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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The principles announced in *Dep't of the Navy v. Egan*, 484 U.S. 518 (1988) (*Egan*) should extend to government contractors like Metropolitan. The National Industrial Security Program Operating Manual ("NISPOM"), promulgated under Executive Order 12,829, mandates that federal contractors must assist the government in conducting polygraph examinations of the contractor's employees to determine whether their security clearance should be revoked. The purpose of NISPOM is to "'prescribe specific requirements, restrictions, and other safeguards that are necessary to preclude unauthorized disclosure and control authorized disclosure of classified information to contractors, licensees, or grantees.'" *Jacobs v. Experts, Inc.*, 212 F. Supp. 3d 55, 92 (D.D.C. 2016) (citing NISPOM, § 201).[1]

In contrast to NISPOM, the Employee Polygraph Protection Act ("EPPA") generally bars private employers from requiring or requesting any employee to submit to a polygraph examination. The conflict between EPPA and NISPOM is manifest and goes to the heart of Metropolitan's argument that the rule of nonreviewability under *Egan* should apply equally to federal contractors who assist the government in conducting polygraphs of their employees. The Ninth Circuit's opinion effectively allows courts to second-guess the

[1] NISPOM can be found at https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/522022M.pdf.

DEA's use of polygraphs as a tool in conducting security clearance investigations – i.e., the methods and means, and in turn, the merits of the DEA's decision to revoke the security clearance of a government contractor's employees. Metropolitan was unfairly subjected to a multimillion dollar judgment for engaging in conduct that NISPOM expressly allows. Given this grave injustice and the fact the Ninth Circuit's opinion will apply to the hundreds of government contractors with actual or potential access to classified information, the Court is urged to grant certiorari.

METROPOLITAN DID NOT FORFEIT ITS ARGUMENT REGARDING THE CONFLICT BETWEEN EPPA AND NISPOM

Contrary to Respondents' contention, Metropolitan did not forfeit its argument regarding the inconsistency between EPPA and NISPOM. The conflict between EPPA and NISPOM is an aspect of Metropolitan's challenge to subject matter jurisdiction – a defense which can never be forfeited or waived and can even be raised for the first time on appeal. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006); Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). In addition, the conflict between NISPOM and EPPA raises a pure question of law. *United States v. Echavarria-Escobar*, 270 F.3d 1265, 1267-1268 (9th Cir. 2001) (no forfeiture of issues

involving pure questions of law and the opposing party will suffer no prejudice).

In any event, in challenging subject matter jurisdiction, Metropolitan raised the conflict between EPPA and NISPOM in several briefs in the Ninth Circuit. Metropolitan specifically argued that NISPOM mandated that it cooperate with the DEA's security clearance investigation and assist the DEA in polygraphing Plaintiffs. For example, Metropolitan argued in its motion to dismiss for lack of subject matter jurisdiction under *Egan* as follows:

> The NISPOM makes clear that contractors, including Department of Justice and Department of Homeland Security contractors like Metropolitan (28 C.F.R. § 17.2(b); Exec. Order No. 12,829, 3 C.F.R., 1993 Comp., p. 570; NISPOM § 1-103(b) {11SER 2543}), must "cooperate" with federal agency security investigations. "Cooperation includes providing suitable arrangements within the facility for conducting private interviews with employees during normal working hours, providing relevant employment and security records for review when requested, and rendering other necessary assistance." NISPOM § 1-204.
>
> The NISPOM explicitly states that federal agencies may require polygraphs as part of security clearance investigations: "Agencies with policies sanctioning the use of the polygraph for [personnel security clearance] purposes may require polygraph examinations when necessary. If issues of concern surface

> during any phase of security processing, coverage will be expanded to resolve those issues." NISPOM § 2-201(c).

(Dkt. 41, pp. 18-19.)

Metropolitan argued in its Fourth Brief in the Ninth Circuit as follows:

> Alternatively, even if Plaintiffs' claims are justiciable, Metropolitan's conduct should not be deemed to constitute a violation of EPPA given the requirements of the National Industrial Security Program Operating Manual ("NISPOM"), the Blanket Purchase Agreement ("BPA") and the government's requirement that monitors obtain security clearances and sign SF-86 Forms.

(Dkt. 91, pp. 12-13.) Therefore, Metropolitan did not forfeit any issues regarding the conflict between EPPA and NISPOM.[2]

Plaintiffs also misconstrue Metropolitan's position. They erroneously argue that Metropolitan's justiciability argument is premised on the assertion that EPPA is *unconstitutional*. (Opp. p. 22.) In fact, Metropolitan does not dispute the fact that Congress had the power under the Commerce Clause, Article I, Section 8, Clause 3, to enact EPPA. *See* 29 U.S.C.S. § 2002 (stating that EPPA shall apply to "any employer engaged in or affecting commerce or in the production of goods for commerce"). The question here is not whether EPPA is

[2] Significantly, the Ninth Circuit's Memorandum Opinion made no determination that Metropolitan had forfeited any issue.

constitutional, but whether courts can, under the separation of powers doctrine, adjudicate claims involving the suspension or revocation of a contractor's employee's security clearance. This question of justiciability does not depend on Congressional authorization, but on whether judicial review would interfere with the prerogatives of a coordinate branch of government and require a court to make decisions beyond areas of judicial expertise, even when the claim is brought against the contractor, as opposed to the government itself.

There is a distinction between subject matter jurisdiction and justiciability. A court may possess jurisdiction over the subject matter, but the case may be nonjusticiable if "the claim presented and the relief sought are of the type which [do not] admit of judicial resolution . . . [or] the issue presented a 'political question' – that is, a question which is not justiciable in federal court because of the separation of powers provided by the Constitution." *Powell v. McCormack*, 395 U.S. 486, 516-517 (1969). "The non-justiciability doctrine precludes review in this case even though review is not precluded by statute." *Panoke v. United States Army Military Police Brigade*, 2009 U.S. App. LEXIS 11551, *2 (9th Cir. 2009), citing *Baker v. Carr*, 369 U.S. 186, 198 (1962).

Moreover, the fact that EPPA does not contain a specific exemption for the DEA's use of polygraphs is not dispositive. EPPA was not intended to usurp the power of the Executive Branch to determine whether a person poses a threat to national security. The test

under *Egan* is whether Congress *unmistakably* intended to allow judicial review of security clearance decisions. "[U]nless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Egan*, 484 U.S. at 530. There must be an "unmistakable expression of purpose" for a court "to conclude that Congress intended security clearance decisions to be subject to judicial review." *Brazil v. United States Dep't of the Navy*, 66 F.3d 193, 197 (9th Cir. 1995); *Guillot v. Garrett*, 970 F.2d 1320, 1324 (4th Cir. 1992) ("unless Congress specifically has provided otherwise, the courts will not intrude upon the President's authority to grant or deny access to national security information"). The issue at hand relates to the power of the federal courts under Article III, and deference that must be accorded the Executive Branch under Article II, not the powers of Congress under Article I.

EGAN DOES NOT DEPEND ON WHETHER PLAINTIFFS ACTUALLY HAD ACCESS TO CLASSIFIED INFORMATION

Plaintiffs argue that there is no conflict between NISPOM and EPPA because NISPOM only governs access to "classified information" and the linguists were only exposed to "law enforcement sensitive" information. (Opp. p. 27.) Plaintiffs' argument is misguided for several reasons.

First, the question of justiciability under *Egan* turns on the *potential* access to classified information, not *actual exposure* to such information. A security clearance may be required for individuals occupying sensitive positions even where an individual does not have access to classified information. As *Kaplan v. Conyers*, 733 F.3d 1148, 1156-1157 (Fed. Cir. 2013) properly observed:

> The centerpiece of the *Egan* analysis, Executive Order No. 10,450, makes no mention of "classified information." . . . *Egan's* core focus is not on "information," but rather on the Executive's discretion to act on threats – information-based or not – to national security generally.

Second, NISPOM's scope is not limited to "classified information." Under NISPOM, Appendix C, Definitions, information that a contractor's employees may be exposed to can fall within one of three categories: "top secret," "secret," or "confidential." (16 SER 3375.) Information is categorized as "top secret" if the disclosure of that information "reasonabl[y] could be expected to cause exceptionally grave damage to the national security." (16 SER 3478.) Information is deemed "secret" if the disclosure of that information "reasonably could be expected to cause serious damage to the national security." (16 SER 3478.) Information is "confidential" if the disclosure of the information "reasonabl[y] could be expected to cause damage to the national security." (16 SER 3475.) All three categories require a security clearance.

Third, Plaintiffs do not dispute that their duties involved intercepting communications from drug cartels, i.e., activities that implicate national security. *See* 58 FR 60989, Exec. Order No. 12,880, 1993 WL 13149673, November 16, 1993 ("[T]he United States considers the operations of international criminal narcotics syndicates as a national security threat. . . ."). Nor do Plaintiffs dispute that the linguists listened to communications involving violent drug cartels. Plainly, Plaintiffs are in no position to second-guess the DEA's determination that the linguists could come across classified information in monitoring Mexican cartels along the border and that it was in the interest of national security to require them to have security clearances to work in the wire rooms.

Fourth, the SF-86 Forms ("Questionnaire for National Security Positions") signed by Plaintiffs are used by the government to determine eligibility for access to *sensitive* information, not just *classified* information. Therefore, whether the linguists actually had access to classified information is beside the point.

METROPOLITAN'S CONDUCT IS INEXTRICABLY INTERTWINED WITH THE MERITS OF THE DEA'S DECISION TO REVOKE PLAINTIFFS' SECURITY CLEARANCE

A. The Ninth Circuit's Opinion Conflicts With *Beattie*.

Beattie v. Boeing Co., 43 F.3d 559 (10th Cir. 1994) held that *Egan* extends to the participation by federal contractors in making security clearance decisions. Stated differently, government contractors are considered "state actors." "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character" that it can be regarded as governmental action. *Evans v. Newton*, 382 U.S. 296, 299 (1966). *Egan*'s principles therefore should apply equally to federal contractors who assist the government in making, or participating in making, security clearance decisions. This is particularly important given the expansion of outsourcing of government services to private parties in recent years.

Plaintiffs argue that the district court's opinion does not conflict with *Beattie* because Plaintiffs "do not challenge the revocation of any security clearance, but only seek to hold Metropolitan liable for its violations of the EPPA." (Opp. 39.) The argument is pure sophistry since Plaintiffs' damage claims were premised on the loss of their security clearance, and in turn, their loss of employment with Metropolitan. Plaintiffs all alleged that they were discharged by Metropolitan because of the "results" of the polygraphs or for "failing" them. (*See* Pet. at 17.) Indeed, Plaintiffs' counsel

argued in closing argument that "the only thing that led to the revocation of access was failing the polygraph." (Doc. 230, 4/20/15, Tr. Transcript, 53:7-9.)

The Ninth Circuit's Memorandum Opinion is similarly misguided in stating that "the linguists challenge Metropolitan's conduct surrounding the polygraphs, not whether or not they actually failed polygraphs." (Pet. App. 3.) The merits of the DEA's decision to suspend or revoke the security clearances cannot be divorced from the methods used in doing so. Indeed, the district court foreclosed any such inquiry into the DEA's reasons for suspending or revoking Plaintiffs' security clearances, *first*, by granting partial summary judgment on liability against Metropolitan under EPPA, *and then*, by ruling *in limine* that the results of the polygraph tests were inadmissible. (Doc. 174, 3/27/15, Tr. Transcript, 51:12-24.) Whether the DEA had valid grounds for terminating Plaintiffs' security clearances became irrelevant in the District Court's view, forcing Metropolitan to defend the case at trial with both hands tied behind its back.

B. The Ninth Circuit's Opinion In *Zeinali* Is Not Controlling And Conflicts With *Egan* And Other Cases.

The Ninth Circuit's opinion relied principally on *Zeinali v. Raytheon*, 636 F.3d 544, 549-550 (9th Cir. 2011). *Zeinali* narrowly construed *Egan*, holding that "federal courts have jurisdiction over employment discrimination claims in which the plaintiff does not

dispute *the merits* of the government's security clearance decision." *Zeinali*, 636 F.3d at 555 (italics added). In *Zeinali*, the employee did not dispute the security clearance determination, but instead maintained that Raytheon had used the employee's lack of a security clearance as a pretext for termination. *Zeinali* reasoned:

> Zeinali does not contend that the Department of Defense (or any other agent of the executive branch) improperly denied his application for a security clearance. Rather, Zeinali contends that Raytheon's security clearance requirement was not a bona fide job requirement, and that Raytheon used the government's security clearance decision as a pretext for terminating Zeinali in a discriminatory fashion. In order to review Zeinali's contentions in a full and fair manner, we need not examine the merits of the government's decision regarding Zeinali's security clearance. Rather, we need only examine the employment decisions made by Raytheon. *Egan* does not strip the courts of jurisdiction to make such determinations.

Zeinali, 636 F.3d at 551-552.

The major flaw in *Zeinali* is that *Egan*'s scope is not limited to judicial review of the "merits" of security clearance decisions. Rather, *Egan* more broadly restricts review of the *methods* used in making such decisions. *Egan* recognizes that the grant of presidential authority under the Constitution includes the "authority to classify and control access to information bearing on national security and to determine whether an

individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information." *Egan*, at 527. As such, *Egan* encompasses the broader use of polygraphs in conducting security clearance decisions and not simply the merits of those decisions.

Zeinali's narrow view of *Egan* also runs directly counter to NISPOM and the DEA's view that polygraphs are an essential tool in making security clearance decisions. *Egan* expressly leaves these kinds of "predictive judgments" to the exclusive discretion and expertise of the Executive Branch. *Egan*'s comprehensive breadth is also reflected in post-*Egan* opinions holding that if an adverse employment decision relates to a security clearance decision and employment was conditioned upon maintaining a security clearance, courts must dismiss the claim for lack of subject matter jurisdiction. *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996) (courts may not review actions arising out of revocations of security clearances, including the "instigation of the investigation into the security clearance as a form of retaliation"); *Haig v. Agee*, 453 U.S. 280, 292 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); *Dorfmont v. Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990) (judicial review of security clearance decisions made by the Executive Branch are not reviewable by federal courts); *United States v. Hawkins*, 249 F.3d 867, 873 n.2 (9th Cir. 2001) ("courts have long recognized that the Judicial Branch should defer to decisions of the Executive Branch that relate

to national security"); *Brazil,* 66 F.3d at 197 (holding that security clearance determinations are "sensitive and inherently discretionary" decisions entrusted by law to the Executive).

The linguists' claims here called into question the methods, merits and motivation behind the DEA's security clearance decisions. For example, Plaintiffs alleged that the DEA polygraph examiner "asked grossly inappropriate and personal questions;" asked questions that were "demeaning and humiliating;" and that DEA agents pressured them into "telling the truth" or accused Plaintiffs of lying and then escorted them out of the building in a humiliating fashion after they "failed" the polygraph. (4 ER 615.) By suing under EPPA the linguists fundamentally challenged the merits and methods used by the DEA since EPPA is grounded on the premise that polygraphs are not reliable tools for making employment decisions.

CONCLUSION

The conundrum facing federal contractors under EPPA is obvious and presents a compelling basis to grant certiorari. *Egan*'s principles should apply whether the government acts directly, or through state actors, like Metropolitan. For the foregoing reasons, as well as the reasons outlined in the petition, certiorari should be granted. In the alternative, the Court should vacate the court of appeals' opinion and direct the

Ninth Circuit to grant a rehearing to address the issues omitted or inadequately discussed in its opinion.

Respectfully submitted,

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