No. 22-

IN THE

Supreme Court of the United States

NATHAN MOWERY,

Petitioner,

v.

WILLIAM J. BURNS, DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY IN HIS OFFICIAL CAPACITY AND THE NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether this Court's decision in *Dep't of the Navy v. Egan* precludes any and all judicial review of agency actions involving employees with security clearances or other credentials, thereby allowing federal agencies to potentially discriminate with no safeguards in place, and deprive those employees of any internal administrative due process or external judicial review regardless of whether the relevant actions involved the exercise of predictive judgment, effectively stripping federal employees of their rights under federal anti-discrimination laws.

PARTIES TO THE PROCEEDING

Petitioner Nathan Mowery was the Plaintiff before the district court and the Appellant before the Fourth Circuit Court of Appeals.

Respondents William Burns, in his official capacity as Director of the Central Intelligence Agency, and the National Geospatial-Intelligence Agency were the Defendants before the district court and the Appellees before the Fourth Circuit Court of Appeals.

RELATED CASES

Mowery v. Nat'l Geospatial-Intelligence Agency, No. 21-2022, U.S. Court of Appeals for the Fourth Circuit. Judgment entered Aug. 2, 2022.

Mowery v. Nat'l Geospatial-Intelligence Agency, No. 1:21-cv-00226-TSE-TCB, U.S. District Court for the Eastern District of Virginia, Alexandria. Judgment entered July 26, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Nathan Mowery respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Fourth Circuit in this matter.

OPINIONS BELOW

The Fourth Circuit's decision is reported and available at *Mowery v. Nat'l Geospatial-Intelligence Agency,* 42 F.4th 428 (4th Cir. Aug. 2, 2022). Pet. App. 1a-29a. The district court's decision is reported and available at *Mowery v. Nat'l Geospatial-Intelligence Agency,* 550 F. Supp. 3d 303 (E.D. Va. July 26, 2021). Pet. App. 30a-51a.

STATEMENT OF JURISDICTION

The Fourth Circuit entered judgment on August 2, 2022. Petitioner filed an Application for Extension of Time to File a Petition for Writ of Certiorari on September 16, 2022. Chief Justice Roberts granted that application on September 20, 2022. Petitioner timely filed this Petition on December 15, 2022. The jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 703(g)

(g) National security

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an

employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if-

> (1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and
>
> (2) such individual has not fulfilled or has ceased to fulfill that requirement.

STATEMENT OF THE CASE

A. Introduction

Over fifty years ago, Congress codified Americans' right to be free from discrimination in the workplace with the passage of Title VII of the Civil Rights Act of 1964 ("Title VII"). 42 U.S.C. § 2000e-2(g). In the decades since, however, Executive agencies gradually transformed the phrase "national security" into a blank check capable of overriding those rights. These agencies use the continued lower court expansion of this Court's decision in *Dep't of the Navy v. Egan* ("*Egan*") as cover for this transformation, allowing them to deprive individual litigants of recourse without the need to justify or substantiate their actions,

and without even allowing access to otherwise available procedural safeguards, as with Petitioner. 484 U.S. 518 (1988). In *Egan,* this Court explained that the "narrow question presented . . . is whether the Merit Systems Protection Board . . . has authority by statute to review the substance of an underlying decision" involving the grant or denial of a security clearance. *Id.* at 520. This Court answered that question with a no, reasoning that the grant of a security clearance is "a sensitive and inherently discretionary judgment call, [] committed by law to the appropriate agency of the Executive Branch." *Id.* at 527. Although this Court kept its holding in *Egan* narrow, its subsequent application has been anything but that.

Respondents assert, and the lower courts accepted, that federal agencies are free to administer employment decisions in whatever way they choose if the employment requires a security clearance or other credentialing—even if those decisions are potentially discriminatory—without a scintilla of judicial oversight. If challenged in litigation, the agencies can and do invoke *Egan* to insulate those actions from any review, ending the matter. During oral argument in this matter, the Honorable Judge James A. Wynn Jr. described the government's position in this way: "you're saying that we can just write a . . . policy that says, well, if its dealing with anything even close to national security, [and] you've been discriminated against . . . don't bring it here, because there's no remedy that the Supreme Court allows you."[1] Counsel attempted to distinguish her argument, but Judge Wynn interjected and observed that

1. Oral Argument at 42:10 (cleaned up), *Mowery v. National Geospatial-Intelligence Agency,* No. 21-2022, https://www.ca4.uscourts.gov/OAarchive/mp3/21-2022-20220308.mp3.

"you're saying exactly that."[2] Despite the Fourth Circuit panel's discomfort expressed during oral argument, both lower courts in this matter felt bound by *Egan* and its progeny and dismissed Petitioner's claim for want of subject matter jurisdiction. This deprived Petitioner of any recourse to address his harm.

National security undoubtedly constitutes a compelling interest, but as this Court knows the judicial system provides procedural tools to balance that interest against the equally critical rights of private citizens. Petitioner respectfully requests this Court grant review and provide much-needed clarification on its intended scope of *Egan's* holding, to safeguard that balance. This Court is the only body with the authority to do that.

B. Factual Background

Petitioner Nathan Mowery ("Petitioner" or "Mr. Mowery") is a U.S. citizen, an Army Bronze Star recipient, a combat veteran and a faithful public servant. Doc. 1 at 1-2. He is also a practicing Muslim. *Id.* Prior to the events of this lawsuit, Petitioner worked in a contracted position with the National Geospatial-Intelligence Agency ("NGA"), a combat support agency associated with the U.S. Department of Defense ("DOD") and the Central Intelligence Agency ("CIA"). *Id.* In his contractor role, he consistently received top performance awards. *Id.* ¶¶ 11-12. He also held a security clearance granting him "Staff-Like Access" to government information and premises necessary to perform the functions of his job. *Id.* at ¶¶ 8-9. In 2016, Mr. Mowery accepted a conditional offer

2. *Id.* (emphasis added).

of employment from NGA to serve as a direct employee assigned to the CIA (the "Assignee Position"). *Id.* at ¶ 13. The Assignee Position involved the exact same duties and access as he held in his contractor position, with improved job security and associated benefits. *Id.*

Petitioner needed only to undergo assignee processing prior to starting his new position; his prior system access was accordingly temporarily suspended for the duration of that screening process. *Id.* at ¶ 14. To resume his previous Staff-Like Access, Mr. Mowery needed to undergo an additional mental health evaluation. *Id.* at ¶¶ 14-15. A CIA-approved psychologist or psychiatrist, whose identity remains unknown to Petitioner or his counsel, conducted the exam. At one point during the exam, the examiner asked Petitioner whether he drank alcohol. *Id.* at 18. Petitioner responded that he does not, and when questioned further explained that he converted to Islam two years prior and drinking alcohol conflicts with his religious beliefs. *Id.* at ¶¶ 18-19. After Petitioner mentioned his religion, the examiner asked him many detailed questions about his religious practice, including whether he prays five times a day and what mosque he attends. *Id.* at ¶ 20. From this point forward, the examiner did not ask about any other topics with near the level of detail accorded to Petitioner's religious practices. Other CIA Assignee applicants with whom Petitioner is familiar were not asked about their religious beliefs at all during their own examinations. *Id.* at ¶¶ 71, 80. Petitioner has no criminal history, mental health diagnoses, or issues with substance abuse, past or present. Upon information and belief and based on Petitioner's direct observations, his religion carried more weight with the examiner than any other factor, disproportionate to the exams experienced by other non-Muslim applicants.

After the mental health examination, the CIA sent Petitioner an email informing him that it would "no longer continue his security clearance assessment[.]" *Id.* at ¶ 24. The email also made a point to specify that Respondents would not provide Petitioner with any appeal mechanism, nor would they provide him with any additional information. The email concluded by reiterating that this action did not constitute a security clearance denial. *Id.* at 25-26. A month later, Respondents informed Petitioner they halted his clearance processing as a result of the mental health evaluation. *Id.* at ¶ 28. Respondents then discharged him from his contractor position, did not reinstate his previous contractor access, and instead deactivated his access badge. *Id.* at ¶ 31. Petitioner moved to a Staff Officer position which entailed only manual tasks and little to no responsibility. Respondents do not dispute that this functional demotion occurred as a direct result of Petitioner no longer having access to the pertinent worksite following the mental health examination. Doc. 38 at 4. Petitioner reasonably inferred that Respondents' decision to discontinue his assignee processing after the mental health evaluation resulted from his disclosure and the ensuing discussion of his religious beliefs. Respondents identified no other reasons or concerns at the time, and have still not to this date. Left with no internal recourse or ability to obtain additional information, Petitioner ultimately filed suit.

C. Lower Court Proceedings

Petitioner initiated this lawsuit in the U.S. District Court for the Eastern District of Virginia on November 02, 2020, alleging religious discrimination and retaliation under Title VII. *See generally* Doc. 1; 42 U.S.C.

§ 2000e. Petitioner brought suit against NGA and William J. Burns, in his official capacity as the Director of the CIA. On March 31, 2020, Defendants/Respondents filed their consolidated Motions to Dismiss pursuant to Fed. Rs. Civ. P. 12(b)(1) and **(6)**, asserting in relevant part that the district court lacked jurisdiction to review any decisions involving a security credential. Docs. 16-18. Following submission of Petitioner's Response and Respondents' Reply, the district court requested additional briefing on subject matter jurisdiction. Doc. 34. After that supplemental briefing, the district court dismissed the case for lack of subject matter jurisdiction on July 26, 2021, denying Appellees' Motion to Dismiss for failure to state a claim as moot. The district court found Mr. Mowery's case nonjusticiable under *Egan,* accepting Respondents' view that his Title VII claims involved a protected decision to grant or deny a security clearance. Petitioner appealed. The Fourth Circuit similarly relied on a sweeping interpretation of *Egan* and affirmed, finding the courts lack jurisdiction to consider Petitioner's claim and could look no further. Neither lower court reviewed any documents *in camera.* This Petition follows.

REASONS FOR GRANTING THE PETITION

I. This Case Raises Exceptionally Important Questions of Law

This case raises both exceptionally important and timely questions of law. Answering Petitioner's question presented will not require this Court to overturn *Egan,* and instead will allow it to clarify the proper scope of that holding. *Stare decisis* does not counsel against review.

A. Executive Deference Over Matters of National Security is Not, and Should Not Become, Absolute

Litigants, jurists and activists have repeatedly challenged agencies' overzealous invocation of national security. *See, e.g., Fazaga v. FBI,* 142 S. Ct. 1051 (2022) (explaining during oral argument that unchecked invocation of the label "national security" to shield the government must have its limits, and observing that, in the words of Justice Sotomayor, the Court does not "know where in any of our jurisprudence we've ever suggested that *in camera* review by a judge threatened national security"). While separation of powers interests demand that the Executive wield primary authority over matters implicating national security, the mere invocation of that phrase cannot and should not automatically insulate federal agencies from all forms of review, without more. Our "system of checks and balances established by the Framers makes clear that such unquestioning deference is not the way our democracy is to operate." *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 632 (4th Cir. 2017). Although the "executive branch may have authority over national security affairs . . . it may only exercise that authority within the confines of the law[.]" *Id.* (citing *Munaf v. Geren*, 553 U.S. 674, 689 (2008)). Just as our system of laws delegates certain powers to the Executive "in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake." *Hamdi v. Rumsfeld*, 542 U.S. 507, 527 (2004) (plurality opinion). "National security concerns must not become a talisman used to ward off inconvenient claims" or a "'label' used to 'cover a multitude of sins[;]'" the resulting risk of abuse comes at too high a price. *Ziglar v. Abbasi*, 137

S. Ct. 1843, 1861-62 (2017) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 523 (1985)); *see also Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (explaining that "[l]iberty and security can be reconciled; and in our system they are reconciled within the framework of the law"). Limited judicial review, potentially incorporating some of the existing safeguard mechanisms described *infra,* does not infringe on separation of powers; it furthers it. This principle remains true even in the face of *Egan's* weighty precedent. As the D.C. Circuit observed, courts have an obligation to strike a balance: "it is [their] duty not only to follow *Egan*, but also to preserve to the maximum extent possible Title VII's important protections against workplace discrimination and retaliation." *Rattigan v. Holder*, 689 F.3d 764, 770 (D.C. Cir. 2012) (internal quotation omitted).

Petitioner's case reveals the harms created by a system that allows agencies to insulate their actions from both internal and external review at the mere mention of "national security." During his mental health evaluation, Petitioner endured extensive questioning only on his religion and religious practice—an experience inconsistent with his peers'. He then learned that Respondents discontinued the processing of his application—while still taking pains to clarify that their actions did not constitute a security clearance denial. Respondents' own policies assure that a denial triggers certain internal review and appeal procedures, which remained unavailable to Petitioner. *See Intelligence Community Directive* 704.3 (explaining that "subjects whose access has been denied or revoked shall be provided with[,]" *inter alia,* significant information regarding that decision as well as an opportunity to appeal to the head of their apparatus).

Petitioner received none of that. Respondents' actions left Petitioner with no viable pathway to vindicate his federally protected rights or be meaningfully heard, even internally.

Federal anti-discrimination laws like Title VII require rigorous protection and codify some of our most honored principles of equal opportunity and fundamental fairness. And although Title VII recognizes an exception for national security-related employment decisions, Congress made clear it never intended that exception to supersede anti-discrimination protections. The EEOC's guidance explains that, while Section 703(g) is intended to "except from Title VII liability situations where employers refuse to hire or discharge persons who are unable to obtain a required security clearance[,]" "national security requirements must be applied equally without regard to race, sex, color, religion or national origin[;] [e]mployers cannot, merely by invoking national security, except themselves from coverage of the nondiscrimination provisions of the act."[3] The district court's and Fourth Circuit's expansive interpretations of *Egan* in Mr. Mowery's case allow federal employers to do exactly that. Separation of powers interests, while crucial, serve as a system of checks and balances and not a blank check to one branch of government. Petitioner does not contend that the judiciary has unfettered authority to second-guess security-related decisions; procedural safeguards exist to properly balance the rights of the individual with the legitimate interests of the government.

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3. Policy guidance on the use of the national security exception contained in sec. 703(g) of Title VII of the Civil Rights Act of 1964, EEOC.GOV, https://www.eeoc.gov/laws/guidance/policy-guidance-use-national-security-exception-contained-sec-703g-title-vii-civil#fn6 (last visited December 12, 2022).

Regardless of whether this Court believes discrimination occurred in Petitioner's case, the current legal framework is ripe for abuse. The lower courts' rulings give Respondents, and therefore other agencies, the latitude to freely discriminate without any meaningful accountability. As Judge Wynn cautioned during oral argument, Respondents could theoretically walk into the interview room, ask what Petitioner's religion is, walk back out and then deny him the job with *Egan* to shield them from any review. And, as in Petitioner's case and others like it, the relevant agencies need not articulate why or how national security is jeopardized by providing Petitioner with some right of review; they need only say those two magic words. This cannot be the result this Court intended with *Egan*.

B. Procedural Safeguards Exist, and Respondents Identify No Reasons Not to Use Them

Limited judicial review, utilized in appropriate circumstances, poses no risk to national security. Respondents' position before the lower courts disregards the judiciary's ability to craft appropriately cabined remedies. Many procedural safeguards exist, which courts routinely employ in circumstances where full disclosure may not be appropriate. Courts take those steps to balance the rights of individual litigants against the interests of the government, particularly where national security concerns are evident. For example, courts implement procedures akin to *ex parte, in camera* proceedings which allow them to examine only the necessary evidence, away from the eyes of improper parties and under a veil of confidentiality. *See Sigler v. LeVan*, 485 F. Supp. 185, 194 (D. Md. 1980) (discussing in the analogous context of the state secrets

privilege that *ex parte, in camera* examination of the relevant materials sufficiently protects national security interests); *see also Abourezk v. Reagan,* 785 F.2d 1043, 1061 (1986) (explaining that in the presence of urgent national security interests, *ex parte, in camera* review of materials provides an appropriate procedure). Even when examining some of the highest privileges, including the Executive Privilege held by the President, federal courts recognize that the "privilege is not absolute, and if a court finds the privilege is overcome by an adequate showing of need, the court may review the documents *in camera.*" *Karnoski v. Trump*, 926 F.3d 1180, 1197 (9th Cir. 2019). Courts may also limit their review to a determination of whether the agencies' actions, "considering the record as a whole[,]" are supported by "substantial evidence." *Mckeand v. Laird,* 490 F.2d 1262, 1264 (9th Cir. 1973). Limited review to establish whether facts support agency actions is consistent with the principle of balancing individual rights and governmental interests.

Courts may instead require relevant agents to submit declarations for review in appropriately confidential settings. Agencies then may present the evidence necessary for the courts to make a sound determination, without revealing sensitive information to non-necessary parties. Similarly, instead of actually providing this information, agencies may submit declarations explaining why disclosure might jeopardize national security. Yet none of that occurred here. This Court has the ability to revisit its holding in *Egan* and clarify the appropriate procedural mechanisms available to courts, agencies like Respondents, and plaintiffs like Mr. Mowery.

Justice White's dissent in *Egan* summed up the concerning effects of that holding quite presciently: "no

[sensitive] information appears to have been at issue in" *Egan,* and "in those cases in which sensitive information would have to be considered, the Board could be expected to adopt procedures (e.g., *in camera* inspection of classified documents) similar to those utilized by the courts in similar circumstances." *Egan,* 484 U.S. at 537, n.1 (White, J., dissenting). The dissent also observed that "the courts have previously adjudicated cases involving denials of security clearances without any documented harm to national security." *Id; see, e.g., Hoska v. U.S. Dep't of the Army,* 677 F.2d 131, 139 (1982) (reviewing and reversing an agency's revocation of an individual's security clearance based on alleged misconduct, security violations and an unfavorable psychiatric evaluation as well as the MSPB's affirmance of that revocation, after finding that "the evidence presented was wholly inadequate to support the MSPB decision" where the "Army's case before the MSPB relied almost entirely on unsubstantiated hearsay evidence"); *see also Mckeand,* 490 F.2d at 1264 (reviewing an agency's revocation of an individual's security clearance due to his homosexuality, explaining that "judicial review of factual determinations by agencies is limited to whether, considering the record as a whole, there is substantial evidence supporting the findings"). The benefit of time proves the wisdom of Justice White's words. In cases like Petitioner's, where a multitude of procedural safeguards exist with no showing of how utilizing them may cause actual harm to national security, permitting agencies to act unchecked irreconcilably contradicts the U.S. scheme of anti-discrimination laws.

C. *Stare Decisis* Does Not Bar Review

This case does not implicate *stare decisis*, because granting review does not require this Court to overturn

Egan or any other precedent. Instead, Petitioner's question presented merely asks this Court to clarify its intended scope in *Egan*, as discussed above. In the alternative, this matter presents a question of sufficient importance to justify breaking with traditional *stare decisis* principles and re-evaluating the workability of *Egan*'s application now, decades out from its holding.

While courts do not revisit precedent lightly, "*stare decisis* is not an inexorable command" demanding perpetual adherence to potentially wrongly decided or no longer workable law. *Franchise Tax Bd. of Calif. v. Hyatt,* 139 S.Ct. 1485, 1499 (2019) (cleaned up). *Stare decisis* was never intended "to be the art of methodically ignoring what everyone knows to be true[,]" and "the doctrine is at its weakest when courts interpret the United States Constitution because a mistaken judicial interpretation of that supreme law is often practically impossible to correct through other means." *Ramos v. Louisiana,* 140 S.Ct. 1390, 1391 (2020). When "experience with [the] application" of "an earlier decision" "reveals that it is unworkable[,]" the doctrine of *stare decisis* "allows the [Supreme Court] to revisit an earlier decision and provide correction or clarification." *Johnson v. United States*, 576 U.S. 591, 591 (2015). In the past few terms alone, almost "every current Member of this Court" voted to overrule "multiple constitutional precedents." *Ramos,* 140 S. Ct. at 1411 (Kavanaugh, J., concurring in part) (collecting cases).

When considering whether to overrule precedent, this Court looks at factors including "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Ramos,* 140 S. Ct. at 1391. These factors counsel

heavily in favor of revisiting *Egan*. Petitioner does not find fault with the original narrow legal reasoning in *Egan* in principle; exercise of the Executive's predictive judgment in matters involving national security clearances derives from sound precedent. Time shows how unworkable this deference became in practice, however. *Egan* created inconsistent law as discussed below, contradicts federal anti-discrimination principles, and does not create a reliance interest sufficient to justify allowing it to stand in its current form.

Respondents asserted below that reliance on *Egan* gives the Executive the confidence needed to conduct its affairs free from judicial interference; this argument does not withstand greater scrutiny. Petitioner does not suggest that courts permit confidential or sensitive information to enter the public record, nor does he ask this Court to become the arbiter of agency decisions. Rather, Petitioner asks that this Court provide reasonable clarification of the intended scope of *Egan's* holding. In matters where a plaintiff pleads facts creating a reasonable inference of discrimination, the Executive should not be able to wholly circumvent review pursuant to anti-discrimination laws by relying on *Egan*. Review by this Court to clarify the scope of its holding in *Egan* will protect against possible abuse, without upsetting the general principle that national security rests properly in the hands of the Executive.

II. Multiple Federal Courts Apply *Egan* Inconsistently with *Egan's* Own Holding, Creating Inconsistency Between the Circuits

Federal courts' interpretations of *Egan* depart from this Court's original narrow holding. The lower courts

have expanded it to differing degrees, both creating inconsistent law between the circuits and improperly applying *Egan* to factually distinct cases like Petitioner's.

A. The Lower Courts' Application of *Egan* to Petitioner Contradicts this Court's Holding

In *Egan,* a civilian employee of the U.S. Navy lost his job repairing Naval submarines when his employer learned that he failed to disclose a history of alcohol abuse, as well as several prior criminal convictions relating to assault and gun possession. *Egan,* 484 U.S. at 521. Following his removal, Mr. Egan sought administrative review; the full Merit Systems Protection Board ("MSPB") concluded that it lacked authority to review the underlying basis for his removal, because that implicated the Navy's security clearance decision. *Id.* at 524. Mr. Egan appealed to federal court. Ultimately, this Court concluded that the MSPB lacked authority to review the merits of the security clearance decision, because discretionary decisions relating to security-sensitive information remain the exclusive territory of the Executive branch. *Id.* at 527. The Court explained that granting a security clearance involves a "predictive judgment" regarding a person's trustworthiness, and that "predictive judgment of this kind must be made by those with the necessary expertise in protecting classified information." *Id.* at 529. This Court therefore concluded "it is not reasonably possible for an outside non-expert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence." *Id.* The Court further "held [that] [Mr. Egan] received adequate procedural protection" when he received "notice, the right to inspect evidence, the right to

respond, a written decision, and an opportunity to appeal to the Personnel Security Appeals Board." *Id.* at 520. This Court's holding in *Egan* stands for the general principle that the decision to grant or revoke security clearances should be made by the Agency with the expertise to do so. Petitioner agrees. However, subsequent decisions relying on *Egan* expand its holding to shield any decision remotely touching on national security or involving an individual with security clearance or other credentials from judicial review, even where the decision does not imperil national security. *Egan's* clear acknowledgement that the employee deserved and received internal due process protections gets overlooked in subsequent application. The Fourth Circuit's ruling in Petitioner's case follows this trend. Its ruling ameliorates any obligation for the Respondents to provide workers with internal avenues of review like those afforded to Mr. Egan and considered by this Court. The Fourth Circuit's holding further greenlights the erroneous application of *Egan* to circumstances where no security clearance grant or denial even occurs, allowing government agencies boundless, unchecked discretion.

Respondents did not deny Petitioner a security clearance; they went out of their way to clarify that fact (and thereby remove any triggers affording him internal review). Petitioner already held a security clearance prior to the assignee processing at issue; Respondents had already determined his trustworthiness and given him access to all relevant information. No material facts relating to Petitioner changed in the intervening time period, other than his religion. Yet after the mental health examination where his religion quickly became the focal point, Respondents claimed they merely "discontinued" processing Mr. Mowery's application. Unlike Mr. Egan,

Petitioner did not suffer the grant, denial or revocation of a security clearance. As a result, Respondents deprived Petitioner of any internal review process and refused to provide any further information. He had no internal appeals process available.[4] Mr. Egan, by contrast, received the ability to inspect evidence and to appeal to an appropriate administrative entity for substantive review. Petitioner's case is factually distinct from *Egan.* The fact that the lower courts ruled otherwise exemplifies *Egan's* improper expansion. Courts across the country similarly expand *Egan's* reach, and do inconsistently—creating law in conflict with both this Court's actual holding in *Egan* and other courts' interpretation of the same.

Some lower courts, including the Fourth Circuit in this case, decline to review cases even with clear indicia of discrimination based on protected classes, requiring no credible showing of any risk to national security. In *Sanchez v. Dep't of Energy,* for example, the Tenth Circuit held that it did not have jurisdiction to review the revocation of a security clearance following an Agency's discovery of the employee's reading disorder,

4. Respondents asserted below that the mandatory EEO process ameliorated this prior absence; the EEO process, however, neither dove any deeper than the district court or Fourth Circuit, nor identified any stated reasons articulated by Respondents for their actions. Instead, the EEO process accepted at face value the assertion by Respondents of "national security" concerns. And no reason(s) why Respondents chose to "halt" petitioner's processing, as stated in the Final Agency Decision, were ever communicated to the EEO investigator either. Individuals who admitted to having no involvement in the processing or knowledge of why it was "halted" nonetheless claimed religious discrimination was not a factor, which the EEO investigator also accepted at face value.

even though this disorder had no bearing whatsoever on his trustworthiness, and clearly infringed on disability protections. 870 F.3d 1185, 1198-99 (10th Cir. 2017). In *Hegab v. Long,* the Fourth Circuit declined to review the revocation of a security clearance that happened after the individual's marital status changed. 716 F.3d 790, 791 (4th Cir. 2013). Creating further inconsistency, the circuits are split on whether issues *collateral* to an actual grant or denial of security clearances fall under the protective cloak of *Egan.* The D.C., Third, Ninth and Tenth circuits find that claims collateral to a security clearance decision are justiciable. *See Rattigan,* 689 F.3d at 770 (holding that *Egan* did not bar Title VII review of "knowingly false" reports to the security clearance apparatus of the relevant Agency, where the plaintiff alleged that agency employees acted with discriminatory or retaliatory motive in making false accusations*); Makky v. Chertoff,* 541 F.2d 205, 212-13 (3d Cir. 2008) (reviewing a challenge to suspension without pay, tangentially related to the denial of a security clearance); *Zeinali v. Raytheon Co.*, 636 F.3d 544, 546 (9th Cir. 2011) (finding the plaintiff's case reviewable where he did not dispute the decision to deny him a security clearance, and instead disputed the bona fides of the employer's security clearance requirements); *Sanchez,* 870 F.3d at 1185 (discussed *supra*). Yet the Fourth Circuit in *Campbell v. McCarthy* reached the opposite conclusion, holding that *Egan* barred discrimination and retaliation claims even where plaintiffs do not challenge an agency's decision to review security clearance. 952 F.3d 193, 207 (4th Cir 2020). Instead, the *Campbell* plaintiff challenged the agency's refusal to assign him to a position requiring no classified duties while it reviewed his security clearance, an inquiry entirely divorced from the "predictive judgment" *Egan* protects. The Fourth

Circuit nonetheless invoked *Egan* to uphold dismissal of Mr. Campbell's case.

B. The Fourth Circuit Improperly Applied *Egan* to Petitioner, in Conflict with Other Circuits' Holdings

The Fourth Circuit's decision in this matter conflicts with nearly every case the lower courts—and Respondents—rely upon. Those cases all involved a decisive grant, denial or revocation of a security clearance, thereby involving the need for predictive judgment by those with necessary expertise. None of those cases involves a scenario where an agency simply discontinued processing, explicitly telling the employee that it did not deny security clearance, and refused to provide access to any internal reviews. *See Campbell,* 952 F.3d at 207 (asking the court to review the suspension of a security clearance); *Hegab v. Long,* 716 F.3d 790, 791 (4th Cir. 2013) (challenging the revocation of a security clearance following a change in marital status, and noting that a claim involving a security clearance may potentially arise under the equal protection clause); *Becerra v. Dalton,* 94 F.3d 145, 149 (4th Cir. 1995) (asking the court to review the instigation of a security check that ultimately led to revocation of a security clearance); *Guillot v. Garret,* 970 F.2d 1320, 1321 (4th Cir. 1992) (challenging denial of a security clearance under the Rehabilitation Act of 1973); *Murphy v. Sec'y, U.S. Dep't of the Army,* 769 F. App'x 779, 782 (11th Cir. 2019) (finding a lack of subject matter jurisdiction to "second-guess" the suspension and revocation of a security clearance); *Whitney v. Carter,* 628 F. App'x 446, 447 (7th Cir. 2016) (assessing a claim where the agency removed an individual from a job); *Wilson v. Dep't of the Navy,* 843 F.

3d 931, 935 (Fed. Cir. 2016) (holding the MSPB correctly determined it lacked jurisdiction to assess the merits of a security clearance revocation); *Panoke v. U.S. Army Military Police Brigade, Haw.*, 307 F. App'x 54, 55-56 (9th Cir. 2009) (finding revocation of a security clearance to be nonjusticiable); *Foote v. Moniz*, 751 F.3d 656, 657-58 (D.C. Cir. 2014) (challenging a denial of a security certification); *Sanchez,* 870 F.3d at 1185 (involving revocation of a security clearance after discovery of a reading disorder).

Petitioner respectfully requests this Court clarify its decision in *Egan* to articulate whether its application by the lower courts comports with this Court's intent, and to set forth the proper parameters of the holding.

III. This Case Presents an Ideal Vehicle to Resolve the Question Presented

Petitioner's case presents an ideal vehicle for review of the question presented. The Fourth Circuit's holding perpetuates a dangerously broad application of *Egan*. Only this Court may revisit and clarify its intended scope in its holding in *Egan,* and curtail further undue expansion. Although the question presented involves complex and important issues relating to national security, separation of powers, and anti-discrimination jurisprudence, this Court may fully resolve the issue presented through an order on the proper legal standard.

The parties agree on the material facts of this case, so any order of this Court will have full force and effect, free from any game-changing lingering factual disputes. Further, the lower courts' opinions are wholly consistent

with one another, giving this Court a clear blueprint for review. Both lower courts concluded that *Egan* bars all judicial review once an agency invokes "national security," regardless of any relevant factual circumstances. Although Respondents may argue that Title VII's national security exception presents an alternative ground for resolution and therefore creates a vehicle problem for consideration of this matter, that position lacks merit. This Court routinely reviews cases where a respondent asserts that a second issue not addressed by the lower court would bar petitioner's requested relief. In those circumstances, this Court grants certiorari on the question presented and then remands for the lower courts to consider the previously unaddressed second issue fully. *See, e.g., Stinson v. United States,* 508 U.S. 36, 37 (1993). Applying that process here allows this Court to remand the case, with instructions to proceed under an appropriately tailored Title VII analysis, rather than allow effectively limitless agency discretion as the Fourth Circuit's application of *Egan* permits. This case presents this Court with an opportunity to clarify the intended scope of its holding in *Egan* where no need to disturb or endanger other national security-related precedent exists. National security undoubtedly presents a compelling interest, one in which all Americans hold equal stake. But when the Executive wields that interest as a sword to harm rather than a shield to protect, the judiciary has both the right and the obligation to get involved.

CONCLUSION

Petitioner Nathan Mowery respectfully requests this Court grant his Petition for a writ of certiorari, for the reasons set forth above. Nathan Mowery deserves access to at least one forum in which he may substantively defend himself, just as he defended our country.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED AUGUST 2, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2022

NATHAN MOWERY,

Plaintiff-Appellant,

v.

NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY; WILLIAM BURNS, DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. (1:21-cv-00226-TSE-TCB). T. S. Ellis, III, Senior District Judge.

March 8, 2022, Argued;
August 2, 2022, Decided

Before KING, WYNN, and RUSHING, Circuit Judges.

WYNN, Circuit Judge:

In *Department of the Navy v. Egan*, 484 U.S. 518, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988), the Supreme Court

held that "the grant [or denial] of [a] security clearance to a particular employee" "must be committed to the broad discretion of the [executive] agency responsible." 484 U.S. at 527, 529.

In this appeal, Plaintiff Nathan Mowery sued the National Geospatial-Intelligence Agency and the Director of the Central Intelligence Agency alleging religious discrimination and retaliation under Title VII. Because the alleged discrimination and retaliation arose from his failure to satisfy additional security requirements and would require the court to review the merits of the security-authorization decision, we are bound by *Egan* to affirm the district court's dismissal of this matter for lack of jurisdiction.

I.

A.

The facts taken from Mowery's complaint as well as other submitted materials show that in 2014, Mowery, a U.S. Army combat veteran and Bronze Star recipient, began working as a contractor for the National Geospatial-Intelligence Agency ("Geospatial Agency"). That position required a "Top Secret security clearance with Sensitive Compartmented Access approval," which Mowery obtained in 2014. J.A. 24.[1] Mowery's level of clearance granted him "Staff-Like Access" to "necessary

1. Citations to the "J.A." refer to the Joint Appendix filed by the parties in this appeal.

government information." Opening Br. at 4. However, the "vetting process" for this security clearance did not require a psychological evaluation. J.A. 11.

In November 2016, the Geospatial Agency extended a conditional offer to employ Mowery as an assignee[2] with the Central Intelligence Agency ("CIA"). That position involved similar duties to his prior contractor role but offered "more job security and associated benefits." J.A. 8. However, the offer was conditioned on Mowery's satisfaction of the CIA's additional personnel security requirement, which was separate from, and in addition to, the clearance Mowery held for his contractor position.

Specifically, Mowery was required to complete a 500-question form and undergo a medical examination, like all CIA assignees, which included a psychological evaluation. While the assignee processing was underway, Mowery's system access was temporarily suspended.

During Mowery's evaluation, a CIA psychologist asked him whether he consumed alcohol.[3] He replied that he had

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2. According to Defendants, "CIA assignees and detailees are federal employees of other government agencies," like the Geospatial Agency, "who have been designated (typically for a certain period of time) to work for the CIA." Memorandum of Defendants in Support of Motion to Dismiss at 4 n.3, *Mowery v. Nat'l Geospatial Intel. Agency*, 550 F. Supp. 3d 303 (E.D. Va. 2021) (No. 1:21-cv-00226-TSE-TCB), Dkt. No. 18. By contrast, "CIA staff are individuals directly hired and employed by the agency." *Id.*

3. The district court took judicial notice of the fact that questions about alcohol consumption are a "standard part of the

not had a drink in the last two years due to his "religious views" and conversion to Islam. J.A. 11. Thereafter, the psychologist asked Mowery various questions about his faith and his personal religious practice. Mowery's religious beliefs were discussed in greater detail than any other topic. In investigative affidavits collected by the Geospatial Agency, several other applicants confirmed that "they either definitively were *not* asked about religion in their own mental health evaluations, or d[id] not recall being asked about religion during their mental health evaluations." J.A. 15.

On May 17, 2017, several months after his psychological exam, Mowery received the following email from the CIA:

> Good Morning Mr. Mowery,
>
> Unfortunately, we have determined that we can no longer continue your assignee processing. The determination was based on information you provided us or was otherwise obtained during your Staff-Like Access processing. There is no appeal regarding this decision nor will additional information be provided.
>
> Please note that this email does not represent a security clearance denial for a National Security position. When filling out future National Security Questionnaires—Standard

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general security clearance assessment." *Mowery*, 550 F. Supp. 3d at 307 n.5. Neither party has challenged that finding on appeal.

> Form 86 (SF-86) application forms and related documents, you should note that ***you were not denied*** a security clearance for this application.
>
> Please inform your [Department of Defense] Program Manager. We also ask that [the Department of Defense] inform the appropriate CIA Component, Mission Center, or Directorate of this decision.
>
> Thank you.

J.A. 76.

On June 9, 2017, a CIA liaison informed a Geospatial Agency security official that Mowery's "clearance processing was halted due to a failed mental health evaluation" and that his "security packet was not the issue." J.A. 12. An investigative affidavit further confirmed that Mowery failed to pass "the medical component of his on boarding." J.A. 15.

Without the additional security authorization, Mowery was unable to start the CIA-assignee position. On July 24, 2017, Mowery's badge was deactivated, and he was removed from his contractor position since it was located at a CIA worksite that he was no longer authorized to access due to the failed mental health evaluation. Instead of terminating Mowery, however, the Geospatial Agency transferred him to a staff-officer desk located off the CIA worksite, "where he held little to no job responsibilities." J.A. 12. Two weeks later, Mowery accepted a different

government contractor position which allowed him to use his original, Staff-Like-Access security clearance. This new position permitted him to access the "same data" and "perform[] substantially similar duties as he would have . . . had his [CIA assignee] security clearance been completed." J.A. 13.

Mowery subsequently filed formal complaints with the Geospatial Agency and CIA alleging constructive discharge due to religious discrimination. Both agencies found that Mowery had failed to state a claim. Mowery appealed the decisions to the U.S. Equal Employment Opportunity Commission, which affirmed the Geospatial Agency's decision and dismissed Mowery's claims against the CIA.

B.

In 2020, Mowery filed this lawsuit in federal district court against the Geospatial Agency and the CIA. His complaint alleged that the May 17, 2017, email stating that his security assessment would be "halted" was "an effective denial of security clearance." J.A. 12. Based on this, Mowery asserted two claims against each Defendant under Title VII of the Civil Rights Act of 1964, alleging that the Geospatial Agency and CIA (1) discriminated against him due to his faith, leading to his inability to start the CIA-assignee position and his constructive discharge from his contractor position, and (2) denied him future staff positions in retaliation for complaining about said discrimination and for filing an Equal Employment Opportunity complaint. For relief,

he sought clearance of any negative records from his file, lost wages, compensatory damages for emotional distress, punitive damages, attorney's fees, and an order enjoining Defendants from discriminating based on religious beliefs.

Defendants moved to dismiss for lack of subject-matter jurisdiction, claiming that the Supreme Court's decision in *Department of the Navy v. Egan* and its progeny clearly established that courts have no jurisdiction to review adverse employment actions resulting from security-clearance decisions. The district court agreed that it lacked jurisdiction under *Egan* and dismissed the case without prejudice under Federal Rule of Civil Procedure 12(b)(1).[4] *Mowery v. Nat'l Geospatial Intel. Agency*, 550 F. Supp. 3d 303, 312 (E.D. Va. 2021). Mowery timely appealed.

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4. In a footnote, the district court further held that 42 U.S.C. § 2000e-2(g) "independently preclude[d] judicial review of [Mowery]'s Title VII claims" and required dismissal. *Mowery*, 550 F. Supp. 3d at 310 n.10. Section 2000e-2(g) provides that "it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ . . . [or] to discharge any individual from any position," if the individual fails to fulfill a requirement "imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President." 42 U.S.C. § 2000e-2(g). Because we affirm on the basis of *Egan*, we do not reach this alternative ground. However, we note that we have previously suggested this provision applies only to *private* employers. *See Guillot v. Garrett*, 970 F.2d 1320, 1326 (4th Cir. 1992), *as amended* (July 23, 1992); *see also* 42 U.S.C. § 2000e(b) (defining "employer" for purposes of most of § 2000e to exclude the United States Government); 42 U.S.C. § 2000e-16 (providing employment protections for federal employees, without mentioning a national security exception).

II.

"We review de novo a district court's dismissal of a complaint for lack of subject matter jurisdiction." *Campbell v. McCarthy*, 952 F.3d 193, 202 (4th Cir. 2020). "Generally, when a defendant challenges subject matter jurisdiction via a Rule 12(b)(1) motion to dismiss, the district court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment."[5] *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004); *see Saval v. BL Ltd.*, 710 F.2d 1027, 1029 n.2 (4th Cir. 1983) ("As to motions to dismiss under Rule 12(b)(1), courts may consider affidavits and other extrinsic information to determine whether subject matter jurisdiction exists."); *Blitz v. Napolitano*, 700 F.3d 733, 736 n.3 (4th Cir. 2012)

5. The district court appears to have construed Defendants' Rule 12(b)(1) motion as a *factual* challenge to subject-matter jurisdiction, *Mowery*, 550 F. Supp. 3d at 304-05, 304 n.2, 305 n.3, which "provid[es] the trial court the discretion to 'go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations,'" *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017) (quoting *Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009)); *see id.* (explaining the difference between factual and facial subject-matter-jurisdiction challenges). No party objected to the district court's categorization or decision to look at evidence outside of the pleadings. *Mowery*, 550 F. Supp. 3d at 304-05 n.2. Nor has Mowery clearly raised any such argument on appeal. "A party waives an argument by failing to present it in its opening brief or by failing to 'develop [its] argument—even if [its] brief takes a passing shot at the issue.'" *Grayson O Co. v. Agadir Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (some quotation marks omitted) (quoting *Brown v. Nucor Corp.*, 785 F.3d 895, 923 (4th Cir. 2015) (Agee, J., dissenting)). Mowery has therefore waived any objection to the consideration of such evidence.

(including declarations as extrinsic evidence that may be considered in evaluating a Rule 12(b)(1) motion). Dismissal should be granted "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Balfour Beatty Infrastructure, Inc. v. Mayor of Balt.*, 855 F.3d 247, 251 (4th Cir. 2017) (quoting *Evans v. B.F. Perkins Co., a Div. of Standex Int'l Corp.*, 166 F.3d 642, 647 (4th Cir. 1999)).

III.

On appeal, Mowery argues that *Egan* does not require dismissal under the particular facts at issue here. In the alternative, he asks this Court to remand the case with instructions to grant him leave to amend his complaint to "include constitutional claims as this Court may deem appropriate." Opening Br. at 33. For the reasons discussed below, we affirm the district court's dismissal under *Egan* and deny Mowery's request for a remand.

A.

In *Egan*, the Supreme Court held that "the grant [or denial] of [a] security clearance to a particular employee" "must be committed to the broad discretion of the [executive] agency responsible." 484 U.S. at 527, 529. Because the grant or denial of a security clearance involves an agency's "[p]redictive judgment" about "whether, under compulsion of circumstances or for other reasons, [an individual] might compromise sensitive information," review by an "outside nonexpert body"—like a federal court—would be inappropriate under general separation-of-powers principles. *Id.* at 528-29.

Thus, "absent a specific mandate from Congress providing otherwise, federal courts are generally without subject-matter jurisdiction to review an agency's security clearance decision." *Hegab v. Long*, 716 F.3d 790, 794 (4th Cir. 2013). And this Court has "never discerned an 'unmistakable expression of purpose by Congress in Title VII [of the Civil Rights Act of 1964]' to subject security clearance decisions 'to judicial scrutiny.'" *Campbell*, 952 F.3d at 203 (quoting *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1996)). Consequently, "a claim that an adverse employment decision violated a plaintiff's statutory rights is unreviewable when it 'necessarily depends upon a review of' an agency's security clearance decision." *Id.* at 205-06 (quoting *Guillot v. Garrett*, 970 F.2d 1320, 1326 (4th Cir. 1992)).

Mowery concedes that *Egan* precludes judicial review of agency *decisions* which "involve the revocation, suspension[,] or denial of a security clearance." Opening Br. at 17. Such decisions, he recognizes, necessarily "involve[] the exercise of predictive judgment." *Id.* at 19. However, he argues that no "decisions" or "predictive judgment[s]" were made here; "instead the [CIA] simply refused to complete the [assignee] process[ing]." *Id.* at 17, 19-20. Finding that *Egan* extends to such non-decisions, he continues, would leave him with "no recourse" because it would allow the agencies to dodge judicial review and avoid internal administrative appeals. *Id.* at 25. For the reasons explained below, we disagree and hold that *Egan* bars judicial review of Mowery's Title VII claims.[6]

6. The district court's jurisdictional analysis did not clearly distinguish between Mowery's discrimination and retaliation claims.

Appendix A

1.

We turn first to Mowery's argument that *Egan* does not apply to the situation at hand since the CIA's decision to "no longer continue" his assignee processing was not a true denial of a security clearance. *Id.* at 20-24. This argument rests on two premises. First, Mowery claims *Egan* cannot be extended beyond security clearances to cover the CIA's personnel security requirements at issue in this case. Even if it did, he secondly argues *Egan*'s "reach does not properly extend beyond the *grant, denial[,] or revocation*" of such a security authorization. *Id.* at 21 (emphasis added). Neither premise holds water.

i.

To the extent Mowery argues that *Egan* can only ever apply to technical security-clearance decisions,[7]

See Mowery, 550 F. Supp. 3d at 309. Mowery's briefing before this Court focuses almost entirely on his discrimination claims. As he makes no separate argument as to why Egan should not bar review of his retaliation claims, Mowery has waived any such argument. *See Grayson O Co.*, 856 F.3d at 316.

7. Mowery's position on this particular point has been less than consistent. And we note that Mowery's complaint and briefing before this Court repeatedly refer to the CIA's additional security requirement as a "security clearance." *E.g.*, J.A. 11-13 (complaint referring to the assignee processing as a "security clearance assessment" and stating that the failure to complete the process resulted in an "effective denial of security clearance"); Reply Br. at 4 (stating that Defendants "neither granted nor denied . . . Mowery's security clearance for his intended new role"). However, since Defendants concede that the CIA's additional security requirement

and not to other similar national-security-authorization decisions involving predictive judgments and implicating the concerns discussed in *Egan*, we disagree. And we are not alone.

For example, in *Foote v. Moniz*, the D.C. Circuit extended *Egan* to bar judicial review of adverse employment actions where such a review would require evaluating the Department of Energy's denial of a Human Reliability Program certificate. 751 F.3d 656, 657-59, 409 U.S. App. D.C. 482 (D.C. Cir. 2014). The Human Reliability Program "carefully evaluates employment applicants for certain positions, such as those where the employees would have access to nuclear devices, materials, or facilities." *Id.* at 657. To obtain a certificate, applicants needed to satisfy several requirements, including "passing a psychological evaluation, passing random drug tests, annually submitting an SF-86 Questionnaire for National Security Positions, and successfully completing a counterintelligence evaluation that includes a polygraph examination." *Id.* The D.C. Circuit recognized that this certification was not precisely the same as a security clearance, since "an applicant seeking certification under the Human Reliability Program must already possess or obtain . . . the Department of Energy's highest level of security clearance," but reasoned that it was still a "similar kind of predictive national security judgment" to that in *Egan*. *Id.* at 658-59.

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for assignees is not technically a security clearance, we assume for purposes of this opinion that it is not.

The Tenth Circuit followed suit in *Sanchez v. United States Department of Energy* and held that the revocation of a Human Reliability Program certification "was a security-clearance decision" under *Egan*. 870 F.3d 1185, 1193 (10th Cir. 2017). In reaching this conclusion, the Tenth Circuit asked whether the certification involved the same "security-clearance characteristics" as *Egan*. *Id.* These characteristics included whether (1) the agency derived its authority from the President's Article II authority; (2) the decision implicated national security concerns; and (3) the decision "involve[d] predictions about someone's future conduct." *Id.* Because the certification involved these characteristics, the court found that *Egan* insulated certification decisions from review. *Id.* at 1193-94.

As these summaries make clear, *Foote* and *Sanchez* focused not on whether the decision at issue was technically labeled a security-clearance determination, but on whether the decision involved the same sort of executive authority, predictive judgments, and underlying national-security concerns at issue in *Egan*. *See Foote*, 751 F.3d at 658-59; *Sanchez*, 870 F.3d at 1192-94; *see also Kaplan v. Conyers*, 733 F.3d 1148, 1151-52, 1163-66 (Fed. Cir. 2013) (en banc) (focusing on the nature of predictive judgments and the existence of national-security concerns and finding that *Egan* was not limited to "actions involving security clearance determinations" but extended to review of "determinations concerning eligibility of an employee to occupy a [Department of Defense] 'sensitive' position, regardless of whether the position requires access to classified information"). Although the Supreme Court in *Egan* only addressed the "narrow question" of security

clearances, our sister circuits' approach corresponds with other language in the *Egan* decision recognizing the "Government's 'compelling interest' in withholding national security information from unauthorized persons" and observing that "[p]redictive judgment[s] of this kind must be made by those with the necessary expertise in protecting classified information." *Egan*, 484 U.S. at 520, 527, 529.

Mowery counters that several Circuits have declined to expand *Egan* to cover other types of security authorizations. But those decisions are distinguishable because the authorizations at issue lacked the kind of discretionary predicative judgment involved in *Egan*. For example, in *Toy v. Holder*, the Fifth Circuit declined to extend *Egan* to the mere revocation of building access by a supervisor. 714 F.3d 881, 885-86 (5th Cir. 2013). The court noted that "[s]ecurity clearances are different from building access" and stressed that the decision lacked the predictive judgment, considered decision-making, specialized decision-makers exercising powers "delegated by the President to agency heads or their designees," and process present in *Egan*. *Id.* at 885 & n.6.[8]

Similarly, in *Hale v. Johnson*, the Sixth Circuit refused to "extend *Egan* to preclude judicial review of an

8. *See also Eghbali v. Dep't of Energy at Savannah River Nat'l Lab*, 90 F. Supp. 3d 587, 593-95 (D.S.C.) (relying on *Toy* and declining to extend *Egan* to bar review of the plaintiff's Title VII claim where the plaintiff's job required no security clearance and the Department of Energy denied him physical access to the Savannah River Site), *aff'd*, 623 F. App'x 115 (4th Cir. 2015) (per curiam).

agency's determination regarding an employee's physical capability" to perform their duties at a nuclear plant.[9] 845 F.3d 224, 231 (6th Cir. 2016). But the court noted that a physical-fitness determination "is based on hard science"—which "has historically been reviewed by courts and administrative agencies"—making it distinguishable from the predictive judgments regarding "an individual's propensity to compromise sensitive information" covered by *Egan*. *Id.* at 230-31. Indeed, the Sixth Circuit declined to "create a *per se* rule that *Egan* can never apply outside of the context of security clearances," instead cabining its decision to "physical-fitness judgments" like the one at issue in that case. *Id.* at 230. By contrast, as opposed to the "hard science" of physical fitness, "[t]he attempt to define not only the individual's future actions, but those of outside and unknown influences renders the grant or denial of security clearances . . . *an inexact science at best*." *Egan*, 484 U.S. at 529 (emphasis added) (internal quotation marks omitted).

Lastly, Mowery's reliance on the D.C. Circuit's decision in *Rattigan v. Holder* is similarly unpersuasive. 689 F.3d 764, 402 U.S. App. D.C. 166 (D.C. Cir. 2012). First, the facts are inapposite, as the D.C. Circuit found that it could review a Title VII claim based on the knowingly false referral of an officer without the authority to make security-clearance decisions that led to a security-clearance investigation. *Id.* at 767-70. Moreover, *Rattigan*

9. Specifically, in *Hale*, the employer discharged the employee "for failing a pulmonary function test," which was "a requirement imposed by the [employer] for employees to maintain their necessary medical clearance." *Hale*, 845 F.3d at 226.

is in some tension with this Court's holding in *Becerra*. *See Kruise v. Fanning*, 214 F. Supp. 3d 520, 526 (E.D. Va. 2016) ("Clearly, the *Becerra* decision forecloses plaintiff's attempt to wiggle out from under *Egan* by relying on *Rattigan*'s holding[.]"), *aff'd sub nom. Kruise v. Speer*, 693 F. App'x 213 (4th Cir. 2017) (per curiam). *Compare Rattigan*, 689 F.3d at 768 ("*Egan*'s absolute bar on judicial review covers only security clearance-related decisions made by trained Security Division personnel and does not preclude all review of decisions by other FBI employees who merely report security concerns."), *with Becerra*, 94 F.3d at 149 ("We find that the distinction between the initiation of a security investigation and the denial of a security clearance is a distinction without a difference."), *and Rattigan*, 689 F.3d at 774 (Kavanaugh, J., dissenting) ("The majority opinion's slicing and dicing of the security clearance process into reviewable and unreviewable portions is nowhere to be found in *Egan*[.]").

We agree that courts must exercise caution in expanding the reach of *Egan*. Nevertheless, we decline to adopt the hardline position, urged by Mowery, that *Egan*'s rationale may only ever apply to determinations explicitly labeled "security clearances." Rather, as in *Foote* and *Sanchez*, this case requires a more detailed analysis of whether the judgment at issue is of the type that *Egan* intended to shield from judicial review.

ii.

Mowery contends that even if *Egan* can extend past those processes explicitly labeled as security clearances,

its jurisdictional bar only applies to the "affirmative suspension, revocation[,] or denial" of a security authorization. Opening Br. at 18. And since the CIA "merely 'halt[ed]'" his security processing and expressly said it was not "den[ying]" any security clearance in its letter, he argues, the agency "refus[ed] to make a decision" or "predictive judgment" that *Egan* would protect from judicial review. Reply Br. at 4 (emphasis omitted).

This argument contains three related but distinct assertions: (1) that the CIA failed to make any kind of decision when it ceased Mowery's security-authorization processing; (2) that, even if there was a decision, *Egan* cannot shield it since it was not a true suspension, revocation, or denial; and (3) that, even if *Egan* would otherwise prevent our review, it does not apply in this case because the CIA did not make any predictive judgment when it discontinued Mowery's security processing. We consider, and reject, each contention in turn.

a.

From the outset, we note that even if we accept Mowery's contention that the agency's email did not constitute an official denial, it still clearly communicated a decision. The email itself stated that "we have *determined* that we can no longer continue your assignee processing" and that this "*determination*" was based on information gained during Mowery's processing. J.A. 76 (emphases added). It further instructed the Department of Defense to "inform the appropriate CIA Component, Mission Center, or Directorate of this *decision*." J.A. 76 (emphasis

added). Mowery himself acknowledged in his complaint that the "language was . . . clear that the Agency intended no further action to complete the clearance assessment, *rendering it an effective denial* of security clearance." J.A. 12 (emphasis added). And, because of the "halting" of his processing, Mowery did not meet the requirements for the CIA assignee position he had been conditionally offered, though he was allowed to reapply for the position in a year. J.A. 18. Thus, although Mowery insists that this language does not amount to a technical denial, it at least demonstrates a clear decision not to grant Mowery the additional, assignee-security authorization at that time.

b.

Having determined that a decision was made, we must next determine what sorts of decisions *Egan* applies to. Mowery argues that *Egan* only covers black-and-white denials, suspensions, and revocations of security authorizations. However, this Court already rejected a similar argument in *Becerra v. Dalton*. 94 F.3d at 149.

In that case, we repudiated the plaintiff's contention that the decision to *initiate an investigation* into an employee's security clearance was judicially reviewable even if the *final revocation* of it was not. *Id.* We explained that drawing a line between the initiation and completion of clearance proceedings would create a "distinction without a difference" since the "[t]he question of whether the [Government] had sufficient reasons to investigate the plaintiff as a potential security risk goes to the very heart of the 'protection of classified information [that]

must be committed to the broad discretion of the agency responsible.'" *Id.* (quoting *Egan*, 484 U.S. at 529). We concluded that "if permitted to review the initial stage of a security clearance determination to ascertain whether it was a retaliatory act, the court would be required to review the very issues that the Supreme Court has held are non-reviewable" as the reasons for the investigation and final denial may be the same. *Id.*[10]

Read together, *Becerra* and *Egan* indicate that a security decision's label is not determinative. If Mowery was correct that a decision's label is all that matters, then courts would be permitted to segment a security-authorization decision and review the early stages of the decision-making process while claiming not to review the end result. But as *Becerra* recognized, it is not possible to disentangle the early stages of a security assessment from the end result. After all, the "reasons why a security investigation is initiated may very well be the same reasons why the final security clearance decision is made." *Id.*; *cf. Hill v. Dep't of Air Force*, 844 F.2d 1407, 1411 (10th

10. *See also Murphy v. Sec'y, U.S. Dep't of Army*, 769 F. App'x 779, 782 (11th Cir. 2019) (explaining that the Eleventh Circuit has "extended *Egan* to apply not only to final denials or revocations of security clearances, but also to decisions made at the suspension or investigatory stage, determining that to review the initial stages of a security clearance determination is to review the basis of the determination itself regardless of how the issue is characterized"); *Panoke v. U.S. Army Mil. Police Brigade*, 307 F. App'x 54, 56 (9th Cir. 2009) ("A review of the circumstances surrounding a security clearance is tantamount to a review of the security clearance itself. Therefore, the circumstances surrounding the revocation of [plaintiff's] security clearance must be precluded from review.").

Cir. 1988) ("If the merits underlying a revocation cannot be examined, there are even stronger reasons why the merits underlying an interim action such as a suspension cannot be examined.").

c.

Consequently, instead of asking whether the CIA's decision to cease Mowery's additional security-authorization processing was a technical denial, we must ask whether its assessment involved the same kind of predictive judgment and national-security concerns underlying *Egan*. *Egan*, 484 U.S. at 526-30; *see Foote*, 751 F.3d at 658-59; *Sanchez*, 870 F.3d at 1193-94. We hold that it did.

In *Egan*, the Court explained that predictive judgments are a type of "judgment call" on the part of executive agencies. 484 U.S. at 529. Instead of simply "passing judgment upon an individual's character," these judgments "attempt to predict" an applicant's "possible future behavior and to assess whether, under compulsion of circumstances or for other reasons, [they] might compromise sensitive information." *Id.* at 528. Such an assessment involves an "attempt to define not only the individual's future actions" but also the possible impacts of "outside and unknown influences." *Id.* at 529.

We conclude that the CIA's decision to cease Mowery's additional security-authorization processing due to a failed mental-health evaluation fits this description. According to the CIA, the purpose of the psychological evaluation

was to ensure that an applicant's employment was "clearly consistent with national security" and to evaluate an applicant's "reliability, trustworthiness, judgment, and ability to protect classified information." J.A. 24-25. A CIA liaison's affidavit states that this additional security requirement was required by CIA regulations and guided by the adjudicative standards laid out in Intelligence Community Policy Guidance 704.2. J.A. 24-25. And "[b]ased on . . . Mowery's psychological examination," the affidavit explains, a "CIA psychologist with the Office of Medical Support" "made the predictive assessment that, at that point in time, there were concerns with . . . Mowery's ability to meet" agency standards. J.A. 25.

We have little trouble in concluding that a psychological evaluation like this is *precisely* the type of predictive assessment protected by *Egan*. It is an "attempt" by the CIA "to predict [Mowery's] possible future behavior and to assess whether . . . he might compromise sensitive information."[11] *Egan*, 484 U.S. at 528. Like the denial of

11. Mowery notes that the contractor position he accepted after his failed mental-health evaluation permitted him access to the same data and involved similar duties to the role he would have had as a CIA assignee. Opening Br. at 6. The potential implication seems to be that the evaluation was effectively not a security clearance, or a judgment about his ability to protect sensitive information, since he was able to gain access to the same information without it. But he does not develop this argument. Moreover, Mowery's counsel conceded at oral argument that the denial impacted Mowery's access to the worksite, systems, *and* information, and that the ultimate effect was the same as not having a security clearance. Oral Arg. at 19:15-20:45, 21:40-21:49, https://www.ca4.uscourts.gov/OAarchive/mp3/21-2022-20220308.mp3.

a security clearance in *Egan*, the CIA's decision to cease Mowery's processing due to the psychologist's concerns with his ability to meet agency standards is a "judgment call" that falls within the agency's broad discretion. *Id.* at 529. Therefore, while Mowery may believe that his evaluation was tainted by religious discrimination, we, as an "outside nonexpert body," have no authority to "review the substance of such a judgment." *Id.*

At least two other courts considering the interplay of psychological evaluations, security determinations, and *Egan* have come to similar conclusions. In *Foote*, the Department of Energy denied the plaintiff a Human Reliability Program certificate based on the "psychological evaluation of a Department psychologist." *Foote*, 751 F.3d at 657. The plaintiff alleged that the psychologist "recommended against certification because of [the plaintiff's] race." *Id.* Nevertheless, the D.C. Circuit held that the decision to certify an applicant, as made by a qualified agency psychologist, was "'an attempt to predict' an applicant's 'future behavior'" and thus "the kind of agency judgment that *Egan* insulates from review, absent a statute that specifically says otherwise." *Id.* at 659 (quoting *Egan*, 484 U.S. at 528).

Similarly, in *Sanchez*, the Tenth Circuit found *Egan* barred review of a refusal to recertify the plaintiff based on an agency psychologist's recommendation. *Sanchez*, 870 F.3d at 1189-90, 1193-94. It explained that the agency "must shoulder the delicate task of weighing the[] risks and safety margins while safeguarding the country's nuclear materials, devices, and facilities" and that this

"balancing act should remain immune from our review." *Id.* at 1194. We see no reason to depart from that logic here.

Seeking to avoid this conclusion, Mowery argues that his case does not involve the kind of expert "predictive judgment" found in *Foote* and *Sanchez*, and thus that his challenge is not precluded by *Egan*, because there is nothing in the record disclosing (1) the evaluating CIA psychologist's name and specific credentials, or (2) any specific recommendation by the CIA psychologist to deny or halt Mowery's assignee-security processing. Reply Br. at 5. But there is nothing in *Egan* suggesting that such details are required. *See Egan*, 484 U.S. at 526-30. And Mowery cites to no regulations applicable here that would require this Court to know of, or evaluate, the psychologist's detailed qualifications. *Cf. Foote*, 751 F.3d 658-59 (relying on past D.C. Circuit precedent when examining whether the psychologist was "in the category of officials within the [agency] authorized and trained to make a judgment" about the applicant and noting that federal regulations governing the Human Reliability Program required specific education and experience minimums for designated psychologists (citing 10 C.F.R. § 712.33)). We therefore conclude that, in this case, such details are not determinative of whether *Egan* may shield an otherwise qualifying decision.

Accordingly, we hold that the CIA's decision to stop Mowery's assignee-security-authorization processing is the kind of discretionary predictive judgment shielded from judicial review by *Egan*.

2.

Mowery raises three counterarguments. First, he weakly contends that, as he seeks only injunctive relief, no substantive review of any national security decision is required. Second, he claims that we should decline to read *Egan* to apply to his situation because he was afforded neither the specific reasons underlying the CIA's decision to cease his security processing, nor the opportunity to internally appeal the decision. Lastly, he argues that *Egan* does not prevent this Court from conducting something akin to *in camera* review to determine the agency's true reasons for halting his assignee processing. All three arguments are flawed.

i.

We turn first to Mowery's passing assertion that we need not substantively review any national security decision to grant him relief. To wit, he asserts he is only seeking an injunction prohibiting Defendants from *discriminating* based on religion in employment decisions, rather than an order *commanding* the CIA to "grant him any security clearances." Opening Br. at 29.

We, like the district court, are somewhat baffled by this argument. *See Mowery*, 550 F. Supp. 3d at 310-11. Injunctions are not magic beans that may be handed out without any analysis of the underlying claims or a showing that such relief is warranted. Instead, courts grant injunctions, if at all, only *after* reviewing the factual basis and merits (or likelihood of success on

the merits) of a claim. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006) (discussing the requirements for a permanent injunction); *Centro Tepeyac v. Montgomery Cnty.*, 722 F.3d 184, 188 (4th Cir. 2013) (discussing the requirements for a preliminary injunction). And if we were to review the merits of Mowery's claims, we would necessarily be reviewing the agency's predictive judgment, which we cannot do. *See Foote*, 751 F.3d at 658-59; *Sanchez*, 870 F.3d at 1193-94.

ii.

Next, Mowery asserts that *Egan* should not bar judicial review of his claims since that would leave him with "no valid recourse to address the harm he suffered." Opening Br. at 25. After all, in its email, the CIA expressly noted that its decision "d[id] not represent a security clearance denial," and that Mowery could not file an internal administrative appeal. J.A. 76. It would be grossly unfair, he contends, if this pseudo-denial were insufficient "to trigger internal rights to review laid out in [the CIA's] own policies" but was "sufficient to preclude judicial review under *Egan*." Opening Br. at 26. "Both cannot be true" at the same time, he asserts. *Id.*

But Mowery points to no controlling authority to support this contention. While provisions for meaningful administrative review of security-clearance denials may be a good practice, we agree with the district court's observation that *Egan* was not predicated on the existence of such procedures. *See Mowery*, 550 F. Supp. 3d at 312. To

be sure, the Court in *Egan* did note that the plaintiff there was told of the specific reasons for his denial, given an opportunity to respond to the proposed denial, and given the opportunity to appeal. *Egan*, 484 U.S. at 521-22. But its holding did not turn on the existence of said process.[12] Instead, *Egan* was based upon fundamental separation-of-powers principles. *See id.* at 527-30 (holding that "unless Congress specifically has provided otherwise," "outside nonexpert bod[ies]," including courts, cannot attempt to substitute their judgments for those of the executive branch on matters of national security). And it is hard to see how the CIA's alleged failure to provide more detailed notice or further administrative relief can alter those fundamental principles or change the nature of the predictive national-security judgment made in this case.[13]

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12. Indeed, the *Egan* Court cited a D.C. Circuit case that referred to the denial of a clearance "*on unspecified grounds*." *Egan*, 484 U.S. at 529 (emphasis added) (quoting *Molerio v. F.B.I.*, 749 F.2d 815, 824, 242 U.S. App. D.C. 137 (D.C. Cir. 1984)).

13. Mowery has asserted no separate constitutional due-process claim in his complaint, before the district court, or before this Court, and such a claim would fail under *Egan* insofar as it related to the assignee-processing decision. *See Reinbold v. Evers*, 187 F.3d 348, 358 (4th Cir. 1999) ("[B]ecause an individual does not have a property or liberty interest in a security clearance, *Egan* precludes a due process claim based upon an agency's security clearance decision."); *Jamil v. Sec'y, Dep't of Def.*, 910 F.2d 1203, 1209 (4th Cir. 1990) (noting that while the plaintiff "did have a property interest in his continued employment," he "did not have a property interest in his security clearance"). Notably, however, "[w]hile [under *Egan*] this [C]ourt may lack the power to review the merits of the decision" to deny or revoke a security clearance, we "still possess[] the authority to require an agency . . . *to follow its own regulations* in making a

iii.

Mowery's final counterargument—that we may subvert *Egan* and conduct something akin to an *ex parte in camera* review in order to "strike the necessary balance" between the CIA's right to make final security determinations and employees' interests—similarly falls flat. Opening Br. at 27.

To start, Mowery waived consideration of this issue by failing to raise it before the district court. *See Zoroastrian Ctr. & Darb-E-Mehr v. Rustam Guiv Found.*, 822 F.3d 739, 753 (4th Cir. 2016) ("Issues raised for the first time on appeal are generally not considered by this Court.").

But even if we opt to reach this issue, Mowery's argument lacks merit. *Egan* does not create a mere privilege against disclosure of protected information. Instead, it operates to insulate an agency's discretionary

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security clearance determination." *Jamil*, 910 F.2d at 1208 (emphasis added). Yet Mowery's complaint does not allege any procedural violations or identify which applicable statutes or regulations the CIA and Geospatial Agency may have violated. *See id.* (rejecting the plaintiff's procedural claim where the plaintiff "complain[ed] that [the] notice [he received] was inadequate, but [did] not refer[] to any rule or regulation granting him the right to any notice at all"). While Mowery's opening brief points to Intelligence Community Policy Guidance 704.3—which governs the appeals process for denials and revocations of security clearances—and notes that certain procedural protections are in place for official denials of security clearances, he does not clearly assert that this provision applies to a cessation of processing for the CIA's additional security requirement. *See* Opening Br. at 26-27.

predictive judgments regarding who can be trusted with sensitive information from second-guessing by an "outside nonexpert body." *Egan*, 484 U.S. at 527-30. Put differently, the Supreme Court's decision in *Egan* did not arise out of concern that sensitive information might be disclosed during judicial review, but from recognition of the fact that "*it is not reasonably possible* for an outside nonexpert body [like a court] to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence." *Id.* at 529 (emphasis added).

Therefore, any type of *in camera* review would be improper since, under *Egan*, courts may not review the merits of such decisions *at all* absent specific authorization from Congress. *See id.* at 529-30.

B.

Finally, in the alternative, Mowery asks that this Court remand the case with instructions that the district court allow him to amend his complaint to include unspecified "constitutional claims as this Court may deem appropriate." Opening Br. at 33. We decline to do so.

A district court's denial of leave to amend is reviewed for abuse of discretion. *Laber v. Harvey*, 438 F.3d 404, 428 (4th Cir. 2006). Here, however, there is no denial to review because Mowery never sought leave to amend his complaint in the district court. Thus, there is no abuse of discretion on the part of the district court in not granting leave to amend.

Despite this, Mowery essentially asks this Court to grant him leave to amend in the first instance, without ever specifying the claims he wishes to add. We decline to grant such an amorphous request raised for the first time at the appellate level. *N. River Ins. Co. v. Stefanou*, 831 F.2d 484, 487 (4th Cir. 1987) (declining to consider plaintiff's argument that the "case should be remanded to the district court with instructions to allow him to amend" his complaint because he raised this argument "for the first time on appeal").

IV.

For the foregoing reasons, we affirm the district court's dismissal for lack of subject-matter jurisdiction and deny Mowery's request for a remand to amend his complaint.

AFFIRMEDv

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, ALEXANDRIA DIVISION, FILED JULY 26, 2021

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

Civil Action No. 1:21-cv-226

NATHAN MOWERY,

Plaintiff,

v.

NATIONAL GEOSPATIAL INTELLIGENCE AGENCY

&

WILLIAM BURNS, DIRECTOR OF THE CENTRAL INTELLIGENCE AGENCY,

Defendants.

MEMORANDUM OPINION

At issue in this employment discrimination action is Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Rule 12(b)(1), Fed. R. Civ. P.[1] This motion has been fully briefed and argued, including

1. Defendants have also filed a Rule 12(b)(6) Motion to Dismiss (Dkt. 17) for failure to state plausible claims for relief. It is neither necessary nor appropriate to address Defendants' Rule 12(b)(6) motion, as Defendants' Rule 12(b)(1) motion correctly argues that there is no federal subject matter jurisdiction for this matter. *See infra* Part II.

a telephonic hearing on the matter that occurred on June 10, 2021. Following the telephonic hearing on June 10, 2021, the parties complied with an Order dated June 11, 2021 directing the submission of additional briefing and/or evidence regarding the question whether subject matter jurisdiction exists here. These submitted materials[2] have been reviewed and considered. Accordingly, the matter is now ripe for disposition.

I.

The following facts, appropriately derived from the Complaint and the submitted evidence,[3] are pertinent to

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2. The materials submitted included: (1) Plaintiff's Supplemental Briefing (Dkt. 36); (2) Defendants' Supplemental Briefing (Dkt. 37); (3) an email from the CIA to Plaintiff dated May 17, 2017 (Dkt. 37-1); and (4) an Affidavit from Douglas Cooper, Plaintiffs' former NGA Branch Chief (Dkt. 37-2). Defendants have also filed a Declaration from Vanna Blaine, a CIA Information Review Officer (Dkt. 18-1). No party has objected to the consideration of these materials in connection with Defendants' Rule 12(b)(1) motion.

3. *Saval v. BL Ltd.*, 710 F.2d 1027, 1029 n.2 (4th Cir. 1983) (federal courts "may consider affidavits and other extrinsic information to determine whether subject matter jurisdiction exists"); *Hamilton v. Pallozzi*, 848 F.3d 614, 621 n.3 (4th Cir. 2017) (same); *Murphy v. Sec., U.S. Dep't of Army*, 769 F. App'x 779, 781-82 (11th Cir. 2019) (district courts may "weigh evidence related to jurisdiction" in considering Rule 12(b)(1) motion to dismiss challenge to a security clearance decision); *Bennett v. Ridge*, 321 F. Supp. 2d 49, 52-53 (D.D.C. 2004) (considering "material outside of the pleadings," including six defense exhibits, as part of Rule 12(b)(1) motion to dismiss challenge to a security clearance decision), *aff'd sub nom*, *Bennett v. Chertoff*, 425 F.3d 999, 368 U.S. App. D.C. 123 (D.C. Cir. 2005).

the question whether subject matter jurisdiction exists here.

- Plaintiff Nathan Mowery is a U.S. Army combat veteran who works as a civilian government contractor in the U.S. intelligence field.

- Defendant National Geospatial Intelligence Agency ("NGA") is a combat support agency associated with the U.S. Department of Defense ("DOD") and the Central Intelligence Agency ("CIA").

- Defendant William Burns is the Director of the CIA.

- In May 2014, Plaintiff obtained a security clearance and was employed as a civilian government contractor by the NGA. Plaintiff's worksite for this government contractor position was a CIA worksite. As a government contractor for NGA, Plaintiff had Staff Like Access to certain secure government information.

- On November 13, 2016, Plaintiff accepted a conditional offer of employment with NGA to serve as an NGA government employee assigned to the CIA ("CIA Assignee position"). As a CIA Assignee, Plaintiff would continue to work at a CIA worksite

but would transition from his current government contractor role to a staff employee role, and thus receive greater job benefits.

- To secure the CIA Assignee position, Plaintiff was required to undergo and pass an additional security clearance assessment, which involved a psychological examination by a CIA-approved psychologist or psychiatrist. This additional CIA security clearance assessment is mandatory for all CIA assignees and is separate from, and in addition to, Plaintiff's May 2014 security clearance assessment.[4]

- On December 27, 2016, Plaintiff underwent the required CIA psychological examination for the CIA Assignee position.

- The Complaint alleges that, during the required CIA psychological examination, a CIA psychologist or psychiatrist (the "Examining Officer") "raised" the subject of Plaintiff's recent conversion to Islam and asked Plaintiff what the Complaint alleges was a "disproportionate" number of questions about Plaintiff's religion. Compl. ¶ 23 Specifically:

4. Plaintiff was also required to complete this additional security clearance assessment in order to retain his existing Staff Like Access to certain secure government information. *See* Compl. ¶¶ 14-15 (Dkt. 31).

- The Complaint alleges that the Examining Officer first asked Plaintiff whether Plaintiff consumed alcohol.[5] Plaintiff allegedly answered that he "ha[d] not had a[n] [alcoholic] drink in the past two years." *Id.* ¶ 18.

- The Complaint next alleges that the Examining Officer asked Plaintiff why Plaintiff did not drink alcohol. Plaintiff allegedly answered that Plaintiff's decision not to drink alcohol "was based on his religious views." *Id.*

- The Complaint alleges that the Examining Officer then asked Plaintiff to specify the religion he was referring to. Plaintiff allegedly answered that "he had converted to Islam." *Id.* ¶ 19.

- The Complaint alleges that the Examining Officer then asked

5. Judicial notice pursuant to Rule 201, Fed. R. Evid., is appropriately taken of the fact that questions about alcohol use are a standard part of the general security clearance assessment process for U.S. federal government national security positions. *See* Section 24, Use of Alcohol, Standard Form 86, Questionnaire for National Security Positions, https://www.opm.gov/forms/pdf_fill/sf86.pdf (last accessed July 26, 2021).

> Plaintiff (1) "whether Plaintiff prayed five times a day," (2) "what mosque [Plaintiff] attended," and (3) unspecified "additional questions" about Plaintiff's religion. *Id.* ¶ 20. The Complaint does not disclose whether Plaintiff responded to these questions from the Examining Officer.

- The Complaint also alleges that other CIA Assignee applicants were not asked about their religious beliefs during their respective psychological examinations.

- Plaintiff's NGA Branch Chief, Douglas Cooper, has filed an Affidavit stating that he does "not think [Plaintiff] was discriminated [against] due to his religious beliefs. There have been and currently are officers [at NGA] who practice the Muslim religion and [that] have [] had the appropriate access." Cooper Affidavit at 8.

- On May 17, 2017, six months after the required psychological examination, Plaintiff received an email from the CIA.

- The May 17, 2017 email stated that the CIA would "no longer continue [Plaintiff's] assignee processing" and that "[t]here is no appeal regarding this decision nor

will additional information be provided." May 17, 2017 Email at 1 (Dkt. 37-1). In full, the May 17, 2017 email states:

> Good Morning Mr. Mowery,
>
> Unfortunately, we have determined that we can no longer continue your assignee processing. The determination was based on information you provided us or was otherwise obtained during your Staff-Like Access processing. There is no appeal regarding this decision nor will additional information be provided.
>
> Please note that this email does not represent a security clearance denial for a National Security position. When filing out future National Security Questionnaires—Standard Form 86 (SF-86) application forms and related documents, you should note that ***you were not denied*** a security clearance for this application.
>
> Please inform your DoD Program Manager. We also

> ask that DoD inform the appropriate CIA Component, Mission Center, or Directorate of this decision.
>
> Thank you.

March 17, 2017 Email at 1 (emphasis in original); *see also* Compl. ¶¶ 24-27.

- On June 9, 2017, the CIA informed NGA that Plaintiff's CIA Assignee security clearance assessment had been "halted" due to a "failed mental health evaluation." Compl. ¶ 28. At this time, the CIA also informed NGA that Plaintiff's completed security packet "was not the issue." *Id.* ¶ 29.

- On July 24, 2017, NGA reassigned Plaintiff from his then NGA position to a position that entailed less responsibility and that was not located at a CIA worksite ("Staff Officer position"). No party disputes that NGA reassigned Plaintiff to this Staff Officer position because Plaintiff was no longer permitted to access the pertinent CIA worksite, and thus could not perform his then-existing NGA job duties.

- Between July 24, 2017 and August 9, 2017, Plaintiff worked as an NGA Staff Officer.

- On August 9, 2017, Plaintiff resigned his NGA Staff Officer position, accepting a different government contractor position in which Plaintiff could use his pre-existing contractor-based security clearance from May 2014.

- On or about August 16, 2017, Plaintiff filed an EEO complaint against the CIA, alleging that the CIA discriminated against Plaintiff on the basis of his religion (1) by failing to process Plaintiff's CIA Assignee security clearance assessment and (2) by constructively discharging Plaintiff from his NGA position in July and/or August 2017. The EEOC dismissed Plaintiff's EEO complaint against the CIA. *See Santiago S., a pseudonym v. Haspe*, No. 17-25, 2018 WL 3584257, at *3 (EEOC July 13, 2018); *see also* Compl. ¶¶ 38, 52.

- On November 2, 2017, Plaintiff filed an EEO complaint against NGA, alleging that NGA discriminated against Plaintiff on the basis of his religion by constructively discharging Plaintiff from his position in July and/or August 2017. The EEOC dismissed Plaintiff's EEO complaint against NGA. *See Jonathan V., a pseudonym v. Esper*, No. NGAE00422017, 2020 WL 5822963, at *4 (EEOC Aug. 4, 2020); *see also* Compl. ¶¶ 40, 51.

- On November 2, 2020, Plaintiff brought this action against the NGA and William Burns, Director of the CIA (collectively, "Defendants").

- The Complaint alleges against each Defendant a Title VII claim for unlawful discrimination and retaliation on the basis of Plaintiff's religion.

    - These two Title VII claims, Counts 1 and 2, allege that the CIA's decision to halt processing Plantiff's CIA Assignee security clearance assessment resulted in Plaintiff's (1) "inability to begin" the CIA Assignee position and (2) "constructive discharge from his existing position." Compl. ¶¶ 70, 79.

    - The Complaint seeks monetary damages and injunctive relief, including an Order (1) that enjoins Defendants "from discriminating in the future on the basis of an employees' or contractors' religious beliefs" and (2) that requires Defendants to remove "any negative reference or actions from Plaintiff's disciplinary file." *Id.* at 13.

II.

The sole question presented is whether there is federal subject matter jurisdiction to review Plaintiff's Title VII claims, challenging the Executive Branch's security clearance decision. This is not a novel question; this question was addressed and decided by the Supreme Court in *Dep't of Navy v. Egan*, 484 U.S. 518, 108 S. Ct. 818, 98 L. Ed. 2d 918 (1988), a case which held that the "grant of security clearance to a particular employee . . . is committed by law to the appropriate agency of the Executive Branch" and is not judicially reviewable. *Id.* at 527.[6] In *Egan*, a civilian employee of the U.S. Navy ("Egan") lost his job repairing a U.S. Navy submarine carrying nuclear weapons because Egan (i) disclosed a prior drinking problem and prior criminal convictions for assault and gun possession during his security clearance assessment process and (ii) failed to disclose two additional criminal convictions for gun possession during his security clearance assessment process. *See id.* at 521. Following his removal, Egan sought administrative review, and ultimately the full Merit Systems Protection Board ("MSPB") concluded that the MSPB lacked authority to review the underlying basis for Egan's removal, as that was the Navy's non-reviewable security

6. To be clear, *Egan* held that security clearance decisions are non-reviewable by an "outside nonexpert body," in that case, the Merit Systems Protection Board. *Id.* at 529. There is no doubt here that *Egan* precludes review of security clearance decisions by other "outside nonexpert bod[ies]," such as Article III courts. *Campbell v. McCarthy*, 952 F.3d 193, 202 (4th Cir. 2020) ("*Egan* generally proscribes judicial review of a security clearance decision.").

clearance decision. *See id.* at 524. Egan appealed to the Federal Circuit, which reversed the MSPB's decision in a split opinion. *See id.* at 525. On review, the Supreme Court concluded that the Civil Service Reform Act, 5 U.S.C. § 1101, *et seq.*, did not permit the MSPB to review the merits of the Navy's security clearance decision. *See id.* at 526-27. The Supreme Court reasoned, quite simply: "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.

The Supreme Court's decision in *Egan* has long been interpreted to preclude judicial review of security clearance decisions. Indeed, the Fourth Circuit[7] and other

7. *See Campbell v. McCarthy*, 952 F.3d 193, 207 (4th Cir. 2020) (applying *Egan* to dismiss ADEA and WPA challenge to security clearance decision for want of subject matter jurisdiction); *see also Kruise v. Speer*, 693 Fed. Appx. 213 (Mem.), 2017 WL 3098149 (4th Cir. 2017) (per curium) (applying *Egan* to affirm dismissal of Title VII challenge to security clearance decision for want of subject matter jurisdiction); *Hegab v. Long*, 716 F.3d 790, 791 (4th Cir. 2013) (applying *Egan* to affirm dismissal of APA challenge to security clearance decision for want of subject matter jurisdiction); *Reinbold v. Evers*, 187 F.3d 348, 358-59 (4th Cir. 1999) (applying *Egan* to affirm dismissal of Fourth Amendment challenge to security clearance decision for want of subject matter jurisdiction); *Becerra v. Dalton*, 94 F.3d 145, 149 (4th Cir. 1995) (applying *Egan* to affirm dismissal of Title VII challenge to the equivalent of a security clearance decision for want of subject matter jurisdiction); *Guillot v. Garrett*, 970 F.2d 1320, 1321 (4th Cir. 1992) (applying *Egan* to affirm dismissal of Rehabilitation Act challenge to security clearance decision for want of subject matter jurisdiction).

circuits[8] have routinely applied *Egan* to dismiss challenges to security clearance decisions for want of subject matter jurisdiction. Indeed, just last year, in *Campbell v. McCarthy*, 952 F.3d 193 (4th Cir. 2020), the Fourth Circuit concluded that a district judge committed reversible error in failing to dismiss, for lack of subject matter jurisdiction, a Title VII, ADEA, and WPA employment discrimination action brought by a Department of Defense employee. *Id.* at 207. The Fourth Circuit's opinion in *Campbell* is unmistakably clear: *Egan* is settled law and district courts are duty bound to dismiss, for lack of subject matter jurisdiction, challenges to Executive Branch security clearance decisions.

The settled *Egan* rule is straightforward: a district court must dismiss, for lack of subject matter jurisdiction,

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8. *See Murphy v. Secretary, U.S. Dep't of Army*, 769 Fed. Appx. 779, 782 (11th Cir. 2019) (applying *Egan* to affirm dismissal of Rehabilitation Act challenge to security clearance decision for want of subject matter jurisdiction); *Sanchez v. Dep't of Energy*, 870 F.3d 1185, 1192 (10th Cir. 2017) (applying *Egan* to dismiss procedural due process challenge to the equivalent of a security clearance decision for want of subject matter jurisdiction); *Whitney v. Carter*, 628 F. App'x 446, 447 (Mem) (7th Cir. 2016) (applying *Egan* to affirm dismissal of unspecified "discrimination" challenge to security clearance decision as non-justiciable); *Wilson v. Dep't of Navy*, 843 F.3d 931, 935 (Fed. Cir. 2016) (applying *Egan* to dismiss Uniformed Services Employment and Reemployment Rights Act challenge to security clearance decision as non-justiciable); *Foote v. Moniz*, 751 F. 3d 656, 658, 409 U.S. App. D.C. 482 (D.C. Cir. 2014) (applying *Egan* to affirm dismissal of Title VII challenge to the equivalent of a security clearance decision as non-justiciable); *Panoke v. U.S. Army Military Police Brigade, Hawaii*, 307 F. App'x 54, 56 (9th Cir. 2009) (applying *Egan* to affirm dismissal of Title VII challenge to security clearance decision as non-justiciable).

an employment discrimination action if resolution of the action "necessarily depends upon a review of . . . [a] security clearance decision," that is, "review of the very issue that the Supreme Court [in *Egan*] held is non-reviewable." *Id.* at 206 (internal marks omitted). And here, there can be no doubt that Plaintiff's Title VII claims in this case "depend[] upon a review of . . . [a] security clearance decision." *Id.* This is so because the challenged adverse employment actions here are (1) the CIA's May 17, 2017 security clearance decision (clearly unreviewable under *Egan*) and (2) the NGA's alleged "constructive discharge" of Plaintiff from a position he was admittedly unable to perform as a result of the CIA's May 17, 2017 security clearance decision.[9] Accordingly, this Title VII

9. No party disputes that Plaintiff could not continue his then-existing NGA position at a CIA worksite following the CIA's May 17, 2017 security clearance decision. *See Jonathan V., a pseudonym v. Esper*, No. NGAE00422017, 2020 WL 5822963, at *4 (EEOC Aug. 4, 2020) ("It is undisputed that [Plaintiff] could only perform his duties . . . at [the CIA worksite] location"); Cooper Affidavit at 6-8 (same); Compl. at 3 ("Plaintiff's claims against NGA are related to and inextricably intertwined with, not separate from, his claims against the CIA."); Compl. ¶¶ 64, 70, 79 (same). As a result, the only way for Plaintiff to prevail on his constructive discharge claim is to establish that the CIA's May 17, 2017 security clearance decision was discriminatory. And clearly, such a challenge is unreviewable under *Egan*. *See supra* notes 7 and 8.

It is also worth noting that, in response to the CIA's May 17, 2017 security clearance decision, NGA took the initiative to find Plaintiff a new job, even though NGA was not required to do so under settled Fourth Circuit authority. *See Campbell v. McCarthy*, 952 F.3d 193, 206 (4th Cir. 2020) (internal citation omitted) ("*Egan* does not impose on an agency the obligation, independent of statute or regulation,

action must be dismissed for want of subject matter jurisdiction.

It is simply not possible to review Plaintiff's Title VII claims against the CIA and NGA without doing what *Egan* prohibits: to review a security clearance decision. In this respect, it is worth remembering that Title VII claims are governed by the familiar three-part *McDonnell Douglas* test. At steps 2 and 3, the district court must evaluate the employer's proffered nondiscriminatory reason for the alleged impermissible employment action. And here, steps 2 and 3 unavoidably require close review of the CIA's security clearance decision that Plaintiff was not fit for the CIA Assignee position, for this is the proffered non-discriminatory reason for the alleged adverse employment actions. To be explicit, if this Title VII matter proceeded to discovery or trial under the *McDonnell Douglas* test, then the Examining Officer, and any other CIA decision-maker involved, would be required to testify, under oath, as to the specific reasons the CIA stopped processing Plaintiff's CIA Assignee security clearance assessment. These reasons might well include description of the classified combat support duties Plaintiff would have performed had he received the CIA Assignee position. Clearly, to allow and evaluate testimony of this sort runs afoul of *Egan*, as it requires the district court to do what *Egan* prohibits: to review a security clearance decision. Plaintiff's Title VII claims

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to transfer employees who lose their security clearance."); *see also Guillot v. Garrett*, 970 F.2d 1320, 1327 (4th Cir. 1992) (same). Two weeks after NGA had found Plaintiff another job, Plaintiff voluntarily resigned from this position.

simply cannot be reviewed without passing judgment on Plaintiff's CIA Assignee security clearance assessment, and thus this Title VII action must be dismissed for lack of subject matter jurisdiction.

Nor is this the first case involving an unreviewable challenge to the predictive national security judgment of a CIA or Executive Branch psychologist. Instructive in this regard are *Foote v. Moniz*, 751 F.3d 656, 409 U.S. App. D.C. 482 (D.C. Cir. 2014) and *Sanchez v. United States DOE*, 870 F.3d 1185 (10th Cir. 2017), recent circuit cases holding that a psychologist's decision "not to certify an applicant" under a national security program is precisely the sort of predictive judgment "covered by *Egan*" and thus non-reviewable by federal courts. *Foote*, 751 F.3d at 657-58; *see also Sanchez*, 870 F.3d at 1193-94. Here, similar to *Foote* and *Sanchez*, the Examining Officer in this case made a predictive national security judgment regarding Plaintiff's fitness for the CIA Assignee position. *See* Blaine Affidavit ¶¶ 9-10 ("Based on Mr. Mowery's psychological examination, the psychologist made the predictive assessment that, at that point in time, there were concerns with Mr. Mowery's ability to meet the standards set forth in ICPG 704.2" on access to sensitive information). It is simply not possible to review Plaintiff's Title VII claims under the three-part *McDonnell Douglas* test without reviewing the Examining Officer's predictive judgment of national security. Accordingly, this Title VII action must be dismissed for lack of subject matter jurisdiction.[10]

10. Separate and apart from *Egan* and its progeny, 42 U.S.C. § 2000e-2(g), a provision of Title VII, independently precludes judicial

Seeking to avoid this conclusion, Plaintiff argues that Plaintiff's Title VII claims do not require judicial review of a security clearance decision inasmuch as the Complaint seeks injunctive relief, namely, an Order that precludes Defendants from "discriminating in the future on the basis of . . . religious belief." Compl. at 13. This argument misses the mark. An injunction may not properly issue without full consideration of the factual basis for enjoining the alleged impermissible conduct. Therefore, to issue or enforce an injunction, a district court must do what *Egan* flatly prohibits: to review a security clearance decision. It is simply not possible to issue or enforce an injunction without passing judgment on the challenged security clearance decision. Accordingly, nothing about the Complaint's requested injunctive relief alters the result

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review of Plaintiff's Title VII claims. This provision, titled *National Security*, states that:

> [I]t shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position . . . if the occupancy of such position . . . is subject to any requirement imposed in the interest of national security . . . and such individual has not fulfilled or has ceased to fulfill that requirement.

The Fifth Circuit has correctly interpreted § 2000e-2(g) "broadly" to preclude review of adverse personnel actions concerning "any set of regulations related to matters of national security." *Toy v. Holder*, 714 F.3d 881, 886 (5th Cir. 2013). And here, as Defendants correctly argue, the CIA Assignee position was subject to numerous regulations related to matters of national security, including Executive Orders 10450, 12333, 13526, 12968, and 13467. Blaine Affidavit ¶ 5. Thus, for this additional reason, Plaintiff's Title VII claims must be dismissed.

reached here that there is no subject matter jurisdiction to review this Title VII action.

Next, Plaintiff argues that neither *Egan* nor its progeny governs here because those cases typically involve formal denials of security clearances, not decisions to halt processing security clearance assessments. This argument is a distinction without a difference. There is simply no difference under *Egan* between a decision to halt processing a security clearance assessment and a formal denial of a security clearance application. Both are "predictive judgment[s]" of national security and thus are judicially non-reviewable. *Egan*, 484 U.S. at 529.

Instructive in this regard is *Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996), in which the Fourth Circuit rejected a similar argument that *Egan* precludes only review of "the denial of a security clearance" and thus permits review of "the initiation of a security investigation." *Id.* at 149 ("We find that the distinction between the initiation of a security investigation and the denial of a security clearance is a distinction without a difference."). Indeed, as the Fourth Circuit made clear in *Campbell v. McCarthy*, 952 F.3d 193 (4th Cir. 2020), *Egan* precludes judicial review of "security clearance *decisions*," and not solely the formal denial of a security clearance. *Id.* at 203 (emphasis added). Thus, nothing about Plaintiff's proffered distinction between the formal denial of a security clearance and the CIA's decision to halt processing Plaintiff's security clearance assessment alters the result reached here that there is no subject matter jurisdiction to review this Title VII action.

Clearly, the CIA's decision to halt processing Plaintiff's CIA Assignee security clearance assessment is *itself* a security clearance decision. And that decision is a "predictive judgment" of national security that is unreviewable under *Egan*. *Egan*, 484 U.S. at 529; *see also Foote v. Moniz*, 751 F.3d 656, 657-58, 409 U.S. App. D.C. 482 (D.C. Cir. 2014) (decision "not to certify an applicant" under national security program for assessing reliability "is the kind of judgment covered by *Egan*"). Indeed, the Complaint essentially concedes this very point, as it accepts that Defendants' decision to halt processing Plaintiff's security clearance assessment was "an effective denial of a security clearance." Compl. ¶ 27; *see also Lucas v. Burnley*, 879 F.2d 1240, 1242 (4th Cir. 1989) ("The general rule is that a party is bound by the admissions of his pleadings."). Accordingly, nothing about Plaintiff's proffered distinction alters the result reached here that there is no subject matter jurisdiction to review this Title VII action.[11]

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11. Seeking to avoid this conclusion, Plaintiff argues that *Egan* precludes nothing more than judicial review of formal denials of security clearances. In support of this argument, Plaintiff cites *Eghbali v. DOE*, 90 F. Supp. 3d 587 (D.S.C. 2014), *Rattingan v. Holder*, 689 F.3d 764, 402 U.S. App. D.C. 166 (D.C. Cir. 2012), *Foote v. Chu*, 928 F. Supp. 2d 96 (D.D.C. 2013), *Guatney v. TVA Bd. of Dirs.*, 9 F. Supp. 3d 1245 (N.D. Ala. 2014), and *Kahook v. Savannah River Unclear Sols. LLC*, No. 1:11-2393, 2013 U.S. Dist. LEXIS 41760, 2013 WL 1110804 (D.S.C. Jan. 25, 2013). None of these cases alters the result reached here that there is no subject matter jurisdiction to review Plaintiff's Title VII claims.

To begin with, *Eghabli* is distinguishable and thus unpersuasive. That case did not involve a security clearance decision or even a job requiring a security clearance. Instead, the question presented there

Finally, Plaintiff argues that subject matter jurisdiction exists because *Egan* is supposedly premised on the idea that meaningful administrative review of a security clearance decision obviates the need for judicial review. This argument overlooks that the EEOC has now twice reviewed and rejected Plaintiff's administrative claims[12] and further misreads the basis for the Supreme Court's decision in *Egan*. The Supreme Court's holding in *Egan* that security clearance decisions are judicially non-reviewable is premised on three principles, none of which concerns the adequacy of administrative review. First, the *Egan* rule is premised on the principle that the Executive Branch is the sole branch with the "necessary

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was whether the defendant's untrained employee could act outside of the formal security clearance process to preclude the plaintiff from accessing his jobsite. Second, *Rattingan* is distinguishable and thus unpersuasive, for there, unlike here, the D.C. Circuit addressed an issue similar to that presented in *Eghbali*, namely, whether *Egan* precludes judicial review of a decision made by an *untrained* Executive Branch employee. Third, the district court's opinion in *Foote* is distinguishable and thus unpersuasive, for the court of appeals ultimately dismissed Plaintiff's claims pursuant to *Egan*. Fourth, *Gautney* is distinguishable and thus unpersuasive because the quoted portion of *Gautney* concerns selective enforcement, which no party argues occurred here. Fifth, *Kahook* is distinguishable and thus unpersuasive, for that case concerned in pertinent part whether an employer could change its policy on how to treat employees with suspended clearances.

12. *See Santiago S., a pseudonym v. Haspel*, No. 17-25, 2018 WL 3584257, at *3 (EEOC July 13, 2018) (affirming dismissal of Plaintiff's EEO complaint against the CIA); *see also Jonathan V., a pseudonym v. Esper*, No. NGAE00422017, 2020 WL 5822963, at *4 (EEOC Aug. 4, 2020) (affirming dismissal of Plaintiff's EEO complaint against the NGA).

expertise" to protect classified information, and therefore that decision on who may access classified information "must be committed to the broad discretion of the agency responsible." *Egan*, 484 U.S. at 529. Second, the *Egan* rule is premised on the principle that "no one has a 'right' to a security clearance," and therefore that an adverse security clearance decision is not necessarily a harm for which there is a legal remedy. *Id.* at 528. Third, the *Egan* rule is premised on the separation of powers, essentially that Article II properly commits decisions on security clearances to the Executive Branch, not to be reviewed by an "outside [] body" such as an Article III court. *See Egan*, 484 U.S. at 527 ("The authority to protect [national security] information falls on the President as head of the Executive Branch and as Commander in Chief."). In other words, the Constitution, as interpreted by *Egan*, commands a true *separation* of powers with respect to security clearance decisions. And that separation of powers vests security clearance decisions with the Executive Branch. Thus, none of Plaintiff's arguments alters the result reached here that this Title VII action must be dismissed for lack of subject matter jurisdiction. Thus, none of Plaintiff's arguments alters the result reached here that this Title VII action must be dismissed for lack of subject matter jurisdiction.

In sum, Plaintiff's Title VII claims challenging a CIA security clearance decision must be dismissed for lack of subject matter jurisdiction pursuant to *Egan*.[13]

13. It must be noted that the Complaint asserts solely Title VII claims and thus does not assert (1) a constitutional claim or cause of action, as in *Hegab v. Long*, 716 F.3d 790, 793 (4th Cir. 2013) or (2) a

An appropriate Order will issue separately. The Clerk is directed to provide a copy of this Memorandum Opinion to all counsel of record.

Alexandria, Virginia
July 26, 2021

/s/ T.S. Ellis, III
T. S. Ellis, III
United States District Judge

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procedural due process claim, as in *Jamil v. Sec., Dep't of Defense*, 910 F.2d 1203, 1208 (4th Cir. 1990). Plaintiff has not sought leave to amend to assert these or other claims. In any event, a plaintiff cannot "circumvent" *Egan* by classifying a challenge to a security clearance decision as a constitutional claim. *Hegab*, 716 F.3d at 795-96 (dismissing constitutional claim challenging security clearance decision for lack of subject matter jurisdiction). As for any procedural due process claim, it is worth noting that Intelligence Community Policy Guidance No. 704.3, cited only in Plaintiff's supplemental briefing, is not necessarily a federal security clearance regulation. It is policy "guidance," which by its terms "does not create or confer on any person or entity any right to administrative or judicial review." *Id.* ¶¶ D.2 & D.5, https://www.dni.gov/files/documents/ICPG/icpg_704_3.pdf (last accessed July 26, 2021); *see also Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000) ("policy statements, agency manuals, and enforcement guidelines . . . lack the force of law").