No. 13-256

In the Supreme Court of the United States

MAHMOUD HEGAB, PETITIONER

v.

LETITIA A. LONG, DIRECTOR,
NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
MARLEIGH D. DOVER
ABBY C. WRIGHT
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-0664

QUESTION PRESENTED

Whether the district court correctly dismissed petitioner's claim that the revocation of his security clearance was based on constitutionally impermissible considerations.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 18

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Gardner,* 387 U.S. 136 (1967) 10
Becerra v. *Dalton*, 94 F.3d 145 (4th Cir. 1996), cert. denied, 519 U.S. 1151 (1997) 12
Bennett v. *Chertoff*, 425 F.3d 999 (D.C. Cir. 2005) 12
Brazil v. *United States Dep't of the Navy*, 66 F.3d 193 (9th Cir. 1995), cert. denied, 517 U.S. 1103 (1996) 12
Cheney v. *Department of Justice*, 479 F.3d 1343 (Fed. Cir. 2007) 12
Department of the Navy v. *Egan*, 484 U.S. 518 (1988) 2, 6, 10, 11, 12, 13
Dorfmont v. *Brown*, 913 F.2d 1399 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) 14, 16, 18
El-Ganayni v. *United States Dep't of Energy*, 591 F.3d 176 (3d Cir. 2010) 9, 12, 15, 16, 17
Franklin v. *Massachusetts*, 505 U.S. 788 (1992) 15
Hall v. *United States Dep't of Labor, Admin. Review Bd.,* 476 F.3d 847 (10th Cir.), cert. denied, 552 U.S. 993 (2007) 12
Hesse v. *Department of State,* 217 F.3d 1372 (Fed. Cir. 2000), cert. denied, 531 U.S. 1154 (2001) 12
Hill v. *Department of Air Force,* 844 F.2d 1407 (10th Cir.), cert. denied, 488 U.S. 825 (1988) 12

Cases—Continued: Page

Johnson v. *Robinson*, 415 U.S. 361 (1974) 14
Lincoln v. *Vigil*, 508 U.S. 182 (1993) 15
National Fed'n of Fed. Emps. v. *Greenberg*, 983 F.2d 286 (D.C. Cir. 1993) 9
Oryszak v. *Sullivan*, 576 F.3d 522 (D.C. Cir 2009) 12, 16, 18
Perez v. *Federal Bureau of Investigation*, 71 F.3d 513 (5th Cir. 1995), cert. denied, 517 U.S. 1234 (1996) 12
Reinbold v. *Evers*, 187 F.3d 348 (4th Cir. 1999) 6
Ryan v. *Reno*, 168 F.3d 520 (D.C. Cir. 1999) 12
Tenenbaum v. *Caldera*, 45 Fed. Appx. 416 (6th Cir. 2002), cert. denied, 539 U.S. 926 (2003) 12
Webster v. *Doe*, 486 U.S. 592 (1988) 7, 13, 14, 15

Constitution, statutes and regulations:

U.S. Const.:
Amend. I 5
Amend. V:
Due Process Clause 5
Administrative Procedure Act, 5 U.S.C. 701(a)(2) 13
National Security Act of 1947, 50 U.S.C. 401 *et seq.*:
50 U.S.C. 403(c) (1988) (§ 102(c)) 13, 14
50 U.S.C. 435(a)(1) 2
Exec. Order No. 12,968, 3 C.F.R. 391 (1996) 2, 4
§ 3.1(b), 3 C.F.R. 397 2
§ 5.2(a), 3 C.F.R. 399 2
§ 5.2(a)(1), 3 C.F.R. 399 3
§ 5.2(a)(6), 3 C.F.R. 400 3
§ 5.2(d), 3 C.F.R 400 2

In the Supreme Court of the United States

No. 13-256

MAHMOUD HEGAB, PETITIONER

v.

LETITIA A. LONG, DIRECTOR,
NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-24) is reported at 716 F.3d 790. The opinion of the district court (Pet. App. 26-37) is available at 2012 WL 162117.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25) was entered on April 25, 2013. A petition for rehearing was denied on June 21, 2013 (Pet. App. 40-41). The petition for a writ of certiorari was filed on August 20, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The President, as "'Commander in Chief of the Army and Navy of the United States,' U.S. Const., Art. II, § 2," has 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 * * * that will give that person access to such information." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988). Presidents have exercised that power through a series of executive orders that delegate to the heads of agencies the authority to determine which employees will have access to classified information. See *id.* at 528.

Executive Order 12,968 instructs that a decision to grant a security clearance "is a discretionary security decision." Exec. Order No. 12,968, § 3.1(b), 3 C.F.R. 397 (1996). A person may be granted a security clearance "only where facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States." *Ibid.*; see also 50 U.S.C. 435(a)(1) ("[E]xcept as may be permitted by the President, no employee in the executive branch of Government may be given access to classified information by any department, agency, or office of the executive branch of Government unless, based upon an appropriate background investigation, such access is determined to be clearly consistent with the national security interests of the United States.").

As relevant here, Executive Order 12,968 establishes internal agency procedures designed to provide meaningful review of agency decisions to deny or revoke security clearances while protecting the interests of national security. See Exec. Order No. 12,968, § 5.2(a) and (d), 3 C.F.R. 399-400 (1996). Under the order, employees or applicants whose eligibility for access to classified information is denied or revoked must be provided "as comprehensive and detailed a

written explanation of the basis for that conclusion as the national security interests of the United States and other applicable law permit." *Id.* § 5.2(a)(1), 3 C.F.R. 399 (1996). They must also be given the opportunity to respond in writing to the denial or revocation and to obtain counsel. The agency must permit the employee to appeal an adverse decision to "a high level panel, appointed by the agency head, which shall be comprised of at least three members, two of whom shall be selected from outside the security field." *Id.* § 5.2(a)(6), 3 C.F.R. 400 (1996).

2. The National Geospatial-Intelligence Agency (NGA) provides combat support and intelligence for the United States Department of Defense (DoD). Pet. App. 3. The NGA's core mission is to develop timely, relevant, and accurate geospatial intelligence in aid of national-security objectives. *Ibid.* Consistent with that mission, each NGA employee is required to possess a Top Secret security clearance, regardless of the position he or she holds at the agency. *Id.* at 3-4. Through executive orders, the President has delegated to the NGA the authority to make security-clearance determinations.

Petitioner began working for the NGA in January 2010 after obtaining the required security clearance. Pet. App. 3. Shortly thereafter, he notified an employee in the NGA's personnel-security branch that he had married a United States citizen with dual citizenship in Jordan. *Id.* at 4. As a result of this new information, the NGA began a reinvestigation of petitioner to determine whether he could maintain his security clearance consistent with national security. *Ibid.* Following completion of the reinvestigation, the NGA notified petitioner that the agency intended to revoke his

security clearance because of concerns related to his susceptibility to foreign influence. *Id.* at 5. The unclassified statement of reasons for the revocation concluded:

> The risks associated with you and your family members holding dual citizenship with another country other than the United States; your possession of a foreign national passport; your family members residing in Egypt; your continuing contact with multiple foreign nationals; your spouse being or having been publicly affiliated with one or more organizations that are reportedly active in advocating political issues that support governments other than the United States; and your publicly known affiliation with the NGA significantly heighten the risks of you being a target for foreign intelligence or security services.

Gov't C.A. Br. 7-8.

In accordance with the requirements of Executive Order 12,968, petitioner was informed of his rights to challenge that determination. After requesting the agency's file supporting the security-clearance determination, petitioner submitted a written response and other documents to the NGA in an attempt to rebut the NGA's findings. Pet. App. 5-6. After reviewing and considering petitioner's written response to the preliminary revocation decision, the NGA's security office determined that petitioner had mitigated some, but not all, of the concerns raised in its initial determination. Specifically, the office determined that petitioner had not mitigated concerns about his wife's "current affiliation with one or more organizations which consist of groups who are organized largely around their non-United States origin and/or their ad-

vocacy of or involvement in foreign political issues." *Id.* at 6. On that basis, the NGA issued a final revocation of petitioner's security clearance. *Ibid.*

Petitioner appealed the revocation by requesting a personal appearance before the NGA's Personnel Security Appeals Board, a body independent of the officials involved in the revocation of petitioner's security clearance. Pet. App. 6. Petitioner and his counsel appeared before the Board and submitted a second written response accompanied by 85 exhibits. *Ibid.* After considering all the classified and unclassified materials before it, as well as the oral responses of petitioner and his attorney, the Board voted to uphold the revocation of petitioner's security clearance. *Id.* at 6-7.

3. Petitioner sued respondents (the NGA and its director, in her official capacity) in the United States District Court for the Eastern District of Virginia "to set aside [the] final decision of the [NGA] revoking [his] security clearance and access to classified information in violation of his rights and privileges under the United States Constitution." Pet. App. 43. His complaint alleged that the NGA had violated (i) his First Amendment rights of freedom of religion, expression, and association (Counts 1-2); (ii) his rights under the Due Process Clause of the Fifth Amendment to employment and reputation (Counts 3-5); and (iii) his equal-protection right to non-discrimination in public employment (Count 6). *Id.* at 58-62. Each claim rested on petitioner's assertion that the NGA had revoked his security clearance "based solely on [his] wife's religion, Islam, her constitutionally protected speech, and her association with, and employment by, an Islamic faith-based organization." *Ibid.*

On respondents' motion, the district court dismissed the case for lack of subject matter jurisdiction. See Pet. App. 38-39. The district court explained that the Fourth Circuit has interpreted this Court's decision in *Egan*, *supra*, "as a broad restriction on the subject matter jurisdiction of courts in security clearance disputes." Pet. App. 33 (citing *Reinbold* v. *Evers*, 187 F.3d 348, 357-358 (4th Cir. 1999)). The district court determined that petitioner's allegations, "though framed as constitutional violations, concern the merits of NGA's decision to revoke his security clearance." *Id.* at 36. Petitioner, the court explained, was asking the court to decide whether his "security clearance was revoked due to legitimate national security concerns or * * * constitutionally impermissible bases." *Ibid.* Resolving those claims, the court concluded, "would necessarily require a review of the merits of NGA's decision." *Ibid.* The court therefore held that it lacked subject matter jurisdiction to adjudicate petitioner's claims.

4. The court of appeals affirmed. Pet. App. 1-24. It held that petitioner's "speculative and conclusory allegations of constitutional violations were essentially recharacterizations of his challenge to the merits of the NGA's security clearance determination" and that the court lacked "jurisdiction to review such a determination." *Id.* at 3.

a. The court of appeals began by explaining that, under *Egan*, *supra*, "courts are generally without subject-matter jurisdiction" in cases challenging security-clearance determinations, because "a court should not be put in the position of second-guessing the discretionary judgment of an executive agency assessing national security risks." Pet. App. 8. The

court also believed, however, that in *Webster* v. *Doe*, 486 U.S. 592 (1988), this Court had held that courts have jurisdiction to review "colorable constitutional claims" arising out of employment-termination decisions purportedly made for national-security reasons. *Id.* at 603; Pet. App. 9-10. The court of appeals therefore found that petitioner's claim "raises the issue of where to draw the line, if there is such a line, between the political question of reviewing the merits of a security clearance decision and the judicial question of whether an Executive Branch agency violated an individual's constitutional rights when denying or revoking his or her security clearance." *Id.* at 10. That line-drawing question, the court explained, had been left open in the Fourth Circuit's prior cases, and "other courts have not come to a consensus on this question." *Id.* at 10-11.

The court of appeals held, however, that "in this case, we need not decide whether and where the line should be drawn because we conclude that [petitioner's] complaint merely challenges the merits of the NGA's security clearance decision and his conclusory constitutional claims are unsuccessful attempts to circumvent the undisputed proposition that we will not review the merits of a security clearance decision." Pet. App. 11. Although petitioner had alleged that an "anti-Islamic bias" motivated the NGA's decision to revoke his security clearance, the court stated, "[t]he complaint alleged no facts to support the claim that anyone at the NGA in fact held the hypothesized bias or said anything that indicated such a bias." *Id.* at 13. "To the contrary, the agency's alleged bias is stated as the speculative product of an ambivalent allegation in the complaint that the NGA security staff *either* failed

to take the time or effort to review the available information *or* were biased against Islam." *Ibid.* The court of appeals found that "[t]hese allegations amount to no more than a challenge to the merits of the agency's security clearance determination, implying that the determination was irrational and unsupported by the evidence." *Id.* at 14. Accordingly, the court held that petitioner had "not state[d] a colorable constitutional claim." *Id.* at 15.

b. Judge Davis "concur[red] in the majority opinion but with an important difference in emphasis." Pet. App. 19-24.[1] He found that petitioner's constitutional challenge was "'colorable' within the meaning of our precedents" insofar as "the gravamen of [petitioner's] claim is the alleged denial of equal protection." *Id.* at 20-21. But he discerned "an impenetrable barrier * * * to the possibility that [petitioner's] claims might proceed past the pleading stage": they "raise a non-justiciable political question." *Id.* at 21. "Rudimentary separation of powers standards," he wrote, "demonstrate the exclusive commitment of national security clearance decisions to the executive branch; that commitment could not be more pervasive or more clear." *Id.* at 22. Judge Davis believed that "the requirement that a security clearance be afforded a government employee only where it is 'clearly consistent with the interests of national security' simply does not admit of judicial determination; it is a politi-

---

[1] Judge Davis styled his separate opinion as a concurrence and referred to the lead opinion by Judge Niemeyer as the "majority opinion," even though he parted company with Judge Niemeyer on whether petitioner had stated a colorable constitutional claim, and the third member of the panel, Judge Motz, concurred only in the judgment.

cal question, not a judicially reviewable question." *Ibid.*

c. Judge Motz wrote an opinion concurring in the judgment. Pet. App. 15-19. She agreed with Judge Davis that petitioner's "complaint states a colorable constitutional claim" and accordingly deemed that conclusion "the holding of the court." *Id.* at 15. But rather than concluding that petitioner's claim raised a non-justiciable political question, which she was concerned might conflict with *Webster*, Judge Motz "follow[ed] a more conservative approach." *Id.* at 17-18. "Since [petitioner] alleges no unconstitutional policy but only an assertedly unconstitutional individualized adverse determination," she said, "his claim fails." *Id.* at 18. According to Judge Motz, "although *Webster* may authorize us to review constitutional challenges to security clearance *policies*, it does not provide us with jurisdiction in this case, where [petitioner] makes no allegation of an assertedly unconstitutional policy." *Ibid.* She explained that this "limited approach accords with that taken by those of our sister circuits to address the question of how to reconcile *Egan* and *Webster*." *Ibid.* (citing *El-Ganayni* v. *United States Dep't of Energy*, 591 F.3d 176, 183-186 (3d Cir. 2010); *National Fed'n of Fed. Emps.* v. *Greenberg*, 983 F.2d 286, 289-290 (D.C. Cir. 1993)).

ARGUMENT

The court of appeals correctly held that petitioner's challenge to the revocation of his security clearance could not proceed. That decision does not conflict with any decision of this Court or another court of appeals. Every circuit to consider the question has concluded that where a plaintiff's constitutional claim would require a court to evaluate the merits of a

security-clearance determination, that claim may not proceed. Although jurists have disagreed over whether that conclusion is properly characterized as a jurisdictional or a non-jurisdictional rule, petitioner does not contend, nor could he, that any court of appeals would reach a different outcome in this case. Further review is therefore unwarranted.

1. The court of appeals correctly concluded that petitioner cannot maintain this suit.

a. In *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), this Court held that the Merit Systems Protection Board lacked the authority to review "the substance of [a] * * * decision to deny or revoke a security clearance." *Id.* at 520. The Federal Circuit had held that such decisions were reviewable, relying on the "strong presumption in favor of appellate review" articulated in *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967), and subsequent decisions. *Egan*, 484 U.S. at 526 (citation omitted). This Court concluded, however, that the *Abbott Laboratories* presumption "is not without limit, and it runs aground when it encounters concerns of national security, as in this case, where the grant of security clearance to a particular employee, a sensitive and inherently discretionary judgment call, is committed by law to the appropriate agency of the Executive Branch." *Id.* at 527. That judgment call, the Court said, entails a prediction as to whether an individual is likely to compromise classified information, and "[p]redictive judgment of this kind must be made by those with the necessary expertise in protecting classified information." *Id.* at 529. The Court did not believe that it was "reasonably possible for an outside nonexpert body to review the substance of such a judgment" or

to "determine what constitutes an acceptable margin of error in assessing the potential risk." *Ibid.* It found support for that conclusion in the fact that "courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530.

Egan forecloses petitioner's request that a court determine whether the NGA's security-clearance decision was supported by legitimate reasons. Petitioner's claim is, at bottom, a disagreement with the agency's stated reasons for revoking his security clearance. Indeed, petitioner urges at length that the agency's security concerns regarding his wife's affiliations were unfounded. See, *e.g.*, Pet. App. 46-57 (petitioner's complaint, which argues that the NGA's concerns with respect to his wife's citizenship, schooling, associational memberships, and employment were unwarranted); see also Pet. 9-16. But as "an outside nonexpert body," a court is not well-situated to review the NGA's "[p]redictive judgment" about petitioner's suitability for a security clearance, *Egan*, 484 U.S. at 529, or his susceptibility to "being a target for foreign intelligence or security services," Gov't C.A. Br. 7-8.

Petitioner does not dispute that adjudicating his constitutional claims would require a court to review the merits of the NGA's revocation decision and to second-guess the agency's predictive judgment. Courts confronted with similar claims have consistently held that *Egan* precludes judicial review even in the face of allegations that a plaintiff was discriminated or retaliated against, because deciding whether the agency's stated reasons are merely pretext to mask discriminatory conduct would require the court to review the

merits of the security-clearance determination.[2] As one court has explained, "[t]he more valid a reason appears upon evaluation, the less likely a court will be to find that reason pretextual," so "the merit of such decisions simply cannot be wholly divorced from a determination of whether they are legitimate or pretextual." *Brazil* v. *United States Dep't of the Navy*, 66 F.3d 193, 197 (9th Cir. 1995), cert. denied, 517 U.S. 1103 (1996). Conducting that inquiry would require a court to make precisely the sort of "sensitive and inherently discretionary judgment call" that "is committed by law to the appropriate agency of the Executive Branch." *Egan*, 484 U.S. at 527.

b. Petitioner argues that the rule established in *Egan* forecloses review only by other executive agencies, not by courts. See Pet. 19. That contention lacks merit, and no court of appeals has adopted petitioner's position.[3] *Egan* rested its holding on principles developed in the context of judicial review of Executive

---

[2] See *Hall* v. *United States Dep't of Labor, Admin. Review Bd.*, 476 F.3d 847, 851-854 (10th Cir.), cert. denied, 552 U.S. 993 (2007); *Bennett* v. *Chertoff*, 425 F.3d 999, 1003 (D.C. Cir. 2005); *Hesse* v. *Department of State*, 217 F.3d 1372, 1377-1380 (Fed. Cir. 2000), cert. denied, 531 U.S. 1154 (2001); *Ryan* v. *Reno*, 168 F.3d 520, 523-524 (D.C. Cir. 1999); *Becerra* v. *Dalton*, 94 F.3d 145, 148-149 (4th Cir. 1996), cert. denied, 519 U.S. 1151 (1997); *Perez* v. *Federal Bureau of Investigation*, 71 F.3d 513, 514-515 (5th Cir. 1995) (per curiam), cert. denied, 517 U.S. 1234 (1996).

[3] See, *e.g.*, *Oryszak* v. *Sullivan*, 576 F.3d 522, 526 (D.C. Cir 2009); *El-Ganayni* v. *United States Dep't of Energy*, 591 F.3d 176, 182 (3d Cir. 2010); *Becerra*, 94 F.3d at 149; *Perez*, 71 F.3d at 514-515; *Brazil*, 66 F.3d at 196; *Hill* v. *Department of Air Force*, 844 F.2d 1407, 1411 (10th Cir.), cert. denied, 488 U.S. 825 (1988); *Cheney* v. *Department of Justice*, 479 F.3d 1343, 1352 (Fed. Cir. 2007); *Tenenbaum* v. *Caldera*, 45 Fed. Appx. 416, 418 (6th Cir. 2002), cert. denied, 539 U.S. 926 (2003).

Branch action concerning sensitive national-security issues. See *Egan*, 484 U.S. at 530 ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs.") And *Egan* expressly rejected the Federal Circuit's reliance on the *Abbott Laboratories* presumption in favor of *judicial* review, explaining that the presumption "runs aground when it encounters concerns of national security." *Id.* at 527.

More generally, the Court's central concern in *Egan* that review by an "outside nonexpert body" would interfere with critical national-security "judgment call[s]" necessary to make security-clearance determinations applies with equal (if not greater) force to courts. As *Egan* explained, such an outside entity does not have the expertise to "decide whether the agency should have been able to make the necessary affirmative prediction with confidence" or "determine what constitutes an acceptable margin of error in assessing the potential risk." 484 U.S. at 529. A court is no better positioned than another federal agency to review such inherently discretionary decisions.

c. Petitioner also argues (Pet. 18-19) that this Court's decision in *Webster* v. *Doe*, 486 U.S. 592 (1988), carves out an exception to *Egan* for constitutional claims raised in judicial proceedings. That argument is incorrect as well.

In *Webster*, this Court held that Section 102(c) of the National Security Act of 1947, 50 U.S.C. 403(c) (1988), committed to the CIA's discretion the decision to terminate an employee because of a threat to national security and thus that such a decision was generally not reviewable under the Administrative Procedure Act (APA). 486 U.S. at 601; see 5 U.S.C.

701(a)(2) (precluding APA review where "agency action is committed to agency discretion by law"). This Court concluded, however, that Section 102(c) did not "preclude consideration of colorable constitutional claims." *Webster*, 486 U.S. at 603. Specifically, the Court rejected the government's view that "all Agency employment termination decisions, even those based on *policies* normally repugnant to the Constitution, are given over to the absolute discretion of the Director." *Ibid.* (emphasis added). The Court rested its decision on the fact that Section 102(c) did not contain a "clear" statement of Congress's intent to preclude judicial review of constitutional claims. *Ibid.* (citing *Johnson* v. *Robison*, 415 U.S. 361, 373-374 (1974)).

For at least two reasons, *Webster* does not support petitioner's argument that courts may review his claims of constitutional error in his individualized security-clearance determination. First, *Webster* involved the interpretation of a statute. The Court accordingly did not have occasion to consider a court's jurisdiction to review an agency's exercise of authority delegated directly from the President and arising from the President's inherent authority to control access to classified information. The question whether courts can review the exercise of a core presidential power is "a question very different from that addressed in *Webster*." *Dorfmont* v. *Brown*, 913 F.2d 1399, 1405 (9th Cir. 1990) (Kozinski, J., concurring), cert. denied, 499 U.S. 905 (1991).

Second, in *Webster* this Court did not decide whether the CIA employee had presented a cognizable constitutional claim, nor did this Court describe the contours of constitutional claims that might be subject to judicial review. See 486 U.S. at 602 ("We share the

confusion of the Court of Appeals as to the precise nature of respondent's constitutional claims."). And in describing the sorts of constitutional claims that might be cognizable, the Court placed particular emphasis on the employee's apparent argument that certain CIA *policies* were unconstitutional. See *id.* at 601-602. Thus, even if *Webster* could be read to limit the holding of *Egan* that security-clearance determinations are not subject to review, "at most *Webster* permits judicial review of a security clearance denial only when that denial results from the application of an allegedly unconstitutional *policy*." Pet. App. 18 (Motz, J., concurring in the judgment); see also *El-Ganayni* v. *United States Dep't of Energy*, 591 F.3d 176, 185 (3d Cir. 2010).[4]

Petitioner does not argue in his petition that he is challenging an unconstitutional NGA policy. Petitioner maintains instead that *Webster* authorizes judicial review even of claims that security-clearance determinations rested on constitutionally impermissible individualized considerations. That view finds no support in *Webster*. Nor do the brief citations of *Webster* in two subsequent cases cited by petitioner (Pet. 21-22) support petitioner's argument. Neither case addressed security-clearance determinations or discussed the type of constitutional claims that might be cognizable under *Webster*. See *Lincoln* v. *Vigil*, 508 U.S. 182, 195 (1993); *Franklin* v. *Massachusetts*, 505 U.S. 788, 801 (1992) (opinion of O'Connor, J.).

---

[4] Petitioner cites (Pet. 20 n.8) the government's argument in *Webster* that the CIA did not have a discriminatory policy. But that does not demonstrate that this Court accepted the government's view when it remanded the case to the court of appeals for further consideration of the plaintiff's constitutional claims.

2. Petitioner briefly contends (Pet. 22-23) that this Court should grant review to resolve a disagreement among the courts of appeals, citing, without substantial discussion, decisions of the Third, Ninth, and D.C. Circuits. None of those decisions, however, concluded that a court has the power to adjudicate a constitutional claim that requires review of the merits of a security-clearance determination.

In *Oryszak* v. *Sullivan*, 576 F.3d 522 (D.C. Cir. 2009), for example, the D.C. Circuit rejected the plaintiff's challenge to the revocation of her security clearance. *Id.* at 524-526. The court explained that "because the authority to issue a security clearance is a discretionary function of the Executive Branch, actions based upon denial of security clearance are committed to agency discretion by law, at least where a constitutional claim is not properly presented." *Id.* at 526. In a footnote, the court stated that although the plaintiff "maintain[ed] that she also brought a constitutional claim," she had not "sufficiently raise[d] that claim in her complaint or otherwise give[n] the district court notice thereof." *Id.* at 524 n.1. The court accordingly did "not consider [her] constitutional claim." *Ibid.* The court did not hold that a constitutional challenge to an individualized security-clearance determination would be permitted to proceed. The Ninth Circuit case cited by petitioner likewise reserved that question. See *Dorfmont*, 913 F.2d at 1404 ("We do not today decide if the court may hear constitutional attacks on [security clearance] decisions, or the precise contours of such claims if allowed.").

In *El-Ganayni*, *supra*, the plaintiff challenged the revocation of his security clearance on the ground that

the agency had acted in retaliation for his exercise of free speech and religion. 591 F.3d at 180. The Third Circuit held that it could review a constitutional challenge to a revocation decision "to the extent that we can do so without examining the merits of that decision." *Id.* at 183. The court concluded, however, that *Egan* posed an "insuperable bar" to relief on plaintiff's constitutional claims because they would require a court to "weigh the merits of [the agency's] decision to decide whether it was pretext." *Id.* at 186.[5]

In none of the cases cited by petitioner did the court of appeals entertain a constitutional challenge to the merits of a security-clearance determination, and the Third Circuit in *El-Ganayni* specifically rejected the position that such claims are reviewable. Petitioner relies (Pet. 22-23) on inferences he draws from *dicta* in D.C. Circuit and Ninth Circuit cases, which he believes indicates that those courts might entertain a constitutional challenge in the future under undefined circumstances. No sound reason exists for this Court to intervene to preemptively resolve a division of authority that might arise in the future.

3. Petitioner also argues (Pet. 23-24) that the petition for writ of certiorari should be granted to resolve

---

[5] The Third Circuit considered petitioner's claim that the Department of Energy had failed to follow its own procedural regulations because "the APA grants federal courts the power to review whether an agency followed its own regulations and procedures during the revocation process," a point the government had conceded. *El-Ganayni*, 591 F.3d at 186 (internal quotation marks and citation omitted). But it did not review the plaintiff's related procedural due process challenge because he had "abandoned that claim at oral argument," and the court noted that the constitutional argument was meritless on its face in any event. See *id.* at 186-187 & n.6.

the disagreement among jurists over whether *Egan* poses a jurisdictional or a non-jurisdictional bar to relief on claims like those brought by petitioner. See Pet. 22-23; compare, *e.g.*, *Oryszak*, 576 F.3d at 526 (Ginsburg, J., concurring) ("That a plaintiff makes a claim that is not justiciable because committed to executive discretion does not mean the court lacks subject matter jurisdiction over his case."), with *Dorfmont*, 913 F.2d at 1404 ("The district court does not have jurisdiction to hear attacks on the merits of security clearance decisions."). But each of the opinions he cites would reach the same outcome in a case like this one: The plaintiff's claim must be dismissed. Further review is not warranted to resolve a disagreement over the precise characterization of the reason for that outcome. Although cases might arise in the future in which different answers to the characterization question would lead to materially different results, this is not such a case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
MARLEIGH D. DOVER
ABBY C. WRIGHT
Attorneys

OCTOBER 2013