizing the disastrous consequences that could result if such information were publicized and exploited, Congress has mandated that the TSA promulgate regulations prohibiting its disclosure. 49 U.S.C. 114(r)(1).

Under respondent's construction of 5 U.S.C. 2302(b)(8)(A) and 49 U.S.C. 114(r)(1), however, when Congress ordered the Under Secretary at the head of the TSA to prevent the disclosure of SSI, Congress at the same time left with each of TSA's 60,000 employees the authority to unilaterally expose that very same information about the actual and perceived vulnerabilities in our national security system. Respondent's brief fails entirely to confront the considerable dangers his position invites.

As respondent interprets Section 2302(b)(8)(A), an employee would potentially enjoy immunity for disclosing SSI whenever his personal opinion on a debatable security issue differs from the judgment reached by the expert agency officials entrusted by Congress to decide that issue. The employee may have no knowledge of the full range of threats that the agency must address; no knowledge of the other measures the agency has taken to address the deficiency the employee perceives; no knowledge of the costs of alternative measures or the resource constraints that Congress may have imposed; and no knowledge of how our adversaries might use the information they gain from the disclosure to harm the safety and security of the United States. And even an employee with full knowledge may simply reach a different judgment from that reached by the expert agency.

Having made his own individual risk assessment and cost-benefit analysis, the employee could effectively derail any TSA plan he disfavors by disseminating the plan around the world on the Internet or through traditional media. And the TSA would be left to clean up the mess, scrambling to develop and im-

plement a new plan—likely one previously considered and rejected as suboptimal—while hoping that now-exposed vulnerabilities remain unexploited in the interim.

The Congress that ordered the Under Secretary to prevent disclosure of SSI could not have intended the TSA's expert decisions on disclosure and a wide range of critical security matters to be subject to veto by any individual federal employee, regardless of how incompletely informed (though perhaps well-intentioned) that employee may be. Even less could it have intended that such a veto come in the form of a publicly disclosed roadmap of how to circumvent existing security measures.

Section 2302(b)(8)(A) does not create such a massive loophole in the TSA's ability to protect security by keeping SSI confidential. The text makes clear that Section 2302(b)(8)(A)'s protections do not apply to disclosures that are "specifically prohibited by law." 5 U.S.C. 2302(b)(8)(A). That proviso comfortably encompasses the congressionally mandated scheme under which the disclosure of SSI is prohibited. And although respondent seeks to bolster his statutory argument by invoking the specter of an agency using its regulatory authority "to choke off the very safety valve that [Section 2302(b)(8)(A)] seek[s] to keep open" (Br. 2), that concern has no force when, as here, Congress *itself* orders an agency to promulgate regulations barring disclosure of specific information.

A. Disclosure Of SSI Is "Specifically Prohibited By Law" Under The TSA's Regulations

Respondent does not dispute that the natural definition of the phrase "by law" includes regulations like the TSA's legislatively mandated SSI regulations.

See, *e.g.*, Br. 27. He also does not dispute that he bears the burden to provide a "clear showing" of "legislative intent" that the term "by law," which would presumptively include regulations with the force and effect of law, in fact excludes such regulations. *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 295-296 (1979); see Resp. Br. 27. He has not carried that burden.

1. Although respondent acknowledges that the phrase "by law" would presumptively include the SSI regulations, he asserts (Br. 19-20, 30-31) that the phrase cannot have that meaning in Section 2302(b)(8)(A), because other portions of Section 2302(b) refer to "law, rule, or regulation." That argument fails. As the government's opening brief explains (at 22-24), the juxtaposition of the two phrases indicates at most that the phrase "by law" excludes *some* regulations, but does not suggest that it excludes *all* regulations or that it excludes the particular congressionally mandated regulations at issue here.

Respondent's contention that the terms "law" and "regulation" must be entirely distinct is unsound. The words describe inherently overlapping categories. See *Chrysler Corp.*, 441 U.S. at 295-296. Some things are both "regulations" and "law" (*e.g.*, regulations with the force and effect of law); some are "law" but not "regulations" (*e.g.*, statutes); and some are "regulations" but not "law" (*e.g.*, internal procedural regulations without legally binding force). When categories overlap, a reference to one without the other does not naturally exclude the area of overlap. A reference to "movies and documentaries," for example, would not imply that a later reference to "movies" excludes documentaries that are movies, as opposed to merely excluding documentaries that are not movies (such as

documentary television programs). By the same token, a reference to "law * * * or regulation" would not imply that a later reference to "law" excludes all regulations, as opposed to merely excluding regulations lacking the force of law (such as internal procedural regulations). Indeed, another subsection of 5 U.S.C. 2302, added in 1998, explicitly categorizes certain "regulation[s]" as "provision[s] of law." 5 U.S.C. 2302(e)(1)(H); see Veterans Employment Opportunities Act of 1998, Pub L. No. 105-339, § 6(b), 112 Stat. 3187-3188.

This Court recognized as much in *Department of the Treasury* v. *Federal Labor Relations Authority*, 494 U.S. 922 (1990). The Court there noted that "'laws'" could not "mean the same thing" as "'any law, rule, or regulation'" in a statute in which both appeared. *Id.* at 931-932. It observed, however, that the term "'laws'" could "extend[] to *some*, but not all, rules and regulations." *Id.* at 932-933 (emphasis added). Respondent dismisses the significance of the Court's observation, noting that the full phrase at issue in that case was not just "laws" but "applicable laws." Br. 30. Respondent offers no explanation, however, for why the presence of a limiting qualifier ("applicable") would give the term "laws" a broader meaning than it would have in isolation. And this case involves not the limited phrase "applicable laws," or even the phrase "by any law," but the common and expansive phrase "by law," which most naturally refers to a broad body of legal authority, including regulations that Congress has required an agency to promulgate.

2. Respondent's reliance (Br. 20-22, 31-32) on the "[s]tructure" of Section 2302(b)(8) is unavailing. Re-

spondent points out (Br. 20-22) that Section 2302(b)(8)(A) explicitly declares its protections inapplicable both to disclosures "specifically prohibited by law" and to disclosures of information "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." As the government's opening brief explains (at 25), Congress's clarification about Section 2302(b)(8)(A)'s applicability to information covered by certain Executive Orders does not give rise to any inference that the phrase "by law" excludes all regulations, including regulations like those at issue here.

The SSI regulations are not only authorized, but mandated, by Congress. 49 U.S.C. 114(r)(1). By contrast, the Executive Orders referenced in Section 2302(b)(8)(A), which govern classified information, flow from the President's own constitutional responsibility to protect national security and thus "exist[] quite apart from any explicit congressional grant" of authority. *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988). Construing the phrase "'authorized by law'" in a disclosure-related statute in *Chrysler Corp.* v. *Brown*, *supra*, this Court distinguished between authorization "rooted in a grant of * * * power by the Congress," which would qualify as authorization "by law," and authorization rooted in inherent executive authority, which would not. 441 U.S. 302; see *id.* at 302-308. Had Section 2302(b)(8)(A) included only the "specifically prohibited by law" proviso, and not expressly addressed orders issued pursuant to the President's inherent classification authority, the provision might have been construed as a congressional effort to supersede those orders. The additional language clarifying Congress's intent to avoid

such separation-of-powers concerns casts no doubt on the natural reading of the phrase "by law" to include legislatively mandated regulations.

3. Respondent fails to locate a "clear showing" in the legislative history of Section 2302(b)(8)(A) that the phrase "by law" excludes all regulations. See Gov't Br. 25-28. He contends that Congress necessarily intended the phrase "by law" to be narrower than the phrase "by law, rule or regulation" because Congress intentionally chose the former over the latter. Resp. Br. 24-25. But for reasons explained above, that choice does not show that the phrase "by law" excludes *all* regulations.

The interpretive principle on which respondent relies—that "Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language," Br. 25 (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987))—supports the government's position, not respondent's. As respondent acknowledges (Br. 34), Congress considered, but did not enact, language that would have limited the Section 2302(b)(8)(A) proviso to disclosures "prohibited by statute." See Gov't Br. 25-26 (emphasis omitted).

Respondent primarily dismisses (Br. 35) the change as merely "stylistic." Focusing on language in the Conference Report stating that the phrase by law refers "to statutory law and court interpretations of those statutes," H.R. Conf. Rep. No. 1717, 95th Cong., 2d. Sess. 130 (1978) (Conference Report), respondent alternatively posits (Br. 35) that Congress made the change simply to clarify that judicial statutory-interpretation decisions would be covered. But it is implausible that any agency or court would have con-

strued the phrase "prohibited by statute" *not* to encompass the statutory interpretations of this Court or other courts.

Accordingly, the better explanation for the change from "statute" to "law" is that Congress's conception of "statutory law" went beyond the four corners of a statute and included, at the very least, regulations that a statute requires to be promulgated. Nothing in the legislative history shows that Congress had any concern about a proviso broad enough to encompass such regulations. It instead simply reflects concern that the proviso not allow unilateral "*agency* rules and regulations," Conference Report 130 (emphasis added), or "*internal procedural* regulations," S. Rep. No. 969, 95th Cong., 2d Sess. 21 (1978) (Senate Report) (emphasis added), through which agencies on their own might effectively nullify the protections that Section 2302(b)(8)(A) provides. See Gov't Br. 25-27.

The 1978 Congress's decision to use the word "law" in the proviso cannot be overridden by legislative materials drawn from *later* Congresses that use the word "statute" instead. See Resp. Br. 25-26. "Post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz* v. *Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011). Nor can Congress be understood to have acquiesced to a rewriting of the statutory language by the Merit Systems Protection Board (MSPB) in *Kent* v. *GSA*, 56 M.S.P.R. 536, 542-543 (1993). See Resp. Br. 26-27. Respondent provides no evidence that Congress was actually aware of *Kent*; the regulation at issue in *Kent* was not promulgated pursuant to a statute that expressly contemplated nondisclosure rules (see 56 M.S.P.R. at 542; 40 U.S.C. 486(c) (1994));

and it is far from clear that Congress would have viewed *Kent* to apply in that situation, see Pet. App. 150a-152a (administrative judge's conclusion that *Kent* was not controlling here). In any event, any assumption that Congress invariably responds to MSPB decisions on this issue is belied by the legislative inaction following the MSPB's decisions in this case in 2009 (Pet. App. 128a-139a) and 2011 (*id.* at 30a-37a), both of which held that a disclosure of SSI is "specifically prohibited by law."

4. Respondent's arguments (Br. 22-24, 33-34) about the "[p]urpose" of Section 2302(b)(8)(A) are question-begging. Everyone agrees that Section 2302(b)(8)(A) was enacted to encourage employees to come forward with information about certain types of undesirable government activity. See, *e.g.*, Gov't Br. 35. Everyone also agrees that the final wording of the "specifically prohibited by law" proviso reflects some degree of concern that agencies would enact nondisclosure regulations that would preclude the sorts of public disclosures that Section 2302(b)(8)(A) encourages. *Id.* at 26-27. But because everyone further agrees that "no legislation pursues its purposes at all costs," Resp. Br. 23 (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam)), those general principles do not counsel in favor of respondent's cramped view of the term "by law" as excluding *all* regulations. Any congressional concern that agencies would abuse their rulemaking authority to prevent disclosure by whistleblowers is beside the point when Congress *itself* has ordered the agency to promulgate the nondisclosure regulations.

Respondent does not dispute that on his reading of Section 2302(b)(8)(A), even if a statute explicitly di-

rected the TSA to "promulgate a regulation barring the disclosure of air-marshal-deployment information," a disclosure in violation of such a regulation would not be prohibited "by law." Gov't Br. 24; see Resp. Br. 33. He asserts (*ibid.*) that this approach presents no "practical problem," because Congress could simply rewrite the nondisclosure statute. The question, however, is not whether Congress could, if necessary, repair the damage done by respondent's counterintuitive interpretation of the term "by law"; the question is whether that interpretation is correct. And respondent provides no reason why Congress would have intended (or thought) that a disclosure barred by a congressionally mandated regulation would be *permitted* "by law."

B. Disclosure Of SSI Is "Specifically Prohibited By Law" Under Section 114(r)(1)

Even if respondent had made a clear showing that the phrase "by law" excludes all regulations, his disclosure would nevertheless have been "specifically prohibited by law" under 49 U.S.C. 114(r)(1) itself. See Gov't Br. 28-34.

1. As the government's opening brief explains (at 28-33), the result in this case follows directly from this Court's decision in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975). *Robertson* addressed the scope of Exemption 3 of the Freedom of Information Act (FOIA), which allowed agencies, in responding to public requests for information, to withhold material "specifically exempted from disclosure by statute." *Id.* at 257 (quoting 5 U.S.C. 552(b)(3) (1970)). The Court held that the exemption applied where a statute merely gave a federal agency discretion to make a case-specific "judgment" about whether competing

interests favored disclosure. *Id.* at 258 n.4 (quoting 49 U.S.C. 1504 (1970)); see *id.* at 256-267. Respondent does not dispute that if Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso were interpreted in the same way as the similarly-worded "specifically exempted from disclosure by statute" exemption in *Robertson*, the Section 2302(b)(8)(A) proviso would apply to Section 114(r)(1).

Respondent argues that *Robertson*'s construction of Exemption 3 should have no bearing on the interpretation of the Section 2302(b)(8)(A) proviso, because the Court in *Robertson* found the text of Exemption 3 to be "unclear and ambiguous" and relied on legislative history. Br. 42 (quoting *Robertson*, 422 U.S. at 263). That the phrase lacked a clear meaning *before* the Court decided *Robertson*, however, does not suggest that it lacked a clear meaning *afterwards*, when Section 2302(b)(8)(A) was enacted. This Court typically presumes that Congress is aware of this Court's construction of particular statutory language and intends to incorporate that construction when it enacts that language in another statute. See, *e.g.*, *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006). That presumption is particularly apt here, where Congress amended FOIA Exemption 3 itself in response to *Robertson*, but reverted to the pre-amendment formulation in enacting Section 2302(b)(8)(A). Gov't Br. 31-33. Had Congress intended the Section 2302(b)(8)(A) proviso to be construed more narrowly than Exemption 3 had been construed in *Robertson*, it is unlikely to have taken the head-in-the-sand approach of importing the *Robertson* formulation into Section 2302(b)(8)(A) and hoping the courts would interpret it differently.

2. Respondent contends that the "specifically prohibited by law" proviso cannot encompass Section 114(r)(1) because Section 114(r)(1) "does not prohibit anything; it 'only empowers the Agency to prescribe regulations prohibiting disclosure.'" Br. 36-37 (quoting Pet. App. 13a). That contention is irreconcilable not only with *Robertson*—which held that information could be "specifically exempted from disclosure by statute" even where the statute authorized an agency to make a discretionary judgment as a prerequisite to confidentiality, Gov't Br. 29-30—but also with the legislative history of Section 2302(b)(8)(A) and this Court's decision in *CIA* v. *Sims*, 471 U.S. 159 (1985).

As respondent acknowledges (Br. 45), the Senate Report accompanying a proposed version of the Section 2302(b)(8)(A) proviso—which would have been even *narrower* than the version eventually enacted—expressly anticipated that the proviso would cover Section 102(d)(3) of the National Security Act of 1947, ch. 343, 61 Stat. 498. Senate Report 21-22; see Gov't Br. 33-34. Section 102(d)(3) did not itself directly prohibit the disclosure of information, but instead provided 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).

In *Sims*, this Court held that information designated as confidential pursuant to Section 102(d)(3) satisfied even the post-*Robertson* version of FOIA Exemption 3. 471 U.S. at 163-164, 167-168. The Court reached that conclusion based on the "plain meaning of the relevant statutory provisions," *id.* at 167 (internal quotation marks omitted), notwithstanding its recognition, later in its opinion, that Section 102(d)(3)

did not in itself "mandate the withholding of information that may reveal the identity of an intelligence source," but instead empowered the Director of Central Intelligence to make a determination about whether confidentiality was appropriate, *id.* at 180; see *id.* at 179-181. It is undisputed that the post-*Robertson* version of FOIA Exemption 3—which still included the requirement that information be "specifically exempted from disclosure by statute," *id.* at 167—is, at the very least, no broader than the Section 2302(b)(8)(A) proviso. See, *e.g.*, Resp. Br. 44-45.

Respondent attempts (Br. 46-47) to distinguish Section 102(d)(3) from Section 114(r)(1) on the grounds that at least some of the information covered by Section 102(d)(3) might also have been rendered nondisclosable by other legal authorities and that Section 2302(b)(8)(A) does not apply to various intelligence agencies. Those are distinctions without a difference. The Senate Report did not mention either point in discussing Section 102(d)(3). See Senate Report 21-22. Nor did *Sims*, in which Section 102(d)(3) was the only confidentiality statute at issue, turn on those points. 471 U.S. at 163-164.

3. Respondent contends (Br. 37-42) that even if Section 114(r)(1) constitutes a legal prohibition against disclosure, it is not sufficiently "specific[]" to fit within the Section 2302(b)(8)(A) proviso. He would limit the proviso to encompass only statutes that (1) contemplate little (or no) exercise of agency discretion in determining whether information should be confidential (see, *e.g.*, Br. 37) and (2) define the nondisclosable information "in detail directly by the qualities of the information, not by the predicted effect its disclosure would have" (Br. 41).

Respondent derives his conditions not from the text or history of Section 2302(b)(8)(A), but from cherrypicking three statutes that clearly satisfy the Section 2302(b)(8)(A) proviso, purporting to identify certain common features of those statutes, and then assuming that every statute satisfying the proviso must have those features. See Br. 37-42. That methodology—which could be employed to argue that apples are not "fruit," because the term "fruit" clearly covers grapefruits, passion fruits, and star fruits, all of which have "fruit" in their names—is unsound. Actions can be "specifically prohibited" without satisfying either of respondent's conditions. If a parent prohibits a child from eating any food that a doctor determines would cause health problems, the child would have no room to argue that the parent has not "specifically prohibited" the consumption of those foods.

When the Section 2302(b)(8)(A) proviso refers to a "disclosure * * * *specifically* prohibited by law" (emphasis added), the word "specifically" clarifies that the legal prohibition must actually be directed *at* disclosures. A proviso applicable to any "disclosure prohibited by law" might have been construed to encompass a prohibition on, say, using government property for unauthorized purposes, if the disclosure at issue had been made by e-mail from the employee's work computer. By using the word "specifically," Congress ensured that the proviso applies only when the law reflects a judgment about the propriety of the disclosure itself, as Section 114(r)(1) does.

In both *Robertson* and *Sims*, the Court applied Exemption 3's "specifically exempted from disclosure by statute" language in the context of statutes that did not contain either of respondent's proffered limita-

tions. In *Robertson*, the Court found a statute sufficiently "specific[]" even though "[t]he discretion vested by Congress in the [agency], in both its nature and scope, [was] broad," 422 U.S. at 266, and the statute conferring that discretion did not itself define exactly what information would be kept confidential, see *id.* at 258 n.4. Similarly, in *Sims*, the Court found Section 102(d)(3) sufficiently "specific[]" even though the Director of Central Intelligence had "discretionary authority," the exercise of which could not necessarily be predicted in advance, to "weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process." 471 U.S. at 180-181.

4. No reasonable reading of the Section 2302(b)(8)(A) proviso could cover Section 102(d)(3) but not Section 114(r)(1). Respondent's attempt to portray Section 114(r)(1) as too narrow to "specifically prohibit" the disclosure of SSI is accordingly misconceived. Respondent notes (*e.g.*, Br. 31, 33) that Section 114(r)(1)'s preamble mentions FOIA but not Section 2302(b)(8)(A). See, *e.g.*, Former U.S. Gov't Officials Amicus Br. 23-25 (comparing Section 114(r)(1) with 6 U.S.C. 133(a)). No one disputes, however, that Section 114(r)(1)'s operative language applies to disclosures both inside and outside the context of a FOIA request, Gov't Br. 34 n.5, which is all that the Section 2302(b)(8)(A) proviso requires. Respondent additionally references (*e.g.*, Br. 46-47) a provision of the Homeland Security Act of 2002 stating that nothing in the Act should be construed to "exempt[]" the Department of Homeland Security from Section 2302(b)(8). Pub. L. No. 107-296, Tit. VIII, § 883, 116

Stat. 2247. This case, however, does not involve any request for an *exemption* from Section 2302(b)(8)(A), but instead involves the *application* of its explicit proviso specifying that it does not cover disclosures "specifically prohibited by law."[1]

C. Congress Did Not Intend SSI To Be Publicly Disclosed

1. As the government's opening brief explains (at 38-40), respondent's position would have serious, and possibly disastrous, practical consequences. It would potentially allow any TSA employee—even one ignorant of the actual considerations underlying the TSA's adoption of a particular security measure—to expose the perceived vulnerabilities of that measure to full public view.

Respondent's passing assertion (Br. 51) that Section 2302(b)(8)(A) immunizes employee disclosures only in "narrow," "rare," and "dire" circumstances is unsupported. When it applies, Section 2302(b)(8)(A) immunizes, *inter alia*, any disclosure "which the employee * * * reasonably believes evidences * * * a

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[1] Some of respondent's amici suggest that, in Executive Order No. 13,556, 3 C.F.R. 267 (2010 Comp. Pres. Doc.), the President affirmatively endorsed the application of Section 2302(b)(8)(A)'s protections to SSI. See, *e.g.*, Project on Gov't Oversight Amicus Br. 3-7. That suggestion misconstrues the Executive Order. The Order creates an overarching category of "Controlled Unclassified Information" (CUI), which encompasses a number of subcategories, including SSI. 3 C.F.R. 267. The Order states that "[t]he mere fact that information is designated *as CUI* shall not have a bearing on determinations pursuant to any law requiring the disclosure of information or permitting disclosure as a matter of discretion." *Ibid.* (emphasis added). The Order does not address whether, as a matter of statutory construction, Section 2302(b)(8)(A)'s "specifically prohibited by law" proviso applies to disclosures of SSI.

substantial and specific danger to public health or safety." Such a belief should be easy to allege in the context of SSI, where agencies must make difficult judgment calls (about, *inter alia*, which security threats should receive the most attention and how best to deal with those threats) that may be subject to reasonable disagreement. Gov't Br. 39-40. And because the reasonableness of the employee's belief turns on "the essential facts known to and readily ascertainable *by the employee*," 5 U.S.C. 2302(b) (emphasis added), an employee's disagreement with TSA policy can be "reasonabl[e]" even if caused in whole or in part by the employee's own ignorance of the full security picture.

If, for example, an employee reasonably disagrees, based on what he knows, with the relative risk assessments reflected in the "selection criteria * * * for screening of persons" at airports, 49 C.F.R. 1520.5(b)(9)(i), the MSPB or a court may well find the disclosure of the allegedly deficient screening criteria to be protected under Section 2302(b)(8)(A). Yet by disclosing the criteria, the employee will force the TSA to change them. Unless and until the TSA is able to develop and implement new criteria, the weaknesses exposed by the employee could be exploited by anyone passing through an airport checkpoint. And even then, the employee might choose to disclose the TSA's revised criteria, starting the process anew. Similar security concerns would arise from disclosures of other types of SSI, including but not limited to "security contingency plan[s]," 49 C.F.R. 1520.5(b)(1); "[s]ecurity measures or protocols recommended by the [f]ederal government," 49 C.F.R. 1520.5(b)(8)(i); and the "performance specification[s]" for magnetometers or

other equipment, 49 C.F.R. 1520.5(b)(4). Having required that the TSA's Under Secretary keep information confidential when he determines that its disclosure would "be detrimental to the security of transportation," 49 U.S.C. 114(r)(1)(C), Congress could not have expected or intended that individual TSA employees decide on their own to expose the national transportation network, and those who use it, to the grave risks of a disclosure.

Contrary to the contentions of some of respondent's amici (see, *e.g.*, U.S. Office of Special Counsel Amicus Br. 14-16), the serious security implications of respondent's position will not necessarily be cabined by Section 2302(b)(8)(A)'s requirement that an employee's reasonable belief relate to a "substantial and specific" public-safety danger. The Federal Circuit applies an amorphous multifactor test for determining whether a disclosure is based on a reasonable belief about a public-safety danger. *Chambers* v. *Department of Interior*, 602 F.3d 1370, 1376 (2010). Notably, "the fact that a particular health or safety [disclosure] involves a policy decision or disagreement does *not* deprive it of protection." *Ibid.* (emphasis added); see 5 U.S.C. 2302(a)(2)(D). And, unsurprisingly, application of Federal Circuit law can result in broad employee immunity in the context of transportation security. See, *e.g.*, *Aquino* v. *Department of Homeland Sec.*, 121 M.S.P.R. 35, 43-45 (2014) (concluding that a disclosure of "concerns about * * * moving the line control stanchions" at an airport screening checkpoint was covered by Section 2302(b)(8) largely because the fact that the government screens passengers in itself reflected the "seriousness" and "immi-

nence" of the dangers that the employee claimed to be trying to prevent).

Respondent asserts (Br. 54) that this case "illustrate[s]" the importance of public disclosures of SSI by employees. But whatever view one takes of the facts of this case—in which respondent intentionally disclosed information of a type that he knew could "endanger[] * * * flight[s]" and that the administrative judge found he knew to be SSI, Gov't Br. 7 (quoting Pet. App. 74a); see *id.* at 6-9—the rule respondent seeks is much more far-reaching. Consider just air-marshal-deployment information. See 49 C.F.R. 1520.5(b)(8)(ii). The TSA's ability to decide how best to deploy its limited number of marshals across tens of thousands of commercial passenger flights each day would be considerably hampered if every employee were entitled to second-guess the agency's final decision, reveal that decision to the public, and thereby force the TSA to shift its limited resources to flights initially deemed to be less at-risk.

2. Respondent's policy arguments are largely just attacks on the SSI system itself. See Br. 47-55. But Congress's policy views, not respondent's, control. Notwithstanding the President's authority to classify certain information, Congress has repeatedly given agencies protecting transportation security separate authority—which they are required to exercise—to safeguard information whose disclosure would harm transportation security. See Gov't Br. 2-6 (detailing the history of Section 114(r)(1)). Indeed, Section 114(r)(1) itself was enacted against a backdrop of preexisting SSI regulations substantially similar to the current ones. See *id.* at 22.

Even if the wisdom of the SSI regime were properly at issue, Congress had compelling reasons for creating it. Respondent's suggestion that the TSA could carry out its functions equally well if it simply categorized "truly vital secrets" as classified information (Br. 52) is seriously misguided. To begin with, a great deal of SSI must be shared with non-federal personnel who do not have security clearances. Such SSI includes, but is not limited to, airport security plans (49 C.F.R. 1520.5(b)(1)) and vulnerability assessments (49 C.F.R. 1520.5(b)(5)) that must be shared with local police and airport officials; security directives (49 C.F.R. 1520.5(b)(2)) that require the cooperation of airline employees (who can, for example, watch out for certain people trying to board flights); and the presence and identity of any federal air marshals on a particular flight (49 C.F.R. 1520.5(b)(8)(ii)), which for safety and security purposes is shared with flight attendants. Requiring security clearance for those tens or hundreds of thousands of non-federal airport and airline employees would strain federal resources and inhibit hiring in the transportation industry. Indeed, many of the persons with whom SSI must be shared are not United States citizens and thus cannot generally have access to classified information. See Exec. Order No. 12,968, § 2.6, 3 C.F.R. 396 (1995 Comp. Pres. Doc.), reprinted as amended in 50 U.S.C. 435 note (stringent standards for access to classified information by foreign nationals even when considered "employees"). These include employees of foreign airlines and airports, with whom, *inter alia*, the TSA coordinates countermeasures based on threat information originating overseas.

The problems would not stop there. Some SSI, such as the internal security plans developed by air carriers (49 C.F.R. 1520.5(b)(1)(i)), is not appropriate for classification because it originates outside of the federal government and is intended for private use. Exec. Order No. 13,526, § 1.1(2), 3 C.F.R. 298 (2009 Comp. Pres. Doc.) (permitting classification only of information "owned by, produced by or for, or * * * under the control of the United States Government"). Other SSI must be used in public places in order to be effective and thus cannot be stored in the manner that is required for classified information, see 32 C.F.R. 2001.43. Examples include inventories of explosives detectable by screening equipment and records of the performance of such equipment, which must be used and stored at security checkpoints; manuals with security procedures for airline crew members (49 C.F.R. 1520.5(b)(1)), which they are required to have with them at home, during flights, and at the hotels where they stay during travel; and calibration equipment for magnetometers and other screening equipment (49 C.F.R. 1520.5(b)(9)), which are used in operational environments.

3. Respondent's objections to how the TSA administers the SSI system (Br. 48-52) have no relevance to the question of statutory interpretation that this case presents. In any event, respondent is wrong to suggest (Br. 49-50) that the TSA can (or does) retroactively discipline employees for disclosing information not categorized as SSI at the time of the disclosure. Information described in 49 C.F.R. 1520.5(b)(1)-(15)—such as air-marshal-deployment information, see 49 C.F.R. 1520.5(b)(8)(ii)—is considered SSI from its inception. Although it is not always initially marked as

such, TSA employees are trained to understand the types of information that are SSI. See Gov't Br. 5-6. In rare circumstances—not including this case[2]—the determination that particular information is SSI may take place sometime after the information is created. See 49 C.F.R. 1520.5(b)(9)(iii) and (16). In such circumstances, the information becomes SSI only at that point, and the TSA would have no authority to discipline an employee for having disclosed the information earlier.

None of respondent's concerns about the administration of the SSI program counsel in favor of reading the Section 2302(b)(8)(A) proviso in the manner he urges. If an affected person believes that the TSA has exceeded its statutory authority in enacting the SSI regulations or has acted unlawfully in categorizing particular information as SSI, he can seek judicial review of the agency's actions. The Ninth Circuit here permitted respondent to bring an (unsuccessful) action under 49 U.S.C. 46110 contending that the infor-

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[2] Respondent was removed for disclosing information that was SSI from the moment it was created and that respondent knew to be SSI. The regulations in effect at the time of his disclosure categorized air-marshal-deployment information as SSI. 49 C.F.R. 1520.7(j) (2002). The administrative judge found not credible respondent's assertion that he was unaware the information he disclosed was SSI. Pet. App. 100a-103a. After the removal proceedings against petitioner had commenced, the TSA issued an order determining that, "under the regulations in place in 2003, 49 C.F.R. § 1520.7(j), the text message" disclosed by respondent "contained [SSI]." *MacLean* v. *Department of Homeland Sec.*, 543 F.3d 1145, 1149 (9th Cir. 2008) (per curiam). The Ninth Circuit correctly held that the order "d[id] not constitute a retroactive agency adjudication," but instead "applied regulations that were in force in 2003 to determine that information created in 2003 was [SSI]." *Id.* at 1152.

mation he disclosed should not, in fact, be considered SSI. See *MacLean* v. *Department of Homeland Sec.*, 543 F.3d 1145, 1149-1150 (2008) (per curiam). Similarly, if an employee believes he has unfairly been singled out for an adverse employment action for disclosing SSI, he may challenge the appropriateness of the disciplinary measure before the MSPB and the Federal Circuit. See, *e.g.*, 5 U.S.C. 7513(d). Respondent (unsuccessfully) raised such a challenge in this case. See Pet. App. 7a-9a. Finally, Congress itself has been attentive to concerns about overbroad designation of SSI. See Gov't Br. 41-42.

4. Application of the Section 2302(b)(8)(A) proviso to SSI does not deny appropriate recourse to employees who reasonably believe that such information shows government misfeasance or negligence. Nothing prevents an employee from publicly raising concerns about TSA actions *without* revealing SSI—say, by telling the media that federal air marshals will be absent from important flights, but declining to specify which flights. To the extent an employee believes a more specific disclosure is necessary, 5 U.S.C. 2302(b)(8)(B) provides that an employee is immunized from reprisal if he raises his concerns with intragovernmental oversight entities. See Gov't Br. 34-38. Those oversight entities can then consider the employee's concerns without exposing to public view information that has been deemed "detrimental to the security of transportation." 49 U.S.C. 114(r)(1)(C). Congress can also obtain access to SSI. See 49 U.S.C. 114(r)(2); see also 5 U.S.C. 2302(b).

Congress plainly viewed the combination of these intragovernmental channels as providing adequate means for addressing employees' concerns in circum-

stances where a public disclosure is "specifically prohibited by law." Respondent's individualized objections (Br. 54) to those procedures—based on his particular experience with an Inspector General employee and on his mistaken belief that the Special Counsel is required to wait 15 days before acting on a complaint, see 5 U.S.C. 1213(b) (requiring action "*within* 15 days") (emphasis added)—do not counsel in favor of reading the phrase "specifically prohibited by law" so narrowly as to allow the sorts of harmful disclosures that the congressionally mandated SSI scheme is specifically designed to prevent. See Gov't Br. 37.

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For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

OCTOBER 2014

APPENDIX

1. 5 U.S.C. 2302 provides:

Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section—

(A) "personnel action" means—

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer, or reassignment;

(v) a reinstatement;

(vi) a restoration;

(vii) a reemployment;

(viii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

(x) a decision to order psychiatric testing or examination;

(xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and

(xii) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection (b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

(B) "covered position" means, with respect to any personnel action, any position in the competitive service, a career appointee position in the Senior Executive Service, or a position in the excepted service, but does not include any position which is, prior to the personnel action—

(i) excepted from the competitive service because of its confidential, policy-determining, policy-making, or policy-advocating character; or

(ii) excluded from the coverage of this section by the President based on a determination by the President that it is necessary and warranted by conditions of good administration;

(C) "agency" means an Executive agency and the Government Printing Office, but does not include—

(i) a Government corporation, except in the case of an alleged prohibited personnel practice

described under subsection (b)(8) or section 2302(b)(9)(A)(i), (B), (C), or (D);

(ii)(I) the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, the National Security Agency, the Office of the Director of National Intelligence, and the National Reconnaissance Office; and

(II) as determined by the President, any executive agency or unit thereof the principal function of which is the conduct of foreign intelligence or counterintelligence activities, provided that the determination be made prior to a personnel action; or

(iii) the Government Accountability Office; and

(D) "disclosure" means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure 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.

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

(D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or

(E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation;

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual;

(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;

(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;

(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;

(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;

(7) appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which such employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant 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; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—

(i) any violation (other than a violation of this section) 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;

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of—

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation—

(i) with regard to remedying a violation of paragraph (8); or

(ii) other than with regard to remedying a violation of paragraph (8);

(B) testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in subparagraph (A)(i) or (ii);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for[1] refusing to obey an order that would require the individual to violate a law;

(10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any conviction of the employee or applicant for any crime under the laws

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[1] So in original. The word "for" probably should not appear.

of any State, of the District of Columbia, or of the United States;

(11)(A) knowingly take, recommend, or approve any personnel action if the taking of such action would violate a veterans' preference requirement; or

(B) knowingly fail to take, recommend, or approve any personnel action if the failure to take such action would violate a veterans' preference requirement;

(12) take or fail to take any other personnel action if the taking of or failure to take such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title; or

(13) implement or enforce any nondisclosure policy, form, or agreement, if such policy, form, or agreement does not contain the following statement: "These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory pro-

visions are incorporated into this agreement and are controlling.".

This subsection shall not be construed to authorize the withholding of information from Congress or the taking of any personnel action against an employee who discloses information to Congress. For purposes of paragraph (8), (i) any presumption relating to the performance of a duty by an employee whose conduct is the subject of a disclosure as defined under subsection (a)(2)(D) may be rebutted by substantial evidence, and (ii) a determination as to whether an employee or applicant reasonably believes that such employee or applicant has disclosed information that evidences any violation of law, rule, regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety shall be made by determining whether a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee or applicant could reasonably conclude that the actions of the Government evidence such violations, mismanagement, waste, abuse, or danger.

(c) The head of each agency shall be responsible for the prevention of prohibited personnel practices, for the compliance with and enforcement of applicable civil service laws, rules, and regulations, and other aspects of personnel management, and for ensuring (in consultation with the Office of Special Counsel) that agency employees are informed of the rights and remedies available to them under this chapter and chapter 12 of this title, including how to make a lawful disclosure of information that is specifically required

by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel, the Inspector General of an agency, Congress, or other agency employee designated to receive such disclosures. Any individual to whom the head of an agency delegates authority for personnel management, or for any aspect thereof, shall be similarly responsible within the limits of the delegation.

(d) This section shall not be construed to extinguish or lessen any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service under—

(1) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), prohibiting discrimination on the basis of race, color, religion, sex, or national origin;

(2) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), prohibiting discrimination on the basis of age;

(3) under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)), prohibiting discrimination on the basis of sex;

(4) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), prohibiting discrimination on the basis of handicapping condition; or

(5) the provisions of any law, rule, or regulation prohibiting discrimination on the basis of marital status or political affiliation.

(e)(1) For the purpose of this section, the term "veterans' preference requirement" means any of the following provisions of law:

(A) Sections 2108, 3305(b), 3309, 3310, 3311, 3312, 3313, 3314, 3315, 3316, 3317(b), 3318, 3320, 3351, 3352, 3363, 3501, 3502(b), 3504, and 4303(e) and (with respect to a preference eligible referred to in section 7511(a)(1)(B)) subchapter II of chapter 75 and section 7701.

(B) Sections 943(c)(2) and 1784(c) of title 10.

(C) Section 1308(b) of the Alaska National Interest Lands Conservation Act.

(D) Section 301(c) of the Foreign Service Act of 1980.

(E) Sections 106(f),[2] 7281(e), and 7802(5)[2] of title 38.

(F) Section 1005(a) of title 39.

(G) Any other provision of law that the Director of the Office of Personnel Management designates in regulations as being a veterans' preference requirement for the purposes of this subsection.

(H) Any regulation prescribed under subsection (b) or (c) of section 1302 and any other regulation that implements a provision of law referred to in any of the preceding subparagraphs.

(2) Notwithstanding any other provision of this title, no authority to order corrective action shall be

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[2] See References in Text note below.

available in connection with a prohibited personnel practice described in subsection (b)(11). Nothing in this paragraph shall be considered to affect any authority under section 1215 (relating to disciplinary action).

(f)(1) A disclosure shall not be excluded from subsection (b)(8) because—

(A) the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

(B) the disclosure revealed information that had been previously disclosed;

(C) of the employee's or applicant's motive for making the disclosure;

(D) the disclosure was not made in writing;

(E) the disclosure was made while the employee was off duty; or

(F) of the amount of time which has passed since the occurrence of the events described in the disclosure.

(2) If a disclosure is made during the normal course of duties of an employee, the disclosure shall not be excluded from subsection (b)(8) if any employee who has authority to take, direct others to take, recommend, or approve any personnel action with respect to the employee making the disclosure, took, failed to take, or threatened to take or fail to take a personnel action with respect to that employee in reprisal for the disclosure.