No. 20-435

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

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND BRIEF OF *AMICI CURIAE* NATIONAL SECURITY LEGAL ACADEMICS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF

Amici curiae ("Amici") William C. Banks, Emily Berman, Louis Fisher, Heidi Gilchrist, Kel McClanahan, Elizabeth Newman, Harvey Rishikof, and Mark Zaid respectfully move for leave of Court to file the accompanying Brief in support of the petition for writ of certiorari in the above-captioned case. Petitioner has consented to the filing of this Brief. Due to an oversight, Amici provided notice to Respondent four days before the filing deadline, rather than the ten days specified in Supreme Court Rule 37.2. Undersigned counsel Kel McClanahan attempted to contact the Government's counsel multiple times to obtain Respondent's consent to this Brief and discuss the oversight, but he has received no response to his email or voicemail messages, other than a response received from the Assistant United States Attorney who represented Respondent in the case below, who stated that he did not know who would be representing Respondent before this Court. The undersigned apologizes to the Court for the oversight but does not believe that Respondent has suffered any prejudiced on account of the inadvertent delay in providing notice which would outweigh the benefit to the Court from receiving this Brief.

Amici are law professors and/or scholars who teach, research, and/or write about national security legal topics, including national security employment law subjects involving security clearances and classified information. Amici submit this Brief to advise the Court of the far-reaching implications of the Fourth Circuit's decision and the full national scope of the issues about which Petitioner seeks judicial review.

Amici respectfully move this Court for leave to file the accompanying Brief in support of Petitioner.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici curiae ("Amici") William C. Banks, Emily Berman, Louis Fisher, Heidi Gilchrist, Kel McClanahan, Elizabeth Newman, Harvey Rishikof, and Mark Zaid are law professors and/or scholars who teach, research, and/or write about national security legal topics, including national security employment law subjects involving security clearances and classified information.[2] *See*, *e.g.*, William C. Banks and Peter Raven-Hansen, *Pulling the Purse Strings of the Commander in Chief*, 80 Va. L. Rev. 833 (1994); Eric Lane, Frederick A. O. Schwartz, Jr., and Emily Berman, *Too Big a Canon in the President's Arsenal: Another Look at* United States v. Nixon, 17 Geo. Mason L. Rev. 737 (2010); Louis Fisher, *Judicial Interpretations of Egan*, Law Library of Congress (2009), *available at* http://www.loufisher.org/docs/ep/466.pdf (last accessed Nov. 2, 2020); Heidi Gilchrist, *Security Clearance Conundrum: The Need for Reform and Judicial Review*, 51 U. Rich. L. Rev. 953 (2017); Kel McClanahan, *The Case for Legislative Security Clearance Reform*, Just Security (Aug. 24, 2018), *at* https://www.justsecurity.org/60440/case-legislative-security-clearance-reform/ (last accessed Nov. 2, 2020); Elizabeth L. Newman & Elaine L. Fitch, *Security Clearance Law and Procedure* (3d ed. 2014); Kevin E. Lunday and Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 Cal. W. Int'l L. J. 87 (2008); Mark Zaid, *Too Many Secrets*, Nat'l L. J. (Mar. 27, 2003), *available at* https://markzaid.com/too-many-secrets/ (last accessed Nov. 2, 2020).

Amici have an interest in clarifying this Court's precedent regarding the nature and scope of its seminal ruling in *Department of the Navy v. Egan*, which has been interpreted by subsequent courts to preclude judicial review of a

[1] No counsel for any party authored this Brief in whole or in part, and no person or entity, other than *Amici Curiae* or their counsel, made a monetary contribution intended to fund the preparation or submission of this Brief.

[2] Amici file this Brief solely as individuals and not on behalf of the institutions with which they are affiliated.

significant array of adverse employment actions—as well as other issues unrelated to employment matters—simply because the case is peripherally related to a national security issue. Amici are interested in this Court's correcting the Fourth, Seventh, Eleventh, and Federal Circuits' misinterpretations of its precedent and in restoring the protections and due process rights to which, as this Court has previously made clear, all persons who seek judicial review of adverse employment decisions are due.

SUMMARY OF ARGUMENT

In 1988, this Court held in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), that the Merit Systems Protection Board ("MSPB"), created by the Civil Service Reform Act ("CSRA"), did not have jurisdiction to review the merits of a decision to deny a security clearance. *Id.* at 530. Specifically, it held that the MSPB could determine "whether in fact clearance was denied, and whether transfer to a nonsensitive position was feasible," but that "[n]othing in the [CSRA], however, directs or empowers the Board to go further." *Id.* The Court based its conclusion largely on the statement, "[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," *id.*: a clear indication that both the Executive and Legislative branches share authority over the field of national security employment law.

However, the Court's actual holding in *Egan* has been vastly overshadowed by its observation three pages prior:

> The President, after all, is the Commander in Chief of the Army and Navy of the United States. His 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 flows primarily from this constitutional investment of power in the President, and exists quite apart from any explicit congressional grant.

Id. at 527. This otherwise unremarkable piece of *dicta* has become the cornerstone of a concerted effort by the Executive Branch to foreclose judicial review of all national security-related matters. This Court should clarify *Egan* to bring it in line with modern jurisprudential norms, in which federal courts regularly review matters involving national security and classified information without implicating any separation of powers concerns. Barring an explicit retraction of the language suggesting that the President possesses exclusive plenary "authority to classify and control access to information bearing on national security," *id.*, this Court should resolve the Circuit split regarding the scope of *Egan* and limit its use to preclude judicial review of employment matters only peripherally related to security clearance determinations.

REASONS FOR GRANTING THE WRIT

I. This Case Is an Ideal Vehicle for This Court to Resolve an Important Federal Question Regarding the Constitutional Separation of Powers Portion of *Egan* Which Will Continue to Reoccur

In 1972, Justice Powell wrote for this Court:

> We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases.

United States v. U.S. Dist. Court, 407 U.S. 297, 320 (1972). *See also Baker v. Carr*, 369 U.S. 186, 211 (1962) ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."); *United States v. Amer. Tel. & Tel. Co.*, 567 F.2d 121, 128 (D.C. Cir. 1977) ("The executive would have it that the Constitution confers on the executive absolute discretion in the area of national security. This does not stand up."). Over the past four decades, the Judicial Branch has consistently proven up to the task of handling such matters, by, *inter alia*, regularly making decisions regarding the admission of classified evidence in criminal proceedings pursuant to the Classified Information Procedures Act, 18

U.S.C. app. 3 §§ 1-16, and making determinations about the proper classification of information pursuant to the Freedom of Information Act, 5 U.S.C. § 552. An entire court exists for the review of classified search warrants and agency surveillance programs pursuant to the Foreign Intelligence Surveillance Act, 92 Stat. 1783, 50 U.S.C. § 1801 *et seq*. The idea that federal judges are not competent to review legal questions simply because "a party raises the specter of national security," *Natural Res. Def. Council v. Winter*, 527 F. Supp. 2d 1216, 1237 (C.D. Cal. 2008), is no longer tethered to the practical reality of federal litigation, if it ever was.[3]

However, despite the growing expertise of federal courts in national security matters, there has also been an increasing reliance on *Egan*'s "constitutional authority" language to assert exclusive Executive Branch authority over national security information in matters far removed from security clearance proceedings. *See*, *e.g.*, *Fazaga v. FBI*, 965 F.3d 1015, 1077 (9th Cir. 2020) (Bumatay, J., dissenting) (FISA); *N.Y. Times v. CIA*, 965 F.3d 109, 122 (2d Cir. 2020) (FOIA prior official disclosure); *United States v. Fernandez*, 887 F.2d 465, 470 (9th Cir. 2017) (CIPA); *Wilson v. McConnell*, 501 F. Supp. 2d 545, 559 (S.D.N.Y. 2007) (prepublication review); *Rafeedie v. INS*, 688 F. Supp. 729, 750 (D.D.C. 1988) (immigration proceedings).

This trend is present in national security employment law cases as well; for example, *Egan*'s constitutional authority language has been cited to defend a court's holding that this Court's decision in *Webster v. Doe*, 486 U.S. 592 (1988), was limited to the Central Intelligence Agency and did not authorize constitutional claims about security clearance denials against any other agencies, *El-Ganayni v. DOE*, No. 08-881, 2008 U.S. Dist. LEXIS 88243, at *13-14 (W.D. Pa. Oct. 31, 2008), *aff'd* 591 F.3d 176 (3d Cir. 2010), and to defend another court's holding that "whistleblower protection laws passed by Congress do not alter the constitutional order, recognized in *Egan*, that gives the Executive Branch the responsibility to

[3] Federal courts—including this Court—have decided cases involving military and national security affairs for over two hundred years. *See*, *e.g.*, *Bas v. Tingy*, 4 U.S. 37 (1800); *Talbot v. Seeman*, 5 U.S. 1 (1801); *Little v. Barreme*, 6 U.S. (2 Cr.) 169 (1804).

make national security determinations," *Teufel v. Dep't of the Army*, 608 F. App'x 705, 707 (10th Cir. 2015).

This Court should accordingly grant Petitioner's writ and use this case as a vehicle to update its *Egan* holding in light of modern litigation realities, for, as one district court judge explained:

> To be clear, the government's argument that its actions are beyond the review of this Court rests on a theory of separation of powers that is not and has never been the law. The implications of the arguments put forth by the government in this case are stunning. The government argues here that any and all conflicts between national security interests and individual constitutional rights can not be resolved by the Article III courts because the Constitution commits the protection of national security to the Executive Branch. If this were the law, the Pentagon Papers case, *New York Times Co. v. United States*, which allowed the publication of classified material, was wrongly decided. If this were the law, *Snepp* [*v. United States*] and *McGehee* [*v. CIA*], which require judicial review of pre-publication classification decisions, were wrongly decided. If this were the law, the provision of the Freedom of Information Act that allows judicial review of documents withheld for national security purposes would be unconstitutional. If this were the law, the provisions of the Classified Information [Procedures] Act that require disclosure of classified information to criminal defense counsel, would be unconstitutional. Finally, if the government's theory of separation of powers carried the day, *Youngstown Sheet & Tube Co. v. Sawyer* in [which] the Supreme Court held that the President unconstitutionally assumed the legislative power in the name of national security, was wrongly decided.

Stillman v. DOD, 209 F. Supp. 2d 185, 212-13 (D.D.C. 2002), *rev'd on other grounds sub nom. Stillman v. CIA*, 319 F.3d 546 (D.C. Cir. 2003).

II. This Case Is an Ideal Vehicle for This Court to Resolve a Circuit Split Regarding the Scope of *Egan*

Even if this Court accepts *arguendo* that *Egan* contains a constitutional element, it should still grant Petitioner's writ to resolve a Circuit split about the scope of that decision with respect to national security employment matters which are only peripherally related to a security clearance determination.

This Court stated in 1976 that "the fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). If *Egan* is held to deprive a person of the opportunity for independent judicial review of an adverse employment determination on the basis of the Executive Branch's constitutional authority, it is incumbent upon this Court to ensure that that preclusion is limited to situations presenting the thorny constitutional issues in play in that case. As the Fourth Circuit's decision shows, this is not currently the case, and this Court should resolve that Circuit split.

The Executive Branch's arguments in favor of an expansive reading of *Egan* can best be understood as an attempt by the Executive Branch, to borrow a phrase from Justice Marshall, "to bootstrap itself into an area in which [the Court] has no jurisdiction." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (quoting *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973)). It does so by implicitly, if not explicitly, relying on an extreme concept of "relatedness" which, when adopted, treats any case identically if its bears the slightest connection to national security: "life, like law, is 'a seamless web,' and all [national security issues] 'relate' to all others in some remote fashion." *Mass. v. HHS*, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989) (paraphrasing Oliver W. Holmes, Jr., *The Common Law* 1 (1945)). This reading is fundamentally incompatible with either this Court's precedent or sound public policy, and the Court should soundly reject it.

In this case, the most relevant portion of *Egan* is this Court's holding that it inappropriate for an outside body to review a security clearance determination because such "predictive judgments . . . must be made by those with the necessary expertise in protecting classified information." 484 U.S. at 529. When coupled with the constitutional authority language, this statement clearly indicates a presumption by the Court that its ruling would only be cited to preclude review of cases involving predictive judgments made by officials with the necessary expertise in protecting classified information, but, as noted above, this is not always the case.

Currently seven Circuits—the Third, Fifth, Sixth, Eighth, Ninth, Tenth, and D.C.[4] Circuits—adhere to this interpretation of *Egan*'s scope, while four Circuits—the Fourth, Seventh, Eleventh, and Federal[5] Circuits—have applied *Egan* to preclude judicial review of national security employment matters besides security clearance determinations and related issues.

The majority view is best exemplified by three cases from the D.C. and 5th Circuits—*Foote v. Moniz*, 751 F.3d 656 (D.C. Cir. 2014); *Rattigan v. Holder*, 689 F.3d 764 (D.C. Cir. 2012) ("*Rattigan II*"); and *Toy v. Holder*, 714 F.3d 881 (5th Cir. 2013). Using these three cases, a model can be constructed for the scope of the majority view, which this Court should adopt.

In *Foote*, the D.C. Circuit described *Egan* thusly: "The Court identified the President's Article II Commander in Chief authority—a 'constitutional investment of power in the President' that 'exists quite apart from any explicit congressional grant'—as a source of the Executive Branch's authority to control access to classified information." 751 F.3d at 658 (D.C. Cir. 2014) (quoting *Egan*, 484 U.S. at 527). The D.C. Circuit further clarified this interpretation in *Rattigan II*, in which that court held that *Egan* does not shield decisions made by officials who "have neither the authority nor the training to make security clearance decisions." 689 F.3d 764, 767 (D.C. Cir. 2012). To the D.C. Circuit, such decisions are "categorically unlike the predictive judgment made by appropriately trained adjudicative personnel who make security clearance decisions pursuant to delegated Executive authority and subject to established adjudicative guidelines." *Id.*

Relatedly, in *Toy*, the Department of Justice attempted to use *Egan* to shield a decision to revoke a contractor's building access. 714 F.3d at 885-86. The Fifth Circuit held:

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[4] At least one D.C. district court decision—*Henry v. Sec'y of the Treas.*, 266 F. Supp. 3d 80 (D.D.C. 2017)—does not follow this pattern and will be discussed as part of the minority view.

[5] At least one Federal Circuit decision—*Dyer v. Dep't of the Air Force*, 971 F.3d 1377 (Fed. Cir. 2020)—does not follow this pattern and will be discussed as part of the majority view.

> Security clearances are different from building access; security-clearance decisions are made by specialized groups of persons, charged with guarding access to secured information, who must make repeated decisions. There is also significant process involved in granting security clearances, the kind of process that allows agencies to make the deliberate, predictive judgments in which they specialize.
>
> That is not the case, as aptly demonstrated here, where building access is concerned. Building access may be revoked, as in this case, by a supervisor, someone who does not specialize in making security decisions. An FBI security clearance, on the other hand, may be granted or revoked only by the FBI's Security Division, a group that specializes in making security-clearance decisions and to which authority to make those decisions is explicitly delegated by the director. A lack of oversight, process, and considered decision-making separates this case from *Egan*, which therefore does not bar Toy's suit.

Id.

Using these three cases, one can develop a reliable model of the majority view. According to that model, in order for *Egan* to apply:

1. The authority for the decision must be the President's Article II Commander in Chief authority;
2. The decision must pertain to controlling access to classified information;
3. The decision must be made by officials with the authority and training to make security clearance decisions;
4. The decision must be subject to established adjudicative guidelines;
5. The decision must involve a significant process; and
6. The decision must be subject to oversight.

This model fits most if not all of the Circuit cases adopting the majority view, of which a representative sample are discussed here:

- *Makky v. Chertoff*, 541 F.3d 205 (3d Cir. 2008): A decision to suspend an employee without pay rather than reassigning him did not, *inter alia*, pertain to controlling access to classified information, and therefore *Egan* did not apply.

- *Hale v. Johnson*, 845 F.3d 224 (6th Cir. 2016): A decision to terminate an employee for failing to pass a physical examination did not, *inter alia*, pertain to controlling access to classified information, and therefore *Egan* did not apply.
- *Dubuque v. Boeing Co.*, 917 F.3d 666 (8th Cir. 2019): A private contractor's termination of an employee while a clearance investigation was pending did not, *inter alia*, stem from a delegation of the President's Article II Commander in Chief authority.
- *Zeinali v. Raytheon Co.*, 636 F.3d 544 (9th Cir. 2011): Same as *Dubuque*.
- *Sanchez v. DOE*, 870 F.3d 1185 (10th Cir. 2017): A refusal to offer a reasonable accommodation under the Rehabilitation Act did not, *inter alia*, pertain to controlling access to classified information, and therefore *Egan* did not apply.[6]
- *Rattigan II*: The act of knowingly providing false information to a security officer about an employee did not trigger *Egan* protection because, *inter alia*, the decision was not made by someone with the authority or the training to make security clearance decisions.
- *Dyer v. Dep't of the Air Force*, 971 F.3d 1377 (Fed. Cir. 2020): A decision to terminate an employee because he was no longer a member of the military did not, *inter alia*, pertain to controlling access to classified information, and therefore *Egan* did not apply.

In contrast, most if not all of the court decisions adopting the minority view do not fit within this model for one or more reasons:

- *Campbell v. McCarthy*, 952 F.3d 193 (4th Cir. 2020): A decision not to provide an employee with unclassified duties made by an official with

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[6] Of note, the court in *Sanchez* found that it would have been barred from reviewing the merits of the denial of his Human Reliability Program ("HRP") certification, following *Foote* in determining that there were enough similarities between that certification and a security clearance to warrant *Egan* preclusion. *Id.* at 1193 (citing *Foote*, 751 F.3d at 658-59).

neither the authority nor the training to make security clearance decisions was still held to be protected by *Egan*.

- *Whitney v. Carter*, 628 Fed. App'x 446 (7th Cir. 2016): Termination from a "sensitive" position with no access to classified information was considered the same as losing a security clearance, triggering *Egan* protection.
- *Hill v. White*, 321 F.3d 1334 (11th Cir. 2003): The initiation of disciplinary proceedings based on false and discriminatory charges was still held to be protected by *Egan*.
- *Kaplan v. Conyers*, 733 F.3d 1148 (Fed. Cir. 2013): Same as *Whitney*.
- *Henry v. Sec'y of the Treasury*, 266 F. Supp. 3d 80 (D.D.C. 2017): Revocation of Internal Revenue Service "staff-like access" eligibility, which would allow a contractor to access sensitive information not related to national security, would be arguably protected by *Egan*.

CONCLUSION

As the above cases demonstrate, there is significant variance between—and occasionally even within—the Circuits with respect to the question of how closely related the adverse action in question must be to the concerns expressed by this Court in *Egan*. While Amici obviously favor the majority view for the aforementioned reasons, they nevertheless maintain that, no matter which interpretation the Court may favor, it should still grant Petitioner's writ to put an end to the uncertainty both litigants and agencies face in such matters. As long as *Egan* is ambiguous and these different opinions exist, defendants will continue to argue that *Egan* precludes judicial review even when such an argument would appear contrary to controlling precedent because the district court might be swayed *this time*, plaintiffs will continue to argue that *Egan* is inapplicable in similar circumstances and for the same reason, and district courts will continue to vary widely in their understanding of both the scope of *Egan* and of their own authorities

and competencies. Accordingly, Amici ask this Court to grant this writ and reverse the decision of the Fourth Circuit.

Respectfully submitted,

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