No. _____

In The
Supreme Court of the United States

WALTON B. CAMPBELL,
Petitioner,

v.

RYAN D. MCCARTHY, U.S. DEPARTMENT OF THE ARMY,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Fourth Circuit correctly held, contrary to decisions of the D.C., Third, Ninth, and Tenth Circuits, that this Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), barred Petitioner's claims of discrimination and retaliation when, while his security clearance was being reviewed, Respondent refused to assign him to a position requiring no classified duties.

DIRECTLY RELATED PROCEEDINGS

Pursuant to Rule 14.1(b)(iii), the directly related proceedings in federal trial and appellate courts are:

1. Dr. Walton Campbell's second civil action against the United States Department of the Army, which he filed in the U.S. District Court for the Eastern District of Virginia (Alexandria). The docket number is 1:18-cv-01250-RDA-JFA and the case caption is *Walton B. Campbell v. McCarthy, Secretary of the Army*. The court entered judgment for the Army on October 3, 2019.
2. Campbell timely appealed the second case to the U.S. Court of Appeals for the Fourth Circuit on December 2, 2019. The docket number for the pending appeal is No. 19-2395.

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The March 5, 2020 opinion of the court of appeals is reported at 952 F.3d 193 and is set out in the Appendix at App. 1. The April 16, 2018 memorandum opinion of the district court, which was not reported, is set out at App. 34.

The Equal Employment Opportunity Commission (EEOC)—the administrative agency responsible for enforcing federal laws against workplace discrimination—issued its decision on March 19, 2014, which is set out at App. 46. The Army Personnel Security Appeals Board (PSAB)—the administrative agency responsible for personnel security clearance cases—adopted the recommended decision of the Department of Defense Office of Hearings and Appeals (DOHA) Administrative Judge (AJ) on September 5, 2007, which is set out at App. 82.

JURISDICTION

The decision of the Court of Appeals was entered on March 5, 2020. A timely petition for rehearing and rehearing en banc was denied on May 4, 2020. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., the United States Government is required to take "[a]ll personnel actions affecting employees or applicants for employment . . . in executive agencies as defined in Title 5 . . ." in a manner that is "free from any discrimination . . ." *See* 42 U.S.C. § 2000e-16(a) (race, color, religion, sex, or national origin). Additionally,

the Age Discrimination in Employment Act, as amended, 29 U.S.C. § 633a et seq., makes the same proclamation, based on age. 29 U.S.C. § 633a(a).

The Whistleblower Protection Act, 5 U.S.C. § 2302, requires that "[a]ny employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority"—

> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—
>
> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—
>
> (i) any violation of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs;
>
> (B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences—
>
> (i) any violation (other than a violation of this section) of any law, rule, or regulation, or
>
> (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety; […]

Pertinent provisions are also set forth in the Appendix at App. 94-198.

STATEMENT OF THE CASE

I. The Statutory Scheme Controlling Access to National Security Information.

Congress controls the Executive's scope of authority over national security. The National Security Act of 1947, as amended, 50 U.S. Code § 3001 et seq., declared

> it is the intent of Congress to provide a comprehensive program for the future security of the United States; to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security [….]

50 U.S.C. § 3002. With respect to access to classified information, Congress ordered that "the President shall, by Executive order or regulation, establish procedures to govern access to classified information which shall be binding upon all departments, agencies, and offices of the executive branch of Government." 50 U.S.C. § 3161(a). Those procedures, Congress decided, must ascertain whether allowing access to classified information will be "clearly consistent with the national security interests of the United States[.]" *Id.*

Ultimately, Executive Order (EO) 10450, *Security Requirements for Government Employment,* as amended, stated that

> The head of each department and agency of the Government shall be responsible for establishing and maintaining within his department or agency an effective program to insure that the employment and retention in employment of any civilian officer or employee within the department or agency is clearly consistent with the interests of the national security.

App. 163. Further, EO 12968, *Access to Classified Information*, as amended, provided:

> Security policies designed to protect classified information must ensure consistent, cost effective, and efficient protection of our Nation's classified information, while providing fair and equitable treatment to those Americans upon whom we rely to guard our national security.

App. 171. EO 12968 established "a uniform Federal personnel security program for employees who will be considered for initial or continued access to classified information." *Id.* The Department of Defense issued regulations that limited "OFFICIALS AUTHORIZED TO GRANT, DENY, OR REVOKE PERSONNEL SECURITY CLEARANCES (TOP SECRET, SECRET, AND CONFIDENTIAL)" to, *inter alia*, the "Secretary of the Army and/or single designee." App. 157.

Various administrations have changed the definition of "classified information"; but, during the timeframe of Campbell's complaint, EO 13292, *Further Amendment to Executive Order 12958, as Amended, Classified National Security Information* (revoked by EO 13426, December 29, 2009), defined "[c]lassified national security information" or "classified information" as "information that has been determined pursuant to this order or any predecessor order to require protection against unauthorized disclosure and is marked to indicate its classified status when in documentary form." App. 196. In particular, a necessary condition to being classified was the determination that "the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security, which includes defense against transnational terrorism, and the original classification authority is able to identify or describe the damage." App. 182.

For the Army, the established personnel security program begins with the Central Clearance Facility (CCF). *See Central Clearance Facility,* PERSONNEL SECURITY APPEALS BOARD, http://www.dami.army.pentagon.mil/site/PSAB/CCF.aspx (last visited Apr. 17, 2020) (CCF website). The Army CCF has the authority to "grant, revoke, and deny eligibility [to classified information] based on personnel security background investigations and continuing evaluation reports." *See* CCF website, *supra*. When the Army CCF revokes or denies eligibility to classified information, the employee has the right to appeal that decision to the Defense Office of Hearings and Appeals (DOHA). *See Defense Office of Hearings and Appeals*, PERSONAL APPEARANCE PROGRAM, https://ogc.osd.mil/doha/pap.html (last visited Sept. 30, 2020). If requested, a DOHA Administrative Judge conducts a personal appearance and issues a recommended decision to the corresponding Agency's Personnel Security Appeals Board (PSAB). *Id.*; *see also About Us*, PERSONNEL SECURITY APPEALS BOARD, http://www.dami.army.pentagon.mil/site/PSAB/about.aspx (last visited Apr. 17, 2020) (PSAB website). The Army PSAB "reviews and makes final decisions on appeals of revocation or denial of security clearances/SCI access eligibility for Department of the Army military and civilian members[.]" *See* PSAB website, *supra*. In short, the Army PSAB is the sole and ultimate authority with respect to anyone's access to its classified information. *See also* Executive Order 12968, Sec. 2.1(a) ("Determinations of eligibility for access to classified information shall be based on criteria established under this order. Such determinations are separate

from suitability determinations with respect to the hiring or retention of persons for employment by the government or any other personnel actions."); App. 174 ("Final Determinations: Three member PSAB shall be formed under the auspices of the following officials to render final determinations when an unfavorable personnel security determination is appealed[.]")

II. Campbell's Claims Fall Outside the Scope of The Army's Personnel Security Program.

Petitioner Walton Campbell was employed by Respondent Department of the Army as a Physical Scientist. The position required a security clearance, which Campbell applied for and received while performing unclassified duties. In 2005, the Army accused Campbell of making his female co-workers uncomfortable and violating security protocols when, *inter alia*, he attempted to collect evidence to defend himself. Those allegations resulted in the suspension of Campbell's security clearance. While other employees whose clearance was suspended or revoked were assigned to unclassified duties, Campbell's chain of command decided in his case to a) suspend his access to classified information and b) administratively suspend him without pay, based on a subset of the same allegations eventually considered by the Army CCF, DOHA, and Army PSAB.

Ultimately, the Army PSAB fully exonerated Campbell and reinstated his security clearance. In other words, despite the multitude of allegations against him, the whole security clearance process—carefully defined by Congress, Executive Orders, and regulations—determined that the allegations were baseless, and that Campbell posed no threat to national security.

Significantly, Campbell disputes neither the Command's decision to suspend his local access to classified information nor its referral of the allegations to the Army CCF. Rather, he challenges his management's decision to suspend him without pay instead of assigning him to unclassified duties. This specific decision, which Campbell contends violated Title VII, the ADEA, and the WPA, is justiciable.

Campbell brought his discrimination and retaliation claims to the district court. The district court dismissed without prejudice the WPA claim, and thereafter awarded summary judgment to the Army on the remaining claims. The Fourth Circuit vacated and remanded for dismissal, holding that *Department of the Navy v. Egan*, 484 U.S. 518 (1988), "deprived the district court of jurisdiction to review any of Campbell's claims." App. 2. Campbell petitioned for rehearing and rehearing en banc because of the circuit split on *Egan*, which the Fourth Circuit denied.

REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Decision Conflicts with the Decisions of Other Circuits.

The Fourth Circuit's decision conflicts with decisions by the D.C., Third, Ninth, and Tenth Circuits. *See Rattigan v. United States Department of Justice*, 689 F.3d 764 (D.C. Cir. 2012) ("*Rattigan II*"); *Makky v. Chertoff*, 541 F.2d 205 (3d Cir. 2008); *Zeinali v. Raytheon Co*., 636 F.3d 544 (9th Cir. 2011); *Sanchez v. United States Department of Energy*, 870 F.3d 1185 (10th Cir. 2017). These Circuits have clearly held that claims collateral to a security clearance decision are justiciable when they do not directly challenge the Executive Branch's decision to grant or deny access to classified information.

In *Rattigan II*, the D.C. Circuit distinguished "appropriately trained" personnel from all other agency employees in deciding that *Egan* did not bar judicial review under Title VII of "knowingly false" reports to the security clearance apparatus. *Rattigan II*, 689 F.3d at 771 ("we hold that Rattigan's Title VII claim may proceed only if he can show that agency employees acted with a retaliatory or discriminatory motive in reporting or referring information that they knew to be false.") Campbell's claims are even clearer: he does not argue that his managers should not have reported his co-workers' allegations to the Army CCF, as overstated as they were. In other words, Campbell makes no attempt to implicate any aspect of the security clearance process. *See Rattigan II,* 689 F.3d at 775 (Kavanaugh, J., dissenting) ("the Supreme Court in Egan protected the security clearance process as a whole."). With Campbell's access to all classified information suspended and

pending adjudication in the parallel security clearance process, his managers could easily have assigned him unclassified work in unrestricted areas. *Egan* poses no bar to Campbell's Title VII and related claims based upon his managers' conduct.

Similarly, the Ninth Circuit focused on whether a security clearance was implicated in deciding if the *Egan* bar applied. In *Zeinali*, the Court explained:

> The core holdings of *Egan*, *Dorfmont*, and *Brazil* are that federal courts may not review the merits of the executive's decision to grant or deny a security clearance. In each of those three cases, the plaintiff (1) brought suit against the government agency responsible for the security clearance determination, and (2) directly challenged the agency's decision to deny or revoke a security clearance. None of these cases held that federal courts lack jurisdiction over employment discrimination claims like the ones in this lawsuit, which are brought against a private employer who was not responsible for the executive's security clearance decision.

Zeinali, 636 F.3d at 549–50 (internal citation omitted). In fact,

> If the plaintiff sues a defendant for allegedly discriminatory conduct that is merely connected to the government's security clearance decision, the concerns of *Egan* are not necessarily implicated. We are therefore persuaded by the reasoning of the Third Circuit that federal courts have jurisdiction to decide claims that "do [ ] not necessarily require consideration of the merits of a security clearance decision," as long as they remain vigilant not to "question the motivation behind the decision to deny [the plaintiff's] security clearance." *Makky v. Chertoff*, 541 F.3d 205, 213 (3d Cir. 2008).

Id. at 550. Therefore, the Ninth Circuit held that courts

> …have jurisdiction to adjudicate Zeinali's discriminatory termination claim, as he does not dispute the merits of the executive branch's decision to deny his security clearance application. Rather, he disputes the *bona fides* of Raytheon's professed security clearance requirement, and he introduces evidence showing that Raytheon retained similarly situated non-Iranian engineers who lacked security clearances.

Id. at 546. Campbell, like *Zeinali*, does not challenge the government's decision to deny or revoke a security clearance.

In addition, the Third Circuit held:

> Makky acknowledges that he would be foreclosed under *Egan* from challenging the decision to deny the security clearance, even if it were denied due to discrimination. He emphasizes that is not what he is arguing. Instead, he argues that the decision to suspend him without pay was motivated in substantial part by discriminatory animus, and that claim is not foreclosed under *Egan*. . . . [W]e conclude that we have jurisdiction to review Makky's claim of discrimination because a discrimination claim under a mixed-motive theory does not necessarily require consideration of the merits of a security clearance decision.

Makky, 541 F.3d at 213; *see also Dubuque v. Boeing Co.*, 917 F.3d 666, 667 (8th Cir. 2019) (agreeing that "not all claims arising from security clearance revocations violate separation of powers or involve political questions.").

In *Sanchez*, Sanchez lost his Human Reliability Program (HRP) certification—which the Tenth Circuit considered to be equivalent to a security clearance—because he had a "reading disorder [that] presented a potential threat to national safety." 870 F.3d at 1185. Specifically, Sanchez, whose office oversaw the transportation of nuclear weapons and materials, "confused the origin and destination cities of mission convoys and mixed up letters and numbers within mission-identification codes," causing his supervisors to question his "ability to transpose mile markers, GPS locations, and other critical information needed in emergencies[.]" *Id.* at 1189. While the U.S. Department of Energy's psychologists were evaluating Sanchez, his supervisors "restricted him to doing research assignments and filing weather-condition reports … [,] prohibited [him] from

answering 911 calls, logging into classified computers, handling trip folders, and relaying information to convoy commanders," and excluded him from morning shift briefings. *Id.* at 1189–90. When the Department of Energy decided to revoke Sanchez's HRP-certification, his supervisors decided to indefinitely suspend him. *Id.* at 1190. On multiple occasions, Sanchez requested, under the Americans with Disability Act, a reasonable accommodation to a non-HRP position, *id.,* offering "to take 'any position, even janitorial[.]'" *Id.* at 1191. Instead, the Department of Energy fired him.

The Tenth Circuit held that:

> Because Sanchez requested reassignment to non-HRP jobs and offered to take "any position, even janitorial," his failure-to-accommodate claim doesn't challenge the Department's HRP-revocation decision. Thus, *Egan* doesn't bar our review of his claim and the district court erred in concluding that it lacked jurisdiction to review Claim 1.

Sanchez, 870 F.3d at 1185. Sanchez and Campbell were both characterized as posing an overt threat to national security. However, neither Sanchez nor Campbell challenged the security clearance decision (Campbell's, after all, was favorable to him). Rather, both Sanchez and Campbell sought work that did not require a security clearance at all.

Because of the clear conflict between the Fourth Circuit and the D.C., Third, Ninth, and Tenth Circuits, this Court should grant a writ of certiorari to resolve the split.

II. The Fourth Circuit's Decision Distorts this Court's Seminal Decision, *Department of the Navy v. Egan.*

Since this Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), the lower courts have misinterpreted and overextended the Executive Branch's already broad authority over national security. *See* Louis Fisher, The Law Library of Congress, *Judicial Interpretations of Egan* (2009), https://www.loc.gov/law/help/usconlaw/pdf/egan_public_2009.pdf (last visited Sept. 30, 2020). *Egan* manifestly addressed a narrow question of statutory interpretation:

> The narrow question presented by this case is whether the Merit Systems Protection Board (Board) has authority *by statute to review the substance of an underlying decision to deny or revoke a security clearance* in the course of reviewing an adverse action.

Egan, 484 U.S. at 520 (emphasis added). This Court was concerned with "the protection of classified information" which "must be committed to the broad discretion of the agency responsible[.]" *Id.* at 529. Handling unclassified information, on the other hand, does not require a security clearance. The Army's decision regarding the assignment of unclassified duties has no bearing on whether it is "clearly consistent with national security interests of the United States" because that decision occurs outside defined security clearance and classification procedures. Thus, *Egan* does not preclude federal courts from adjudicating Campbell's discrimination and retaliation claims concerning his assignment pending review of his clearance.

Moreover, this Court expressly allowed judicial review of administrative suspensions:

> An employee who is removed for "cause" under § 7513, when his required clearance is denied, is entitled to the several procedural protections specified in that statute. The Board then may determine whether such cause existed, whether in fact clearance was denied, ***and whether transfer to a nonsensitive position was feasible***. Nothing in the Act, however, directs or empowers the Board to go further.

Dep't of Navy v. Egan, 484 U.S. 518, 530 (1988) (emphasis added). Before Campbell, the Army had always allowed employees with suspended or revoked clearances to continue working on unclassified assignments. Moreover, the Army provided unclassified assignments to employees who were waiting for decisions on their security clearance applications. Indeed, while Campbell's initial security clearance application was pending, his managers allowed him to work on unclassified assignments. Only after Campbell vigorously disputed his co-workers' false claims that he harassed them and reported his security concerns regarding the escalation of their allegations against him, did his managers refuse to offer him unclassified work.

Significantly, the district court could determine Campbell's relief without undertaking any review of classified information or otherwise review the security clearance decisions affecting Campbell. *Compare with Hagreb v. Long*, 716 F.3d 90, 791–93 (4th Cir. 2013) (the employee challenged PSAB's security clearance decision and sought reinstatement of his security clearance as relief.) He simply seeks payment for the administrative suspension because he could have been paid while he performed unclassified work.

III. The Fourth Circuit's Decision Unnecessarily Deprives Federal Courts of Jurisdiction Congress Conferred on Them and Deprives Public Servants of Remedies for Violations of their Civil Rights.

Federal courts have a responsibility to exercise the jurisdiction established by Congress. This responsibility is "virtually unflagging[.]" *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976); see also *Cohens v. Va.*, 19 U.S. 264, 404 (1821) (Marshall, C.J.) ("It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should .... We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."). Pertinently, Courts must "preserve to the maximum extent possible congressionally mandated protections against and remedies for unlawful retaliation in the workplace." *Rattigan II*, 689 F.3d at 771.

In the decision below, the Fourth Circuit has fallen short of its responsibility to adjudicate claims that federal officials violated the civil rights enacted by Congress. The plain language of Title VII prohibits sex discrimination in all of its forms. Likewise, the ADEA prohibits age discrimination and the WPA prohibits retaliation against whistleblowing. In *Rattigan II*, the D.C. Circuit admonished that

> it is our duty not only to follow *Egan*, but also to "preserv[e] to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation." *Rattigan*, 643 F.3d at 984; *cf. J.E.M. Ag Supply, Inc. v. Pioneer Hi–Bred Int'l, Inc.*, 534 U.S. 124, 143–44, 122 S.Ct. 593, 151 L.Ed.2d 508 (2001) ("when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective" (internal quotation marks omitted)).

Rattigan II, 689 F.3d at 770.

Where, as here, the language of a statute is unambiguous, the Court need not try to divine the specific intent of the Members of Congress that passed the law. *See Caminetti v. U.S.*, 242 U.S. 470, 490 (1917) (acknowledging as a "recognized rule" of statutory interpretation that "it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning" when the language of the statute is clear).

The territory of the Fourth Circuit includes an unusual confluence of intelligence agencies and defense contractors. The decision below exposes all the employees in this confluence to adverse personnel actions that they would be unable to challenge if their employers choose to rely on the same discretionary decisions used to suspend a security clearance. It is, therefore, particularly unfair to these employees in the Fourth Circuit that they, and they alone, cannot enforce their civil rights when comparable employees in any other circuit can.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: October 1, 2020

Respectfully submitted,

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