No. 18-751

In The
Supreme Court of the United States

METROPOLITAN INTERPRETERS
& TRANSLATORS, INC.,

Petitioner,

v.

FRANCISCO BATES, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Metropolitan forfeited its current arguments, including a claim that a manual, the National Industrial Security Operating Manual ("NISPOM") "supersedes" a federal statute, the Employee Polygraph Protection Act ("EPPA"), by failing to timely raise the issues.

2. Whether the NISPOM "supersedes" the EPPA, when NISPOM by its own terms does not apply because this case did not involve access to classified information.

3. Whether *Department of Navy v. Egan*, 484 U.S. 518 (1998), renders the EPPA a nullity when Respondents expressly sought to vindicate statutory rights conferred by Congress through a private cause of action created by statute (29 U.S.C. § 2005(b)) and neither national security clearance determinations nor access to classified information were involved here.

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The decision of the District Court denying Metropolitan's motion for certification of the District Court's summary judgment order for interlocutory appeal is published at *M.G. v. Metro. Interpreters & Translators, Inc.*, 85 F. Supp. 3d 1195, 1198-99 (S.D. Cal. 2015).

The decision of the District Court denying Metropolitan's motion for judgment as a matter of law and denying its motion for a new trial is published at *Medina v. Metro. Interpreters & Translators, Inc.*, 139 F. Supp. 3d 1170 (S.D. Cal. 2015).

The decision of the Ninth Circuit Court of Appeals affirming the District Court's judgment is unpublished but reported at *Bates v. Metro. Interpreters & Translators, Inc.*, 742 F. App'x 268 (9th Cir. 2018), and is included in Petitioner's Appendix.

STATUTORY PROVISIONS INVOLVED

29 U.S.C. § 2002 provides in relevant part:

> Except as provided in sections 7 and 8 [29 U.S.C. §§ 2006, 2007], it shall be unlawful for any employer engaged in or affecting

commerce or in the production of goods for commerce –

(1) directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test;

(2) to use, accept, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee;

(3) to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against –

(A) any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test, or

(B) any employee or prospective employee on the basis of the results of any lie detector test. . . .

29 U.S.C. §§ 2005(c) and (d) provide as follows:

(c) Private civil actions.

(1) Liability. An employer who violates this Act [29 U.S.C. §§ 2001 *et seq.*] shall be liable to the employee or prospective employee affected by such violation. Such employer shall be liable for such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits.

> **(2)** Court. An action to recover the liability prescribed in paragraph (1) may be maintained against the employer in any Federal or State court of competent jurisdiction by an employee or prospective employee for or on behalf of such employee, prospective employee, and other employees or prospective employees similarly situated. No such action may be commenced more than 3 years after the date of the alleged violation.
>
> **(3)** Costs. The court, in its discretion, may allow the prevailing party (other than the United States) reasonable costs, including attorney's fees.
>
> **(d)** Waiver of rights prohibited. The rights and procedures provided by this Act [29 U.S.C. §§ 2001 *et seq.*] may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed and signed by the parties to the pending action or complaint under this Act [29 U.S.C. §§ 2001 *et seq.*].

29 U.S.C. §§ 2006(b) and (c) set forth the following:

> **(b)** National defense and security exemption.
>
> > **(1)** National defense. Nothing in this Act [29 U.S.C. §§ 2001 *et seq.*] shall be construed to prohibit the administration, by the Federal Government, in the performance of any counterintelligence function, of any lie detector test to –

(A) any expert or consultant under contract to the Department of Defense or any employee of any contractor of such Department; or

(B) any expert or consultant under contract with the Department of Energy in connection with the atomic energy defense activities of such Department or any employee of any contractor of such Department in connection with such activities.

(2) Security. Nothing in this Act [29 U.S.C. §§ 2001 *et seq*.] shall be construed to prohibit the administration, by the Federal Government, in the performance of any intelligence or counterintelligence function, of any lie detector test to –

(A)

(i) any individual employed by, assigned to, or detailed to, the National Security Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, or the Central Intelligence Agency,

(ii) any expert or consultant under contract to any such agency,

(iii) any employee of a contractor to any such agency,

> **(iv)** any individual applying for a position in any such agency, or
>
> **(v)** any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for any such agency; or
>
> **(B)** any expert, or consultant (or employee of such expert or consultant) under contract with any Federal Government department, agency, or program whose duties involve access to information that has been classified at the level of top secret or designated as being within a special access program under section 4.2(a) of Executive Order 12356 (or a successor Executive order).
>
> **(c)** FBI contractors exemption. Nothing in this Act [29 U.S.C. §§ 2001 *et seq.*] shall be construed to prohibit the administration, by the Federal Government, in the performance of any counterintelligence function, of any lie detector test to an employee of a contractor of the Federal Bureau of Investigation of the Department of Justice who is engaged in the performance of any work under the contract with such Bureau.

29 C.F.R. § 801.10 provides in relevant part:

> **(a)** Section 7(a) [29 U.S.C. § 2006(a)] provides an exclusion from the Act's coverage for

> the United States Government, any State or local government, or any political subdivision of a State or local government, acting in the capacity of an employer. This exclusion from the Act also extends to any interstate governmental agency.
>
> . . .
>
> **(d)** This exclusion from the Act applies only to the Federal, State, and local government entity with respect to its own public employees. Except as provided in sections 7(b) and (c) of the Act [29 U.S.C. § 2006(b) and (c)], and § 801.11 of the regulations, this exclusion does not extend to contractors or nongovernmental agents of a government entity, nor does it extend to government entities with respect to employees of a private employer with which the government entity has a contractual or other business relationship.

STATEMENT OF THE CASE

A. Facts

Respondents Francisco Bates, Richard Gonzalez, Maria Nielsen, Eduardo Ruvalcaba, Fernando Medina, Melany Duran, Elizabeth Sanchez, Lilia Palomino, and Maribel Taylor were linguists (together, "Linguists") formerly employed by Metropolitan Interpreters and Translators ("Metropolitan"), a private company contracted to provide translation services to the Drug Enforcement Administration ("DEA"). (Pet. App. 2).

Metropolitan describes itself as the largest provider of linguistic services to law enforcement in the United States. (Dkt. 52-2 p. 2125).[1] It had over 600 employees nationwide. (Dkt. 22-4 p. 697).

The Linguists worked at DEA facilities in the Southern District of California. (Pet. App. 9). Among other tasks, they monitored and translated Title III intercepts for criminal investigations. (Dkt. 68-1 p. 2621). The information to which Linguists had access was denominated "law enforcement sensitive" or "DEA sensitive."[2] (*Id.*). It was not classified and did not include "national security" information.[3] (*Id.*; Dkt. 52-2 p. 2080).

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[1] Unless otherwise noted, all references to the court docket as "Dkt." are to the Ninth Circuit's CM/ECF docket in Ninth Circuit case no. 15-56658. A reference to the district court's CM/ECF docket in case no. 12-cv-00460-JM is indicated by "Dist. Dkt." All pincites are to the original page number of the document, not the page numbers of the ECF header.

[2] Metropolitan's reliance on its use of the SF-86 forms in the recruitment process has no independent legal significance. The form was used to obtain information to vet Respondents. Sometimes Metropolitan used the SF-85 form (a questionnaire for public trust positions). The use of the form did not convert the linguist job into a "national security" position.

[3] Respondents do not denigrate the DEA's legitimate interest in confidentiality and security by pointing out that the law enforcement information in this case is not classified or national security information. DEA, under its contract with Metropolitan, had contractual authority to investigate Metropolitan's employees at any time, for any reason, or no reason at all. DEA could directly question linguists, who had an obligation to respond to questioning. The contract provided that the DEA may "immediately and without advance notice" suspend or revoke the facility access of any contractor employee for failing to "cooperate fully with any inquiry or 'investigation.' " Moreover, DEA had the right

In 2011, the local DEA told Metropolitan that it intended to polygraph all of the nearly 100 Metropolitan employees in San Diego and Imperial Counties, as well as prospective employees. (Pet. App. 13; Dkt. 35-3 p. 562; Dkt. 52-2 p. 2094). The DEA was concerned about a single linguist, Jovane Huerta, whose brother was the apparent subject of an ICE investigation. (Dkt. 52-2 pp. 2091-92). A search warrant executed at the brother's house turned up marijuana paraphernalia and a medicinal quantity (personal use amount) of marijuana.[4] (Dkt. 22-4 pp. 730-31). DEA had no evidence that Respondent Linguists had leaked information or committed any form of misconduct. (Dkt. 68-1 pp. 2619-20). Metropolitan supervisors testified that Respondent Linguists were all truthful, honest, and good employees. (Dkt. 22-4 pp. 733-35; 737-38).

Although DEA officials expected Metropolitan to ensure that there was compliance with federal labor law (Dkt. 22-4 p. 699), Metropolitan officials never informed the DEA of the provisions of the Employee Polygraph Protection Act. (Dkt. 22-4 p. 711; Dkt. 68-4 p. 3194). Metropolitan never told DEA officials that its employees had expressed concerns regarding the legality of the polygraphs under the EPPA. (*Id*.).

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to revoke or suspend Metropolitan's employees' access to its facility at any time. The Metropolitan/DEA contract provided the DEA with broad investigative powers and unreviewable discretionary authority to bar anyone without review. The contract could not and did not, however, repeal the EPPA.

[4] Jovane Huerta left Metropolitan's employ and was later hired as a Border Patrol agent after he passed a Border Patrol administered pre-employment polygraph exam. (Dkt. 68-1 p. 2618).

Metropolitan's Vice President Joseph Citrano instructed Francisco Bates, a Linguist, to refrain from voicing his concerns regarding the legality of the polygraphs to DEA officials. (Dkt. 52-3 p. 2432).

Sondra Hester, the DEA contract representative, testified at trial that no Metropolitan official ever told Hester that Respondent Linguists had raised concerns regarding the legality of the polygraphs. (Dkt. 35-5 p. 960). Similarly, Citrano did not inform DEA Assistant Special-Agent-in-Charge (ASAC) Donald Torres that Metropolitan employees had complained that the polygraphs violated federal law. (Dkt. 68-4 pp. 3194-95).

The District Court found the undisputed evidentiary record showed Metropolitan violated the EPPA:

> Defendants [Metropolitan and Citrano] exercised substantial control over the nature, structure, implementation, and ultimate use of the polygraph examinations. Not only did Defendants organize, schedule, and coordinate the polygraph examinations but they provided employees with information concerning the nature of the polygraph examinations, used the polygraph examination results to screen new applicants, reported the results to Immigration and Customs Enforcement, discouraged and prohibited employees from contacting the DEA concerning the examinations, and provided erroneous information and misstatements of law and fact to Metropolitan's employees concerning the polygraph examinations. Furthermore, Defendants failed to consult with any lawyer or non-lawyer

> about the legality of the polygraphs nor did they convey Plaintiffs' concerns to the DEA about the legality of polygraph examinations. As noted by DEA Assistant Special Agent Torres, had Defendants informed him about the concerns of Metropolitan's employees, he would have consulted with DEA's Chief Counsel to obtain additional information about the legality of the polygraph examinations.

M.G. v. Metro. Interpreters & Translators, Inc., 85 F. Supp. 3d 1195, 1198-99 (S.D. Cal. 2015). Metropolitan "actively participated in requiring the polygraph examinations (nor is there any genuine issue of material fact that Defendants used the polygraph examination results and disciplined Metropolitan's employees)." *Id*. at 1199.

B. Procedural History

1. District Court

Originally, fourteen plaintiffs, including Respondent Linguists, filed complaints against Metropolitan and the United States alleging violations of the EPPA. (Dkt. 21-1 p. 5). The United States settled with all plaintiffs, including the nine Respondents. (Pet. App. 11). The United States agreed to pay a total of $500,000 to all fourteen plaintiffs and, upon proper application, to reassess plaintiffs' facility access without consideration of polygraph results. (*Id*.). Metropolitan objected to the United States' settlement with plaintiffs, contending that it was not an adequate or good faith settlement. (Dist. Dkt. 121). Metropolitan

claimed that the government's payment of a "relatively nominal sum" was "fundamentally unfair, and so far short of what is reasonable" that the court should reject the settlement, and deny plaintiffs' motion to dismiss the United States. (*Id*. at 5). The District Court denied Metropolitan's motion to set aside the settlement between the United States and the fourteen original plaintiffs. (Dist. Dkt. 159). Metropolitan itself then settled with five of the fourteen plaintiffs. (Dkt. 21-1 at 5). Three settlements were confidential. (*Id*.). Two plaintiffs accepted Metropolitan's Rule 68 settlement demands, one of which was for over $196,000.00. (*Id*. at 6).

The District Court granted partial summary judgment in favor of the remaining nine Linguists, finding Metropolitan had violated 29 U.S.C. §§ 2002(1), (2), and (3). (Pet. App. 19). "Plaintiffs come forward with overwhelming evidence to show (1) Metropolitan is the Plaintiffs' employer and (2) Metropolitan required Plaintiffs to submit to or take a polygraph examination, it inquired into the results of the polygraph examinations, and Metropolitan discharged employees who failed or refused to take the polygraph examination." (*Id*.).

Metropolitan then sought certification of the District Court's summary judgment order for interlocutory appeal. 85 F. Supp. 3d at 1197. It identified as the dispositive legal issue " 'whether, as a matter of law, an employer may be liable under [the Employee Polygraph Protection Act ("EPPA"), 29 U.S.C. §§ 2002(1), (2), and (3)] when a federal law enforcement agency

with which it contracts requires that the employer's employees submit to polygraph examinations pursuant to a criminal investigation.'" *Id*. (internal citation omitted). Metropolitan claimed that the Department of Labor's regulation related to the EPPA, 29 C.F.R. § 801.4(b), applied here. *Id*. at 1198. That regulation provides that employers who cooperate with law enforcement during the course of a criminal investigation do not violate the EPPA "provided that such cooperation is passive in nature." *Id*. The District Court held 29 C.F.R. § 801.4(b) did not apply to Metropolitan because the "undisputed evidentiary record demonstrates Defendants' direct and indirect involvement in the polygraph examinations (in contravention of the EPPA). . . ." *Id*.

The District Court further found that there was no evidence of a criminal investigation because Metropolitan "failed to articulate any particularized suspicion of criminal activities by any Metropolitan employee." *Id*. at 1199. "Without such particularized suspicion, submitting every employee (and prospective employees) to a mandatory polygraph examination and terminating the employee if he or she declines to take the polygraph examination or 'fails' the examination" distinguished this case "from other EPPA cases" which permitted polygraphs when there was a reasonable basis to suspect criminal activity by employees. *Id*.

The District Court concluded by questioning the "propriety of resolving, by means of a motion for interlocutory appeal, an issue that could have been raised

in Defendants' motion for summary judgment but was not." *Id*. at 1200. By declining to assert on summary judgment that Metropolitan was not liable under the EPPA due to its purported cooperation with a criminal investigation, "Defendants have sidestepped the extensive factual record demonstrating the Defendants' active involvement in requiring Plaintiffs to submit to polygraph examination[s] and then using those results to the detriment of Plaintiffs." *Id*. Given the "evidentiary record and the absence of legal authorities supporting Defendants' contentions," the District Court denied Metropolitan's motion. *Id*. at 1199.

Metropolitan proceeded to a jury trial to contest causation and damages. (Dkt. 22-2 p. 233). After a nearly three-week trial, a jury found that Metropolitan's violations of the EPPA were a "substantial factor causing injury, damage, loss or harm" to all nine Linguists and awarded each Linguist economic and non-economic damages.[5] (*Id*. at 233-34). The jury apportioned responsibility for Linguists' non-economic damages, finding Metropolitan 60 percent responsible and the United States 40 percent responsible. (*Id*. at 234). Although the jury found that Metropolitan had acted in reckless disregard of plaintiffs' federally protected EPPA rights (*id*.), it exercised its discretion to decline to impose any punitive damages. (Dkt. 22-2 at pp. 189-90). After trial, the district court reduced the

[5] During trial, plaintiffs dismissed Citrano as a separate defendant when Metropolitan stipulated that his conduct was in the course and scope of his employment as its vice-president.

jury award for non-economic damages by 40 percent. (Dkt. 22-1 p. 6).

After the trial, Metropolitan filed motions for judgment as a matter of law and for a new trial. In rejecting Metropolitan's Fed. R. Civ. P. 50(b) motion for judgment as a matter of law, the District Court ruled as follows:

> [The] trial record is replete with evidence that Metropolitan was Plaintiffs' employer, required Plaintiffs to submit to the polygraphs, rejected claims by its employees that the polygraphs violated the Employee Polygraph Protection Act ("EPPA"), 29 U.S.C. §§ 2002(1)(2), and (3) EPPA, misinformed its employees about the polygraphs, scheduled the polygraphs, used the polygraph results to discharge its employees who failed or refused to take the exam, acted jointly and in concert with the DEA in effectuating the polygraphs, and shared the polygraph results with ICE, leading to additional employee firings.

Medina v. Metro. Interpreters & Translators, Inc., 139 F. Supp. 3d 1170, 1174-75 (S.D. Cal. 2015).

The District Court denied Metropolitan's motion for a new trial, which, among other arguments, challenged the court's grant of summary judgment. *Id*. at 1178. The District Court observed Metropolitan's argument "misconstrues the evidentiary record and minimizes Metropolitan's wrongful conduct." *Id*. It held "[c]ontrary to Metropolitan's contentions, the evidentiary trial record overwhelming supports, rather than

undermines, the grant of summary adjudication on the issue of whether Metropolitan violated EPPA." *Id*. at 1178.

2. Court of Appeals

Respondent Linguists appealed the district court's reduction of the jury's award of damages in accordance with the allocation of fault, contending the EPPA did not provide for apportionment of damages. (Dkt. 21-1). Metropolitan cross-appealed. (Dkt. 41).

In its initial brief in the Court of Appeals (as the cross-appellant) Metropolitan raised a plethora of complaints. It argued, *inter alia*, that: (1) Metropolitan did not act as plaintiffs' employer or require them to submit to the polygraph; (2) Metropolitan was complying with its contract and could not be found liable notwithstanding the controlling federal statute (EPPA); (3) there was no causal link between its conduct and plaintiffs' harm; (4) as a matter of law, plaintiffs had no damages; (5) the jury's finding on damages was "grossly excessive"; and (6) the jury's verdict that Metropolitan was 60 percent responsible for plaintiffs' non-economic damages was "not supported by the evidence." (Dkt. 41).

In addition, Metropolitan argued that Congress did not intend the EPPA to "interfere with polygraphing used by the Executive Branch" in "national security clearance investigations"; and that the EPPA did not "confer liability" on an employer for cooperating with an "executive branch security clearance

investigation." (*Id*. at 61-73). It argued in a two-page section of its oversized brief that "[t]he vast array of highly specific laws, regulations, Executive Orders, and agency directives governing security clearances superseded [the] EPPA." (*Id*. at 73-75).

In response, the Linguists pointed out that they did not possess national security clearances, held no national security positions, never sought national security positions, were never subject to a national security investigation, and never had access to classified information. (Dkt. 53-1 at 13). The Linguists explained that the EPPA itself provided extensive exemptions which permit the federal government to administer polygraphs to private employees of government contractors, but that none of those exemptions applied to this non-national security, non-classified information context. (*See* 29 U.S.C. § 2006(b)-(c)).

Metropolitan in its final brief insisted that it did not challenge the constitutionality of the EPPA. (Dkt. 91 at 10). It claimed an alleged lack of federal jurisdiction. (*Id*.) Metropolitan argued it was irrelevant that the Linguists held no national security positions; irrelevant that they had no access to classified information; and irrelevant whether the investigation was national security, criminal, or administrative in nature. (*Id*. at 20, 24, 26). It contended that a finding that Metropolitan violated the EPPA "would be tantamount to a legal determination that EPPA trumps NISPOM" and "[e]ssentially plaintiffs ask this Court to issue a ruling that EPPA supersedes NISPOM, as well as agreements between government agencies and government

contractors, a result which Congress never intended." (*Id*. at 40). The Court of Appeals denied Metropolitan's motion to dismiss for lack of subject matter jurisdiction. (Pet. App. 3).

In its petition for panel rehearing and rehearing *en banc*, Metropolitan raised nine separate grounds for rehearing. Metropolitan raised for the first time the "conflict between EPPA and NISPOM" to which it devoted two pages of argument. (Dkt. 107 pp. i-ii, 2 at ¶ 3). Although Metropolitan had never asked the Court of Appeals to adjudicate a separation of powers claim, it asserted *en banc* rehearing was warranted because "[t]he conflict between EPPA and NISPOM presents a conflict between the powers of Congress, on one hand, and the powers of the Executive Branch, on the other, which this Court has neither addressed nor resolved." (*Id*.). The Ninth Circuit denied Metropolitan's petition. (Pet. App. 33).

REASONS FOR DENYING THE PETITION

A. Summary of Reasons for Denying *Certiorari*.

The Court should deny Metropolitan's petition for three reasons. First, it has forfeited all of its arguments in the petition by failing to raise them in any form before the district court. It has forfeited its contention that NISPOM supersedes the EPPA in this case by failing to timely raise the claim before the Court of Appeals rendered its decision. Metropolitan made such an

assertion for the first time in a petition for rehearing *en banc*. Having deprived the appellate court of an opportunity to adjudicate its claim by belatedly raising it, Metropolitan may not seek this Court's review of a purported error of its own creation.

Before the Court of Appeals, Metropolitan moved to dismiss the Linguists' claims for lack of subject matter jurisdiction, asserting such claims were nonjusticiable under *Department of Navy v. Egan*, 484 U.S. 518 (1988). The appellate court addressed Metropolitan's contention by finding it had subject matter jurisdiction of the Linguists' claims. (Pet. App. 3). While Metropolitan now asks the Court to address a purported "conflict between EPPA and NISPOM," it failed to timely request the appellate court to resolve this conflict "between the powers of Congress, on one hand, and the powers of the Executive Branch, on the other." (Pet. 12). Given Metropolitan's insistence before the Ninth Circuit that its justiciability argument was not premised on any constitutional objection to the EPPA (Dkt. 91 p. 10), it has forfeited this contention before the Court.

Second, even if Metropolitan had properly raised its claim that NISPOM supersedes the EPPA before the lower courts, its contention lacks any merit as NISPOM does not apply to this case. NISPOM sets forth guidelines regulating access to classified information by employees of federal contractors. It is undisputed that the Linguists never had access to any classified information. Thus, the case does not present any conflict between the EPPA and NISPOM.

Third, Metropolitan's claim that the Linguists' statutory EPPA claims are a nullity under *Egan* flies in the face of *Egan*'s finding that the presumption of non-reviewability of Executive national security decisions is subject to Congress' power to legislate in this arena. *Egan*, 484 U.S. at 530. Here, Metropolitan attempts to expand *Egan* beyond its military and national security context, despite the fact that this case does not involve national security or access to classified information. Even were *Egan* somehow applicable to this case, Congress' act in conferring a specific statutory cause of action while explicitly declining to exempt DEA from the ambit of the EPPA would control. Through a right of private civil action created by Congress, which vested jurisdiction in the federal courts, *see* 29 U.S.C. § 2005(c), the Linguists sought to enforce their EPPA rights. Where "the statute's language is plain, the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters*., 489 U.S. 235, 241 (1989) (internal citation omitted). Because the EPPA's "statutory scheme is coherent and consistent" this Court need not "inquire beyond the plain language of the statute." *Ron Pair*, 489 U.S. at 241-42.

B. Metropolitan Has Forfeited the Right to Raise Any of the Arguments Presented in Its Petition for *Certiorari*.

1. Metropolitan has forfeited the claims it now makes before the Court by failing to make any such arguments before the District Court.

Metropolitan never presented any of the issues it raises in its petition in the three years of proceedings before the District Court. It raised no claim regarding *Egan*, the constitutionality of the application of the EPPA, classified information, national security concerns, the District Court's jurisdiction, justiciability, or NISPOM in the District Court. "It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below." *Singleton v. Wulff*, 428 U.S. 106, 120 (1976). It is essential to raise all claims before the district court "in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence." *Id*. "This limitation on appellate-court authority serves to induce the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them. That court is ordinarily in the best position to determine the relevant facts and adjudicate the dispute." *Puckett v. United States*, 556 U.S. 129, 134 (2009).

2. Metropolitan cannot seek this Court's review by claiming the appellate court erred in failing to consider an argument Metropolitan never made before the Court of Appeals rendered its decision.

Metropolitan now challenges the constitutionality of the Employee Polygraph Protection Act as applied to this case. Metropolitan does not, however, directly attack the constitutionality of the EPPA, but obliquely asserts that the National Industrial Security Program Operating Manual ("NISPOM"), promulgated under Executive Order 12829, trumps the EPPA and precludes Linguists from asserting their EPPA rights. Metropolitan frames this as a "conflict between the powers of Congress, on one hand, and the powers of the Executive Branch, on the other." (Pet. 12). NISPOM purportedly supersedes a duly enacted statute "because the power of the executive branch to control access to classified information necessarily exists independently of Congress." (*Id*.). According to Metropolitan, the failure to elevate NISPOM over the EPPA would be an unconstitutional infringement on Executive prerogatives.[6]

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[6] Even assuming this case implicated national security and access to classified information, Metropolitan does not explain why Congress is unable to legislate on issues touching upon national security given the Constitution's explicit authorization. Article I, § 8 ("Congress shall have power . . . To make rules for the government and regulation of the land and naval forces"); *see also Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded

In the Court of Appeals, Metropolitan did not timely raise the question it now presents to this Court, whether NISPOM supersedes the EPPA due to the separate powers of the Legislative and Executive Branches. It first raised that question in its petition for panel rehearing and rehearing *en banc*. Metropolitan may not fault the Court of Appeals for failing to consider a matter that it never timely asked the appellate court to adjudicate. It has forfeited its ability to challenge the constitutionality of the EPPA before this Court by failing to raise its argument either before the district court or appellate court. "If an error is not properly preserved, appellate-court authority to remedy the error (by reversing the judgment, for example, or ordering a new trial) is strictly circumscribed." *Puckett v. United States*, 556 U.S. 129, 134 (2009). This limitation on a reviewing court's authority "prevents a litigant from 'sandbagging' the court – remaining

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Congress greater deference."). This Court in *Egan* held that any presumption of nonreviewability of Executive national security decisions may be modified or eliminated by Congressional legislation. 484 U.S. at 530.

Moreover, Congress has the authority to regulate employment and labor affairs. *See, e.g.*, *United States v. Darby*, 312 U.S. 100, 115 (1941) (upholding the Fair Labor Standards Act (FLSA) of 1938 by finding the FLSA to be a valid exercise under the Commerce Clause of "legislative judgment"). Congress' decision to limit and regulate polygraph testing in employment was a valid exercise of its constitutional authority. It was a rational decision in light of the unreliability of the polygraph, and the risk of unfairness and injustice occasioned by its use. *See Veazey v. Communications & Cable of Chicago, Inc.*, 194 F.3d 850, 855-56 (7th Cir. 1999) (discussing studies demonstrating the unreliability of polygraph testing).

silent about his objection and belatedly raising the error only if the case does not conclude in his favor." *Id*. (internal citation omitted).

Before the Ninth Circuit, Metropolitan asserted only that the federal courts lacked subject matter jurisdiction because the Linguists' claims were non-justiciable. By way of a motion to dismiss the appeal, Metropolitan asserted that an Executive Branch agency's decision to revoke a security clearance or facility access was non-justiciable, citing *Egan*, 484 U.S. at 530-33. Metropolitan asserted "[a]ll of plaintiffs' claims in the district court, and all of plaintiffs' claims on appeal, are non-justiciable because they are inextricably intertwined with the DEA's methods and motivations for conducting its security investigations, and with DEA's reasons for suspending, and ultimately revoking, plaintiffs' clearances." (Dkt. 42 at 4).

In their opposition, the Linguists explained the federal courts had jurisdiction to hear their claims under the EPPA because the statute explicitly authorized aggrieved employees to bring private civil actions against offending employers in "any Federal or State court of competent jurisdiction." 29 U.S.C. § 2005(c)(2). The Linguists explained that their statutory claims under the EPPA were justiciable under the framework set forth by this Court in *Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012). Because the Linguists sought to enforce specific statutory rights, this only required federal courts to engage in the "familiar judicial exercise" of (1) determining whether the Linguists' interpretation of the statute was correct; and (2) determining

whether the statute was constitutional. *Id*. The Linguists contended Metropolitan was liable under the plain language of the statute and that Metropolitan, which had never challenged the constitutionality of the EPPA, had forfeited any constitutional objection.

In reply, Metropolitan claimed that its justiciability argument was not premised on any constitutional objection: "justiciability deals with the range of a court's power and ability to adjudicate disputes, not with a party's constitutional rights."[7] (Dkt. 91 p. 10).

Because Metropolitan made no challenge to the constitutionality of the EPPA, the Ninth Circuit only addressed its jurisdictional argument. It denied Metropolitan's motion to dismiss for lack of subject matter jurisdiction. The appellate court distinguished the conduct of the federal government from the actions of Metropolitan in this case. Noting that "federal courts may not review the merits of the executive's decision to grant [or] deny a security clearance," the Ninth Circuit wrote "Metropolitan is not the DEA, and the linguists challenge Metropolitan's conduct surrounding

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[7] Any contention related to the scope of the Executive Branch's Constitutional authority is justiciable as it is the Judiciary that must determine the appropriate authority of each branch of government under the Constitution. *Zivotofsky*, 566 U.S. at 197 ("But there is, of course, no exclusive commitment to the Executive of the power to determine the constitutionality of a statute. The Judicial Branch appropriately exercises that authority, including in a case such as this, where the question is whether Congress or the Executive is 'aggrandizing its power at the expense of another branch.' ") (internal citation omitted).

the polygraphs, not whether or not they actually failed the polygraphs . . . "[8] (Pet. App. 3).

Metropolitan then submitted a petition for panel rehearing and rehearing *en banc* in which it asserted the Ninth Circuit panel had failed to address a constitutional claim it had never made regarding the separate powers of the legislative branch and executive branch: "[t]he conflict between EPPA and NISPOM presents a conflict between the powers of Congress, on one hand, and the powers of the Executive Branch, on the other, which this Court has neither addressed nor resolved." (Dkt. 107 p. 2 ¶ 3). The Ninth Circuit denied Metropolitan's petition.

By failing to challenge the constitutionality of the EPPA in the courts below, Metropolitan has forfeited its claim Congress has exceeded its authority under the Constitution by infringing on the Executive Branch's authority to determine access to classified information. (Pet. 12). "No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal

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[8] Metropolitan cites to the Respondent's complaint to argue that plaintiffs' case questioned the technical manner of polygraph administration, the accuracy of the polygraphs, and whether certain Linguists actually "failed" the polygraph. (Pet. 17). Metropolitan fails to inform the Court that at trial, the district court excluded any testimony regarding the accuracy *vel non* of the polygraphs in this case, and precluded any inquiry into the details of scoring of charts, training of polygraphers, and the calibration/faults in the machines. Thus, there was no inquiry at all into the accuracy or merits of the results of the DEA-administered polygraphs.

as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *United States v. Olano*, 507 U.S. 725, 731 (1993) (internal citation omitted). Because Metropolitan has forfeited its objections by failing to raise them at the proper time, *certiorari* should be denied.

C. Because NISPOM Does Not Apply to This Case There Is No Conflict Between the EPPA and NISPOM for This Court to Resolve.

Although Metropolitan seeks this Court's review by claiming there is a conflict between NISPOM and the EPPA in this case, NISPOM does not apply to this case. Metropolitan urges the Court to grant *certiorari* to hold that "NISPOM should control in this case because the power of the executive branch to control access to classified information necessarily exists independently of Congress." (Pet. 12). But this issue is not raised by the facts of this case because: (1) DEA officials repeatedly testified the Linguists did not have access to classified information; and (2) the United States, a party before the District Court, never contended the EPPA infringed on its exclusive Executive Branch authority to control access to classified information.

Instead, during the District Court proceedings, the United States settled the Linguists' EPPA claims by agreeing to pay $500,000 and to re-evaluate the

Linguists' ability to work at DEA facilities. It never claimed that *Egan* divested the Court of jurisdiction; never claimed that its determination involved, as Metropolitan suggests, classified information, national security positions, or a national security investigation. This case presents the anomaly that Metropolitan, the contractor, in an attempt to avoid liability, argues the constitutional prerogatives of the Executive, when the United States itself never raised such concerns.

There is no conflict between NISPOM and the EPPA in this case when NISPOM, by its own terms, only governs access to classified information. Linguists had no access to classified information. Executive Order 12829 is the authority under which NISPOM was promulgated. The "National Industrial Security Program shall serve as a single, integrated, cohesive industrial security program to protect *classified information* and to preserve our Nation's economic and technological interests." Exec. Order 12829, 58 Fed. Reg. 3479 (Jan. 6, 1993). (Federal Register Vol. 58, No. 5) (emphasis added). "The purpose of this program is to safeguard *classified information* that may be released or has been released to current, prospective, or former contractors, licensees, or grantees of United States agencies." Exec. Order 12829 § 101 (emphasis added). NISPOM "prescribes the requirements, restrictions, and other safeguards to prevent unauthorized disclosure of *classified information*. The Manual controls the authorized disclosure of *classified information* released by U.S. Government Executive Branch

Departments and Agencies as to their contractors." (Dkt. 68-6 p. 3356 § 1-100) (emphasis added).

"Classified information" is a term of art that is specifically defined. Executive Order 13526 sets forth the controlling definitions and demonstrates conclusively that NISPOM had no application to the DEA wire room, Metropolitan, or the monitors. The relevant provisions of Executive Order 13526 read as follows:

> **Sec. 1.2.** *Classification Levels*. (a) Information may be classified at one of the following three levels:
>
> (1) "Top Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the original classification authority is able to identify or describe. (2) "Secret" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the original classification authority is able to identify or describe. (3) "Confidential" shall be applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority is able to identify or describe.
>
> (b) Except as otherwise provided by statute, no other terms shall be used to identify United States classified information. . . .

Sec. 1.4. *Classification Categories*. Information shall not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with § 1.2 of this order, and it pertains to one or more of the following:

(a) military plans, weapons systems, or operations;

(b) foreign government information;

(c) intelligence activities (including covert action), intelligence sources or methods, or cryptology;

(d) foreign relations or foreign activities of the United States, including confidential sources;

(e) scientific, technological, or economic matters relating to the national security;

(f) United States Government programs for safeguarding nuclear materials or facilities;

(g) vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or

(h) the development, production, or use of weapons of mass destruction. . . .

Sec. 1.6. *Identification and Markings.* (a) At the time of original classification, the following shall be indicated in a manner that is immediately apparent:

> (1) one of the three classification levels defined in § 1.2 of this order; (2) the identity, by name and position, or by personal identifier, of the original classification authority; (3) the agency and office of origin, if not otherwise evident. . . .
>
> **Sec. 6.1.** *Definitions.* For purposes of this order. . . .
>
> (cc) "National security" means the national defense or foreign relations of the United States.

Exec. Order 13526, 75 Fed. Reg. 707-09, 729 (Jan. 5, 2010).

None of the Linguists had access to classified national security information. (Dkt. 52-2 pp. 2080-81). *None* of the Linguists held national security positions.[9] *None* of the information in the DEA facilities where the Linguists worked was classified as "top secret," "secret," or "confidential." (Dkt. 68-1 p. 2621). *None* of the wiretap transcripts were ever classified, marked as

[9] The head of a federal agency is responsible for designating those positions within the department or agency that are national security positions. 5 C.F.R. § 1400.201. DEA never designated Linguists' positions as national security positions. Another regulation defines "national security positions" as: "(1) Those positions that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States; and (2) positions that require regular use of, or access to, classified information." 5 C.F.R. § 732.102(a). The Linguists' positions did not involve either category of work.

classified, or referred to by these classification categories. (Dkt. 52-2 pp. 2080-81). Thus, Metropolitan's argument that NISPOM, an operations manual, "supersedes" a federal statute flounders at a basic level. NISPOM, by its own terms, does not apply in this case.

Moreover, Metropolitan's contention that NISPOM must trump the EPPA in this case is inconsistent with the Congressional grant of authority to the President which enabled Executive Order 12829. Executive Order 12829 specifically cites to multiple statutes as sources of authority under which the President established the National Industrial Security Program, including the Atomic Energy Act of 1954, the National Security Act of 1947, and the Federal Advisory Committee Act. Given that NISPOM is derived in part from authority conferred on the President by multiple acts of Congress, Metropolitan provides no explanation as to how NISPOM supersedes a separate statute, the EPPA, especially when the EPPA provides specific exemptions for national security and defense classified information.

D. *Egan* Does Not Preclude the Vindication of Statutory Rights Outside the National Security Context.

Metropolitan seeks to extend *Egan* beyond the national security/classified information context to render Linguists' statutory claims non-justiciable, even though Linguists did not possess security clearances,

did not hold national security positions, and did not have access to any classified national security information. *Egan*'s preclusion of review of the merits of Executive national security decisions applies in the context of national security and classified information. 484 U.S. at 527. *Egan* did not, however, address statutory claims outside the national security context or divest the federal courts of jurisdiction to adjudicate such statutory claims.

Egan held that the Merit Systems Protection Board ("MSPB") could not review the substance of a federal agency's underlying decision to deny or revoke a national security clearance. 484 U.S. at 527. Egan was a Navy employee who worked at the Trident Submarine Facility. *Id*. at 520. The Trident, a nuclear power vessel, carried nuclear weapons. *Id*. Egan had sustained convictions for assault and being a felon in possession of a gun, but did not disclose these convictions on his employment application. *Id*. at 521. He had suffered from a drinking problem as well. *Id*. The Navy denied Egan a security clearance. *Id*. at 522. *Egan* noted that "unless Congress specifically has provided otherwise, courts had traditionally been reluctant to intrude upon the authority of the Executive in military and national security affairs." 484 U.S. at 530. The Court held that it considered it extremely unlikely that Congress intended to permit MSPB "second guessing" of security decisions when it passed the Act and created the Merit Systems Protection Board. *Id*. at 531-32.

The Court described Executive Branch efforts since World War I to protect national security information by means of a "classified system graded according to sensitivity." *Id*. at 527. After World War II, certain civilian agencies, including the CIA, the National Security Agency, and the Atomic Energy Commission, were entrusted with gathering, creating, and safeguarding national security information. *Id*. at 527-28. Presidents, through a series of executive orders, sought to protect information and ensure its proper classification. *Id*. at 528. *Egan*'s holding is based upon the Executive's authority, in the absence of contrary Congressional legislation, to regulate access to such classified national security information. *Id*. at 530.

Circuit Courts of Appeals have construed *Egan* to preclude judicial review of denials of security clearances in the national security and classified information context. *See, e.g.*, *Dorfmont v. Brown*, 913 F.2d 1399 (9th Cir. 1990); *Hill v. Dep't of Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988) ("The Executive Branch has constitutional responsibility to classify and control access to information bearing on national security. A security clearance is merely temporary permission by the Executive for access to national secrets."); *Perez v. FBI*, 71 F.3d 513, 514-15 (5th Cir. 1995) (*Egan* barred review where FBI revoked plaintiff's Top Secret FBI security clearance); *Bennett v. Chertoff*, 425 F.3d 999, 1001 (D.C. Cir. 2005) (*Egan* barred judicial review of plaintiff's claims which involved a Top Secret security clearance); *Hegab v. Long*, 716 F.3d 790, 791 (4th Cir. 2013) (*Egan* applied to plaintiff's claims related to

revocation of his Top Secret security clearance with the National Geospatial-Intelligence Agency).

In contrast, the circuit courts have not extended *Egan*'s rationale beyond the context of national security clearances. For example, in *Hale v. Johnson*, 845 F.3d 224 (6th Cir. 2016), the Sixth Circuit declined to extend *Egan* beyond its holding barring judicial review of decisions to revoke or deny security clearances. 845 F.3d at 230. *Egan* analyzed "the importance of executive control over access to national security *information*, [] not general national-security concerns . . . " *Id*. (emphasis in the original) (internal citation omitted). Thus, *Egan* did not bar plaintiff's ADA and Rehabilitation Act claims based on revocation of plaintiff's security clearance due to plaintiff's failure to pass a medical test. *Id*. at 226, 230. In contrast to the predictive judgments at issue in *Egan* which assessed an individual's likelihood of disclosing sensitive classified information, 484 U.S. at 529-30, the Sixth Circuit found "the determination of an individual's physical capability to perform a job is based on hard science and has historically been reviewed by courts and administrative agencies." *Hale*, 845 F.3d at 230. "Remaining faithful to *Egan* and the logic on which it stands prevents this circuit from slipping into an untenable position wherein we are precluded from reviewing any federal agency's employment decision so long as it is made in the name of national security." *Id*. at 231.

Likewise, in *Toy v. Holder*, 714 F.3d 881 (5th Cir. 2013), the Fifth Circuit held that a security clearance was not identical to facility access and, therefore, *Egan*

did not apply to plaintiff's claim premised on revocation of access to an FBI facility. *Id*. at 884-85. The *Toy* court distinguished building access from a security clearance determination because the latter is made by "specialized groups of persons, charged with guarding access to secured information, who must make repeated decisions." 714 F.3d at 885. This "significant" process allows agencies "to make the deliberate, predictive judgments in which they specialize." *Id*. In contrast, building access can be revoked by "someone who does not specialize in making security decisions." *Id*. This lack of "oversight, process, and considered decision-making" rendered *Egan* inapplicable to plaintiff's claim related to building access. *Id*. at 885-86.

E. The EPPA Is Congress' Controlling Determination Regarding Administration of Polygraphs to Employees of Federal Government Contractors.

1. There is no conflict between *Egan* and the EPPA.

The Court in *Egan* recognized the authority of Congress to pass a statute overriding any presumption of unreviewability of security clearance decisions. *Egan*, 484 U.S. at 530. Even if this case truly implicated *Egan*'s holding, and even if it involved classified information (which it does not), the enactment of the EPPA, which did not exempt DEA and its contractors from its provisions, would make *Egan* inapplicable here.

This Court decided *Egan* on February 23, 1988. Congress passed the Employee Polygraph Protection Act on June 27, 1988. In the immediate aftermath of *Egan*, the Congress crafted specific statutory exemptions for federal national security agencies from any proscription on administering polygraphs to government contractors' employees. The statutory exemptions mirror the *Egan* Court's enumeration of national security agencies (*e.g.*, CIA, NSA, and the Atomic Energy Commission). The exemption of those agencies from the Act, and the decision to deny DEA any such exemption, demonstrates Congress intended DEA to be subject to the EPPA's prohibitions on the use of polygraphs for contractors' employees.[10]

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[10] The Joint Explanatory Statement of the Committee of Conference for the EPPA stated:

> . . . The exemption provided for national security functions specifies that the federal government may administer lie detector tests to certain employees of contractors to various federal agencies engaged in intelligence and counterintelligence work. The conference agreement is designed to conform with the National Defense Authorization Act for Fiscal Years 1988 and 1989 (H.R. 1748), which restricts such testing to individuals whose duties involve access to top secret or special access program information.

134 Cong. Rec. H3709 (May 26, 1988).

2. Metropolitan is liable for violating the EPPA because it is not exempt from its provisions.

Section 2006(a) permits the administration of polygraphs to government employees by the government entity employer. *See* 29 U.S.C. § 2006(a). But the § 2006(a) exemption only applies to the government with respect to its own public employees. 29 C.F.R. § 801.10(d). And except as provided in 29 U.S.C. §§ 2006(b) and (c), this exemption from the EPPA in § 2006(a) does not extend to government contractors and does not apply to government entities with respect to private employees of a contractor. 29 C.F.R. § 801.10(d).

The exemptions in § 2006(b)-(c) permit the federal government to administer polygraphs to employees of private contractors in the following specified, clearly delineated circumstances:

1) any expert, consultant, contractor, or employee of a contractor to the Department of Defense and Department of Energy;

2) any experts, consultants, contractors, employees of contractors, prospective employee, and individuals "assigned to a space where sensitive cryptologic information is produced, processed, or stored," and any person assigned to work at the following agencies: National Security Agency, the Defense Intelligence Agency, the National Geospatial-Intelligence Agency, or the Central Intelligence Agency;

3) any expert or consultant, and any employee of that expert or consultant, whose duties involve access to top secret information or information "designated as being within a special access program"; and

4) in the performance of any counterintelligence function, any employee of a contractor of the FBI.

The statute provides no exemption permitting the federal government to administer a polygraph to any employee of a contractor to DEA.

Congress' decision to exempt private contractors of specific federal agencies from the EPPA, but not private contractors of DEA, evidences its deliberate exclusion of DEA from the exemptions of the EPPA. The canon of statutory construction *expressio unius est exclusio alterius* applies in force "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168-69 (2003); *see also Chevron USA Inc. v. Echazabal*, 536 U.S. 73, 81 (2002).

F. There Is No Circuit Conflict.

The Ninth Circuit rejected Metropolitan's claims that *Egan* rendered the Linguists' EPPA claims nonjusticiable because "Metropolitan is not the DEA, and the linguists challenge Metropolitan's conduct surrounding the polygraphs, not whether or not they actually failed the polygraphs . . . " (App. 3). The Ninth

Circuit held the "DEA's exclusive control of the actual polygraph examinations does not preclude Metropolitan's liability – the EPPA covers damages caused by a wide array of employer conduct surrounding polygraphing, not just the actual examinations." (App. 4). As the district court noted, "[t]he fact that the DEA was the driving force behind the polygraph examinations does not immunize [Citrano] from his own conduct."

There is no conflict between this case and the Tenth Circuit decision in *Beattie v. Boeing Co.*, 43 F.3d 559 (10th Cir. 1994), because the Linguists do not challenge the revocation of any security clearance, but only seek to hold Metropolitan liable for its violations of the EPPA. Unlike the Linguists' attempts to enforce specific statutory rights, the plaintiff in *Beattie* filed suit against Boeing for damages caused by the loss of his clearance. 43 F.3d at 562. The district court in *Beattie* found that Boeing had no role in determining whether Beattie's security clearance should be denied and "'it was the Air Force which denied Beattie's request for clearance.'" *Id*. (citations omitted). Beattie had previously sued the United States for denying him a security clearance, which the district court had dismissed under *Egan*. *Id*. at 566. The Tenth Circuit agreed with the "sound reasoning" of the district court and held that any authority by Boeing to deny access came from its contract with the Air Force. *Id*. at 566. Boeing could rely on the Air Force's authority pursuant to the contract *Id*. at 566.

The Ninth Circuit held it had jurisdiction to consider the Linguists' EPPA claims because the Linguists did not contest the revocation of any security clearance but challenged Metropolitan's separate and distinct conduct in violating the EPPA. (Pet. App. 3). The Ninth Circuit cited to *Zeinali v. Raytheon*, 636 F.3d 544, 549-50 (9th Cir. 2011), which held federal courts may adjudicate claims against private employers, contractors to the federal government, so long as such claims do not involve the merits of the security clearance determination. *Zeinali* does not conflict with *Beattie* because *Zeinali* did not hold that a contractor may never raise *Egan*'s jurisdictional bar as a defense. 636 F.3d at 551. Rather, *Zeinali* explained that such a case as *Beattie* may be rare because in employment suits against private employers, "courts can generally avoid examining the merits of the government's security clearance decision." *Id*.

Because *Beattie* is factually distinguishable from the facts here, this case does not present any conflict between the Ninth and Tenth Circuits. In any event, as the Linguists have demonstrated, neither *Egan* nor *Beattie* can foreclose their EPPA claims because the Linguists do not challenge the revocation of national security clearances which they never had. Rather, they seek to hold Metropolitan liable for the violation of statutory rights conferred by Congress in the manner provided for by Congress.

CONCLUSION

Metropolitan's claims have radically shifted at each level of the process. In the District Court, Metropolitan claimed, without support, that its conduct was exempt from the EPPA because it was assisting in a criminal investigation. In the Ninth Circuit, Metropolitan, despite failing to raise its "national security" argument in any form in the District Court when the United States was a party, asserted *Egan* foreclosed the Linguists' claims and rendered them non-justiciable. Now, having failed to challenge the constitutionality of the EPPA in the Court of Appeals, Metropolitan asserts that a federal agency operating manual, NISPOM, which has no application to this case, extinguishes the Linguists' statutory rights. The petition for writ of *certiorari* should be denied.

Respectfully submitted,

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