UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT J. MACLEAN, *Appellant,* **v.**	**DOCKET NUMBER** **SF-0752-06-0611-I-2**
DEPARTMENT OF HOMELAND SECURITY, *Agency.*	

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT ROBERT J. MACLEAN

The United States Office of Special Counsel hereby moves this Board for leave to file its Brief in support of Appellant as *amicus curiae* in the above-captioned matter. Pursuant to 5 C.F.R. § 1201.34(e), as *amicus curiae*, and for the reasons cited in the brief, the Office respectfully requests leave to submit the attached brief for the Board's consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 25, 2011, I served a copy of the foregoing Motion and Brief of U.S. Office of Special Counsel as *amicus curiae* by First Class Mail, postage prepaid, upon the following individuals:

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ROBERT J. MACLEAN,

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v.

DEPARTMENT OF HOMELAND SECURITY,

Agency.

BRIEF OF U.S. OFFICE OF SPECIAL COUNSEL AS *AMICUS CURIAE*

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IDENTITY AND INTEREST OF THE AMICUS

Amicus, the United States Office of Special Counsel ("OSC"), is an independent federal agency charged with, *inter alia*, protecting federal employees, former federal employees, and applicants for federal employment, from "prohibited personnel practices," as defined in 5 U.S.C. § 2302(b). In particular, OSC is responsible for protecting federal employees against retaliation where they disclose "any information" that they reasonably believe evidences misconduct or a substantial and specific danger to public health and safety, unless such disclosure is specifically prohibited by law. *See* 5 U.S.C. § 2302(b)(8).

The issue presented in this case is whether the narrow exception to protected whistleblowing under the Civil Service Reform Act of 1978 ("CSRA") as amended by the Whistleblower Protection Act, *i.e.*, disclosures "specifically prohibited by law," encompasses disclosures prohibited by agency regulations issued pursuant to Congressional delegation of rulemaking authority. In other words, where Congress authorizes an agency to issue regulations barring the release of non-classified information, do rules or regulations issued pursuant to such authorization trump the whistleblower protection provision of the CSRA? OSC contends that the answer is no, and that the Merit Systems Protection Board ("Board") erred in holding in *MacLean v. Dep't of Homeland Sec.*, 112 M.S.P.R. 4 (2009) ("*MacLean I*") and *MacLean v. Dep't of Homeland Sec.*, No. SF-0752-06-0611-I-2, slip op. at ¶ 18 (M.S.P.B. July 25, 2011) ("*MacLean II*") that an agency-issued substantive regulation constitutes a "law" within the meaning of § 2302(b)(8)(A)(ii).[1] The Board's expansion of the exception to CSRA protected whistleblowing is contrary to the plain meaning and intent of the statute and significantly

[1] This *amicus curiae* brief addresses solely the Board's holding on the scope of the § 2302(b)(8)(A)(ii) exception to CSRA protected whistleblowing.

expands what Congress intended to be a very narrow exception to CSRA protected whistleblowing, thereby chilling would-be whistleblowers.

STANDARD OF REVIEW

The Board has statutory and regulatory authority to reopen appeals in which it has rendered a final Board decision. 5 U.S.C. § 7701(e)(1)(B); *Basco v. Dep't of Army*, 67 M.S.P.R. 490, 491 (1995) (citing *Tipsword v. Dep't of Army*, 66 M.S.P.R. 53, 55 (1994)). Any reopening and reconsideration must be obtained within a short and reasonable time period. *Marshall v. Gov't Printing Off.*, 43 M.S.P.R. 346, 350 (1990).

As the agency charged with enforcing the statute, OSC's interpretation of the CSRA brings specialized experience to bear. *See United States v. Mead Corp.*, 533 U.S. 218, 235 (2001). OSC has enforced the CSRA for decades and is therefore uniquely situated to offer its expertise on the scope of CSRA protected whistleblowing.

SUMMARY OF ARGUMENT

In enacting the CSRA, Congress foresaw the risk that agencies might try to regulate around the CSRA's whistleblower protection provision by promulgating secrecy regulations, thereby rendering disclosure of certain information outside the ambit of CSRA protected whistleblowing. To mitigate against that risk, Congress specifically narrowed the proposed exception to CSRA protected whistleblowing by deleting the words "rule or regulation" and by adding the word "specifically." The legislative history of the CSRA explains that Congress narrowed the exception to CSRA protected whistleblowing to ensure that the phrase "prohibited by law" referred *solely* to statutes and not to agency rules or regulations. Indeed, the House Conference Report expressly states that "the reference to disclosures specifically prohibited by law is meant to refer to statutory law . . . *It does not refer to agency rules and regulations*." H.R.

Conf. Rep. 95-1717, 95th Cong., 2d Sess. 130, *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864 (emphasis added).

Although the term "law" could, in some contexts, refer to agency regulations, the text of the CSRA as a whole underscores that its use in the narrow exception to CSRA protected whistleblowing encompasses only statutory, and not regulatory, prohibitions. In particular, there are seven instances in the CSRA in which Congress employs the phrase "law, rule or regulation,"[2] a clear indication that Congress could have purposefully provided that rules and regulations also comprise the exception to CSRA protected whistleblowing, yet chose not to do so. Congress did, however, include a specific exception to CSRA protected whistleblowing to allow for the President, through Executive order, to prohibit the disclosure of certain information. If Congress intended the term "law" to encompass all binding legal authority, then Congress would not have needed to add an express exception for disclosures specifically prohibited by Executive order.

Moreover, the legislative history reveals that Congress had in mind the Trade Secrets Act as an example of a specific prohibition that would meet the narrow "specifically prohibited by law" exception. The Trade Secrets Act is readily distinguishable from the Air Transportation Security Act ("ATSA") as amended, which the Transportation Security Administration ("TSA") relied upon to retroactively designate as Sensitive Security Information ("SSI") MacLean's disclosure about a substantial danger to public safety.[3] In contrast to the Trade Secrets Act, the ATSA lacks specific criteria for designating information as SSI and instead gives the TSA Administrator boundless discretion to withhold information obtained or developed in carrying

[2] *See* 5 U.S.C. §§ 2302(b)(1)(E), (6), (8)(A)(i), 8(B)(i), (9)(A), (12), (D)(5).

[3] The TSA's non-disclosure rules were promulgated pursuant to 49 U.S.C. § 40119. *See* 67 Fed. Reg. 8340 (2002).

out security if disclosure would be "detrimental to the safety of passengers in air transportation." 49 U.S.C. § 40119(b)(1)(c). Unlike the Trade Secrets Act, the ATSA does not contain a specific prohibition against disclosure of information. Thus, if ATSA is deemed specific enough to fall within the *narrow* exception to CSRA protected whistleblowing, all agencies will have substantial leeway to regulate around the CSRA, thereby thwarting the CSRA and chilling employees from disclosing violations of law, threats to public safety, gross mismanagement and waste, fraud and abuse.

ARGUMENT

I. THE BOARD'S *MACLEAN* DECISIONS ARE INCONSISTENT WITH THE PLAIN MEANING OF THE CSRA.

It is well settled that an unambiguously written statute shall be read and implemented to give effect to its plain meaning. *See Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (citing *Kmart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-292 (1988)). The Board should begin its statutory analysis with the presumption that Congress "says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992). In ascertaining the plain meaning of the statute, the Board should look to the particular statutory language at issue, as well as "the language and design of the statute as a whole." *Kmart Corp.*, 486 U.S. at 292. When, as here, the meaning of a statutory provision is otherwise unambiguous, the judicial inquiry is complete. *Burlington N.R.R. v. Okla. Tax Comm'n*, 481 U.S. 454, 461 (1987).

The CSRA provides that it is a prohibited personnel practice to "take . . . a personnel action with respect to any employee because of . . . any disclosure of information by an employee which the employee reasonably believes evidences . . . a substantial and specific danger to public health or safety . . . if such information is not *specifically* prohibited by *law*." 5

U.S.C. § 2302(b)(8) (emphasis added). Prior to the Board's decision in *MacLean I*, it was well settled that the "specifically prohibited by law" exception encompasses solely disclosures specifically prohibited by statute. *See, e.g., Kent v. General Servs. Admin.*, 56 M.S.P.R. 536, 542 (1993) (holding that while substantive agency regulations may have the force and effect of law in other contexts, "the statutory language, coupled with the legislative history of the CSRA, subsequently amended by the WPA, evidences a clear legislative intent to limit the term 'specifically prohibited by law' in section 2302(b)(8) to statutes and court interpretations of those statutes."). *MacLean I,* however, substantially expanded this exception to include disclosures prohibited by substantive agency regulations, 112 M.S.P.R. at ¶ 23, an interpretation that is inconsistent with the plain meaning of the statute.

"[W]here Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). The "specifically prohibited by law" exception is surrounded by seven instances of statutory language employing the phrase "law, rule or regulation." *See* 5 U.S.C. §§ 2302(b)(1)(E), (6), (8)(A)(i), 8(B)(i), (9)(A), (12), (D)(5). *Accord Kent*, 56 M.S.P.R. at 542. If Congress intended to exclude from the ambit of CSRA protected conduct disclosures prohibited by agency regulations, it knew how to do so. Indeed, as discussed in Section II, *infra*, Congress intentionally omitted agency regulations from this narrow exception in order to preclude agencies from weakening CSRA whistleblower protection. *See* H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 130, *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864 (noting that the phrase "rule or regulation" was removed from CSRA as originally introduced, and clarifying that "the reference to disclosures specifically

prohibited by law is meant to refer to statutory law and court interpretations of those statutes. It does not refer to agency rules and regulations.")

Moreover, the only other statutory exclusion from CSRA protected whistleblowing further compels the conclusion that the phrase "specifically prohibited by law" does not include Agency regulations. The CSRA excludes from the scope of protected conduct disclosures "specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs." 5 U.S.C § 2302(b)(8)(A)(ii).[4] If the phrase "specifically prohibited by law" truly encompassed all binding legal authority, then Congress would not have added a specific exception permitting the President, through Executive order, to prohibit disclosure.

The pointed exclusion of the term "rule or regulation" from the phrase "specifically prohibited by law" compels the conclusion that *only* statutory and Executive order prohibitions are exempted from the CSRA's whistleblower protections. Thus, in order for a federal employee's disclosures to be exempt from the CSRA's protections, Congress must have explicitly prohibited such a disclosure via legislative enactment. Congress did not say – as the Board recently affirmed – that regulations can limit the CSRA's protections for federal whistleblowers. The Board's conclusion that Agency regulations are "laws" within the meaning of the Act's exceptions is beyond the plain meaning of the statute and is therefore erroneous.

The Board's affirmance of *MacLean I* relies heavily upon the law of the case doctrine, but that doctrine does not apply where the prior decision was clearly erroneous. *MacLean II*, slip op. at ¶ 16. Because the *MacLean I* decision concerning the scope of the exception to CSRA

[4]As the Board noted in *MacLean I*, the TSA "does not argue that any Executive order prohibited disclosure of the information that [MacLean] allegedly disclosed." 112 M.S.P.R. at ¶ 22.

protected whistleblowing is contrary to the plain meaning of the CSRA and Congressional intent, the decision is clearly erroneous and therefore should be reversed.

II. THE BOARD'S EXPANSION OF THE "SPECIFICALLY PROHIBITED BY LAW" EXCEPTION TO CSRA PROTECTED WHISTLEBLOWING IS CONTRARY TO CONGRESSIONAL INTENT

If a statute's plain meaning is ambiguous, the second step in statutory interpretation is to examine extrinsic aids such as legislative history in order to ascertain the intent of Congress regarding the legislation. *Amegan v. U.S. Int'l Trade Comm'n*, 902 F.2d 1532, 1538 (Fed. Cir. 1990). It is also necessary to interpret the language of the statute in light of the purposes Congress sought to serve. *Hanson v. Office of Pers. Mgmt.*, 33 M.S.P.R. 581, 590 (1987), *aff'd*, 833 F.2d 1568 (Fed. Cir. 1988); *Crowley v. Office of Pers. Mgmt.*, 23 M.S.P.R. 29, 31 (1984). Under the CSRA, the disclosure of information is protected only if the disclosure is not "specifically prohibited by law" or by "Executive order." 5 U.S.C. § 2302(b)(8)(A)(ii). This requirement narrowly limits the scope of those disclosures where either *Congress* or the *President* – and not federal agencies – seek to preserve the government's interest in secrecy. Even assuming, *arguendo*, that the plain meaning of the term "not specifically prohibited by law" is ambiguous, the statute's legislative history demonstrates that substantive agency regulations prohibiting disclosures are not "laws" within the meaning of 5 U.S.C. § 2302(b)(8)(A)(ii) and reinforces the conclusion reached through the plain meaning analysis.

A. The CSRA's Legislative History Makes Clear that Congress Intended to Prevent Agencies from Issuing Regulations that Circumvent CSRA Whistleblower Protection.

The original CSRA as introduced in the House and Senate limited the disclosure of information prohibited by "law, rule or regulation." *See* H.R. 11, 280, 95th Cong., 2d Sess. (1978) ("any employee who has authority to take . . . personnel action shall not . . . take action against any employee . . . for the disclosure, *not prohibited by law, rule or regulation*, of

information concerning violations of law, rules or regulations") (emphasis added); S. 2640, 95th Cong., 2d Sess. (1978). The CSRA, as enacted, however, limits the exceptions to protected whistleblowing activity to disclosures "*specifically* prohibited by law." 5 U.S.C. § 2302(b)(8)(A)(ii) (emphasis added). Thus, Congress affirmatively removed the words "rule or regulation" from that part of the statute, intentionally narrowing the exception. The exception was narrowed due to concerns that the limitations in the original bills would encourage the adoption of agency regulations against disclosure. *See* S. Rep. No. 969, 95th Cong., 2d Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743. As explained in the Conference Report, "the reference to disclosures specifically prohibited by law is meant to refer to *statutory law* and court interpretations of those statutes. *It does not refer to agency rules and regulations.*" H.R. Conf. Rep. 95-1717, 95th Cong., 2d Sess. 130, *reprinted in* 1978 U.S.C.C.A.N. 2860, 2864 (emphasis added).

Moreover, the legislative history of the CSRA shows that the drafters narrowed the exception to CSRA protected whistleblowing to prevent agencies from adopting regulations that would weaken CSRA whistleblower protection:

> Those disclosures which are specifically exempted from disclosure by a *statute* which requires that matters be withheld from the public in such a manner *as to leave no discretion on the issue*, or by a statute which established particular criteria for withholding or refers to particular types of matters to be withheld, are not subject to the [CSRA whistleblower] protections.

See S. Rep. No 969, 95th Cong., 2d Sess. 23 (1978), *reprinted in* 1978U.S.C.C.A.N 2723, 2743 (hereinafter "Senate Report") (emphasis added). *See also* H.R. Rep. No. 1402, 95th Cong., 2d Sess. 146, *reprinted in* 19789 U.S.C.C.A.N. 2860. As Congress clearly intended the term "law" in § 2302(b)(8)(A)(ii) to refer only to statutes, the Board should not amend the CSRA to add substantive regulations to the *narrow* exception to CSRA protected whistleblowing.

Indeed, the instant case demonstrates the very abuse that Congress was trying to prevent by removing the language "rule or regulation" from the pertinent section of statute. Here, the TSA relies on regulations promulgated by the agency to retroactively designate MacLean's protected disclosures as SSI. Although the TSA argues that those regulations are tantamount to law because the ATSA authorizes it to issue such regulations, the legislative history makes clear that merely granting an agency authority to issue regulations is insufficient to render those regulations "law" for the purposes of excepting disclosures from CSRA protected whistleblowing. The agency improperly conflates the two separate terms— regulation and statutory law. And there is no support for the argument that the ATSA is specific enough to fall within the narrow exception to CSRA Protected Conduct, as discussed in Section II B, *infra.*

The Board should reject a construction of a statute that is "inconsistent with the statutory mandate or that frustrate[s] the policy that Congress sought to implement." *FEC v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 32 (1981). In carving out a narrow exception to CSRA protected whistleblowing, Congress expressly sought to avoid opening the door for agencies to promulgate regulations that would circumvent CSRA whistleblower protection. Permitting the TSA to exempt itself from the CSRA's whistleblower protection provision pursuant to a statute that employs an ambiguous standard and confers boundless discretion upon TSA is exactly the result that Congress sought to avoid when it created a *narrow* exception to CSRA protected whistleblowing.

B. The TSA's SSI Regulations Are Not a "Specific" Statutory Prohibition that Falls Within The Narrow Exception to CSRA Protected Whistleblowing

The Board should construe the CSRA so as to avoid rendering its language redundant. *See Bailey v. United States*, 516 U.S. 137, 146 (1995) ("we assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning"). Congress

amended the original proposed CSRA by adding the word "specifically" to modify the phrase "prohibited by law," an important requirement that militates against permitting TSA to cancel MacLean's whistleblower rights.

No specific statute exists that would allow the TSA to negate CSRA whistleblower protections. The statute that the TSA relied upon to retroactively designate MacLean's protected disclosure as SSI does not establish particular criteria for withholding and does not refer to particular types of matters to be withheld. *See* 49 U.S.C. § 40119(b)(1)(C). The ATSA grants the TSA the authority to prescribe regulations prohibiting the disclosure of information obtained or developed in carrying out security if disclosure would "be detrimental to the safety of passengers in air transportation." 49 U.S.C § 40119(b)(1)(C). It does not establish particular types of matters to be withheld; rather, it leaves tremendous discretion with TSA to prohibit disclosure of information concerning transportation security. 49 U.S.C. § 40119(b)(1)(C).

Statutes that give agency officials discretion to prohibit the disclosure of information by federal employees can do so only if 1) the statute affords the officials no discretion to control disclosure or 2) establishes criteria for withholding information. *See* Robert Vaughn, *Statutory Protections of Whistleblowers in the Federal Executive Branch*, 1982 U. Ill. L. Rev. 615, 629 (1982). The ATSA confers very broad authority to the TSA to withhold information, and thus the regulations promulgated pursuant to the ATSA cannot be considered a specific law within the meaning of the narrow exception to CSRA protected whistleblowing.

Moreover, the legislative history of the CSRA indicates that Congress had in mind the Trade Secrets Act, 18 U.S.C. § 1905, as an example of a statute that would fall within the narrow exception to CSRA protected whistleblowing. *See* H.R. Conf. Rep. No. 95-1717 at 132, *reprinted in* 1978 U.S.C.C.A.N 2860, 2865 (hereinafter "House Report"); S. Rep. No. 969, 95th

Cong., 2d Sess. 23 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2743 (hereinafter "Senate Report). The Trade Secrets Act is readily distinguishable from the ATSA.

The Trade Secrets Act, which prohibits public disclosure of trade secrets, defines in precise detail the type of information that qualifies as a trade secret. This is in stark contrast to the ATSA, which confers upon the TSA Administrator undefined and overly broad discretion to prohibit the disclosure of information detrimental to the safety of passengers in air transportation. *Compare the specificity of* 18 U.S.C. § 1905 ("any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law"); *with the vagueness of* 49 U.S.C. § 40119 (directing the TSA to issue regulations prohibiting the disclosure of information obtained or developed in carrying out security where disclosure would be "detrimental to the safety of passengers in air transportation."). The ambiguous standard governing the disclosure of information about air transportation safety in Section 40119 cannot be considered a "specific" prohibition.

III. THE BOARD'S *MACLEAN* DECISIONS THREATEN TO CHILL WOULD-BE WHISTLEBLOWERS

As the Board explains in a recent report titled "*Whistleblower Protections for Federal Employees: Report to the President and the Congress*," Congress intended for the whistleblower protection provision of the CSRA to provide robust protection. However, whistleblowers

subjected to retaliation still must surmount several hurdles to demonstrate they engaged in protected conduct. In particular, the report explains that the MSPB is not able to provide relief to a federal employee who discloses wrongdoing unless 1) the individual made the disclosure to the "right" type of party; 2) "the individual made a report that is either (a) outside of the employee's course of duties[,] or (b) communicated outside of normal channels"; and 3) "the individual made the report to someone other than the wrongdoer." Merit Sys. Protection Bd., *Whistleblower Protections for Federal Employees: Report to the President and the Congress* (2010), at 51. The *MacLean* decisions create yet another loophole that will further narrow the scope of CSRA protected whistleblowing and deter would-be whistleblowers. Indeed, the Board's recent report on the scope of whistleblower protections for federal employees expressly acknowledges the impact of *MacLean I*:

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

Id., at 20-21 (emphasis added). Given the current state of the law, a federal employee who is contemplating blowing the whistle on a substantial threat to public safety needs to perform legal research or consult with an attorney to determine how to make a disclosure without losing the protection of the CSRA. But in enacting the CSRA's whistleblower protection provision, Congress never intended to create obstacles for federal employees to surmount prior to blowing the whistle. Instead, Congress intended to provide robust protection to whistleblowers and

sought to avoid agencies using rules and regulations to impede the disclosure of government wrongdoing. *See Kent*, 56 M.S.P.R. at 542.

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

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

[5] 49 U.S.C. § 40119(b)(1)(C).

CONCLUSION

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

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