No. 13-607

In the Supreme Court of the United States

DEVON HAUGHTON NORTHOVER, PETITIONER

v.

KATHERINE ARCHULETA, DIRECTOR,
OFFICE OF PERSONNEL MANAGEMENT

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether this Court's decision in *Department of Navy* v. *Egan*, 484 U.S. 518 (1988), forecloses Merit Systems Protection Board review of the merits of an agency's determination that an individual's employment in a national security sensitive position is not consistent with the interests of national security.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 733 F.3d 1148. The opinion of the court of appeals panel (Pet. App. 68a-120a) is reported at 692 F.3d 1223. The decision of the Merit Systems Protection Board (Pet. App. 121a-148a) is reported at 115 M.S.P.R. 451.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2013. The petition for writ of certiorari was filed on November 15, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Pursuant to the President's constitutional authority to protect national security, Executive Order

10,450 directs federal agency heads to establish security programs to ensure that "the employment and retention * * * of any civilian officer or employee * * * is clearly consistent with the interests of the national security." Exec. Order No. 10,450, § 2, 3 C.F.R. 936-937 (1949-1953 comp.). To aid in that determination, the Executive Order directs agencies to designate positions as "sensitive" when "the occupant of [the position] could bring about, by virtue of the nature of the position, a material adverse effect on the national security." *Id.* § 3(b). These positions are known as national security "sensitive" positions.

Government agencies "classify [sensitive] jobs in three categories," each of which is "expressly made subject to a background investigation that varies according to the degree of adverse effect the applicant could have on the national security." *Department of Navy* v. *Egan*, 484 U.S. 518, 528 (1988). Those categories are "noncritical-sensitive," "critical-sensitive," and "special-sensitive." 5 C.F.R. 732.201(a) (capitalization altered). Pursuant to Office of Personnel Management (OPM) implementing guidance, a "noncritical-sensitive" position—the category at issue here—is one in which the occupant has the potential to cause damage to national security up to the "significant or serious level." OPM, Position Designation of National Security and Public Trust Positions 3, https://www.opm.gov/investigations/background-investigations/position-designation-tool/oct2010.pdf (Oct. 2010) (OPM Position Designation); C.A. J.A. 326 (2009 version); 78 Fed. Reg. 31,847, 31,849 (May 28, 2013) (proposed rules). "Critical-sensitive" positions are those where the occupant of the position would have the potential to cause "exceptionally grave damage" to national se-

curity, and "[s]pecial-sensitive" positions are those where the occupant of the position would have the potential to cause "inestimable" damage to national security. OPM Position Designation 2. Some, but not all, employees who hold such national security sensitive positions may require authorization to access classified information—*i.e.*, a security clearance—in order to perform their jobs.[1] For instance, positions involving protecting the borders or critical infrastructure may be sensitive but may not require access to classified information. See 75 Fed. Reg. 77,783 (Dec. 14, 2010).

Consistent with these principles, OPM's regulations implementing Executive Order 10,450 define "national security [sensitive] position[s]" to include not only those positions "that require regular use of, or access to, classified information," but also those positions "that involve activities of the Government that are concerned with the protection of the nation from foreign aggression or espionage, including development of defense plans or policies, intelligence or counterintelligence activities, and related activities concerned with the preservation of the military strength of the United States." 5 C.F.R. 732.102(a).[2]

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[1] The standards for granting a security clearance are governed by, *inter alia*, Executive Order 12,968. Exec. Order No. 12,968, § 2.1(b), 3 C.F.R. 395 (1996); see also *id.* §§ 1.2(a), 3.1.

[2] In August 2013, in accordance with a Presidential Memorandum entitled "Rulemaking Concerning the Standards for Designating Positions in the Competitive Service as National Security Sensitive and Related Matters," 78 Fed. Reg. 7253 (Jan. 31, 2013), OPM and the Office of the Director of National Intelligence jointly proposed revised regulations governing the designation of positions as sensitive. *Id.* at 31,849. The proposed regulations do not materially alter the definitions of the position designations that

Executive Order 10,450 requires that an individual must successfully undergo a background check in order to be considered eligible to hold a national security sensitive position. That background check, which uses materially the same standards as those that govern the determination whether an individual is eligible for a security clearance, see Exec. Order No. 12,968, § 3.1, 3 C.F.R. 397 (1996), examines whether the individual is susceptible to coercion or influence, and is reliable and trustworthy. Exec. Order No. 10,450, §§ 2, 3(a) and (b), 8(a), 3 C.F.R. 936-938 (1949-1953 comp.). Ultimately, the agency must ensure that employment of the individual is "clearly consistent with the interests of the national security." *Id.* § 8(a).

The Department of Defense (DoD), the agency whose actions are at issue in this case, maintains an "adjudication facility" that makes eligibility determinations for sensitive positions based on background checks conducted by OPM. See Gov't C.A. Br. 13. Pursuant to regulations promulgated by DoD to implement Executive Order 10,450, that facility makes both determinations of eligibility for access to classified information and determinations of eligibility to hold a national security position. See generally 32 C.F.R. 154.41, 154.3. When DoD's adjudication facility determines that an individual is not eligible for a national security position, DoD may take appropriate action in response. For instance, if the individual already occupies the national security position, the agency may, depending on the circumstances, reassign the individual to a nonsensitive position, or sus-

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appear in OPM's implementing guidance, but add examples of the types of position duties that may result in a designation at a particular level. *Id.* at 31,849-31,850.

pend or remove the employee. And if the individual is being considered for a sensitive position, DoD will decline to hire him. See Gov't C.A. Br. 19-21.

b. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, generally sets forth a framework for "reviewing personnel action[s] taken against federal employees." *Elgin* v. *Department of Treasury*, 132 S. Ct. 2126, 2127 (2012). The CSRA provides that when a federal agency takes an adverse "action" against an "employee," as defined in 5 U.S.C. 7511(a)(1), that employee is entitled to the protections of 5 U.S.C. 7513. An appealable "action" is defined by statute as "(1) a removal; (2) a suspension for more than 14 days; (3) a reduction in grade; (4) a reduction in pay; and (5) a furlough of 30 days or less."[3] 5 U.S.C. 7512.

Section 7513(a) provides that an agency may take an adverse action "only for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). Section 7513(b) provides that an employee against whom an adverse action is proposed is entitled to 30 days' advance written notice, the opportunity to respond orally and in writing, the right to be represented by an attorney, and a written decision and the specific reasons for that decision "at the earliest practicable

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[3] Excluded from the definition of appealable "action[s]" are employment actions taken pursuant to Section 7532, which allows the head of certain agencies to suspend or remove an employee when "necessary in the interests of national security." 5 U.S.C. 7532(a). Under that provision, the agency head's decision to remove the employee is "final." 5 U.S.C. 7532(b). Section 7532 provides an "alternative route[]" for certain agencies to remove or take other action against an employee on national security grounds. *Egan*, 484 U.S. at 532; see pp. 24-25, *infra*. As in this case, an agency may choose to proceed under Section 7513 instead. *Ibid.*

date." 5 U.S.C. 7513(b). Section 7513(d) further provides that "[a]n employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under Section 7701 of this title." 5 U.S.C. 7513(d).

When an employee appeals an adverse action, the Merit Systems Protection Board (Board) may sustain the agency's action only if the agency demonstrates that its decision is supported by a preponderance of the evidence. 5 U.S.C. 7701(c)(1)(B), 7513(a); Pet. App. 127a. When the Board rules against the agency, it may order a range of relief, including, in appropriate cases, reinstatement or backpay. 5 U.S.C. 7701(b)(2). Alternatively, the Board may mitigate or reduce the action taken against the employee after considering case-specific factors and concluding that the agency "clearly exceeded the limits of reasonableness." See *Douglas* v. *Veterans Admin.*, 5 M.S.P.R. 280, 306 (1981).

When the Board rules for the employee, the CSRA permits the government to seek further review in certain limited circumstances. The Director of OPM may petition the Board for reconsideration of a final Board decision. 5 U.S.C. 7703(d). If reconsideration is denied, the OPM Director may file a petition for judicial review in the Federal Circuit "if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. 7703(d)(1). The granting of a petition for judicial review is "at the discretion of the Court of Appeals." *Ibid.*

c. In *Department of Navy* v. *Egan*, *supra*, this Court considered the interaction of the Executive Branch's procedures for ensuring that employees are eligible for access to classified information and the CSRA's review provisions. The Court held that in the absence of a specific statutory provision to the contrary, the Board lacks jurisdiction to review the merits of 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 Board therefore may review only an adverse "action"—*i.e.*, removal, demotion, or other actions listed in Section 7512—that follows the security clearance determination by ascertaining whether the clearance was in fact denied and whether the agency complied with procedural requirements. *Id.* at 530.

2. a. In 2003, petitioner was promoted to commissary management specialist at the Defense Commissary Agency, a noncritical sensitive position within DoD. Gov't C.A. Br. 21. Following an investigation, DoD determined that petitioner was not eligible to occupy a national security sensitive position within DoD.[4] Pet. App. 122a-123a.

DoD regulations, which apply to both a denial of a security clearance and an unfavorable national security position eligibility determination, provided petitioner with an opportunity to appeal within the agency. Specifically, after petitioner was given written notice of the reasons for the adverse determination, he was entitled to respond in writing. 32 C.F.R.

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[4] This case was consolidated with another case before the Board and the Federal Circuit. See *Conyers* v. *Department of Def.*, 115 M.S.P.R. 572 (2010); Pet. App. 149a. The Federal Circuit dismissed the petition in the *Conyers* case as moot. See Pet. App. 7a.

154.56(b)(1) and (2). DoD regulations further provide for an on-the-record hearing before the Defense Office of Hearing and Appeals—at which the employee may challenge the merits of the national security determination, may be represented by counsel, and may present and cross-examine witnesses—and a subsequent appeal to an independent review panel appointed by the Secretary of Defense pursuant to Executive Order 12,968. See generally 32 C.F.R. Part 154; *Romero* v. *Department of Def.*, 658 F.3d 1372, 1375 (Fed. Cir. 2008) (describing appeal procedures that apply to both security clearance and eligibility determinations); Exec. Order No. 12,968, § 5.2(a)(6), 3 C.F.R. 400 (1996).

Petitioner, however, did not timely respond to the notification that his eligibility had been denied, and the agency's decision became final without further review. Gov't C.A. Br. 21. Accordingly, DoD placed petitioner in an available position that was not classified as national security sensitive. That position involved a lower grade and pay, and the placement was therefore a demotion.

b. Petitioner appealed his demotion to the Board on the grounds that the demotion lacked sufficient cause, 5 U.S.C. 7513(a), 7701(c)(1), and that the agency acted in retaliation for petitioner's filing a discrimination complaint, 5 U.S.C. 7701(c)(2)(B), 7702. See Gov't C.A. Br. 22; Pet. App. 121a-148a. Petitioner thus brought what is known as a "mixed" case—one that challenges an adverse action as defined in Section 7512 on the ground that, among other things, the action was discriminatory. See generally *Kloeckner* v. *Solis*, 133 S. Ct. 596 (2012).

DoD argued that *Egan* precluded Board review of the merits of the agency's determination that petition-

er was not eligible to hold a national security sensitive position. The Board rejected DoD's argument and held that *Egan* "limits the Board's statutory review of an appealable adverse action only when such review would require the Board to review the substance" of a security clearance determination.[5] Pet. App. 133a.

3. The Director of OPM petitioned the Federal Circuit for review of the Board's decision under Section 7703(d)(1).[6] A panel of the court of appeals reversed the Board's decision. Pet. App. 64a-120a. The panel held that this Court's decision in *Egan* "prohibits Board review of agency determinations concerning eligibility of an employee to occupy a 'sensitive' position, regardless of whether the position requires

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[5] While petitioner's appeal was pending before the Board, petitioner was retroactively restored to his original position and given backpay after the head of the Defense Commissary Agency determined that he could hold the position consistent with the interests of national security. See Pet. 4; Gov't C.A. Br. 22. The government moved to dismiss the case on mootness grounds, but the Board denied the motion on the ground that DoD's actions did not dispose of petitioner's discrimination claim. An administrative judge subsequently dismissed the discrimination claims without prejudice to refiling after the court of appeals resolved OPM's petition for review of the Board's ruling. Gov't C.A. Br. 22. That administrative dismissal ensured that the Board did not violate the time limitations for deciding discrimination claims set forth in Section 7702(a)(1) and 5 C.F.R. 1201.156.

[6] Although *Kloeckner* held that judicial review of an employee's challenge to the Board's procedural rulings in mixed cases takes place in district court, that holding does not preclude jurisdiction in the Federal Circuit in this case. *Kloeckner* interpreted 5 U.S.C. 7703(b), which governs employee appeals, not Section 7703(d), which provides that the OPM Director may obtain review of a Board decision by petitioning for review in the Federal Circuit.

access to classified information." *Id.* at 69a. Judge Dyk dissented.

4. The court of appeals granted rehearing en banc and once again reversed the Board's decision. Pet. App. 1a-63a. The en banc court held that "*Egan*'s principles prohibit Board review of [agency] determinations concerning eligibility of an employee to occupy a 'sensitive' position, regardless of whether the position requires access to classified information." *Id.* at 2a.

As an initial matter, the court of appeals held that it had jurisdiction over the appeal. Pet. App. 8a. OPM's interlocutory petition for review fell within the collateral order doctrine, the court concluded, because the Board's order resolved an important question separate from the merits, and "[a]waiting a final judgment in such cases would require Executive Branch agencies to litigate the merits and to potentially disclose matters concerning national security." *Id.* at 8a-9a (citing *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S 541, 545-546 (1949)). The court also observed that the parties did not dispute that petitioner's case was not moot because, as the Board had held, his reinstatement and award of back pay did not dispose of his discrimination claims. *Id.* at 7a-8a.

Turning to the *Egan* issue, the court of appeals explained that *Egan* held that the presumption in favor of judicial review of Executive action "runs aground when it encounters concerns of *national security,*" and that "courts have long been hesitant to intrude" on Executive determinations concerning foreign policy and national security, made pursuant to the President's discretion under the Commander in Chief Clause. Pet. App. 12a (quoting *Egan*, 484 U.S. at 527).

Although *Egan* itself concerned review of an agency's denial of a security clearance, the court of appeals concluded that the decision's "rationale" that "it is not reasonably possible for an outside nonexpert body," such as the Board, "to review the substance" of a security-risk judgment "applies to *all* prediction of risk regarding national security." *Id.* at 13a (citation and alteration omitted).

The court of appeals explained that in Executive Order 10,450, the President directed agencies to classify sensitive positions based on the "effect the position may have on national security," rather than simply the need for classified information. Pet. App. 15a. Such positions, the court reasoned, may provide access to facilities, supplies, or sensitive but nonclassified information, and therefore they may have a significant impact on national security even if they do not require access to classified information. *Id.* at 19a-20a, 29a-32a. The court also explained that in determining eligibility for such a position, the Executive Order directs agencies to apply the same standard as in granting a security clearance: in both contexts, the agency must determine, based on "predictive judgments" about the employee's likely future behavior, *id.* at 15a, that employing him in the position is "clearly consistent with the interests of the national security." See Exec. Order No. 10,450, §§ 2, 3(a)-(b), 8(a), 3 C.F.R. 936-938 (1949-1953 comp.) (eligibility to occupy national security sensitive position); Exec. Order No. 12,968, §§ 1.2(b), 3.1(b), 3 C.F.R. 392, 397 (1996) (eligibility for access to classified information). Concluding that "there is no meaningful difference in substance between" eligibility determinations and security clearance determinations, the court stated that "*Egan*

prohibits review" of those determinations "absent contrary congressional action." Pet. App 20a.

The court of appeals next concluded that "[n]either the CSRA nor any other legislative action provides a basis for limiting the Executive's role" in making national security eligibility determinations. Pet. App. 21a. The court explained that *Egan* held that security clearance determinations did not fall within Section 7512's definition of adverse actions over which the Board had jurisdiction, and it concluded that that reasoning applied equally to eligibility determinations. *Ibid.* The court also rejected petitioner's arguments that certain other statutes enacted after *Egan* indicated congressional intent to subject Executive national security eligibility determinations to outside review. *Id.* at 22a-24a. Finally, the court rejected petitioner's argument that Section 7532's alternative procedure for removing an employee on national security grounds indicated congressional intent to render national security-related determinations reviewable when the agency proceeds under Section 7513, observing that *Egan* had considered and rejected that contention. *Id.* at 25a-27a.

Judge Dyk, joined by Judges Newman and Reyna, dissented. Pet. App. 35a-63a. The dissenting judges would have held that *Egan* is limited to situations involving access to classified information and that the Board may review the merits of DoD's removal decisions absent an express grant of authority (such as that in Section 7532) to make unreviewable removal decisions. *Id.* at 35a-44a.

ARGUMENT

Petitioner contends (Pet. 14-27) that the court of appeals erred in concluding that this Court's decision

in *Department of Navy* v. *Egan*, 484 U.S. 518 (1988), forecloses the Board from reviewing the merits of an agency's determination that an employee is ineligible to hold a national security sensitive position. The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other circuit. Further review is not warranted.

1. a. Petitioner contends (Pet. 24) that this Court's review is warranted because "other federal courts of appeals have * * * confined *Egan* to security clearance determinations." No other court of appeals, however, has addressed the question whether *Egan*'s reasoning applies to review of an agency's determination that a person is ineligible for a national security sensitive position. Because there is no conflict among the courts of appeals, further review is not warranted.

Most of the decisions on which petitioner relies concern the extent to which an employee may assert claims that the employee contends do not challenge the merits of the agency's security clearance determination. See *Rattigan* v. *Holder*, 689 F.3d 764, 767-768 (D.C. Cir. 2012) (*Egan* bars review of security clearance determinations but may permit review of retaliation claim against employees who allegedly reported false security concerns but did not make the actual clearance determination); *Zeinali* v. *Raytheon Co.*, 636 F.3d 544, 549-550 (9th Cir. 2011) (although *Egan* prohibits review of security clearance determination, it does not prohibit review of an employee's claim that his private employer discriminated against him following the government's security clearance denial); *Duane* v. *United States Dep't of Def.*, 275 F.3d 988, 993 (10th Cir. 2002) (court may review whether agency complied with procedural protections in denying secu-

rity clearance). Those decisions therefore did not consider whether *Egan*'s rationale extends to review of the merits of national security determinations analogous to, and made under the same standard as, security clearance decisions.

Petitioner also relies (Pet. 24) on *Toy* v. *Holder*, 714 F.3d 881 (5th Cir.), cert denied, 134 S. Ct. 650 (2013), but that decision is consistent with the decision below. In *Toy*, an FBI office supervisor denied building access to a contract employee. The court held that *Egan* did not bar review of the employee's Title VII challenge to that denial, reasoning that "[s]ecurity clearances are different from building access" because "security-clearance decisions are made by specialized groups of persons, charged with guarding access to secured information, who must make repeated decisions" concerning national security, and are made subject to oversight and pursuant to procedural protections. *Id.* at 885. The Fifth Circuit thus concluded that building-access decisions are sufficiently distinct from security clearance decisions to fall outside the scope of *Egan*'s reasoning. The court did not purport to impose a per se rule that *Egan* is limited to security clearance determinations. The decision is thus consistent with the decision below, which correctly held that agency determinations concerning eligibility to hold national security sensitive positions are, for *Egan* purposes, materially indistinguishable from security clearance determinations. See pp. 18-20, *infra*.

Petitioner also argues that review is warranted because "the Federal Circuit enjoys exclusive power among the courts of appeals to bind the [Board]." Pet. 24. Petitioner is incorrect. Certain Board decisions are reviewable in other courts of appeals, and the

question of *Egan*'s applicability to eligibility determinations may arise in those cases. For example, an employee in petitioner's position could bring a mixed case appeal to the Board challenging the adverse action following the eligibility determination and alleging that it was motivated by discrimination. See, *e.g.*, *Kloeckner* v. *Solis*, 133 S. Ct. 596 (2012); *Ballentine* v. *MSPB*, 738 F.2d 1244, 1245 (Fed. Cir. 1984); 29 C.F.R. 1614.302. In such a case, the Board—now bound by the decision below—would presumably decline to review the merits of the eligibility determination. If the employee were aggrieved by this decision, he could bring suit in district court, and that court would render a decision on both the CSRA and discrimination claims. See *Kloeckner*, 133 S. Ct. at 607 n.4 (review of the Board's decision in mixed cases takes place in district court). The regional court of appeals would adjudicate any appeal from that decision, see *Williams* v. *Department of Army*, 715 F.2d 1485, 1491 (Fed. Cir. 1983) (en banc), and it would have the opportunity to address whether *Egan* bars consideration of the merits of an agency's eligibility determination.

b. Review is unwarranted for the additional reason that petitioner appears to have little remaining stake in the court of appeals' interlocutory decision. DoD reinstated petitioner to his sensitive position and provided backpay, thus resolving petitioner's appeal of the sufficiency of the basis for his demotion.

To be sure, petitioner's discrimination claim, which was administratively dismissed without prejudice pending the Federal Circuit's consideration of OPM's petition for review, remains to be adjudicated. See note 5, *supra*. And, as the court of appeals noted (Pet.

App. 7a-8a), the existence of that discrimination claim prevents petitioner's CSRA claim from becoming moot. See *Frazier* v. *MSPB*, 672 F.2d 150, 161 & n.38 (D.C. Cir. 1982). Petitioner has a continuing interest in seeking to have the Board's decision reinstated because, under the court of appeals' holding that *Egan* bars review of the merits of an eligibility determination, the Board will lack authority to adjudicate petitioner's discrimination claim.[7] See C.A. J.A. 1421; see also *Bennett* v. *Chertoff*, 425 F.3d 999, 1003 (D.C. Cir. 2005). And the government has a continuing interest in preserving the Federal Circuit's reversal of the Board's decision even apart from any effect on petitioner's discrimination claim, because the resolution of the question whether *Egan* bars review of eligibility determinations will have a substantial impact on the government's prospective conduct. See *Camreta* v. *Greene*, 131 S. Ct. 2020, 2032 (2011).

But while the discrimination claim saves the petition from mootness, it provides no legitimate reason to overlook the fact that petitioner here challenges only the ruling on his CSRA claim, and on that claim he has received all of the relief to which he is entitled. If the Board rules that the decision below forecloses its review of the discrimination claim, petitioner—if so

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[7] This case is distinguishable from *Camreta* v. *Greene*, 131 S. Ct. 2020, 2034 (2011), in which the Court held that the potential effect of the Court's decision on a separate claim that had already been dismissed on the merits for reasons that would not have been affected by the Court's decision was not sufficient to prevent the case from being moot. While there was no realistic possibility in *Camreta* that the Court's decision could affect the plaintiff's already-dismissed claim, here petitioner's discrimination claim has never been adjudicated, and upon refiling, the Federal Circuit's decision will govern the Board's resolution of the claim.

inclined, despite his reinstatement and receipt of backpay—might then challenge that determination. If the Board dismisses petitioner's claim for lack of jurisdiction, petitioner could challenge that determination in the Federal Circuit and seek this Court's review of that decision. See *Conforto* v. *MSPB*, 713 F.3d 1111, 1117-1119 (Fed. Cir. 2013). Alternatively, if the Board dismisses on non-jurisdictional grounds, petitioner may challenge that determination by filing a civil rights action in district court. See 5 U.S.C. 7703(b)(2). *Egan*'s applicability would then be determined by that court and, in the event of an appeal, by the regional circuit court. If that court concluded that *Egan* barred review of the merits of DoD's eligibility determination, petitioner could seek this Court's review at that time. In no event, however, does the discrimination claim render appropriate review of petitioner's CSRA claim, which is all that is at issue here.

2. The court of appeals concluded correctly that the MSPB lacked jurisdiction to review the merits of DoD's determination that petitioner was not eligible to hold a national security sensitive position. *Egan*'s holding that the "presumption in favor of appellate review * * * runs aground when it encounters concerns of national security," including in cases involving the "sensitive and inherently discretionary judgment call" whether to grant a security clearance, 484 U.S. at 526-527, applies with equal force to the national security eligibility determination at issue here. As in *Egan*, moreover, there is no evidence that Congress intended such determinations to be reviewable.

a. In *Egan*, this Court explained that the ordinary presumption in favor of appellate review did 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; U.S. Const. Art. II, § 2. In particular, although *Egan* itself involved the Executive Branch's decisions concerning access to classified information, 484 U.S. at 527, the Court emphasized that the President's efforts to protect national security information include his directive in Executive Order 10,450—the order at issue in this case—that agencies designate sensitive positions and require background checks as a condition of holding those positions. *Id.* at 528-529 (citing Exec. Order No. 10,450, § 3, 3 C.F.R. 937 (1949-1953 comp.)). The Court stated that the inquiries contemplated by Executive Order 10,450 (which, at the time, governed access to classified information as well as eligibility for sensitive positions) and the ultimate determination whether granting a security clearance would be "clearly consistent" with national security involve sensitive predictive judgments that require the application of the Executive's unique national-security expertise. *Id.* at 528-530. Those complex assessments of "potential risk," the Court reasoned, cannot reasonably be reviewed by non-expert outside bodies. *Ibid.* Accordingly, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530.

Egan's reasoning applies with equal force to Executive determinations of whether an individual should be permitted to hold a national security sensitive position. As *Egan* itself explained, the President's directive that agencies designate national security positions and permit individuals, after background checks, to hold those positions only if "clearly consistent" with national security is, like a security clearance determination, an exercise of the President's constitutional authority to protect national security. 484 U.S. at 527-528. In addition, while security clearance determinations are now governed by a separate Executive Order, Exec. Order No. 12,968, the President has directed that agencies shall make both types of national security eligibility determinations using materially identical standards. In both determinations, agencies must focus on susceptibility to coercion, trustworthiness, loyalty, and reliability. See Exec. Order No. 12,968, §§ 1.2(c)(1), 3.1(b), 3 C.F.R. 392, 397 (1996); 60 Fed. Reg. 40,245 (Aug. 2, 1995), 3 C.F.R. 391 (1996); Exec. Order No. 10,450, §§ 3(a) and (b), 8(a), 3 C.F.R. 937-938 (1949-1953 comp.). In both determinations, the President has required that the agency make an affirmative prediction that granting the clearance or finding eligibility is "clearly consistent" with national security, with all doubts resolved in favor of national security. Exec. Order No. 10,450, §§ 2, 3(a), 3(b), 8(a); Exec. Order No. 12,968, § 3.1; see *Egan*, 484 U.S. at 528. And in both determinations, making the wrong decision can lead to severe national security consequences. Even those sensitive positions that do not require access to classified information may entail entrusting the employee with access to sensitive facilities, technology, or supply chains, development of

military or other sensitive technology, or protective functions. Pet. App. 19a-20a. As this Court explained, these types of determinations are "committed to the broad discretion of the agency responsible." 484 U.S. at 529.

As with security clearance determinations, then, the Board is in no position to "determine what constitutes an acceptable margin of error in assessing the potential risk" to national security posed by the employee. *Egan*, 484 U.S. at 529; Pet. App. 29a. Determinations of eligibility require the agency to make complex, predictive judgments about future behavior—often when there has been no past misconduct—based on a host of factors that require specific expertise in foreign affairs and national security. See 484 U.S. at 529. Thus, these cases often present issues that are vastly different than those involved in the typical adverse action cases that the Board usually decides.

b. Nothing in the CSRA suggests that Congress intended the Board to review the merits of national security eligibility determinations. The CSRA does not confer general jurisdiction on the Board, but instead limits its review to enumerated "action[s]" against an employee (reductions in pay, removal, extended suspensions, reductions in grade, or furloughs). 5 U.S.C. 7512; *Egan*, 484 U.S. at 530. Like the denial of a security clearance, an agency's determination that an employee is ineligible for a national security sensitive position is not itself an "action" subject to review under the CSRA. 484 U.S. at 530. Rather, the eligibility determination serves as the predicate for the agency to take steps to remedy the employee's occupation of a sensitive position for which he is ineligible.

Some of those remedies, as here, might involve a removal or demotion, which are adverse actions under Section 7512—but the eligibility determination might not result in any adverse action, such as when an employee may be transferred to a non-sensitive position at the same grade and pay.

As was the case in *Egan*, moreover, the CSRA's requirement that the agency justify the adverse action by a preponderance of the evidence is fundamentally incompatible with the Executive Order's requirement that agencies must affirmatively conclude that an individual's employment is "clearly consistent with the interests of the national security." Exec. Order No. 10,450, § 2, 3 C.F.R. 936-937 (1949-1953 comp.); *Egan*, 484 U.S. at 531 ("The clearly consistent standard indicates that security-clearance determinations should err, if they must, on the side of denials."). Thus, as this Court recognized in *Egan*, it is "extremely unlikely that Congress intended" the Board to second-guess Executive national security determinations using a standard that is considerably less protective of national security than that set forth by the President. 484 U.S. at 531-532.

c. The fact that the Board may not review the merits of an agency's determination that an employee is ineligible to occupy a national security sensitive position does not mean that the employee is deprived of the protections provided in Chapter 75 of Title 5. See *Egan*, 484 U.S. at 530. Under *Egan*, the Board is empowered to evaluate whether the agency made an eligibility determination, and whether, in doing so, it provided the employee with the requisite procedural protections. *Ibid.*; see, *e.g.*, *Romero* v. *Department of Def.*, 527 F.3d 1324, 1329 (Fed. Cir. 2008). Those pro-

cedural protections can be significant; as discussed above, DoD regulations gave petitioner the opportunity to contest the merits of the agency's eligibility determination, including by presenting witnesses, challenging the factual basis of the decision, and explaining why the agency's findings did not indicate a security risk. See pp. 7-8, *supra*. Petitioner, however, did not avail himself of that opportunity in this case.

In appropriate cases, the Board also may be able to review the merits of challenges to the adverse action that do not require the Board to review the substance of the eligibility determination. Cf. *Hegab* v. *Long*, 716 F.3d 790, 798 (4th Cir.) (Motz, J., concurring) (suggesting that there may be instances in which court could review a challenged policy if doing so did not require review of the merits of the security clearance determination), cert. denied, 134 S. Ct. 785 (2013). The Board also may review adverse actions taken against employees in sensitive positions for reasons unrelated to eligibility to hold the position.[8]

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[8] The argument of amicus The National Treasury Employees Union (NTEU) (Br. 15) that agencies will increase the number of sensitive positions in order to evade Board review of adverse actions is without basis. OPM and the Office of the Director of National Intelligence have recently proposed revised regulations governing the designation of positions as sensitive in order "to clarify the requirements and procedures agencies should observe when designating [positions] as national security positions," 78 Fed. Reg. 31,847; see *supra*, note 1. Contrary to NTEU's suggestion (Br. 13 n.7), the proposed regulations are not intended to increase the number of national security sensitive positions. See 78 Fed. Reg. 31,847; see also 75 Fed. Reg. 77,784 (Dec. 14, 2010) (proposed regulations are designed to "avoid the risk of overdesignation" and "underdesignation"). In any event, NTEU's argument about misuse of position designations ignores the "presumption of regularity" that attaches to an official's performance of his or her

3. Petitioner's arguments that the court of appeals' decision is erroneous are without merit.

Petitioner contends (Pet. 15) that *Egan* is limited "on its face" to security clearance determinations. But for the reasons discussed above, although *Egan* itself concerned an employee's removal following the denial of a security clearance, its reasoning applies to the Executive Branch's determination that an individual is not eligible to hold a national security sensitive position, even when the individual does not also require a security clearance. See, *e.g.*, 484 U.S. at 529. Petitioner further argues (Pet. 23) that *Egan* is distinguishable because the President had expressly delegated to agencies the authority to make "final" determinations concerning an employee's access to classified information. But *Egan* did not rely on any express delegation of final authority. Rather, the Court reasoned that security clearance assessments "must be" committed to the agency's discretion because only the Executive Branch is positioned to make the necessary predictive national security judgments. 484 U.S. at 529. That reasoning applies equally to the determination whether permitting a person to occupy a sensi-

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duties. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (citation omitted).

NTEU also argues (Br. 15) that agency officials will use position designations and eligibility determinations to shield employee dismissals from scrutiny. That allegation is entirely unsupported, and in any event implausible. At DoD, each relevant decision is made independently. Agency officials make designation determinations. A central adjudication facility makes national security determinations based on background checks, making it unlikely that a supervisor could manipulate the process. The employee, moreover, may appeal the merits of an eligibility determination within the agency. 32 C.F.R. 154.41, 154.3(cc).

tive position is clearly consistent with national security.

Petitioner next argues (Pet. 18-20) that the "text of the CSRA does not foreclose the [Board's] assertion of authority," Pet. 18, and the court of appeals expanded *Egan* without "Congressional indication that such an extension was intended or desirable," Pet. 20. But the Court rejected that argument in *Egan*, explaining that there the court of appeals had erred in concluding that the absence of any express preclusion of review in the CSRA established a presumption in favor of appellate review of security clearance determinations. 484 U.S. at 526-527. That presumption, the Court held, "runs aground" when the Executive Branch's authority over, and expertise concerning, predictive national security employment judgments is at issue.[9] *Ibid.*

Petitioner next asserts (Pet. 22) that Congress's provision in Section 7532 of authority to some agencies to summarily remove employees on national security grounds indicates that Congress intended the Board to review the merits of an agency's eligibility determination when an agency proceeds against an employee under Section 7513. *Egan* also rejected that contention. The Court explained that Section 7532 is a "drastic" remedy designed to provide certain agencies with an *additional* means of removing an employee on national security grounds. 484 U.S. at 532. Section 7532 provides much more summary procedures than

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[9] Petitioner's reliance (Pet. 18-19) on the fact that Congress excluded certain employees from Chapter 75's protections is also misplaced. Those exclusions do not suggest that Congress has given the Board authority to review the underlying merits, as opposed to the procedural correctness, of all adverse actions within the Board's jurisdiction. See *Egan*, 484 U.S. at 530-531.

Section 7513: it provides for no process before suspension, and no review outside of the procedures prescribed by the agency. It also requires the agency head to make a finding that suspension or removal is "necessary" to national security. *Id.* at 532-533; 5 U.S.C. 7532(a) and (b). If an agency decides to proceed against an employee under Section 7532, moreover, the employee is removed entirely from the agency, and may not seek any future government employment without consultation with OPM; Section 7513 removals entail no such harsh consequences.[10] *Egan*, 484 U.S. at 532. Section 7532 is thus not intended to be used routinely to remove employees determined not to be eligible for national security positions; rather, Section 7532 removal is appropriate only where "delay from invoking 'normal dismissal procedures' could 'cause serious damage to the national security.'" *Carlucci* v. *Doe*, 488 U.S. 93, 102 (1988) (quoting *Cole* v. *Young*, 351 U.S. 536, 546 (1956)). That Congress provided an additional remedy for certain agencies in Section 7532 therefore does not suggest that Congress intended eligibility determinations leading to adverse actions under Section 7513 to be reviewable.[11]

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[10] Here, for instance, petitioner was demoted under Section 7513 rather than removed under Section 7532, thus sparing him the consequences of a Section 7532 removal.

[11] Petitioner observes (Pet. 24) that Executive Order 10,450 mentions only Section 7532's predecessor statute in discussing removal of employees whose employment in sensitive positions is found to be not clearly consistent with national security. That is irrelevant. The Executive Order did not purport to address exhaustively agencies' authority to take action against employees based on antecedent eligibility determinations. *Egan* establishes that once a security determination has been made, the agency has the au-

Finally, petitioner contends (Pet. 17, 21-22) that the Board's ruling that *Egan* does not bar it from reviewing the merits of a national security eligibility determination is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). See generally *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1871 (2013) (agency's construction of the scope of its statutorily conferred jurisdiction to regulate is entitled to *Chevron* deference). Petitioner has forfeited that argument, however, as he did not raise it below. The Board itself also did not suggest that its ruling was entitled to deference, and for good reason. The Supreme Court, when affirming the Board's decision in *Egan*, made no reference to *Chevron* and apparently gave no deference to the Board's ruling there. Moreover, the Board's ruling here that it had jurisdiction to review the merits of DoD's eligibility determination was based on its interpretation of this Court's decision in *Egan*, rather than any construction of the CSRA's provisions. See, *e.g.*, Pet. App. 129a ("[W]e further

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thority to take appropriate employment actions under either Section 7532 or Section 7513.

In addition, the dissent's suggestion (Pet. App. 43a-44a) that agencies "only have such removal authority as is conferred by Congressional statute" is incorrect. In the absence of a contrary "statutory regulation," the "power of removal" is generally considered "incident to the power of appointment." *Sampson* v. *Murray*, 415 U.S. 61, 70 n.17 (1974) (citation omitted); accord *Engquist* v. *Oregon Dep't of Agric.*, 553 U.S. 591, 606 (2008). Thus, the CSRA sets forth specific limitations on the authority that the heads of executive agencies possess to remove and discipline employees as an incident to their power to appoint, as well as procedural protections for tenured employees. For the reasons stated above, nothing in the CSRA purports to limit the Executive Branch's authority to remove an employee under Section 7513 following a determination that he is ineligible to hold a sensitive position.

conclude that *Egan* does not limit the Board's statutory authority."); *id.* at 131a (*Egan* "must be viewed narrowly."); *id.* at 141a ("*Egan* does not support" the agency's arguments.). Even assuming that the Board would get deference to construction of the relevant CSRA provisions, but cf. *Welshans* v. *USPS*, 550 F.3d 1100, 1102 (Fed. Cir. 2008) (Board's legal determinations reviewed de novo), the Board's understanding of this Court's decision in *Egan* is not entitled to *Chevron* deference. See *Association of Civilian Technicians* v. *Federal Labor Relations Auth.*, 353 F.3d 46, 50 (D.C. Cir. 2004) (*Chevron* deference not appropriate "[w]here an agency interprets and applies judicial precedent, rather than the statute it is charged with administering.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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