No. 15-530

In the Supreme Court of the United States

WILFRED SAMUEL RATTIGAN, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

In *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), this Court held that an Executive Branch determination whether an agency employee should be entrusted with a security clearance providing access to classified information is not subject to review by outside non-expert bodies. Executive Order 12,968, which governs access to classified information, provides that "[e]mployees are encouraged and expected to report any information that raises doubts as to whether another employee's continued eligibility for access to classified information is clearly consistent with the national security." Exec. Order No. 12,968, § 6.2(b), 3 C.F.R. 401 (1995 Comp.). Petitioner, who possessed a security clearance, brought this suit alleging that his supervisors referred for investigation allegations indicating that he might be a security risk in order to retaliate against him, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq*. The question presented is:

Whether the court of appeals erred in holding that, in order to avoid judicial second-guessing of the Executive Branch's security-related assessments, petitioner was required to prove that his supervisors knew that the allegations against him were false.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 780 F.3d 413. The opinion of the district court (Pet. App. 13a-44a) is reported at 982 F. Supp. 2d 69. A prior opinion of the court of appeals (Pet. App. 83a-109a) is reported at 689 F.3d 764.

JURISDICTION

The judgment of the court of appeals was entered on March 13, 2015. A petition for rehearing en banc was denied on July 28, 2015 (Pet. App. 45a). The petition for a writ of certiorari was filed on October 26, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The President, in the exercise of his constitutional authority as Commander in Chief and head of the Executive Branch, has established procedures "to

classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information." *Department of the Navy* v. *Egan*, 484 U.S. 518, 527 (1988). By Executive Order, the President has delegated authority for controlling access to classified information to the heads of Executive agencies, including the Director of the Federal Bureau of Investigation (FBI). See Exec. Order No. 12,968, § 1.2(b), 3 C.F.R. 392 (1995 Comp.). Under Executive Order 12,968, agencies may grant security clearances only where "facts and circumstances indicate access to classified information is clearly consistent with the national security interests of the United States, and any doubt shall be resolved in favor of national security." *Id.* § 3.1(b), 3 C.F.R. 397.

Once an employee is given a security clearance, the employing agency must ensure that the employee "continue[s] to meet the requirements for access" to classified information at all times. Exec. Order No. 12,968, § 1.2(d), 3 C.F.R. 392-393. It is therefore critical that the employing agency have access to information concerning any potential reasons to believe that an employee holding a clearance may present a security risk. Executive Order 12,968 provides that "[e]mployees are encouraged and expected to report any information that raises doubts about whether another employee's continued eligibility for access to classified information is clearly consistent with the national security." *Id.* § 6.2(b), 3 C.F.R. 401.

In *Egan*, *supra*, this Court explained that the ordinary presumption in favor of reviewability of agency

decisions does not apply to Executive Branch security clearance determinations. 484 U.S. at 526-527. Such determinations, the Court reasoned, fall within the President's broad authority, as the "Commander in Chief of the Army and Navy of the United States," over national security and foreign affairs. *Id.* at 527, 529-530 (quoting U.S. Const. Art. II, § 2). The Court accordingly held that the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, does not confer jurisdiction on the Merit Systems Protection Board (Board) to review an Executive Branch determination as to whether an employee should be granted access to classified information. 484 U.S. at 530-531. The Court explained that although the CSRA generally authorizes the Board to review personnel actions taken against federal employees, that grant of jurisdiction should not be construed to extend to security-clearance determinations absent a specific statement of congressional intent. *Ibid.*

The Court emphasized that security-clearance determinations are an "inexact science," involving the exercise of "[p]redictive judgment" about security risks that "must be made by those with the necessary expertise in protecting classified information." *Egan*, 484 U.S. at 529. The Court stated that "it is not reasonably possible for an outside nonexpert 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." *Ibid.* That conclusion was "fortified," the Court explained, by the fact that a security clearance may be granted only when it is "'clearly consistent with the interests of the national security.'" *Id.* at 531 (quoting Exec. Order No. 10,450, 3 C.F.R. 936 (1949-1953

Comp.)). The Court found it "difficult to see how the Board would be able to review security-clearance determinations under a preponderance of the evidence standard without departing from the 'clearly consistent'" standard. *Ibid.*

2. Petitioner, who is black and of Jamaican descent, was employed as the FBI's legal attaché in Riyadh, Saudi Arabia, a position that required a security clearance. In that capacity, petitioner functioned as the primary FBI liaison to the Saudi intelligence service. Pet. App. 48a-49a.

Petitioner's supervisors included Cary Gleicher, Michael Pyszczymuka, and Leslie Kaciban, all of whom were officials in the FBI's Office of International Operations (OIO). At various times, petitioner made allegations of race and national-origin discrimination against all three supervisors. Pet. App. 15a.

In November 2001, Gleicher assigned Special Agent Donovan Leighton to a temporary detail in Riyadh. During his time in Riyadh, Leighton became concerned by a number of things he observed and heard about petitioner that suggested that petitioner might be a security risk. Upon his return to FBI headquarters, Leighton shared his concerns about petitioner with petitioner's supervisors, and he drafted an electronic communication (EC) documenting his concerns. Pet. App. 15a-16a.

Leighton's EC contained a mixture of personal observations, facts reported to him by others, and subjective judgments. Pet. App. 16a-17a. Among other things, Leighton noted in the EC that petitioner's Saudi counterparts were trying to find him a "suitable wife," which raised questions in Leighton's mind about whether petitioner had become too close to the Saudi

security service; and that petitioner had taken a leave of absence to make a pilgrimage to Mecca, leaving no way to contact him except through the Saudis. *Id.* at 17a. Leighton also noted that he had been told that petitioner had hosted wild parties at his residence, where petitioner and other FBI agents had sex with women described as "nurses," which Leighton understood to be a euphemism for prostitutes. *Ibid.*

Petitioner's supervisors referred Leighton's allegations to the FBI's Security Division. After reviewing the allegations, the Security Division initiated a formal security investigation. After conducting an investigation, the Security Division concluded that petitioner did not present a security risk and that his clearance should not be revoked. Pet. App. 52a-53a.

3. a. In 2004, petitioner filed this suit against the FBI, asserting claims of unlawful discrimination and retaliation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Pet. App. 53a. As relevant here, petitioner alleged that the FBI had retaliated against him by initiating a security investigation. *Ibid.* Shortly before trial, the FBI moved to dismiss that claim, contending that it was barred under *Egan* because adjudicating it would require the factfinder to second-guess the FBI's security-related decisions. The district court denied that motion. The jury returned a verdict in favor of petitioner, and the district court entered judgment against the government. *Ibid.*

b. The court of appeals vacated and remanded. Pet. App. 47a-82a (*Rattigan I*). The court explained that D.C. Circuit precedent held that "*Egan* applies to Title VII claims and bars judicial resolution of" a discrimination claim founded on an "agency security

clearance decision." *Id.* at 56a (quoting *Ryan* v. *Reno*, 168 F.3d 520, 523 (D.C. Cir. 1999)). The court observed, however, that determining whether *Egan* barred petitioner's claim presented issues of "first impression," as the claim "implicate[d] neither the denial nor revocation of [petitioner's] security clearance nor the loss of employment resulting from such action." *Id.* at 58a. Rather, the court observed, petitioner's claim challenged preliminary decisions in the security-clearance process. The court concluded that *Egan* did not bar all such challenges, but instead "shields from review only those security decisions made by the FBI's Security Division." *Id.* at 61a. Thus, "the actions of thousands of other FBI employees who * * * may from time to time refer matters to the Division," but who are not themselves security personnel, may be subject to judicial review. *Ibid.*

Applying that holding to petitioner's allegations, the court of appeals concluded that the Security Division's decision to initiate a security investigation of petitioner fell within *Egan*'s prohibition on judicial review. Because the jury instructions on petitioner's retaliation claim had permitted the jury to second-guess that decision, the court vacated the jury verdict in petitioner's favor. Pet. App. 67a.

The court of appeals declined to dismiss the case, however, because it concluded that petitioner's challenge to his OIO supervisors' decision to refer Leighton's allegations to the Security Division might fall "outside *Egan*." Pet. App. 68a. The court recognized that in evaluating whether OIO's referral of the security allegations was retaliatory, the jury would have to consider whether OIO's assertion that the allegations raised a potential security risk was pretextual. *Id.* at

73a. That inquiry, the court acknowledged, would contravene *Egan* if the jury were invited to second-guess whether the allegations raised sufficient security concerns to "merit[] further inquiry." *Ibid.* To guard against that possibility, the court held that petitioner would be required on remand to establish that his OIO supervisors "included in their referral accusations that they knew or should have known were false or misleading." *Id.* at 74a.

Judge Kavanaugh dissented, arguing that the panel majority's "slicing and dicing of the security clearance process into reviewable and unreviewable portions is nowhere to be found in *Egan*, and does not reflect the essential role that the reporting of security risks plays in the maintenance of national security." Pet. App. 76a-77a.

c. The government petitioned for panel rehearing and rehearing en banc, arguing that the court of appeals' decision was contrary to *Egan* and would chill the reporting of security risks to those officials charged with making security clearance determinations. The court granted panel rehearing and revisited the portion of its earlier opinion holding that liability could be based on referral of allegations to the Security Division if the referring employees "should have known" that the allegations were false or misleading. Pet. App. 83a-109a (*Rattigan II*).

The court of appeals agreed with the government that its "earlier decision could indeed discourage critical reporting by permitting jurors to infer pretext based on their own judgment that the information reported was either unlikely to prove true or raised insufficiently weighty concerns." Pet. App. 93a. The court recognized that "this likely chilling effect pre-

sents serious *Egan* problems" because officials charged with making security clearance decisions "need full access to even unsubstantiated and doubtful information in order to make the sensitive, predictive judgments that *Egan* protects." *Id*. at 94a.

The court of appeals therefore "narrow[ed] the scope" of permissible Title VII claims based on the allegedly discriminatory referral of security allegations. Pet. App. 95a. The court held that only "Title VII claims based on *knowingly false* reporting" could proceed consistent with *Egan*. *Ibid*. (emphasis in original). Such claims "present no serious risk of chill," the court reasoned, and would not require jurors to weigh the significance of information reported "or to second-guess the employee's determination that seemingly doubtful or insignificant information warranted reporting." *Id*. at 96a.

Turning to petitioner's allegations, the court of appeals held that the bulk of the statements in Leighton's EC could not be the basis for liability because they were undisputedly true. Pet. App. 99a-100a. The court held, however, that two allegations—both pertaining to petitioner's hosting parties with prostitutes—might "be evidence to support a claim that Leighton or other OIO officials chose to report * * * information that they knew to be false." *Id*. at 100a-103a. The court remanded to permit the district court to determine "whether there is sufficient evidence of knowing falsity to allow [petitioner] to bring his claim before a jury." *Id*. at 102a.

Judge Kavanaugh again dissented. Pet. App. 103a-108a. He would have held that "*Egan* protects the front end of the security clearance process—including

reports of possible security risks—as much as it protects the back end." *Id.* at 107a.

4. On remand, the district court granted the government's motion for summary judgment. Pet. App. 13a-44a. The court held that petitioner had failed to present evidence creating a genuine issue of material fact as to whether petitioner's supervisors reported knowingly false information to the Security Division. *Id.* at 26a-34a. Indeed, the court observed, there was no evidence that petitioner's supervisors had any knowledge whether Leighton's allegations were false. *Ibid.* The court also held that no reasonable jury could conclude that retaliatory animus, rather than a legitimate security concern, was the but-for cause of the referral to the Security Division. *Id.* at 34a-41a. Finally, the court rejected petitioner's request for additional discovery, holding that petitioner had not demonstrated that his proposed avenues of inquiry would lead to any additional relevant evidence beyond that already developed in preparation for the previous trial in the case. *Id.* at 41a-44a.

5. The court of appeals affirmed. Pet. App. 1a-10a. The court first explained that petitioner "focuse[d] on demonstrating" that Leighton knew his allegations were false. *Id.* at 5a. That tack was unavailing, the court held, because "there is no evidence that Leighton, who was not the object of Rattigan's original discrimination claim, had any unlawful retaliatory motive when he documented his concerns." *Ibid.*

The court also rejected petitioner's attempt "to cobble together his supervisors' alleged retaliatory motive and Leighton's alleged knowing falsehoods." Pet. App. 6a. The court explained that under *Rattigan II*, "[m]otive and knowing falsity must unite in the

same person." *Id.* at 5a. Petitioner's evidence, the court observed, failed to establish that any of the supervisors who allegedly harbored retaliatory animus toward plaintiff had any significant knowledge of the truth of the allegations in Leighton's referral, thus precluding any claim that they referred information that they knew to be false. *Id.* at 6a-7a.

Finally, the court of appeals held that the district court did not abuse its discretion in denying petitioner's requests for additional discovery, because petitioner failed to identify specific discovery necessary to address the "knowing falsity" issue on remand. Pet. App. 8a-10a.

ARGUMENT

Petitioner contends (Pet. 13-21) that the court of appeals erred in holding that a plaintiff who alleges that a security referral violated Title VII must establish that agency employees acted with discriminatory motive in referring information that they knew to be false. Further review is unwarranted. The court of appeals' decision does not conflict with any decision of this Court or any other court of appeals. The factual circumstances to which the court's decision applies—an allegedly retaliatory security referral that did not result in the revocation of, or any other adverse effect on, a security clearance—are unlikely to recur with any frequency. The petition for a writ of certiorari should be denied.

1. Petitioner first argues (Pet. 13-16) that the court of appeals' decision conflicts with this Court's decision in *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988). Petitioner is incorrect.

a. In *Egan*, this Court held that the ordinary presumption in favor of appellate review does not apply to

the Executive Branch's predictive national-security determination that an individual is not entitled to a security clearance. 484 U.S. at 528-530. The Court gave two primary reasons for its conclusion. First, security-clearance determinations fall within the President's broad authority over national security and foreign affairs. *Id.* at 527, 529-530; see U.S. Const. Art. II, § 2. Second, the determination whether granting a particular security clearance would be "clearly consistent" with national security involves sensitive predictive judgments that require the application of the Executive's unique national-security expertise. *Egan*, 484 U.S. at 528-530; see Exec. Order No. 10,450, §§ 2, 7, 3 C.F.R. 936 (1949-1953 Comp.). Those complex assessments of "potential risk," the Court reasoned, cannot reasonably be reviewed by non-expert outside bodies. *Egan*, 484 U.S. at 529.

b. The court of appeals did not contravene *Egan* by holding that a referral of security-related allegations by an employee without particular security expertise implicates the national-security concerns discussed in *Egan*. As an initial matter, although *Egan*'s precise holding concerns only an agency's ultimate decision whether to grant or revoke a security clearance, the *Egan* Court nowhere suggested that the Article II concerns animating its holding are implicated only by ultimate security clearance decisions. 484 U.S. at 528-530.

The court of appeals correctly concluded that the principles animating *Egan* were relevant to petitioner's challenge to reporting of security allegations. As the court explained, "broad liability for * * * reporting" of security-related concerns would "compromise the integrity of decisions that *are* shielded from judi-

cial intrusion, *i.e.*, decisions of the Security Division." Pet. App. 94a-95a (emphasis in original). The Executive Branch has determined that comprehensive reporting of "any information that raises doubts" about an employee's fitness for a security clearance (even if the allegations are vague or unsubstantiated) is necessary to ensure the integrity of security-clearance determinations. See Exec. Order No. 12,968, § 6.2(b), 3 C.F.R. 401. Permitting a jury to "infer pretext—and find Title VII liability—from an employee's decision to report dubious or potentially irrelevant information" would chill reporting that is mandated by Executive Order 12,968. Pet. App. 92a. That chilling effect would in turn undermine the Executive Branch's access to the information necessary to permit trained employees to make the complex national-security judgments necessary to grant, deny, or revoke security clearances. *Id.* at 94a; see *Egan*, 484 U.S. at 531.

That conclusion follows from the principles set forth in *Egan*. But cf. Pet. 15-16. The *Egan* Court emphasized that in view of the national-security implications of security-clearance determinations, courts should not "intrude" in security-clearance decisions in any way that undermines the Executive Branch's ability to "make the necessary affirmative prediction with confidence." 484 U.S. at 529. Decisions to report information that may reflect a security risk to agency security decisionmakers implicate that concern. Permitting Title VII claims to chill such reporting will reduce the information available to security personnel, thereby undermining the Executive Branch's ability to ensure that employees who have clearances should be permitted to maintain them.

In addition, *Egan* accorded deference to the President's determination, embodied in Executive Orders, as to how best to determine whether an employee should be given a clearance, and it held that judicial review should not be permitted to undermine the operation of those orders. 484 U.S. at 528-529 (explaining that judicial review to determine whether clearance determinations were supported by a preponderance of the evidence would conflict with Executive's policy of granting clearances only when "clearly consistent" with national security). The court of appeals applied that reasoning in holding that permitting factfinders in Title VII cases to rely on reporting of unsubstantiated allegations as evidence of pretext would undermine the operation of Executive Order No. 12,968.[1]

The court of appeals' conclusion that the Article II concerns set forth in *Egan* are relevant to actions other than the formal denial or revocation of a security clearance is consistent with other decisions addressing similar issues. See*, e.g., Bennett* v. *Chertoff*,

[1] The government adheres to its view, expressed in its petitions seeking rehearing en banc after *Rattigan I* and *Rattigan II*, that the court of appeals should have held that the principles set forth in *Egan* shield the reporting of potential security risks from judicial review under Title VII. The court correctly held, however, that the Article II principles set forth in *Egan* are not limited to cases involving ultimate security determinations. The court also applied its "knowing falsity" standard in *Rattigan III* in an appropriately rigorous manner that makes clear that the circumstances under which a discriminatory security referral claim may proceed are quite narrow. And the court reached the correct judgment in affirming the dismissal of petitioner's retaliation claim. See *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956) (this Court "reviews judgments, not statements in opinions").

425 F.3d 999, 1004-1005 (D.C. Cir. 2005) (dismissing challenge to "suitability" determination by agency based on security concerns); *Hill* v. *White*, 321 F.3d 1334, 1336 (11th Cir. 2003) (per curiam) (dismissing challenge to initiation of security investigation); *Ryan* v. *Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999) (dismissing challenge to agency's refusal to waive security background check); *Becerra* v. *Dalton*, 94 F.3d 145, 149 (4th Cir. 1996) (dismissing challenge to initiation of security investigation).

2. Petitioner next contends (Pet. 15-18) that the "knowing falsity" standard "unnecessarily limits Title VII protections for federal employees." That contention does not warrant review. Petitioner's challenges to the "knowing falsity" standard lack merit, and he does not argue that the court of appeals' adoption of that standard created a conflict with the decision of any other court of appeals.

In adopting the "knowing falsity" standard, the court of appeals sought to balance "Title VII's important protections" with the government's "powerful" interest in safeguarding employee referrals of security-related information. Pet. App. 63a-64a, 93a. The court explained that a less rigorous standard would chill employee reporting, thereby undermining the Executive Branch's authority and ability to make security-clearance determinations. *Id.* at 92a-93a; see pp. 11-12, *supra*. Petitioner does not challenge the court's conclusion that a standard less rigorous than "knowing falsity" would create a chilling effect that would impede security-clearance determinations. See Pet. 16-18. He therefore cannot establish that the court of appeals' decision imposes a burden on Title VII plaintiffs that is "unnecessar[y]" (Pet. 16) to pro-

tect the government's compelling interest in safeguarding its security-clearance process from chilling effects. Pet. App. 93a.

Petitioner incorrectly asserts (Pet. 16) that the "knowing falsity" standard is a significant "limit[ation]" on Title VII's protections. To the contrary, the circumstances in which the standard will apply are extremely narrow. The court of appeals held only that the "knowing falsity" standard applies when a plaintiff alleges that he was subject to a discriminatory referral of security-related allegations and the ensuing investigation did not result in any adverse effect on his security clearance. See Pet. App. 60a. Petitioner points to no other case involving that scenario.[2]

Petitioner is also incorrect in contending (Pet. 17-18) that the knowing falsity standard is inconsistent with Executive Order No. 12,968. That order broadly requires the reporting of any information that "raises doubts" about whether an employee's continued access to classified information is "clearly consistent with the national security." Exec. Order No. 12,968, § 6.2(b), 3 C.F.R. 401. Petitioner apparently argues that the factfinder should apply the standard set forth in the Executive Order and evaluate whether the allegations "raise[d] doubts" about the targeted em-

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[2] Petitioner asserts (Pet. 16) that the court of appeals' decision will create "paradoxical results." He relies on an interlocutory district court decision denying the government's motion to dismiss a Title VII claim on *Egan* grounds where the plaintiff alleged that agency employees knowingly reported false information leading to the revocation of his security clearance. See *Burns-Ramirez* v. *Napolitano*, 962 F. Supp. 2d 253 (D.D.C. 2013). A single nonprecedential district court decision that has yet to be reviewed by the D.C. Circuit does not shed any light on the scope or implications of the decisions below.

ployee's fitness for a clearance. But that regime would invite jurors to second-guess the referring employee's compliance with the Executive Order and to infer pretext from the employee's referral of unsubstantiated information. See Pet. App. 92a. That would create precisely the chilling effect with which the court of appeals was appropriately concerned.

3. Petitioner next argues (Pet. 18-19) that the court of appeals improperly limited Title VII claims based on security referrals by holding that "[m]otive and knowing falsity must unite in the same person." Pet. 18 (quoting *Rattigan III*) (brackets in original). Petitioner relies (Pet. 19) on decisions holding that in general, employment-discrimination liability may be premised on an action taken by a supervisor who did not himself possess discriminatory motive, but who was influenced by an employee who did. See, *e.g.*, *Staub* v. *Proctor Hosp.*, 562 U.S. 411 (2011). Those decisions are inapposite, however, because they did not involve a challenge to a clearance-related action that implicates the national-security concerns discussed in *Egan*.

In the unique situation presented here, the court of appeals correctly concluded that the referring employee must possess both a discriminatory motive and knowledge that his allegations are false. That is because the "knowing falsity" requirement is designed to ensure that unsubstantiated or doubtful allegations—which must be reported under Executive Order No. 12,968—do not serve as the basis for an inference of discriminatory intent. See Pet. App. 92a-95a; see pp. 7-8, *supra*. If two employees are involved in the referral decision, and the plaintiff could prevail by showing that one employee knowingly made false

allegations and the second employee possessed retaliatory intent, the factfinder could infer the second employee's intent from the unsubstantiated nature of the allegations. That would create the very chilling effect on security reporting that the court of appeals sought to avoid.

4. Petitioner contends (Pet. 19-21) that "*Rattigan III* improperly demands direct evidence of firsthand knowledge to prove 'knowing falsity.'" Pet. 19. To the contrary, the court of appeals did not impose any requirement that a plaintiff rely only on direct evidence of knowledge. See Pet. App. 5a-6a. The court considered all of petitioner's evidence and concluded that it was insufficient to raise a genuine dispute of material fact with respect to whether petitioner's supervisors knew the allegations were false. See *ibid*. Petitioner's contention is at bottom a case-specific challenge to the lower courts' consideration of the evidence in this case.

5. Review is unwarranted for the additional reason that no other published court of appeals decision has addressed the application of *Egan* to a claim that allegations of a security risk were made for discriminatory reasons. No court has held, contrary to the decision below, that *Egan* is inapplicable to claims of discriminatory reporting of security allegations, nor has any court suggested that such claims should be subject to less rigorous requirements than the "knowing falsity" standard.

Indeed, no court has squarely addressed the situation presented here, where the plaintiff challenges the decision to report security-related allegations for a possible investigation. To our knowledge, only one other case has involved a similar claim (albeit where

the clearance was ultimately revoked), and there the Ninth Circuit summarily affirmed the district court's dismissal on *Egan* grounds. See *Panoke* v. *United States Army Military Police Brigade*, 307 Fed. Appx. 54 (2009).

Challenges to reporting of security allegations thus appear to be quite rare. And the decision below applies only to a subcategory of that small set: challenges to security referrals in which the plaintiff's security clearance was not ultimately affected. See Pet. App. 58a (situations in which the agency denied a security clearance would more directly implicate *Egan* and are distinguishable from petitioner's claim, which "implicates neither the denial nor revocation of his security clearance nor the loss of employment resulting from such action"). The decision below thus applies only to highly unusual circumstances that are unlikely to recur with any regularity. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should accordingly be denied.

Respectfully submitted.

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