No. 13-607

IN THE

Supreme Court of the United States

DEVON HAUGHTON NORTHOVER,
Petitioner,

v.

KATHERINE ARCHULETA, Director,
U.S. Office of Personnel Management,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

DAVID A. BORER
General Counsel

JOSEPH F. HENDERSON
Deputy General Counsel

ANDRES M. GRAJALES*
Deputy General Counsel
American Federation Of
Government Employees,
AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
Grajaa@afge.org
(202) 639-6426

* Counsel of Record

Peake DeLancey Printers, LLC - (301) 341-4600 - Cheverly MD

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REPLY TO THE BRIEF IN OPPOSITION

The United States Court of Appeals for the Federal Circuit ("Federal Circuit"), like the Executive, wrongly arrogated to itself the power to make a policy determination that should properly have been left to Congress. The question of whether the narrow decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), ("*Egan*") should be extended, without Congressional action, to the far larger universe of non-security clearance cases, in the face of the detailed and comprehensive nature of the Civil Service Reform Act of 1978 ("CSRA"), 5 U.S.C. § 1101, et seq., is an important question of federal law that should be decided by this Court. The narrow exception of *Egan* should not be permitted to swallow the rule.

Respondent's points in opposition are, moreover, not well-taken. The Federal Circuit's expansion of *Egan* is unique among the courts of appeals. This fact is not diminished by the jurisdiction of the U.S. Merit Systems Protection Board ("Board") over mixed case appeals, nor is it remedied by the possibility of judicial review of such mixed cases in the federal district courts. Petitioner also continues to have a genuine and substantial personal stake in the outcome of this case; a stake that is inextricably tethered to the Federal Circuit's erroneous determination that *Egan* restricts the Board's scope of review in appeals arising from a federal employee's loss of eligibility to occupy a sensitive position which does not require a security clearance or access to classified information. The Court should therefore grant certiorari.[1]

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[1] Respondent also asserts that petitioner has forfeited any argument for deference under *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984) ("*Chevron*"). Brief in Opp.

I. The Board's Mixed Case Jurisdiction Does Not Alleviate the Conflict Created by the Federal Circuit's Unique Expansion of *Egan*

Respondent denies that the decision of the Federal Circuit conflicts with that of any other court of appeals. Respondent also seeks to deflect the fact that the Federal Circuit has exclusive power to bind the Board. But respondent does not claim that any other federal court of appeals has so dramatically extended *Egan*. Respondent also does not meaningfully contest that the Federal Circuit occupies a special position with respect to the Board.

Respondent instead answers that in the small class of appeals presented to the Board as mixed cases pursuant to 5 U.S.C. § 7702, an appellant might seek review of a Board decision in federal district court, as described by *Kloeckner v. Solis*, 133 S. Ct. 596 (2012). This hypothetical mixed case could then, potentially, be brought before a regional court of appeals for resolution of both the appellant's (now plaintiff's) discrimination and personnel claims. The regional court of appeals could then, in respondent's view, "address

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p. 26. Petitioner disagrees. Both the majority and the dissent below passed on the application of *Chevron*. The dissent argued, *inter alia*, that the Board was entitled to deference because the Board was determining the scope of its own authority under the CSRA. App. 57a-58a. The majority countered and held that the Board could not "usurp" what it saw as the President's power over national security "by asserting *Chevron*." App. 14a. Because the court of appeals passed on the issue, it should be considered preserved in this Court. *See U.S. v. Williams*, 504 U.S. 36, 41 (1992). The question of deference is also but another facet of the larger question of statutory interpretation squarely raised by petitioner below and here.

whether *Egan* bars consideration of the merits of an agency's eligibility determination." Brief in Opp. p. 15.

Respondent's view should be rejected because it creates an unnecessary problem. While a district court may hear a mixed case plaintiff's discrimination claims *de novo*, a district court adjudicating a mixed case and a regional court of appeals reviewing that adjudication would each be bound to review the Board's resolution of the plaintiff's non-discrimination claims on the administrative record. *See* 5 U.S.C. § 7703(c); *see also Kelliher v. Veneman*, 313 F.3d 1270, 1275 (11th Cir. 2002) ("Courts that have addressed the issue uniformly apply the de novo standard of review only to the discrimination claims while other claims adjudicated before the MSPB are reviewed on the record.").

It is thus highly unlikely that a regional court of appeals would be in a position to pass on the Board's scope of review in either parts of a mixed-case plaintiff's Board appeal. This is because the Board's putative determination in respondent's hypothetical mixed case, that its scope of review was curtailed by the Federal Circuit's ruling below, would only be subject to arbitrary and capricious review. Given that only the Federal Circuit may bind the Board, it is simply unrealistic to imagine that a regional court of appeals would disagree, or even review, the Board's determination that it was bound to follow the precedent of its sole reviewing court.

Respondent's view is also deficient because it could potentially lead to inconsistent results. For example, a district court that exercised *de novo* review over a plaintiff's discrimination claims and rejected *Egan*'s application to the merits of those claims might very well be

forced, under the prevailing standard of review, to nonetheless accept the Board's holding that it lacked the power to review the merits of that same plaintiff's non-discrimination personnel claims. Considering that the underlying facts for both sides of a mixed case are often thoroughly enmeshed, respondent creates an unnecessary problem that further supports review by this Court. Consequently, the Court should grant certiorari.

II. Petitioner Has a Genuine and Substantial Stake in the Outcome of this Case

To begin with, as respondent is forced to concede, petitioner's case is not moot. Brief in Opp. 15-16. This fact alone moves petitioner past the threshold question of whether there remains a controversy fit for this Court's resolution. The issues are also clearly presented and are crystalized for review.

Petitioner, moreover, continues to have a genuine and substantial personal stake in the outcome of this case. His discrimination claim is still before the Board. The Board's ability to review the merits of that claim will depend on the outcome of this petition for certiorari. That the law potentially allows petitioner more than one avenue of judicial review if the Board finds against him on his discrimination claim does not change this fact.

Petitioner also remains employed by the Department of Defense. The possibility that petitioner will once again find himself occupying a sensitive position is real. His employing agency has already changed the designation of its Commissary Management Specialist position more than once. App. 146a. Indeed, the possibility that petitioner may be impacted by a change in position sensitivity designation will increase

if the proposed regulations cited by respondent are adopted. Brief in Opp. p. 22. Those proposed regulations call for a global review of position sensitivity designations within twenty-four months of their effective date. *See* 5 C.F.R. § 1400.204(a) (proposed). Such a review would necessarily entail the review, and possible re-designation, of any position held by petitioner because the required review would be conducted on an agency-wide basis.

The possibility that petitioner may again be subject to an adverse action based on an agency eligibility determination is thus also real. For example, agency heads will continue to have unreviewable discretion to designate any position as sensitive. *See* 5 C.F.R. § 732.201(a); *see also Skees v. Dep't of the Navy*, 864 F.2d 1576, 1578 (Fed. Cir. 1989). This discretion is not altered by the proposed regulations relied on by respondent. *See* 5 C.F.R. § 1400.201 (proposed). Sensitive positions also remain subject to reinvestigation, independently from the proposed review of designation levels. *See* 5 C.F.R. § 732.203; *see also* 5 C.F.R. § 1400.203 (proposed) (expanding reinvestigation requirements). As a result, petitioner has a personal stake in the outcome of this case that stands apart from his discrimination claim.

Moreover, any difference between this case and *Camreta v. Greene*, 131 S.Ct. 2010 (2011) ("*Camreta*"), cuts in favor of granting certiorari. Unlike in *Camreta*, where it was the prevailing party who sought certiorari, and where resolution of the Fourth Amendment question would never impact that respondent's daughter because she was no longer a minor, this Court's determination on the Board's scope of review will not

only control the disposition of petitioner's discrimination claim before the Board, it will impact him because, as explained above, he "may again be subject to the challenged conduct." *Camreta*, 131 S. Ct. at 2029.

Petitioner, consequently, has a personal stake in this case sufficient to warrant a grant of certiorari. All that *Camreta* stands for, read properly, is the proposition that had petitioner prevailed on the scope of review question but lost on the merits and then failed to appeal that loss, respondent could likely still have sought this Court's review on the scope of review question. But this case is not in that posture.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

DAVID A. BORER
General Counsel

JOSEPH F. HENDERSON
Deputy General Counsel

ANDRES M. GRAJALES*
Deputy General Counsel
American Federation Of
Government Employees,
AFL-CIO
80 F Street, N.W.
Washington, D.C. 20001
Grajaa@afge.org
(202) 639-6426

* Counsel of Record
For the petitioner

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