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OSC Files First Supreme Court Amicus Brief to Help Protect Whistleblower Rights

FOR IMMEDIATE RELEASE

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Yesterday, the U.S. Office of Special Counsel (OSC) filed an amicus curiae (friend of the court) [brief](#) with the Supreme Court in [Department of Homeland Security v. Robert MacLean](#). This is the first amicus brief OSC has filed with the Supreme Court under the amicus authority granted to OSC by the Whistleblower Protection Enhancement Act of 2012. OSC's brief supports Mr. MacLean, a former Department of Homeland Security (DHS) air marshal who disclosed in 2003 that the Federal Air Marshal Service was stopping its coverage of long-distance flights even though there were heightened intelligence warnings that terrorists were targeting those flights. Oral argument is scheduled for November 4, 2014.

Congress passed the Whistleblower Protection Act to provide robust protection against agency retaliation for employees who blow the whistle on threats to public health or safety. In its brief, OSC argues that agencies should not be permitted to regulate around these whistleblower protections through rules that would restrict the disclosure of certain information. A reversal of the lower court decision, which ruled in favor of Mr. MacLean, would, according to the brief, seriously threaten "OSC's ability to enforce . . . whistleblower protections and deter agencies from retaliating against employees."

The Federal Circuit [held](#) in April 2013 that the information Mr. MacLean disclosed—deemed 'Sensitive Security Information' (SSI) by DHS three years after it was disclosed—may be protected under the federal whistleblower law. Mr. MacLean was fired in 2006 for releasing SSI. DHS argues that disclosures of SSI are not protected unless made through specific channels.

According to OSC's brief: "Of grave concern to OSC is that agencies could abuse their regulatory power to over-designate the information that is to be prohibited from disclosure as a means of suppressing a broad swath of information and stifling whistleblowers. Likewise, agencies may selectively enforce such broad regulations to punish and deter whistleblowing. This danger is not farfetched. After all, whistleblower protection laws exist because government officials do not always act in the nation's best interests. In light of Congress's central goal to encourage disclosures and restrain agencies, it is doubtful that Congress would vest agencies with the power to eliminate the very restraint it placed on agencies' own actions."

"If the Court reverses, potential whistleblowers will have to weigh whether their agency might one day retroactively determine that the information they disclosed is SSI, thereby exposing them to discipline," OSC's brief states. "Moreover, in fear that such retroactive designations are possible, whistleblowers may refrain from alerting the public to dangers that could have been averted or mitigated."

OSC's amicus brief can be found at: <https://osc.gov/Resources/amicus-dhs-v-maclean-2014-09-30.pdf>

The U.S. Office of Special Counsel (OSC) is an independent federal investigative and prosecutorial agency. Our basic authorities come from four federal statutes: the Civil Service Reform Act, the Whistleblower Protection Act, the Hatch Act, and the Uniformed Services Employment & Reemployment Rights Act (USERRA). OSC's primary mission is to safeguard the merit system by protecting federal employees and applicants from prohibited personnel practices, especially reprisal for whistleblowing, and to serve as a safe channel for allegations of wrongdoing. For more information, please visit our website at www.osc.gov.