No. _____

In the Supreme Court of the United States

MAHMOUD HEGAB,
Petitioner,

v.

LETITIA A. LONG, DIRECTOR, NATIONAL GEOSPATIAL-INTELLIGENCE AGENGY, AND NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner's security clearance was revoked and his employment terminated by respondent, a federal agency, solely because he married a woman who was employed by Islamic Relief-USA, a non-profit charitable organization with no ties to any terrorist or other illegal organization. After exhausting his administrative remedies petitioner sued, claiming violation of his rights to: freely exercise his religion; privacy; association with others; not to be excluded from government employment for patently arbitrary or discriminatory reasons; and other of his rights guaranteed by the First, Fifth and Ninth Amendments to the Constitution. The District Court dismissed the suit for lack of jurisdiction under *Dept of Navy v. Egan* (484 U.S. 518). On appeal the Fourth Circuit Court of Appeals held that petitioner had stated colorable constitutional claims and that there was jurisdiction under *Webster v. Doe* (486 U.S. 592), but nevertheless affirmed the dismissal, one panel member holding that the case was a nonjusticiable political question, one panel member holding that it was justiciable but petitioner had not challenged an agency policy, and the third panel member holding that petitioner was simply challenging an agency fact finding.

The question presented is:

Whether a Federal District Court may review a decision of a federal agency revoking the security clearance of an employee where the employee has made a colorable claim that the decision revoking his clearance was in violation of his rights under the First, Fifth and Ninth Amendments to the U.S. Constitution.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed in the caption of the case.

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The opinion of the Fourth Circuit Court of Appeals is reported at 716 F.3d 790 (Apr. 25, 2013), and is reproduced in the Appendix hereto as Appendix A. App. 1. The Fourth Circuit's Order denying rehearing or rehearing en banc was entered on June 21, 2013 and is reproduced as appendix C. App.40. The decision of the United States District Court for the Eastern District of Virginia, Alexandria Division, dated January 19, 2012, 2012 WL 162117, and affirmed by the Fourth Circuit is reproduced as Appendix B. App. 26.

STATEMENT OF JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. §1254(1). The judgement of the Fourth Circuit Court of Appeals was entered on April 25, 2013. An order denying a petition for rehearing or rehearing en banc was entered by the Fourth Circuit on June 21, 2013.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances".

The Fifth Amendment to the U.S. Constitution provides " No person shall be . . . deprived of life, liberty, or property, without due process of law . . .."

The Ninth Amendment to the U.S. Constitution provides " The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

STATEMENT OF THE CASE

INTRODUCTION

In February 1988 this Court, in *Dept. of Navy v. Egan,* 484 U.S. 518 (1988), held that one federal agency, the Merit Systems Protection Board, could not review the merits of a security clearance decision by another federal Agency, the Department of the Navy. Five months later, in June 1988 this court, in *Webster v. Doe,* 486 U.S. 592 (1988), held that if a federal employee raised a colorable constitutional claim that his security clearance had been denied or revoked in violation of his constitutional rights, he was entitled to a hearing in District Court. (Doe alleged that he lost his security clearance and was fired because he was a homosexual). Since that time, in numerous cases, the lower federal courts have relied on the dictum in *Dept of Navy v. Egan* to dismiss every attempt to challenge a security clearance determination.[1] The courts have rebuffed claims under the Administrative Procedures Act, the Civil Rights Act, the Privacy Act, the Age

[1] For a comprehensive review of the cases interpreting and applying *Egan* to that time, see L. Fisher, *Judicial Interpretations of Egan*, The Law Library of Congress, LL File No 2010-003499, Nov. 13, 2009. Since then there have been many more cases.

Discrimination Act and other statutes.[2] In a number of those cases however, the courts, including the Fourth Circuit prior to the instant case, have indicated that if a colorable constitutional claim were raised it would be heard.[3]

In the instant case Petitioner based his claims that his security clearance has been unlawfully revoked, solely and directly in violation of his rights under the First, Fifth and Ninth amendments to the Constitution, and that under *Webster v. Doe* he is entitled to judicial review.[4] Two of the three judges ruled that Petitioner had raised colorable constitutional claims. However, one of the two judges held that Petitioner could only challenge an agency *policy*, not an individual decision, while the other judge held that petitioner's claim was claim was nonjusticiable. The third judge held that Petitioner had simply challenged the fact finding of the respondent agency over which the District court lacked subject matter jurisdiction. The decision, if left standing, would render *Webster v. Doe* meaningless and

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[2] *Eg, Oryszak v. Sullivan,* 576 F.3d 522 (D.C. Cir. 2009); *Jamil v. Secretary, Dept. of Defense*, 910 F.2d 1203 (4th Cir. 1990); *Hill v. Dept. of Air Force*, 844 F.2d 1407 (10th Cir.), cert. den. 488 U.S. 825 (1988).

[3] *Oryszak v. Sullivan,* 576 F.3d 522 (D.C. Cir. 2009); *Jamil v. Secretary, Dept. of Defense*, 910 F.2d 1203 (4th Cir. 1990); *Dorfmont v. Brown*, 913 F.2d 1399 (1990) cert. den. 499 U.S. 905 (1991)

[4] In only one other case has a direct claim of a violation of a constitutional right been invoked. In that case the court held that it had jurisdiction but that the claim was nonjusticiable. *El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176 (3d Cir. 2010).

would preclude any judicial review of an Executive agency's alleged unconstitutional actions.

PROCEEDINGS BELOW

On October 4, 2011 Hegab filed suit in the U.S. District Court for the Eastern District of Virginia against the National Geospatial-Intelligence Agency ("NGA") and its Director, Letitia Long, in her official capacity, alleging that his security clearance had been revoked by NGA and his employment suspended because his wife was employed by Islamic Relief USA, an American Islamic faith-based charity, which had impeccable credentials and a long history of co-operative endeavors with a variety of U.S. Government agencies and offices, including the White House. App. 42-63. Hegab alleged that the decision was solely due to NGA's anti-Islamic bias, and was in violation of his rights of freedom of religion and speech, rights to privacy, familial association and continued government employment, and his liberty interests in future employment opportunities, his standing in the community, and his reputation guaranteed under the First, Fifth and Ninth Amendments to the U.S. Constitution. App. 58-63. He argued that he was entitled to judicial review of the revocation of his clearance and the resultant termination of his Federal employment under the holding of *Webster v. Doe*, 486 U.S. 592 (1988).

On January 19, 2012 the District Court dismissed Hegab's complaint without prejudice for lack of subject matter jurisdiction under Fed. R. 12(b)(1), holding that without clear congressional directive, a review of NGA's decision on the merits is "flatly prohibited by

[*Department of Navy v. Egan* 484 U.S. 518 (1988)] and Fourth Circuit precedent". App. 26, 36. Hegab appealed that decision to the Fourth Circuit Court of Appeals.

The question squarely before the Fourth Circuit was whether a federal court has the authority under *Webster v. Doe* to review a security clearance denial where the plaintiff asserts a claim that he was denied a security clearance in violation of a colorable constitutional right. On April 25, 2013 the Fourth Circuit affirmed the District Court's decision for reasons on which the three members of the panel could not agree. App. 1. Their three separate opinions were based on internally conflicting rationales. Judges Motz and Davis agreed that Hegab had presented a colorable constitutional claim by alleging that he had been denied a security clearance based on his wife's associations. App. 15, 20. Judge Niemeyer voted to dismiss the appeal because, in his view, plaintiff had not stated a colorable constitutional claim, but merely challenged the merits of the agency's security clearance determination, the review of which did not fall within the court's jurisdiction. App. 15. His analysis avoided the serious constitutional question of whether Executive action violating a constitutional right could be denied any judicial review. His reasoning was rejected by his two colleagues on the panel.

Judge Motz acknowledged that Hegab had raised a colorable constitutional claim, and that this Court in *Webster v. Doe* had held that security-based employment decisions could be reviewed where the employee alleged that his constitutional rights were violated, but, she concluded, *Webster* preserved only

challenges to agency *policy*, and not to individual employment decisions. App. 17-18.

Judge Davis rejected Judge Motz's distinction between unconstitutional *policies* and unconstitutional individual *actions*. He concluded, based on *Dept. of Navy v. Egan*, that because Hegab challenged a security clearance determination, his case presented a non-justiciable political question. App. 21. Thus, each member of the panel rested his or her decision on reasoning rejected by the other panel members.

Hegab filed a petition for rehearing or rehearing en banc which was denied by on June 21, 2013. App. 40.

STATEMENT OF FACTS[5]

Hegab pleaded in his Complaint that when he was first employed by NGA on January 4, 2010 he held a Top Secret security clearance and Access to Sensitive Compartmented Information, that there were no problems with his employment, and that his performance was well regarded by his supervisors. App. 44, ¶ 9. When he began working at NGA he informed the security officer that he had married Bushra Nusurait in a civil ceremony, but they had not yet begun to live together because, according to their religion, until there was a religious ceremony, they

[5] This statement of facts is based on Hegab's complaint which was dismissed for failure to state a claim. The allegations therefore must be accepted as true for the purposes of this review. *Jenkins v. McKeithen*, 395 U.S. 411, 421, reh. den. 396 U.S. 869 (1969).

were considered betrothed and not married. App. 44, ¶ 10. They were married in a religious ceremony on October 2, 2010 after which they began living together as husband and wife and at that time he so notified NGA. App. 44, ¶ 10.

On November 18, 2010 Hegab was notified by NGA that he was immediately suspended and that it was NGA's intent to revoke his security clearance and his access to classified information. App. 45, ¶ 12. The proposed revocation was based in part on his marriage to Ms. Nusurait and her connections to various organizations, and in part on information he had previously provided about himself in 2009 as part of his own security clearance investigation which had been reviewed, discussed, and cleared by NGA prior to his being hired and being granted a security clearance. App. 45, ¶ 12. Hegab was not allowed to re-enter NGA facilities and was placed on administrative leave based on the suspension of his security clearance. App. 45, ¶ 13.

The issues raised by NGA in the proposed revocation of Hegab's clearance concerning his wife were: (1) "your spouse's attendance and graduation from the Islamic Saudi Academy, whose curriculum, syllabus, and materials are influenced, funded, and controlled by the Saudi government"; and (2) "information available through open sources [which] identifies your spouse as being or having been actively involved in one or more organizations which consist of groups who are organized largely around their non-United States origin and their advocacy of or

involvement in foreign political issues".[6] App. 46, ¶ 16. Hegab subsequently received from NGA the file which contained the information that NGA claimed supported its proposal to revoke his security clearance. App. 46, ¶ 17. With respect to Hegab, the file contained the same materials which he had submitted in 2009 prior to his being hired by NGA, and prior to having been granted a security clearance. App. 46, ¶ 18.

With respect to his wife, the file contained: (1) reports of statements of various anti-Islamic organizations concerning the Saudi Islamic Academy; (2) a photograph "believed to be that of applicant's spouse taken at an 'anti-war occupation protest in Washington" on the grounds of the Washington Monument, carrying a sign which bore the website identification of an organization with the acronym "ANSWER", the sign stating, "War No - Act Now to Stop War and End Racism"; (3) a statement that "open source references to Bushra Nusurait indicate that following her graduation from Islamic Saudi Academy in 2005 she attended George Mason University (GMU)", (4) the statement that "She reportedly attended GMU from 2005 to 2009 and her area of study was shown as 'Global Affairs, International Development, Diplomacy and Global Governance, Islamic Studies'; and (5) she was also shown to be president of Students for Justice in Palestine at GMU." App. 47, ¶ 19. The file provided by NGA further quoted Ms. Nusairat as saying: "SJP has a mission, like that

[6] Since the agency stated that all information about Petitioner's wife was obtained from "open sources" there is no issue relevant to the use or production of classified information.

of the USC, which is concentrated on educating our membership, and the GMU community at large, about the ongoing Israel and Palestine conflict", and that "Our goal on this campus is to disseminate correct information about the plight of the Palestinian people and to be the voice of the under-represented." App. 47, ¶ 20. As a further basis for revoking appellant's clearance, the NGA file contained the statement that "Subject told an NGA polygrapher in March, 2010 that Bushra Nusurait now works for a non-profit organization called 'Islamic Relief' which supports 'humanitarian relief efforts". App. 47, ¶ 21. NGA never provided any additional information, although requested, regarding appellant's wife or her employer, Islamic Relief USA, before or after reaching its decision.

On January 19, 2011 Hegab responded to the proposed revocation of his clearance and access. App. 47, ¶ 22. With respect to the allegations against him personally, Hegab provided the same information he had initially provided to NGA prior to his hire. App. 47, ¶ 23. With respect to his wife, Hegab responded that his wife "is a U.S. citizen residing in the U.S. who has never been accused of any illegal activity or being associated with any illegal activity." App. 48, ¶ 24. Along with the response, Hegab provided fifty exhibits of supporting documentary evidence. App. 48, ¶ 22.

With respect to the allegation concerning his wife's attendance at the Islamic Saudi Academy, Hegab provided evidence that his wife was enrolled by her parents in Islamic Saudi Academy because: it taught Arabic and Islamic Studies which no other school in the D.C. area did at that time; that his wife attended

Islamic Saudi Academy from the first through twelfth grades with the exception of sixth and seventh grades when her father held a teaching position abroad; that Islamic Saudi Academy encourages sports, community service, national leadership, and arts participation; that the curriculum it uses is based on the Fairfax County, Virginia curriculum for Math, Science, English and Social Studies, and on the Saudi curriculum for Arabic and Islamic Studies; that Islamic Saudi Academy students participate in activities that allow them to interact with non-Muslims, such as Model United Nations, varsity soccer and basketball, community service programs, and Help the Homeless Walkathons; and that Islamic Saudi Academy has served as an advisor to the U.S. Army, Fort Belvoir, on Arabic language and Arabic cultural studies. App. 48, ¶ 25.

Hegab further provided evidence that the combined secular-religious curriculum of the Islamic Saudi Academy is no different than other religious schools such as, for example, the Yeshiva of Greater Washington which teaches based on a Jewish curriculum, the Blessed Sacrament School which teaches a Catholic curriculum, and Fairfax County Christian Academy which teaches in a Christian atmosphere, and that the stated goal of each of these schools is virtually identical, with the only difference being the particular religious viewpoint taught to the students. App. 48-49, ¶ 26.

With respect to the allegation concerning his wife's connection to "ANSWER", Hegab provided evidence that she attended a rally in 2003 on the U.S. Capitol steps protesting the war in Iraq, a rally in which tens

of thousands of Americans converged on Washington to voice their disapproval of the war, that his wife was at the time sixteen years of age, that she picked up a poster at the rally grounds that described how she felt about the Iraq war, and that she was not affiliated with the organization, ANSWER, its missions, or its objectives in any way. App. 49, ¶ 27. Hegab further provided evidence that at the rally one of the day's many speakers was a Democratic presidential candidate, and that a large number of veterans and military families with loved ones in Iraq also participated. App. 49, ¶ 28.

With respect to NGA's concerns regarding his wife's connection to Students for Justice in Palestine, Hegab presented evidence that his wife, while attending George Mason University as an undergraduate between 2005 and 2009, was the president of Students for Justice in Palestine, that it was a student organization sanctioned and funded by George Mason University like other student organizations, and that the organization advocated a peaceful solution for a difficult problem, the differences between the state of Israel and the Palestinians in the West Bank. App. 49-50, ¶ 29.

With respect to NGA's concerns about his wife's employment by Islamic Relief USA, Hegab provided evidence that his wife had held the position of Program Associate with that organization since shortly after her graduation from George Mason University, that Islamic Relief USA is a U.S. based organization founded in 1993 in California and was currently based in Alexandria, Virginia, that its mission is to alleviate suffering, hunger, illiteracy and disease worldwide, and

to provide aid in a dignified and compassionate manner regardless of color, race, religion or creed. App. 50, ¶ 30. Hegab further provided evidence that Islamic Relief USA is part of Inter-Action, the largest network of non-governmental development organizations in the USA, that it is a participating member of the Combined Federal Campaign, and that its purpose is no different than other faith-based relief organizations, such as the American Jewish Joint Distribution Committee, Catholic Charities USA, and the Latter Day Saints Charities, to name but a few. App. 50, ¶ 31.

In his response to the proposed revocation of his security clearance Hegab argued that NGA's proposed action was based on rumor, innuendo and guilt by association, that it was religiously biased against Islam and violated appellant's and his wife's free exercise of their religion of Islam, their right to peaceably assemble to petition the government for a redress of grievances, and their right to freedom of speech to express legitimate political concerns, all guaranteed by the First Amendment to the Constitution of the United States. App. 50-51, ¶ 32.

On March 4, 2011 NGA issued its decision revoking Hegab's security clearance, stating that he had mitigated its concerns about him for the same reasons that it had previously cleared Hegab prior to his having been hired, and that he had satisfied its concerns about his wife's education at the Islamic Saudi Academy. App. 51, ¶ ¶ 33,34. However, NGA stated

> the information provided does not mitigate your spouse's current affiliation with one or more

> organizations which consist of groups who are organized largely around their non-United States origin and/or the advocacy of or involvement in foreign political issues. This concern elevates the potential for conflicts of interest between your obligation to protect sensitive or classified United States information and technology and your desire to help a foreign person, group, or country by providing that information. App. 51, ¶ 35.

Because Hegab 's wife had by then graduated from George Mason University and was no longer a member of the student organization, Students for Justice in Palestine, because evidence had been presented that she was never affiliated with "ANSWER", and because the only other group identified in NGA's file of supporting information accompanying the proposed revocation, was his wife's current affiliation with her employer, Islamic Relief USA, Hegab 's counsel, on March 15, 2011 wrote to the Chief of NGA's Adjudications Branch requesting that due to the ambiguity of the decision revoking Hegab's clearance and access, to "please advise if NGA is referring solely to Ms. Nusairat's current affiliation with Islamic Relief USA or if it is referring to some other organization or organizations not previously identified". App. 51-52, ¶ 36. In response, on March 24, 2011, NGA's Chief, Adjudications Branch replied, "NGA is not referring to organizations not previously identified". App. 52, ¶ 37.

Hegab thereafter filed a timely appeal to the NGA Personnel Security Appeals Board of the decision revoking his clearance and access, consisting of his further written response and eighty five accompanying

exhibits. App. 52, ¶ 38. He presented evidence that Islamic Relief USA is a charitable organization whose purpose is to alleviate poverty and suffering wherever it is found, paying no heed to gender, race or creed; that it was incorporated in the State of California in 1993, that it was granted non-profit status as a 501(c)(3) charitable organization by the Internal Revenue Service in 1994; that it is a member of the Combined Federal Campaign, a requirement of which is not to be affiliated with any terrorist or terrorist supporting organizations; and that it sponsors an annual Iftar (end of Ramadan) dinner in Washington which in the past has been attended by the Director of President Obama's faith-based initiatives, by representatives from the Department of Homeland Security and the U.S. Institute for Peace, and by an Ambassador and former U.S. Senator. App. 53, ¶ 39. Hegab further presented evidence that Islamic Relief USA has been included in the White House Leadership Consultation for Faith, Health, and Development; that it was announced in President Obama's "United Who We Serve Initiative" as part of the Interfaith Service Week; that it was recognized by President Obama in his message to Muslims worldwide as one of the Muslim-American organizations engaged in volunteering community-wide service; and that it was recognized by the White House Office of Faith Based and Neighborhood Partnerships as an example of more than thirty organizations represented at the Consultation on Global Hunger. App. 53, ¶ 40. Hegab further presented evidence that Islamic Relief USA has been recognized by the Department of Defense, Department of Homeland Security, the United States Mission to the United Nations, the Department of State, the United States Census Bureau, USAID, the

Department of Agriculture, and the White House for its role for many years in providing disaster relief in the United States and throughout the world, along with other non-government organizations. App. 53, ¶ 41.

Hegab further presented evidence that the CEO of Islamic Relief USA, Mr. Abed Ayoub, was invited by the Department of Agriculture and USAID to be part of the International Food, Aid, and Development Conference, and to be part of a panel session on interfaith cooperation to feed hungry people, and was invited by USAID to be a member of the Advisory Committee on Voluntary Foreign Aid, App. 53-54, ¶ 42; that Islamic Relief USA has partnered with the Church of Jesus Christ of Latter Day Saints and numerous other faith-based charitable organizations to provide relief, App. 54, ¶ 43; that a number of U.S. Senators and Representatives had also recognized the importance of the work of Islamic Relief USA, including Senator John Kerry, Senator Carl Levin, Representative Elliott Engel, and Representative Maxine Waters. App. 54 ¶ 44; that Islamic Relief USA had been commended by the Governor of the State of Illinois for its commitment to providing crucial services to refugees in Illinois, App. 54, ¶ 45; that numerous agencies of the United Nations, including the United Nations Relief and Works Agency (UNRWA), United Nations Economic and Social Council (ECOSOC), International Fund for Agricultural Development (IFAD), and the United Nations Fund for Providing Relief for Children (UNICEF) all had noted and recognized Islamic Relief USA's worldwide charitable efforts, App. 54, ¶ 46; that its charitable work has been recognized by other non-governmental organizations including the Church of Jesus Christ of the Latter Day

Saints, Catholic Relief Services, progressive Evangelical leaders, the Jewish Council for Public Affairs, Meals on Wheels, the Jewish World Service, Tents of Hope, Save Darfur Coalition, the American Council for Voluntary International Relief, and Religions for Peace, among other non-governmental organizations which have all collaborated with Islamic Relief USA in providing charitable relief throughout the world and which have recognized its important role in this area, App. 55, ¶ 47; and that Charity Navigator, the leading organization in judging the quality and effectiveness of charitable organizations in the United States, gives Islamic Relief USA a four star rating, its highest rating, and that the Chronicle of Philanthropy rated Islamic Relief as number 132 among the top 400 charities in the United States. App. 55, ¶ 48.

Importantly, Hegab provided evidence of who and what Islamic Relief is not: that it is not listed on the Department of Treasury's list of foreign-controlled or subversive organizations even though it has the word, Islam, in its name; that it has not been identified by the CIA as a subversive or terrorist organization; that it has not been subject to an IRS inquiry; that it is not of interest to the FBI; and has not been the subject of Congressional hearings. App. 55, ¶ 49.

Hegab provided overwhelming evidence in great detail refuting the allegation that it is "organized largely around its non-United States origin and/or its advocacy of or involvement in foreign political issues". App. 55-56, ¶ 50. Hegab argued that the denial of his clearance and access because of his wife's employment as Program Associate by Islamic Relief USA reflected an anti-Islamic bias by NGA, and was in violation of

his and his wife's constitutionally protected rights of freedom of religion, freedom of expression, and freedom of association. App. 56, ¶ 51.

On July 26, 2011 Hegab appeared with counsel before the NGA Personnel Security Appeals Board to orally present his appeal. There Hegab presented additional evidence that Islamic Relief USA's CEO had been appointed to the Advisory Committee on Voluntary Foreign Aid by the United States Agency for International Development; that it had partnered with the Red Cross and other national relief organizations to provide relief to tornado victims in Alabama; and that it had collaborated with the Department of Agriculture and several other faith-based organizations to provide summer food service programs at a local Maryland school. App. 56, ¶ 52. Hegab again argued that his wife's employment by Islamic Relief USA did not constitute a security risk, that the action taken was solely due to the anti-Islamic bias of NGA, and that the revocation of his security clearance and access was in violation of his constitutional rights and privileges. App. 57, ¶ 53. Nevertheless, the NGA Personnel Security Appeal Board (PSAB) the next day notified Hegab that it had affirmed the decision revoking his eligibility for access to sensitive compartmented information. The only reason given was that "the PSAB determined that your written appeal and the information provided during your personal appearance failed to mitigate security concerns related to the Adjudicative Guidelines provided in Reference D." App. 57, ¶ 54.

On September 7, 2011 Hegab 's counsel wrote to the Chief, NGA Personnel Security Division, requesting

that if NGA possessed other information not previously provided to Hegab concerning Islamic Relief USA, that supports its decision revoking Hegab's security clearance due to his wife's employment by that organization that would dissuade Hegab from filing suit, to please provide it. App. 57, ¶ 55. NGA never responded and never provided any additional information. App. 57, ¶ 56. Hegab then filed suit in the US District Court.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit Has Decided an Important Federal Question That is in Conflict with a Relevant Decision of this Court

In rejecting any judicial review for Hegab's admittedly colorable constitutional claim that his security clearance revocation violated his constitutional rights the Fourth Circuit decision is flatly contrary to *Webster v. Doe,* 486 U.S. 592 (1988). *Webster* involved a CIA employee's challenge to his dismissal which rested on grounds of his homosexuality. This Court held that Doe's claim was judicially reviewable notwithstanding the security implications of his job and the CIA Director's broad discretion, because he claimed that his denial on the basis of homosexuality violated the Constitution. This court held "a constitutional claim based on an individual discharge may be reviewed by the District Court" *Webster v, Doe,* 486 U.S at 603-04.

The Fourth Circuit panel members operated under the erroneous assumption that *Dept of Navy v. Egan*,

484 U.S. 518 (1988), was somehow in tension with the decision in *Webster*, decided six months later in the same term of court. This Court in *Webster* was clearly aware of it own limited holding in *Egan*.[7] Nevertheless Judge Motz stated that in Egan, "the Supreme Court held that federal courts generally lack jurisdiction to review an agency's decision to deny or revoke an individual's security clearance". App.16. *Egan*, however, did not address the question of *judicial* review; it involved the distinct question of whether one part of the Executive Branch, the Merit Systems Protection Board, could under the Civil Service Reform Act, review another Executive Department's security clearance denial. This is a question of intra-executive branch relations, and not a question of judicial review. Thus, *Egan* did not present a constitutional question. The *Egan* Court concluded, based on a reading of the statute under consideration, that the Merit Systems Protection Board did not have authority to review the underlying security clearance decision.

The *Egan* decision, however, is not in tension with *Webster* for two basic reasons. First, it did not involve a question of *judicial* review, and second, it did not involve a *constitutional* claim. Thus, the "serious constitutional question" that drove the Court's subsequent decision in *Webster* – whether all *judicial* review of a colorable *constitutional* claim could be denied – was simply not present in *Egan*. *Webster v. Doe*, 486 U.S. 592, 603.

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[7] See, *Webster v. Doe*, 486 U.S. 592 at 606 (Justice O'Connor, concurring in part and dissenting in part) and at 609, 615 (Justice Scalia dissenting).

The Fourth Circuit panel concluded that a colorable constitutional claim could *not* be judicially reviewed, notwithstanding the absence of any express congressional directive to that effect. The panel judges' attempts to distinguish, disregard, or avoid *Webster* are in error. Judge Motz's reading that *Webster v. Doe* meant that an individual could only challenge an agency's unconstitutional *policy* rather than an unconstitutional *individual* decision was expressly rejected in *Webster* on its facts and in its holding. *Webster v. Doe* pointed out "[T]he Deputy General Counsel of the CIA later informed respondent that homosexuality was merely a security concern that did not inevitably result in termination, but instead was evaluated on a case-by-case basis". 486 U.S. 592, 602. As noted in *Webster,* it was admitted by the government that it was the CIA's practice to make security clearance decisions on a "case by case basis" and not a broad sweeping policy. *Webster v. Doe*, 486 U.S. 592, 602.[8]

Judge Davis disagreed with Judge Motz on the meaning of *Webster,* but concluded, on the authority of *Egan,* that, although there is a colorable constitutional claim and "indisputably, sound authority supports Hegab's assertion that we have subject matter

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[8] The Government's brief in *Webster v. Doe*, at page 4, stated:" "Two security officers had told respondent that his homosexual activities violated Agency regulations, but the then-CIA Deputy General Counsel told respondent's attorney that homosexuality was a security concern that did not inevitably result in dismissal and was evaluated on a case-by-case basis". *Webster v. Doe*, Brief for Petitioner, p. 4.

jurisdiction of the constitutional claims he alleges", App. 20, f.n.1, that Hegab's challenge to the revocation of his security clearance is a non-justiciable *political* question.[9] App. 21. Had *Webster v Doe* been decided before *Dept of Navy v. Egan,* there might be a basis for relying on the *dictum* in *Egan* for holding it is a non-justiciable political question. But as noted above, *Egan* concerned intra-executive review, not judicial review, and thus did not find Egan's challenge non-justiciable in the courts. Judge Davis's conclusion that all security-based employment decisions are non-justiciable, even when presenting constitutional claims, conflicts squarely with *Webster v. Doe,* which upheld judicial review of just such a claim, and which remanded that case for a hearing six months after the *Egan* decision in the same term of court. If Judge Davis were right, even an *explicit* agency decision rejecting a clearance based on an applicant's religion, political party, gender or race would be immune from any judicial review.

The Fourth Circuit's decision is contrary to this Court's understanding of *Webster* as exemplified by its subsequent holdings.[10] In *Lincoln v. Vigil*, 508 U.S. 182, 195 (1993), it stated:

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[9] Judge Motz disagreed with Judge Davis' conclusion that Appellant's claims are non-justiciable as a political question. Her holding is that it would be justiciable if Hegab had challenged an agency policy rather than an individual decision.

[10] Justice Scalia would have granted a writ of certiorari to clarify the holding in *Webster v. Doe*. *Reed v. Collyer*, 487 U.S. 1225 (1988) (cert denied) (Justice Scalia dissenting).

> Thus, while the APA contemplates, in the absence of a clear expression of contrary congressional intent, that judicial review will be available for colorable constitutional claims, see *Webster*, 486 U.S., at 603-604, 108 S.Ct., at 2054, the record at this stage does not allow mature consideration of constitutional issues, which we leave for the Court of appeals on remand.

In yet another decision this Court noted in *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992):

> Although the reapportionment determination is not subject to review under the standards of the APA, that does not dispose of appellee's constitutional claims. See *Webster v. Doe*, 486 U.S. 592, 603-605, 108 S.Ct. 2047, 2053-2054, 100 L.Ed.2d 631 (1988). Constitutional challenges to apportionment are justicable.

The Fourth Circuit Has Decided an Important Federal Question That Is in Conflict with Rulings of Other U.S. Courts of Appeal

Other Circuit Courts of Appeal have indicated that they would hear constitutional claims in the context of a security clearance issue if presented. *Oryszak v. Sullivan*, 576 F.3d 522, 526 (D.C. Cir. 2009) (noting that while courts may have jurisdiction over the review of security clearance claims, they are non-justiciable *except for* such constitutional claims); *Dorfmont v. Brown*, 913 F.2d 1399, 1401-04 (9th Cir. 1990), *cert. denied.,* 499 U.S. 905 (1991) (court lacks jurisdiction

excepted in the possible limited case where an individual has a colorable constitutional claim). Only one other Court of Appeals, the Third Circuit, which has addressed the issue raised in this case agrees with Judge Davis, that there is jurisdiction but the issue is non-justiciable. *El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176 (3d Cir. 2010).

This Case Raises an Important Question of Federal Jurisdiction and Procedure That has Confused the Lower Courts and is in Need of Clarification

The District Court held that it had no jurisdiction to hear an employee's appeal concerning a security clearance under the authority of *Navy v. Egan.* While Judge Neimeyer of the Fourth Circuit agreed, Judges Motz and Davis of the Fourth Circuit, held that the court did have jurisdiction under *Webster v. Doe*. Judge Motz, however, held that there would only be jurisdiction of there was an agency *policy* that was challenged. Judge Davis held that although there was jurisdiction the case was non-justiciable as a political question.

The holdings of other courts of appeal are also in disarray. The U.S. Court of Appeals for the D.C. Circuit has held there is jurisdiction but that a claim based on a statutory violation would be non-justiciable however has indicated a constitutional claim would be justiciable. *Oryszak v. Sullivan*, 576 F.3d 522, 526 (D.C. Cir. 2009). The Third Circuit has held that a constitutional claim is jurisdictional but non-justiciable. *El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176 (3d Cir. 2010). The Ninth Circuit has held

that it lacks jurisdiction excepted in the possible limited case where an individual has a colorable constitutional claim. *Dorfmont v. Brown*, 913 F.2d 1399, 1401-04 (9th Cir. 1990), *cert. denied.,* 499 U.S. 905 (1991) . These decisions are in conflict with each other and some are in conflict with *Webster v. Doe* which held that there was jurisdiction to hear an individual complaint of a colorable constitutional violation and which remanded that case for a hearing.

These decisions reflect the confusion among the lower courts on the permissability of judicial review of challenges to security clearance determinations where constitutional rights are alleged to have been violated. Now the Fourth Circuit has held that even colorable constitutional claims cannot be adjudicated. This question needs clarification from this Court.

Exceptional Importance of Issue Involved

This case is of exceptional importance because close to five million federal civilian employees, members of the military and employees of defense contractors hold security clearances.[11] While not every such person might file suit to vindicate a claimed violation of their constitutionally protected rights, a decision providing for judicial review in those exceptional cases that present a colorable claim that basic constitutional rights have been violated would not only protect and uphold the constitutional rights of the affected individual, but would put agency decision makers on

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[11] Eg., www.usatoday.com/story/news/2013/06/09/government-se (accessed, July 9, 2013)

notice that they do not have *carte blanche* to violate the Constitution in this realm.

CONCLUSION

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

Respectfully submitted,

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DATE August 20, 2013

APPENDIX

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12-1182

[Filed April 25, 2013]

PUBLISHED

MAHMOUD M. HEGAB,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
LETITIA A. LONG, Director, National Geospatial-Intelligence Agency; NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY,	)
	)
Defendants-Appellees.	)

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Senior District Judge.
(1:11-cv-01067-JCC-IDD)

Argued: October 26, 2012

Decided: April 25, 2013

Before NIEMEYER, MOTZ, and DAVIS, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Davis concurred. Judge Motz wrote a separate opinion concurring in the judgment. Judge Davis wrote a separate concurring opinion.

COUNSEL

ARGUED: Sheldon I. Cohen, SHELDON I. COHEN & ASSOCIATES, Oakton, Virginia, for Appellant. Bernard G. Kim, OFFICE OF THE UNITED STATES ATTORNEY, Alexandria, Virginia, for Appellees. **ON BRIEF:** Neil H. MacBride, United States Attorney, Alexandria, Virginia, for Appellees.

OPINION

NIEMEYER, Circuit Judge:

When Mahmoud Hegab, an employee of the National Geospatial-Intelligence Agency ("NGA") with a top secret security clearance, informed the agency of his marriage to Bushra Nusairat, the NGA conducted a reinvestigation into his security clearance. Based on new information, the NGA revoked Hegab's security clearance.

Hegab commenced this action under the Administrative Procedure Act against the NGA and its Director to reverse the NGA's decision, to reinstate his security clearance, and to award him back pay, benefits, and attorneys' fees. In his complaint, he alleged that he presented "overwhelming evidence" to refute the NGA's conclusions and that the NGA staff "did not take the time or effort to review" the facts or "assumed that anything with the name 'Islam' associated with it is a subversive terrorist organization." He alleged that "[i]f the latter is true . . . [his] constitutionally protected rights of freedom of religion, freedom of expression, and freedom of association" were violated. The district court dismissed Hegab's complaint under Federal Rule of Civil Procedure 12(b)(1), concluding that it did not have subject-matter jurisdiction to review a security clearance determination.

We conclude that Hegab's speculative and conclusory allegations of constitutional violations were essentially recharacterizations of his challenge to the merits of the NGA's security clearance determination and that we do not have jurisdiction to review such a determination. Accordingly, we affirm.

I

After obtaining the necessary top secret security clearance, Hegab began work for the NGA as a financial/budget analyst on January 4, 2010. The NGA, a member of the U.S. Intelligence Community and a Department of Defense Combat Support Agency, produces geospatial intelligence in support of national security, and all NGA employees must possess a top

secret security clearance with "sensitive compartmented information access."

During his orientation at the NGA, Hegab informed a security officer that after the investigation for his security clearance had been completed but before he had begun work, he had married Bushra Nusairat. This information prompted the agency to reinvestigate Hegab. By a memorandum dated November 2, 2010, the NGA notified Hegab that a preliminary decision had been made to revoke his security clearance, effective November 18, 2010. On January 7, 2011, Hegab was placed on unpaid administrative leave.

The proposed revocation was based on information about Nusairat, as well as earlier information that Hegab had provided during his initial security clearance investigation. The Statement of Reasons that the NGA gave to Hegab listed the facts on which it relied. It stated (1) that Hegab, his parents, and his siblings held dual citizenship with the United States and Egypt; (2) that Hegab still possessed an Egyptian passport and that it would require contact with foreign national government officials for Hegab to renounce his Egyptian citizenship and turn in his passport, which would increase the potential that he would be monitored by foreign intelligence services; (3) that Hegab stated that he was 80% certain that his wife held dual citizenship with Jordan; (4) that Hegab reported "continuing contact with multiple foreign nationals (including relatives), some of whom reside outside of the Continental United States"; (5) that Hegab had reported residing in Egypt from May 2004 to November 2007; (6) that Hegab's spouse had attended and graduated "from the Islamic Saudi

Academy, whose curriculum, syllabus, and materials are influenced, funded, and controlled by the Saudi government"; and (7) that "[i]nformation available through open sources identifies [Hegab's] spouse as being or having been actively involved with one or more organizations which consist of groups who are organized largely around their non-United States origin and/or their advocacy of or involvement in foreign political issues." The Statement of Reasons concluded that this information "presents an elevated foreign influence risk that is problematic and unacceptable to the national security of the United States."

After receiving the Statement of Reasons, Hegab requested and received the file supporting the NGA's proposal to revoke his security clearance. The file contained the information that Hegab had submitted during his initial security clearance, as well as the information the agency had subsequently obtained about his wife, including: (1) statements of various organizations concerning the Saudi Islamic Academy, which she had attended; (2) a photograph believed to be of her taken at an anti-war protest in Washington, D.C., depicting her carrying a sign bearing the website identification of an organization named "ANSWER" and stating, "War No—Act Now to Stop War and End Racism"; (3) a statement indicating that after graduating from the Islamic Saudi Academy in 2005, she attended George Mason University, where she studied "Global Affairs, International Development, Diplomacy and Global Governance, Islamic Studies," and was the president of a student group called Students for Justice in Palestine; and (4) information

concerning her employment at a non-profit organization called Islamic Relief USA.

Hegab submitted a detailed response to the NGA to explain the evidence, but the agency nonetheless issued a final decision on March 4, 2011, revoking Hegab's security clearance. The decision informed Hegab that:

> Your response has mitigated the concerns of citizenship, foreign contact, overseas employment and residency, as well as your spouse's education at the Islamic Saudi Academy. However, the information provided does not mitigate your spouse's current affiliation with one or more organizations which consist of groups who are organized largely around their non-United States origin and/or their advocacy of or involvement in foreign political issues. This concern elevates the potential for conflicts of interest between your obligation to protect sensitive or classified United States information and technology and your desire to help a foreign person, group, or country by providing that information.

Hegab appealed the decision to the NGA Personnel Security Appeals Board, submitting a written response and 85 exhibits focused on Islamic Relief USA. And on July 26, 2011, he appeared with counsel at a hearing before the Board and presented additional evidence about Islamic Relief USA. The next day, the Board issued its decision affirming the agency's revocation of Hegab's security clearance and advising Hegab that the Board "determined that your written appeal and the

information provided during your personal appearance failed to mitigate security concerns."

Seeking review of the Board's decision, Hegab commenced this action against the NGA and its Director, Letitia Long, in her official capacity, alleging that the revocation of his security clearance "was based solely on [his] wife's religion, Islam, her constitutionally protected speech, and her association with, and employment by, an Islamic faith-based organization" and that the NGA's actions therefore violated his constitutional rights. In six counts, he alleged violations of the Free Speech Clause of the First Amendment, the Free Exercise Clause of the First Amendment, the freedom of association protected by the First Amendment, the Due Process Clause of the Fifth Amendment, a right to privacy under the Ninth Amendment, and a right to equal protection under the First, Fifth, Ninth, and Fourteenth Amendments.

The NGA and its Director filed a motion to dismiss the complaint for lack of subject-matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(b)(1), and for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). Following a hearing on the motion, the district court dismissed the complaint without prejudice under Rule 12(b)(1) for lack of subject-matter jurisdiction. The court found that "Hegab's claims, though framed as constitutional violations, concern the merits of NGA's decision to revoke his security clearance," and "[a]bsent clear congressional directive, which Hegab fails to identify, such review is flatly prohibited by [*Department of Navy v.*] *Egan* [484 U.S. 518 (1988)] and Fourth Circuit precedent," referring to *Reinbold v. Evers*, 187 F.3d

348, 357-58 (4th Cir. 1999), and *Guillot v. Garrett*, 970 F.2d 1320, 1326 (4th Cir. 1992).

This appeal followed.

II

Both Hegab and the NGA appear to agree with the proposition that no one has a right to a security clearance and that the grant of a security clearance is a highly discretionary act of the Executive Branch. They also recognize that the Fourth Circuit has concluded that security clearance determinations are generally not subject to judicial review. As the Supreme Court observed in *Egan*, "the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it." *Egan*, 484 U.S. at 529. Thus, when we have been asked to review security clearance decisions, we have concluded that courts are generally without subject-matter jurisdiction, recognizing that a court should not be put in the position of second-guessing the discretionary judgment of an executive agency assessing national security risks. *See Reinbold*, 187 F.3d at 357-58; *Becerra v. Dalton*, 94 F.3d 145, 148-49 (4th Cir. 1996); *Guillot*, 970 F.2d at 1326. The *Egan* Court amplified the reasons for this, stating, "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." *Egan*, 484 U.S. at 529. Rather, the agency head charged with the protection of classified information "'should have *the final say* in deciding whether to

repose his trust in an employee who has access to such information.'" *Id.* (emphasis added) (quoting *Cole v. Young*, 351 U.S. 536, 546 (1956)). Harkening to separation of powers concerns, the Court emphasized that "'the courts have traditionally shown the utmost deference to Presidential responsibilities.' Thus . . . courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Id.* at 530 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)); *see also Baker v. Carr*, 369 U.S. 186, 217 (1962) (finding questions to be political and nonjusticiable when, among other things, there is an absence of "judicially discoverable and manageable standards for resolving" the question; the question cannot be decided "without an initial policy determination of a kind clearly for nonjudicial discretion"; or it is impossible for a court to "undertak[e] independent resolution without expressing lack of the respect due coordinate branches of government").

Therefore, as the parties recognize, it is well established in our circuit that absent a specific mandate from Congress providing otherwise, federal courts are generally without subject-matter jurisdiction to review an agency's security clearance decision. *See Reinbold*, 187 F.3d at 357-58; *Becerra*, 94 F.3d at 148-49; *Guillot*, 970 F.2d at 1325-26.

Hegab argues, however, that his complaint should not be dismissed by application of those established principles because, as he contends, even security clearance decisions must be subject to judicial protection of individual rights guaranteed by the Constitution. He maintains that because his complaint

has alleged constitutional claims, the claims should be adjudicated in court, citing *Webster v. Doe*, 486 U.S. 592 (1988). In *Webster*, the governing statute authorized the CIA Director to terminate employees "whenever [the Director] shall deem such termination necessary or advisable in the interests of the United States." *Id.* at 594. The Court held that this statutory provision did not preclude judicial review of "colorable constitutional claims arising out of the actions of the Director." *Id.* at 603. It reached this conclusion "to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Id.*

This case thus raises the issue of where to draw the line, if there is such a line, between the political question of reviewing the merits of a security clearance decision and the judicial question of whether an Executive Branch agency violated an individual's constitutional rights when denying or revoking his or her security clearance.

In the cases we have decided, we have left open the question of whether we can review a security clearance decision *even where* an individual presents a colorable claim that the agency's decision violated his or her constitutional rights. *See Reinbold*, 187 F.3d at 358 (noting that "it is arguable that we could review an agency's security clearance decision in the limited circumstance where the agency's security clearance decision violated an individual's constitutional rights"); *Jamil v. Sec'y, Dep't of Def.*, 910 F.2d 1203, 1209 (4th Cir. 1990) ("Whether, however, review of [an] alleged denial of constitutional rights is reachable by a court in the light of *Egan* presents a difficult question that we

do not need to reach in this appeal" because "nothing in the record, other than [the plaintiff's] conclusory assertion," supported his constitutional claims). And other courts have not come to a consensus on this question. *See, e.g.*, *El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176, 183-85 (3d Cir. 2010) (holding that the court had jurisdiction to review plaintiff's claims that an agency violated his constitutional rights in the process of revoking his security clearance, but concluding that any claim that requires reviewing the merits of the security clearance decision fails to state a claim); *Oryszak v. Sullivan*, 576 F.3d 522, 526 (D.C. Cir. 2009) (noting that while courts may have jurisdiction over the review of security clearance claims, such claims other than constitutional claims fail to state a claim); *Dorfmont v. Brown*, 913 F.2d 1399, 1401-04 (9th Cir. 1990) (holding that courts lack jurisdiction to review the merits of security clearance determinations, except possibly in the limited case where an individual has a colorable constitutional claim); *Hill v. Dep't of Air Force*, 844 F.2d 1407, 1411 (10th Cir. 1988) (suggesting that *Egan* would be "hardly worth the effort" if it could be "bypassed simply by invoking alleged constitutional rights").

But in this case, we need not decide whether and where the line should be drawn because we conclude that Hegab's complaint merely challenges the merits of the NGA's security clearance decision and his conclusory constitutional claims are unsuccessful attempts to circumvent the undisputed proposition that we will not review the merits of a security clearance decision.

Hegab's complaint is factually fulsome, setting forth in detail—over a span of some 15 pages—the communications between him and the NGA during a period from January 2010 to September 2011. He alleged that after the investigation for his security clearance had been completed and he had been granted clearance, he married Nusairat and so advised the NGA. That fact prompted the agency to conduct another investigation and to conclude, based on this investigation and other materials that Hegab had previously submitted, that Hegab's security clearance should be revoked. Before reaching its final decision, the NGA gave Hegab its reasons and identified the evidence giving it concern. Hegab responded with additional evidence and explanations in an effort to rebut the NGA's evidence and reasoning. While the evidence he presented allayed some of the NGA's concerns, the NGA adhered to its preliminary decision to revoke his clearance, explaining that his wife's affiliation with "one or more organizations which consist of groups who are organized largely around their non-United States origin and/or their advocacy of or involvement in foreign political issues" created potential conflicts with Hegab's "obligation to protect sensitive or classified United States information."

Hegab appealed the decision to the NGA Personnel Security Appeals Board and presented 85 exhibits to the Board in support of his appeal, contending that his evidence was "overwhelming" in refuting the NGA's conclusions. The Board, after conducting a hearing, nonetheless affirmed the agency's decision.

Based on these historical facts, Hegab alleged in his complaint that the "NGA's security staff either did not

take the time or effort to review the readily available information previously presented to it, or other open source information, *or* that the security staff assumed that anything with the name 'Islam' associated with it is a subversive terrorist organization." (Emphasis added). And he alleged further that the NGA's decision "reflects, most generously, a failure to examine and a misunderstanding of the facts and, less generously, an anti-Islamic bias among the NGA security staff." His complaint then concluded, "*[i]f* the latter is true," the NGA's "actions and conclusions would be in violation of plaintiff's and his wife's constitutionally protected rights of freedom of religion, freedom of expression, and freedom of association." (Emphasis added). Based on these allegations, the complaint set forth in six counts various causes of actions grounded in different provisions of the Constitution. But each count alleged the same factual basis:

> The revocation of plaintiff's security clearance and access to classified information by defendant was based solely on plaintiff's wife's religion, Islam, her constitutionally protected speech, and her association with, and employment by, an Islamic faith-based organization.

The complaint alleged no facts to support the claim that anyone at the NGA in fact held the hypothesized bias or said anything that indicated such a bias. To the contrary, the agency's alleged bias is stated as the speculative product of an ambivalent allegation in the complaint that the NGA security staff *either* failed to take the time or effort to review the available information *or* were biased against Islam.

These allegations amount to no more than a challenge to the merits of the agency's security clearance determination, implying that the determination was irrational and unsupported by the evidence. Indeed, Hegab alleged as much, stating that he provided "overwhelming" evidence to refute the reasons given by the NGA. But these are exactly the type of claims that we have held are beyond the subject-matter jurisdiction of a district court. As we explained in *Reinbold*, decided in a similar circumstance:

> Reinbold essentially concedes that, to decide his Fourth Amendment claim on the merits, we must determine whether the NSA wrongly suspended his SCI security clearance. This is precisely the type of review that *Egan* prohibits.

Reinbold, 187 F.3d at 358 (distinguishing claims only focused on the merits from constitutional claims).

Hegab's constitutional allegations are conclusory only, resting on his disagreement with the NGA's decision on the merits. Reasoning from the premise that the NGA's decision was wrong—in particular, that it was irrational and unsupported by the evidence—he concludes that the decision must therefore have been the product of an unconstitutional bias. The conclusion, however, does not follow, and no independent facts are alleged to support such a bias. When that is understood, it becomes apparent that Hegab's constitutional claims depend entirely on his disagreement with NGA's review of the evidence and his conclusion that the agency did not make its decision for the reasons that it gave and therefore must have

acted from an unconstitutional bias. This type of speculative claim, however, does not state a colorable constitutional claim. *See Reinbold*, 187 F.3d at 358-59; *Jamil*, 910 F.2d at 1209. Hegab's constitutional claims are in substance merely creative recharacterizations of his allegation that the NGA made the wrong decision and that its decision was irrational and unsupported by the evidence. Such a challenge goes to the merits of the security clearance determination, the review of which does not fall within our jurisdiction. *See Reinbold*, 187 F.3d at 357-58.

In its security clearance determination, the NGA concluded that Hegab had failed to mitigate its concern of "an elevated foreign influence risk that is problematic and unacceptable to the national security of the United States," and this conclusion is one in which the NGA "should have the final say," *Egan*, 484 U.S. at 529, and in which courts should not intrude, *id.* at 530.

Accordingly, the judgment of the district court is

AFFIRMED.

DIANA GRIBBON MOTZ, Circuit Judge, concurring:

I join in holding that we lack jurisdiction to review the National Geospatial-Intelligence Agency's ("NGA's") revocation of Mahmoud Hegab's security clearance. Like Judge Davis, however, I believe Hegab's complaint states a colorable constitutional claim; such is now the holding of the court. I also agree with Judge Davis, albeit on somewhat different grounds, that precedent prohibits us from reviewing

the merits of the NGA's individualized security clearance determination, even in light of Hegab's colorable constitutional challenge. Accordingly, I concur in the judgment.

As to Hegab's allegation of a constitutional violation, he asserts that the NGA revoked his security clearance because of concern regarding his wife's "current affiliation with [an] . . . organization[ ] which . . . [is] organized largely around [its] non-United States origin and/or the advocacy of or involvement in foreign political issues," *i.e.*, her employment by Islamic Relief USA. Hegab alleges that this revocation violated his constitutional rights because it "was based solely on [his] wife's religion, Islam, her constitutionally protected speech, and her association with, and employment by, an Islamic faith-based organization." These allegations certainly suffice to state a claim of discrimination that is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

In *Department of Navy v. Egan*, 484 U.S. 518 (1988), however, the Supreme Court held that federal courts generally lack jurisdiction to review an agency's decision to deny or revoke an individual's security clearance. For this reason, we have dismissed for lack of jurisdiction claims that an agency's security clearance determination violated a petitioner's statutory rights. *See, e.g.*, *Becerra v. Dalton*, 94 F.3d 145, 148-49 (4th Cir. 1996) (court lacked jurisdiction to review Title VII claim arising from Navy's security clearance decision); *Guillot v. Garrett*, 970 F.2d 1320, 1323-26 (4th Cir. 1992) (court lacked jurisdiction to review appellant's claim that Navy's denial of his security clearance violated Rehabilitation Act of 1973).

If *Egan* stood alone, clearly it would require dismissal here too. But in *Webster v. Doe*, 486 U.S. 592 (1988), decided the same term as *Egan*, the Supreme Court appeared to hold, over vigorous dissents, that federal courts have jurisdiction to review *constitutional* challenges to security-related employment decisions. *Id.* at 601-605. In *Webster*, the employee challenged as violative of his constitutional rights the CIA's decision to discharge him because he was homosexual, in keeping with its policy of treating homosexuality as a potential security threat. *Id.* at 595, 602. The Court found that, while the CIA had discretion to discharge an employee under the National Security Act, that statute did not preclude judicial review of an employee's constitutional claims. *Id.* at 603- 604.

Prior to today, we have been able to avoid attempting to reconcile *Egan* and *Webster*. *See, e.g.*, *Jamil v. Sec'y, Dep't of Def.*, 910 F.2d 1203, 1209 (4th Cir. 1990). But we must do so in this case because we cannot assess Hegab's constitutional claims without reviewing the merits of the NGA's decision. It may well be that, if presented with the task of reconciling these two cases today, the Supreme Court would hold, in accordance with Justice Scalia's dissent in *Webster* and Judge Davis's concurrence in the case at hand, that any challenge to an agency's security clearance determination raises a non-justiciable political question. However, to date the Supreme Court has not so held.

Given the Court's direction that we follow its cases until expressly overruled, *Agostini v. Felton*, 521 U.S. 203, 237 (1997), and the possibility of reconciling *Egan* and *Webster* without holding *Webster* a dead letter, I

follow a more conservative approach. In light of the holding in *Egan*, at most *Webster* permits judicial review of a security clearance denial only when that denial results from the application of an allegedly unconstitutional *policy*. Since Hegab alleges no unconstitutional policy but only an assertedly unconstitutional individualized adverse determination, his claim fails.

I recognize that some of the language in *Webster* sweeps broadly enough to suggest that judicial review extends to any constitutional challenge, but nothing in *Webster* indicates that it overruled *Egan*, which the Court issued only a few months earlier. And a court could assess the constitutionality of the CIA policy at issue in *Webster* without delving into the merits of an individualized security clearance determination, which *Egan* clearly prohibited.

In sum, although *Webster* may authorize us to review constitutional challenges to security clearance *policies*, it does not provide us with jurisdiction in this case, where Hegab makes no allegation of an assertedly unconstitutional policy. I note that this limited approach accords with that taken by those of our sister circuits to address the question of how to reconcile *Egan* and *Webster*. *See El-Ganayni v. Dep't of Energy*, 591 F.3d 176, 183-86 (3d Cir. 2010) (finding judicial review of constitutional claims appropriate only to the extent it would not require court to review merits of agency's decision to revoke petitioner's security clearance); *Nat'l Fed'n of Fed. Emps. v. Greenberg*, 983 F.2d 286, 289-90 (D.C. Cir. 1993) (finding *Egan* did not bar judicial review of constitutional challenge to questionnaire used in making security clearance

determinations but distinguishing case from those "challenging, on constitutional grounds, discretionary judgments regarding a particular employee's security clearance"). This approach may not gain an employee his reinstatement, but it certainly could gain him money damages and attorneys' fees.

DAVIS, Circuit Judge, concurring:

I concur in the majority opinion but with an important difference in emphasis; hence, I offer these further thoughts.

The National Geospatial-Intelligence Agency (the "NGA") concluded, after a thorough investigation of Appellant Mahmoud Hegab's background and qualifications, that its award of a top secret security clearance (an essential requirement of his federal employment with the agency) was warranted as "clearly consistent with the interests of national security." *See* Appellees' Br. at 4 (quoting Executive Order 12968, § 3.1(b), 60 Fed. Reg. 40245 (Aug. 7, 1995)). Hegab had spent several months on the job, and after a further investigation and review of Hegab's background and qualifications, the NGA determined, to the contrary, that a top secret security clearance was *not* "clearly consistent with the interests of national security." Consequently, having lost his top secret security clearance, Hegab lost his job.

What changed?

Reading the material allegations of the complaint in the light most favorable to Hegab, the only thing that changed is he got married to a dual citizen Muslim

activist who, before their marriage, robustly exercised her First Amendment rights of speech and association.[1] I do not regard Hegab's allegations as "conclusory"; rather, I regard them as "colorable" within the contemplation of our precedents.[2] Unlike the

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[1] Hegab alleges that subject matter jurisdiction over this case rests on the general federal question statute, 28 U.S.C. § 1331, *see* J.A. 5 ("this matter arises under the Constitution of the United States"), and that his claims are cognizable by virtue of "the government's waiver of immunity under the Administrative Procedure Act," *id.* Indisputably, sound authority supports Hegab's assertion that we have subject matter jurisdiction over the constitutional claims he alleges. *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178 (D.C. Cir. 2006) (holding that federal question jurisdiction exists over First Amendment claim by individual against the FTC, but finding claim legally insufficient); *Hubbard v. Envtl. Prot. Agency*, 949 F.2d 453 (D.C. Cir. 1991) (affirming judgment for injunctive relief against the EPA, and remanding for consideration of an award of back-pay, after trial of First Amendment retaliation claim instituted by rejected applicant for employment).

[2] It is at least arguable, as the majority opinion intimates, that Hegab essentially pled himself out of his causes of action by including such an abundant narrative of the factual bases for his disagreement with the agency's decision. *See Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) ("Rule 12(b)(6) dismissal is appropriate where the allegations contradict the claim asserted.") (citing Charles Alan Wright & Arthur R. Miller, Fed. Practice & Procedure § 1357 (2d ed. 1990)); *see also Bennett v. Schmidt*, 153 F.3d 516, 519 (7th Cir. 1998) ("Litigants may plead themselves out of court by alleging facts that establish defendants' entitlement to prevail."). But lawyers not infrequently plead claims "on information and belief", *e.g.*, *Kush v. Rutledge*, 460 U.S. 719, 721 & n.1 (1983), and courts generally understand that some ultimate facts, *e.g.*, the existence of an invidious motivation for facially (but pretextual) non-discriminatory adverse actions, can be pled,

allegations in many extant cases raising claims of unconstitutional security clearance revocations,[3] the gravamen of Hegab's complaint is the alleged denial of equal protection, in violation of the Fifth Amendment.

Thus, I would conclude on this record that, even after the most grudging application of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), Hegab has stated cognizable claims of unconstitutional adverse action by a governmental agency. There is an impenetrable barrier, however, to the possibility that Hegab's claims might proceed past the pleading stage. Specifically, Hegab's claims raise a non-justiciable political question—i.e., whether the agency revoked his security clearance on legitimate national security grounds, or whether the decision "was based solely on [Hegab's] wife's religion, Islam[;] her constitutionally protected speech[;] and her [mere] association with, and employment by, an Islamic faith-based organization." J.A. 21.

"Pursuant to the political question doctrine, the judiciary is deprived of jurisdiction to assess decisions

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conformably within the strictures of Federal Rule of Civil Procedure 11, only in such a manner. At bottom, that is exactly what Hegab has done here, somewhat inartfully.

[3] *See, e.g.*, *Reinbold v. Evers*, 187 F.3d 348, 358 (4th Cir. 1999) (noting that the plaintiff-appellant had alleged that his seizure, debriefing, and ejection from a Navy facility had "violated his rights as guaranteed under the Fourth Amendment," "not that the suspension of his . . . security clearance amounted to a constitutional violation").

exclusively committed to a separate branch of government." *Taylor v. Kellogg Brown & Root Servs., Inc.*, 658 F.3d 402, 407 n.9 (4th Cir. 2011).[4] Rudimentary separation of powers standards demonstrate the exclusive commitment of national security clearance decisions to the executive branch; that commitment could not be more pervasive or more clear. *See, e.g.*, *Becerra v. Dalton*, 94 F.3d 145, 148 (4th Cir. 1996) ("Security clearances are within the Executive's purview, and therefore, '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.'") (citing *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988)). Manifestly, the requirement that a security clearance be afforded a government employee only where it is "clearly consistent with the interests of national security" simply does not admit of judicial determination; it is a political question, not a judicially reviewable question.

This case points out (once again) the difficulty facing lawyers and lower federal courts trying to make jurisprudential sense of the Supreme Court's *dictum* in

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[4] Notably, "the [Supreme] Court has not announced whether it views the [political question doctrine] as constitutional"—and thus, jurisdictional—"or prudential." Erwin Chemerinsky, *Federal Jurisdiction* 45 (5th ed. 2007). Although we have said political questions rob us of jurisdiction, *see Taylor*, 658 F.3d at 407 n.9, other courts are not so certain. *Cf. Oryszak v. Sullivan*, 576 F.3d 522, 527 (D.C. Cir. 2009) (Ginsburg, J., concurring) (observing that "it is important to distinguish among failure to state a claim, a claim that is not justiciable, and a claim over which the court lacks subject matter jurisdiction").

Webster v. Doe, 486 U.S. 592, 603 (1988), over dissents by Justice O'Connor and Justice Scalia, that the Court desired to avoid "the serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." As the majority opinion points out, in this Circuit, we have strained mightily to pay heed to that *dictum*, usually by holding, as the majority opinion here does, that a plaintiff has failed to allege a "colorable constitutional claim" and that therefore subject matter jurisdiction is lacking. *Reinbold v. Evers*, 187 F.3d 348, 358 (4th Cir. 1999).[5] None of the

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[5] A number of courts have reconciled *Egan* and *Webster* by reasoning that *Webster* allows courts to review constitutional challenges to the *process* for making security clearance decisions, but *Egan* bars courts from reviewing the *merits* of those decisions. *See, e.g.*, *El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176, 183 (3d Cir. 2010) ("We read *Egan* and *Webster* together as holding that Article III courts have jurisdiction to hear 'constitutional claims arising from the clearance revocation process,' even though the merits of that revocation cannot be reviewed.") (citing *Webster*, 486 U.S. at 603–04).

I have grave doubt that many federal employees whose security clearance is revoked care much about the *procedures* used to do so; they care about their *clearance* (thus, their jobs and their reputations, and not necessarily in that order). *See Hill v. Dep't of Air Force*, 844 F.2d 1407, 1412 (10th Cir. 1988) ("[T]he district court made no finding that the Air Force violated any particular procedure; and even if such a finding had been made the remedy would have been a remand for the purpose of compliance with applicable procedures, not an order requiring reinstatement of Hill's clearance."). Accordingly, I find this attempted reconciliation, based on reasoning that a court could not "review the merits of the decision to revoke [the plaintiff's] security clearance," but could "exercise jurisdiction over [his] constitutional claims and review

six justices comprising the majority in *Webster* remain on the Court; it would be fair to express uncertainty as to the continuing viability of the twenty-five year old *Webster dic*tum.

For now it suffices to observe that cases such as this one bring to mind the story of the three umpires sitting in a tavern discussing how they make calls on pitches when working home plate. The first said, "I call them as I see them." The second said, "I call them as they are." The third said, "They ain't nothin' until I call 'em." As important as constitutional protections are for all of our fellow citizens, and as critical as the Third Branch's role is in the vindication of those protections, the President and his designees, and no other decision-makers, have the authority of the third umpire in security clearance decisions.

On the above understandings, I concur in the majority opinion.

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them to the extent that [the court] [could] do so without examining the merits of that decision," *El- Ganayni*, 591 F.3d at 183, largely incoherent in any real-life application.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-1182
(1:11-cv-01067-JCC-IDD)

[Filed April 25, 2013]

MAHMOUD M. HEGAB,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
LETITIA A. LONG, Director, National Geospatial-Intelligence Agency; NATIONAL GEOSPATIAL INTELLIGENCE AGENCY,	)
	)
Defendants-Appellees.	)

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX B

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

Alexandria Division

1:11cv01067 (JCC/IDD)

[Filed January 19, 2012]

MAHMOUD HEGAB,	)
	)
Plaintiff,	)
	)
v.	)
	)
LETITIA LONG, *et al*.,	)
	)
Defendants.	)
	)

MEMORANDUM OPINION

This matter is before the Court on a Motion to Dismiss [Dkt. 10] (the "Motion") filed by Defendants the National Geospatial-Intelligence Agency ("NGA") and its Director, Letitia Long (collectively "Defendants"). For the following reasons, the Court will grant Defendants' Motion.

I. Background

This case arises out of the revocation of Plaintiff Mahmoud Hegab's security clearance by his employer, NGA.

A. Factual Background

Hegab was employed by NGA as a Financial/Budget Analyst beginning on January 4, 2010. (Compl. [Dkt. 1] ¶¶ 5, 8.) During Hegab's employment, he possessed a "Top Secret" security clearance and access to Sensitive Compartmented Information ("SCI") (collectively "security clearance"). (Compl. ¶ 9.)

NGA commenced a reinvestigation of Hegab's security clearance due to his marriage to Bushra Nusairat. (Compl. ¶¶ 10-11.) By memorandum dated November 2, 2010, NGA notified Hegab of its intent to revoke his security clearance based on his marriage to Nusairat as well as information previously disclosed during NGA's initial investigation. (Compl. ¶ 12.) Hegab's security clearance was suspended effective November 18, 2010. (Compl. ¶ 13.) Because of the suspension, Hegab was placed on unpaid administrative leave on January 7, 2011. (Compl. ¶ 15.) Hegab remains on unpaid administrative leave, and has not received notification that his employment has been terminated. (*Id*.)

The issues raised by NGA in its proposed revocation of Hegab's security clearance included the following: (1) Nusairat's attendance and graduation from the Islamic Saudi Academy, whose curriculum, syllabus, and materials are influenced, funded, and controlled by the

Saudi government; and (2) information available through open sources which identified Nusairat's involvement with organizations consisting of groups organized largely around their non-United States origin and advocacy in foreign political issues. (Compl. ¶ 16.)

Hegab subsequently obtained a file, which NGA informed him contained the information supporting its decision to revoke his security clearance. (Compl. ¶ 17.) The information relating to Hegab was the same as what he had submitted prior to being hired by NGA and receiving his security clearance. (Compl. ¶ 18.) With respect to Nusairat, the file contained: (1) statements made by various organizations concerning the Saudi Islamic Academy; (2) a photograph believed to be of Nusairat taken at an anti-war protest in Washington, D.C., in which she carried a sign bearing the website identification of an organization named "ANSWER" and stating "War No -- Act Now to Stop War and End Racism"; (3) information indicating that Nusairat attended George Mason University, that her area of study was "Global Affairs, International Development, Diplomacy and Global Governance, Islamic Studies," and that she was president of an organization known as Students for Justice in Palestine; and (4) information concerning Nusairat's employment at a non-profit organization known as "Islamic Relief." (Compl. ¶¶ 19-21.)

Hegab submitted a detailed response to NGA's proposed revocation of his security clearance, which included fifty exhibits. (*See* Compl. ¶¶ 22-31.) On March 4, 2011, NGA issued its decision revoking Hegab's security clearance. (Compl. ¶ 33.) NGA stated

that Hegab had mitigated its concerns as to his citizenship, foreign contact, overseas employment, and residency -- the same issues that had been cleared prior to his initial hiring. (*Id*.) NGA also stated that Hegab had satisfied its concerns about his wife's education at the Islamic Saudi Academy. (Compl. ¶ 34.) The information provided by Hegab did not, however, mitigate NGA's concerns about his wife's "current affiliation with one or more organizations which consist of groups who are organized largely around their non-United States origin and/or the advocacy of or involvement in foreign political issues." (Compl. ¶ 35.) NGA informed Hegab that "[t]his concern elevates the potential for conflicts of interest between your obligation to protect sensitive or classified United States information and technology and your desire to help a foreign person, group, or country by providing that information." (*Id*.)

Hegab deduced that the organization to which NGA referred was Islamic Relief USA.[1] (*See* Compl. ¶¶ 35-37.) He timely appealed the revocation of his security clearance to the NGA Personnel Security Appeals Board, submitting eighty-five exhibits. (Compl. ¶ 38.) The exhibits generally related to Islamic Relief USA's charitable mission, its recognition by political leaders, government agencies, and non-governmental organizations, and its partnership with other charitable organizations. (Compl. ¶¶ 39-50.) Hegab

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[1] At oral argument, Hegab advised the Court that Nusairat resigned from her position at Islamic Relief USA effective January 13, 2012. Because Hegab's security clearance is presently revoked, this remains a live controversy.

argued that the revocation of his security clearance was based on anti-Islamic bias and violated his constitutional rights to freedom of religion, freedom of speech, and freedom of association. (Compl. ¶ 51.)

On July 26, 2011, Hegab appeared with counsel before the NGA Personnel Security Appeals Board and orally presented his appeal. (Compl. ¶ 52.) At that time, he submitted additional evidence pertaining to Islamic Relief USA and reiterated the arguments made in his previous response. (Compl. ¶¶ 52-53.) The NGA Personnel Security Appeal Board affirmed its decision revoking Hegab's security clearance by letter dated July 27, 2011. (Compl. ¶ 54.)

B. Procedural Background

Hegab filed suit on October 4, 2011. [Dkt. 1.] In the Complaint, Hegab asserts six causes of action, all of which arise under the Constitution. Hegab alleges that NGA violated (1) his First Amendment rights to freedom of religion, speech, and association (Counts I and II); (2) his rights under the Due Process Clause of the Fifth Amendment to employment and reputation (Counts III, IV, and V); and (3) his Fifth Amendment right to non-discrimination in employment (Count VI).

Defendants filed a Motion to Dismiss on December 5, 2011, arguing that the Complaint should be dismissed for lack of subject matter jurisdiction or, alternatively, for failure to state a claim. [Dkt. 10.] Hegab filed an opposition on December 14, 2011 [Dkt. 15], to which Defendants replied on January 4, 2012 [Dkt. 23]. Defendants' Motion is before the Court.

II. Standard of Review

Pursuant to Rule 12(b)(1), a claim may be dismissed for lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). Defendants may attack subject matter jurisdiction in one of two ways. First, defendants may contend that the complaint fails to allege facts upon which subject matter jurisdiction may be based. *See Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982); *King v. Riverside Reg'l Med. Ctr.*, 211 F. Supp. 2d 779, 780 (E.D. Va. 2002). In such instances, all facts alleged in the complaint are presumed to be true. *Adams*, 697 F.2d at 1219; *Virginia v. United States*, 926 F. Supp. 537, 540 (E.D. Va. 1995).

Alternatively, defendants may argue that the jurisdictional facts alleged in the complaint are untrue. *Adams*, 697 F.2d at 1219; *King*, 211 F. Supp. 2d at 780. In that situation, "the Court may 'look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists.'" *Virginia v. United States*, 926 F. Supp. at 540 (quoting *Capitol Leasing Co. v. FDIC*, 999 F.2d 188, 191 (7th Cir. 1993)); *see also Velasco v. Gov't of Indonesia*, 370 F.3d 393, 398 (4th Cir. 2004) (holding that "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") (citations omitted).

In either circumstance, the burden of proving subject matter jurisdiction falls on the plaintiff. *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189

(1936); *Adams*, 697 F.2d at 1219; *Johnson v. Portfolio Recovery Assocs*., 682 F. Supp. 2d 560, 566 (E.D. Va. 2009) (holding that "having filed this suit and thereby seeking to invoke the jurisdiction of the Court, Plaintiff bears the burden of proving that this Court has subject matter jurisdiction").

III. Analysis

Defendants argue that the Complaint must be dismissed for lack of subject matter jurisdiction because Hegab asks the Court to review the merits of NGA's security clearance determination -- something foreclosed by the Supreme Court's decision in *Department of Navy v. Egan*, 484 U.S. 518 (1988).[2] In *Egan*, the Supreme Court held that the Merit Systems Protection Board[3] lacked the authority to review the merits of the Navy's decision to revoke the plaintiff's security clearance. *Id.* at 526-27. Notwithstanding the general rule that agency action is presumptively reviewable, the Supreme Court noted that the presumption has its limits, and that it "runs aground when it encounters concerns of national security." *Id*. at 527. It reasoned that the grant of security clearance to a particular employee is "a sensitive and inherently discretionary judgment call," which is "committed by

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[2] Defendants also argue that even assuming the Court has jurisdiction, Hegab fails to state a claim for which relief can be granted. Because the Court holds that it is without subject matter jurisdiction, it need not reach this issue.

[3] The Merits Systems Protection Board is an independent, quasi-judicial agency in the Executive Branch. *See El-Ganayni v. U.S. Dep't of Energy*, 591 F.3d 176, 181 n.3 (3d Cir. 2010).

law to the appropriate agency of the Executive Branch." *Id.* The Supreme Court explained that:

> The President, after all, is the 'Commander in Chief of the Army and Navy of the United States.' U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.

Id. The Fourth Circuit has interpreted *Egan* as a broad restriction on the subject matter jurisdiction of courts in security clearance disputes. *See Reinbold v. Evers*, 187 F.3d 348, 357-58 (4th Cir. 2005) ("[U]nder our circuit precedent, in the absence of a specific mandate from Congress providing otherwise, *Egan* deprives the federal courts of subject-matter jurisdiction to review an agency's security clearance decision"); *see also Guillot v. Garrett*, 970 F.2d 1320, 1326 (4th Cir. 1992) (holding that the court did not have jurisdiction to decide whether the denial of a security clearance violated the Rehabilitation Act).

Hegab cites *Webster v. Doe*, 486 U.S. 592 (1988), arguing that his claims, which allege constitutional violations, are not barred by *Egan*. *Webster* addressed whether the CIA's employment decisions under Section 102(c) of the National Security Act were judicially reviewable. *Id.* at 594. The Supreme Court held that

Section 102(c) did not preclude judicial review of "colorable constitutional claims arising out of the actions of the Director pursuant to that section."[4] *Id*. at 603. The Fourth Circuit, however, has declined to extend *Webster's* holding to the *Egan* rule barring judicial review of security clearance decisions on the merits. *See Reinbold*, 187 F.3d at 358 (noting the arguable exception to *Egan* in the limited circumstance where the security clearance decision resulted in constitutional violations, but finding it unnecessary to reach the issue); *Jamil v. Sec'y, Dep't of Def.*, 910 F.2d 1203, 1209 (4th Cir. 1990) (same).[5]

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[4] Hegab contends that *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), and *Rasul v. Bush*, 542 U.S. 466 (2004), reaffirmed the Supreme Court's position in *Webster*. While *Hamdi* and *Rasul* are consistent with the principle that there are limits to the authority of the Executive Branch in the realm of national security, the cases involved far different circumstances from those at issue here. *Hamdi* involved the detention of a United States citizen who had been designated an "enemy combatant." *Hamdi*, 542 U.S. at 516. Other courts have rejected the argument that *Hamdi* unsettled the Supreme Court's holding in *Egan*. *See Bennett v. Chertoff*, 425 F.3d 999, 1004 (D.C. Cir. 2005) (finding *Hamdi* inapposite in security clearance dispute because "physical liberty is a fundamental right that must be accorded great weight" and it is far from clear that the Supreme Court "would strike the same balance in the context of employment termination"). *Rasul* addressed the "narrow" question whether federal courts have jurisdiction to consider habeas challenges of foreign nationals detained at the Guantanamo Bay Naval Base in Cuba, 542 U.S. at 470, and is likewise inapposite.

[5] The Third Circuit and D.C. Circuit, relying on *Webster*, have held that courts have jurisdiction to review constitutional claims arising the revocation of a security clearance. *See, e.g*., *Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996); *Nat'l Fed'n of Fed. Emps. v.*

Judge Brinkema recently dismissed claims similar to those advanced by Hegab in *Ciralsky v. CIA*, No. 1:10cv911, 2010 WL 4724279 (E.D. Va. Nov. 15, 2010), *aff'd sub nom. Ciralsky v. Tenet*, --- F. App'x ----, 2011 WL 6367072 (4th Cir. Dec. 20, 2011) (unpublished). In that case, the plaintiff also alleged constitutional violations relating to the revocation of his security clearance.[6] *Id.* at *2. The plaintiff claimed that his

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Greenberg, 983 F.2d 286, 289-90 (D.C. Cir. 1993). Both cases, however, involved challenges to *policies*, and, in any event, ultimately ruled against the plaintiffs on the merits. *See Stehney*, 101 F.3d at 935-38 (constitutional challenge to security clearance revocation based on plaintiff's refusal to take polygraph); *Greenberg*, 983 F.2d at 291-95 (constitutional challenge to standard questionnaire used in security clearance process). Indeed, at oral argument, Hegab conceded that he cannot cite a single case where a court reviewed the merits of a security clearance decision and found for the plaintiff. Moreover, the Third Circuit recently clarified its position in *El-Ganayni*, stating that "courts have jurisdiction to hear constitutional claims arising from the clearance revocation *process*, even though the *merits* of that revocation cannot be reviewed." 591 F.3d at 183 (emphases added) (internal quotation marks and citation omitted). Here, Hegab clearly seeks a review of the merits of his security clearance revocation.

[6] Hegab attempts to distinguish *Ciralsky*, noting that in that case the plaintiff asserted constitutional torts against individuals under *Bivens v. Six Unknown Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), while here Hegab asserts constitutional claims directly against an agency. The Court is not persuaded that this distinction is material. Both the *Bivens* claims in *Ciralsky* and Hegab's claims here allege constitutional violations and invoke overlapping constitutional rights –- namely, the rights to free exercise, due process, and equal protection. *See Ciralsky*, 2010 WL 4724279, at *2. Hegab offers no cogent reason why Ciralsky's

security clearance was revoked because he was Jewish and was viewed as a supporter of Israel, *id*. at *1, and that the revocation violated his right to due process, his right to free exercise of religion, his right to equal protection, and his right to be free from unreasonable search and seizure, *id.* at *2. Citing *Egan* and its Fourth Circuit progeny, the court held that it lacked subject matter jurisdiction to hear the plaintiff's claims. *Id.* at *2-4. Judge Brinkema stated that the "revocation of a security clearance is a *sui generis* act over which the federal courts have no jurisdiction absent congressional directive" and held that the plaintiff had failed to overcome "the clear constitutional rule set forth in *Egan*." *Id.* at *3.

Here, Hegab's claims, though framed as constitutional violations, concern the merits of NGA's decision to revoke his security clearance. (*See* Compl. ¶¶ 60, 63, 66, 70, 76, 79 (alleging that the security clearance revocation was "based solely on plaintiff's wife's religion, Islam, her constitutionally protected speech, and her association with, and employment by, an Islamic faith-based organization").) A determination of whether Hegab's security clearance was revoked due to legitimate national security concerns or, as Hegab alleges, constitutionally impermissible bases would necessarily require a review of the merits of NGA's decision. Absent clear congressional directive, which Hegab fails to identify, such a review is flatly prohibited by *Egan* and Fourth Circuit precedent.

Bivens claims were barred under *Egan*, but his constitutional claims are not.

IV. Conclusion

For these reasons, the Court will grant Defendants' Motion to Dismiss.

An appropriate Order will issue.

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

January 19, 2012
Alexandria, Virginia

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

Alexandria Division

1:11cv01067 (JCC/IDD)

[Filed January 19, 2012]

MAHMOUD HEGAB,	)
	)
Plaintiff,	)
	)
v.	)
	)
LETITIA LONG, *et al*.,	)
	)
Defendants.	)
	)

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

(1) Defendants Letitia Long and the National Geospatial-Intelligence Agency's Motion to Dismiss [10] is GRANTED;

(2) Plaintiff Mahmoud Hegab's Complaint is DISMISSED WITHOUT PREJUDICE pursuant to Federal Rule of Civil Procedure 12(b)(1); and

(3) the Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to all counsel of record.

/s/
James C. Cacheris
UNITED STATES DISTRICT COURT JUDGE

January 19, 2012
Alexandria, Virginia

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-1182
(1:11-cv-01067-JCC-IDD)

[Filed June 21, 2013]

MAHMOUD M. HEGAB,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
LETITIA A. LONG, Director, National Geospatial-Intelligence Agency; NATIONAL GEOSPATIAL INTELLIGENCE AGENCY,	)
	)
Defendants-Appellees.	)

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Motz, and Judge Davis.

For the Court
/s/ Patricia S. Connor, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Civil No. 1:11cv1067 JCC/IDD

[Filed October 4, 2011]

MAHMOUD M. HEGAB
6614 Jupiter Hill Circle
Apartment F
Alexandria, VA 22312

Plaintiff,

v.

LETITIA A. LONG, Director
NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY

And

NATIONAL GEOSPATIAL-INTELLIGENCE AGENCY
7500 Geoint Drive (Fort Belvoir)
Springfield, VA 22150

Defendants.

COMPLAINT

(TO SET ASIDE AGENCY ACTION DENYING PLAINTIFF A SECURITY CLEARANCE IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS)

1. This is an action to set aside a final decision of the National Geospatial-Intelligence Agency (hereinafter referred to as (NGA) revoking Plaintiff's security clearance and access to classified information in violation of his rights and privileges under the United States Constitution.

JURISDICTION

2. This court had jurisdiction pursuant to 28 U.S.C. § 1331 because this matter arises under the Constitution of the United States.

VENUE

3. Venue properly lies in this court pursuant to 28 U.S.C. § 139l(e) (l)and (2). Defendant is an agency of the United States with its principal headquarters in Fairfax County, Virginia.

WAIVER OF IMMUNITY

4. This action is brought against Defendant, NGA, pursuant to the government's waiver of immunity under the Administrative Procedure Act, 5 U.S.C. § 702 and§ 706(2) (B), for an agency's violation of a Constitutional Right and unlawful agency action contrary to a Constitutional right, power, or privilege.

THE FACTS

5. Mahmoud M. Hegab, plaintiff, is a United States citizen who was employed by defendant, NGA.

6. Defendant, Letitia A. Long, is the Director of NGA and is sued in her official capacity

7. Defendant, NGA, is an agency of the United States government.

8. Plaintiff was employed by NGA on January 4, 2010 in the position of Financial/Budget Analyst.

9. During plaintiff's employment by NGA, he held a Top Secret security clearance and Access to Sensitive Compartmented Information (SCI) . There were no problems with plaintiff's employment and his performance was well regarded by his supervisors.

10. On January 4, 2010 when plaintiff began his work at NGA he informed a security officer during his orientation that he had gotten married to Bushra Nusairat, in a civil ceremony which took place in November 2009, between the time of his security clearance investigation and that date when he first he reported to work. He reported further that he and his wife had not yet begun living together because, according to their religious custom, until there was a religious ceremony they were considered betrothed, but not married. Plaintiff and Ms. Nusairat were married in a religious ceremony on October 2, 2010 after which they began living together as husband and wife and have continued to live together to present.

11. Bushra Nusairat is an American citizen, who at the time of her marriage to plaintiff was residing in Fairfax County, Virginia, and who has continued to reside in Fairfax County Virginia with plaintiff since their marriage.

12. By memorandum dated November 2, 2010, which plaintiff received on November 18, 2010, NGA notified plaintiff of its intent to revoke his security clearance and his access to classified information. The proposed revocation was based in part, on his marriage to Ms. Nusarait, and in part on information previously disclosed by plaintiff as part of his security clearance investigation in 2009 which had been reviewed, discussed and cleared by NGA prior to his being hired and being granted a security clearance by NGA.

13. Plaintiff's security clearance and access to SCI were suspended effective November 18, 2011, on his receipt on November 2, 2010 memorandum. He has not been allowed to reenter NGA facilities since that time.

14. Also on November 18, 2010, NGA notified plaintiff by memorandum of that date, that it proposed to indefinitely place him on unpaid administrative leave based on the suspension of his security clearance and access to SCI.

15. By memorandum dated January 6, 2011 NGA place plaintiff on indefinite unpaid administrative leave, effective January 7, 2011. Plaintiff remains in that status to present. NGA has never notified plaintiff that his employment has been terminated.

16. The issues raised by NGA in the proposed revocation of plaintiff clearance and access concerning Ms. Nusairat were: (1) "your spouse's attendance and graduation from the Islamic Saudi Academy, whose curriculum, syllabus, and materials are influenced, funded, and controlled by the Saudi government"; and (2) "information available through open sources [which] identifies your spouse as being or having been actively involved in one or more organizations which consist of groups who are organized largely around their non-United States origin and their advocacy of or involvement in foreign political issues".

17. Plaintiff thereafter requested and received from NGA the file which NGA informed him contained the information supporting its decision to revoke Plaintiff's security clearance.

18. With respect to the issues raised concerning plaintiff, the file contained the same material which plaintiff had submitted prior to his being hired by NGA and prior to his having been granted a security clearance.

19. With respect to the issues concerning Ms. Nusarait, the file contained: (1) reports of statements of various anti-Islamic organizations concerning the Saudi Islamic Academy; (2) a photograph "believed to be that of applicant's spouse taken at an 'anti-war occupation protest in Washington'" on the grounds of the Washington monument, carrying a sign which bore the website identification of an organization with the acronym "ANSWER", the sign stating, "War No-Act Now to Stop War and End Racism"; (3) a statement that "open source references to Bushra Nusairat

indicate that following her graduation from Islamic Saudi Academy in 2005 she attended George Mason University (GMU)", and the further statement that "She reportedly attended GMU from 2005 to 2009 and her area of study was shown as 'Global Affairs, International Development, Diplomacy and Global Governance, Islamic Studies'. She was also shown to be president of Students for Justice in Palestine at GMU."

20. The file provided by NGA further quoted Ms. Nusairat as saying: "SJP has a mission, like that of the USC, which is concentrated on educating our membership, and the GMU community at large, about the ongoing Israel and Palestine conflict", and that "Our goal on this campus is to disseminate correct information about the plight of the Palestinian people and to be the voice of the under-represented."

21. As a further basis for revoking plaintiff's clearance, the NGA file contained the statement that: "Subject told an NGA polygrapher in March, 2010 that Bushra Nusairat now works for a non-profit organization called 'Islamic Relief' which supports 'humanitarian relief efforts.'"

22. On January 19, 2011 plaintiff responded to the proposed revocation of his clearance which included his written response and 50 exhibits of supporting evidence.

23. With respect to the allegations against plaintiff personally, plaintiff responded with the same information he had initially provided to NGA prior to his hire.

24. With respect to his wife, Ms. Nusairat, plaintiff responded that his wife "is a U.S. citizen residing in the u.s. who has never been accused of any illegal activity or being associated with any illegal activity."

25. With respect to the allegation concerning his wife's attendance at the Islamic Saudi Academy, plaintiff provided evidence that his wife was enrolled by her parents in Islamic Saudi Academy because: it taught Arabic and Islamic Studies which no other school in the D.C. area did at that time; that his wife attended Islamic Saudi Academy from the first through twelfth grades with the exception of sixth and seventh grades when her father held a teaching position abroad; that Islamic Saudi Academy encourages sports, community service, national leadership, and arts participation; that the curriculum it uses is based on the Fairfax County, Virginia curriculum for Math, Science, English, and Social Studies, and on the Saudi curriculum for Arabic and Islamic Studies; that Islamic Saudi Academy students participate in activities that allow them to interact with non-Muslims, such as Model United Nations, varsity soccer and basketball, community service programs, and Help the Homeless Walkathons; and that Islamic Saudi Academy has served as an advisor to the U.S. Army, Fort Belvoir, on Arabic language and Arabic cultural studies.

26. Plaintiff further provided evidence that the combined secular-religious curriculum of the Islamic Saudi Academy is no different than other religious schools such as, for example, the Yeshiva of Greater Washington which teaches based on a Jewish curriculum, the Blessed Sacrament School which

teaches a Catholic curriculum, and Fairfax County Christian Academy which teaches in a Christian atmosphere, and that the stated goal of each of these schools is virtually identical, with the only difference being the particular religious viewpoint taught to the students.

27. Further, plaintiff provided evidence with respect to the allegation concerning his wife's connection to "ANSWER", that she attended a rally in 2003 on the U.S. Capitol steps protesting the war in Iraq, a rally in which tens of thousands of Americans converged on Washington to voice their disapproval of the war, that his wife was at the time sixteen years of age, that she picked up a poster at the rally grounds that described how she felt about the Iraq war, and that she was not affiliated with the organization, ANSWER, its missions, or its objectives in any way.

28. Plaintiff further provided evidence that at the rally one of the day's many speakers was a Democratic presidential candidate, and that a large number of veterans and military families with loved ones in Iraq also participated.

29. With respect to NGA's concerns regarding plaintiff's wife's connection to Students for Justice in Palestine, plaintiff presented evidence that his wife, while attending George Mason University as an undergraduate between 2005 and 2009 was the president of Students for Justice in Palestine, that it was a student organization sanctioned and funded by George Mason University like other student organizations, and that the organization advocated a peaceful solution for a difficult problem, the differences

between the state of Israel and the Palestinians in the West Bank.

30. With respect to NGA's concerns about his wife's employment by Islamic Relief USA, plaintiff provided evidence that his wife had held the position of Program Associate with that organization since shortly after her graduation from George Mason University, that Islamic Relief USA is a U.S. based organization founded in 1993 in California and was currently based in Alexandria, Virginia, whose mission is to alleviate suffering, hunger, illiteracy and disease worldwide, and to provide aid in a dignified and compassionate manner regardless of color, race, religion or creed.

31. Plaintiff further provided evidence that Islamic Relief USA is part of Inter-Action, the largest network of nongovernmental development organizations in the USA, that it is a participating member of the Combined Federal Campaign, and that its purpose is no different than other faith-based relief organizations, such as the American Jewish Joint Distribution Committee, Catholic Charities USA, and the Latter Day Saints Charities, to name but a few.

32. In his response to the proposed revocation of his security clearance plaintiff argued that NGA's proposed action was based on rumor, innuendo and guilt by association, that it was religiously biased against Islam and violated plaintiff's and his wife's free exercise of their religion of Islam, their right to peaceably assemble to petition the government for a redress of grievances, and their right to freedom of speech to express legitimate political concerns, all

guaranteed by the First Amendment to the Constitution of the United States.

33. On March 4, 2011 NGA issued its decision revoking plaintiff's security clearance and access to SCI. In its decision, NGA stated that plaintiff had mitigated the concerns of his citizenship, foreign contact, overseas employment and residency, the same issues of which it had previously cleared plaintiff prior to his having been hired.

34. NGA also determined that plaintiff had satisfied its concerns about spouse's education at the Islamic Saudi Academy.

35. NGA's decision did not resolve all issues. It further continued:

> However, the information provided does not mitigate your spouse's current affiliation with one or more organizations which consist of groups who are organized largely around their non-United States origin and/or the advocacy of or involvement in foreign political issues. This concern elevates the potential for conflicts of interest between your obligation to protect sensitive or classified United States information and technology and your desire to help a foreign person, group, or country by providing that information. (Emphasis added).

36. Because plaintiff's wife had by then graduated from George Mason University and was no longer a member of the student organization, Students for Justice in Palestine, because evidence had been

presented that she was never affiliated with "ANSWER", and because the only other group identified in NGA's file of supporting information accompanying the proposed revocation, was his wife's current affiliation with her employer, Islamic Relief USA, plaintiff's counsel, on March 15, 2011 wrote to the Chief of NGA's Adjudications Branch requesting that due to the ambiguity of the decision revoking plaintiff's clearance and access, to "please advise if NGA is referring solely to Ms. Nusairat's current affiliation with Islamic Relief USA or if it is referring to some other organization or organizations not previously identified."

37. In response on March 24, 2011, NGA' s Chief, Adjudications Branch replied, "NGA is not referring to organizations not previously identified."

38. Plaintiff thereafter filed a timely appeal to the NGA Personnel Security Appeals Board of the decision revoking his clearance and access, consisting of his further written response and eighty five accompanying exhibits.

39. Plaintiff presented evidence that Islamic Relief USA is a charitable organization whose purpose is to alleviate poverty and suffering wherever it is found, paying no heed to gender, race or creed; that it was incorporated in the State of California in 1993; that it was granted non-profit status as a 501{c) {3) charitable organization by the Internal Revenue Service in 1994; that it is a member of the Combined Federal Campaign, a requirement of which is not to be affiliated with any terrorist or terrorist supporting organizations; and that it sponsors an annual Iftar (end

of Ramadan) dinner in Washington, which in the past has been attended by the Director of President Obama's faith-based initiatives, representatives from the Department of Homeland Security, the U.S. Institute for Peace, and an Ambassador and former U.S. Senator.

40. Plaintiff further presented evidence that Islamic Relief USA has been included in the White House Leadership Consultation for Faith, Health, and Development; that it was announced in President Obama's "United Who We Serve Initiative" as part of the Interfaith Service Week; that it was recognized by President Obama in his message to Muslims worldwide as one of the Muslim-American organizations engaged in volunteering community-wide service; and that it was recognized by the White House Office of Faith Based and Neighborhood Partnerships as an example of more than thirty organizations represented at the Consultation on Global Hunger.

41. Plaintiff further presented evidence that Islamic Relief USA has been recognized by the Department of Defense, Department of Homeland Security, the United States Mission to the United Nations, the Department of State, the United States Census Bureau, USAID, the Department of Agriculture, and the White House for its role for many years in providing disaster relief in the United States and throughout the world, along with other non-government organizations.

42. Plaintiff further presented evidence that the CEO of Islamic Relief USA, Mr. Abed Ayoub, was invited by the Department of Agriculture and USAID

to be part of the International Food, Aid, and Development Conference, and to be part of a panel session on interfaith cooperation to feed hungry people, and was invited by USAID to be a member of the Advisory Committee on Voluntary Foreign Aid.

43. Plaintiff further presented evidence that Islamic Relief USA has partnered with the Church of Jesus Christ of Latter Day Saints and numerous other faith-based charitable organizations to provide relief worldwide.

44. Plaintiff further presented evidence that a number of U.S. Senators and Representatives have also recognized the importance of the work of Islamic Relief USA, including Senator John Kerry, Senator Carl Levin, Representative Elliott Engel, and Representative Maxine Waters.

45. Plaintiff further presented evidence that Islamic Relief USA has been commended by the Governor of the State of Illinois for its commitment to providing crucial services to refugees in Illinois.

46. Plaintiff provided further evidence that numerous agencies of the United Nations, including the United Nations Relief and Works Agency (UNRWA), United Nations Economic and Social Council (ECOSOC), International Fund for Agricultural Development (IFAD), and the United Nations Fund for Providing Relief for Children (UNICEF) all have noted and recognized Islamic Relief USA's worldwide charitable efforts.

47. Plaintiff provided further evidence of recognition of the charitable work of Islamic Relief USA by other non-governmental organizations including the Church of Jesus Christ of the Latter Day Saints, Catholic Relief Services, progressive Evangelical leaders, the Jewish Council for Public Affairs, Meals on Wheels, the Jewish World Service, Tents of Hope, Save Darfur Coalition, the American Council for Voluntary International Relief, and Religions for Peace, among other non-governmental organizations which have all collaborated with Islamic Relief USA in providing charitable relief throughout the world and which have recognized its important role in this area.

48. Plaintiff provided further evidence that Charity Navigator, the leading organization in judging the quality and effectiveness of charitable organizations in the United States, gives Islamic Relief USA a four star rating, its highest rating, and that the Chronicle of Philanthropy rated Islamic Relief as number 132 among the top 400 charities in the United States.

49. Importantly, plaintiff provided evidence of who and what Islamic Relief is not: that it is not listed on the Department of Treasury's list of foreign controlled or subversive organizations even though it has the word, Islam, in its name; that it has not been identified by the CIA as a subversive or terrorist organization; that it has not been subject to an IRS inquiry; that it is not of interest to the FBI; and has not been the subject of Congressional hearings.

50. Plaintiff provided overwhelming evidence in great detail refuting the allegation that it is "organized

largely around its non-United States origin and/or its advocacy of or involvement in foreign political issues."

51. Plaintiff argued in his appeal that NGA's security staff either did not take the time or effort to review the readily available information previously presented to it, or other open source information, or that the security staff assumed that anything with the name "Islam" associated with it is a subversive terrorist organization. Plaintiff further argued that the denial of his clearance and access because his wife is employed as Program Associate by Islamic Relief USA reflects, most generously, a failure to examine and a misunderstanding of the facts and, less generously, an anti-Islamic bias among the NGA security staff. If the latter is true plaintiff argued, its actions and conclusions would be in violation of plaintiff's and his wife's constitutionally protected rights of freedom of religion, freedom of expression, and freedom of association.

52. On July 26, 2011 plaintiff, with counsel, appeared before the NGA Personnel Security Appeals Board to orally present his appeal. At that time, plaintiff presented additional evidence to the Appeal Board that: Islamic Relief USA's CEO had been appointed to the Advisory Committee on Voluntary Foreign Aid by the United States Agency for International Development; it had partnered with the Red Cross and other national relief organizations to provide relief to tornado victims in Alabama; and it had collaborated with the Department of Agriculture and several other faith-based organizations to provide summer food service programs at a local Maryland school.

53. Plaintiff renewed his argument that his wife's employment by Islamic Relief USA did not constitute a security risk, that the action taken was solely due to the anti-Islamic bias of NGA' s security personnel, and that the revocation of Plaintiff's security clearance and access was in violation of his constitutional rights and privileges.

54. Nevertheless, plaintiff was notified by letter dated July 27, 2011 that the NGA Personnel Security Appeal Board had affirmed the decision revoking his eligibility for access to sensitive compartmented information, the only reason being given was that "the PSAB determined that your written appeal and the information provided during your personal appearance failed to mitigate security concerns related to the Adjudicative Guidelines provided in Reference D."

55. On September 7, 2011 plaintiff's counsel wrote to the Chief, NGA Personnel Security Division, requesting that if NGA possessed other information not previously provided to plaintiff concerning Islamic Relief USA that supports its decision revoking plaintiff's security clearance because of his wife's employment by that organization that would dissuade plaintiff from filing suit, to please provide it.

56. NGA never responded to that request for additional information and has provided no additional information.

57. The decision of the NGA Personnel Security Appeals Board is a final agency action for which there is no other adequate remedy at law.

58. Plaintiff has exhausted his administrative remedies.

COUNT I.

(FREEDOM OF RELIGION, FREEDOM OF SPEECH, AND FREEDOM OF ASSOCIATION)

59. Plaintiff realleges and incorporates by reference the allegations of paragraphs 1 through 58 above.

60. The revocation of plaintiff's security clearance and access to classified information by defendant was based solely on plaintiff's wife's religion, Islam, her constitutionally protected speech, and her association with, and employment by, an Islamic faith-based organization.

61. Defendant's actions are in violation of plaintiff's right to freely associate with others regardless of their religious preference, and regardless of their protected speech, guaranteed by the First, Fifth and Ninth Amendments to the United States Constitution.

COUNT II.

(RIGHT TO PRIVACY AND FAMILIAL ASSOCIATION)

62. Plaintiff incorporates and alleges by reference the allegations of paragraphs 1 through 58 above.

63. The revocation of plaintiff's security clearance and access to classified information by defendant was based on solely on plaintiff's wife's religion, Islam, her constitutionally protected speech, and her association with, and employment by, an Islamic faith-based organization.

64. Defendant's actions are in violation of plaintiff's right to privacy, his right to familial associations, and his right to be married to whom he wishes regardless of her religious preference or religious associations, and regardless of her protected speech, which are guaranteed by the First and Ninth Amendments to the United States Constitution.

COUNT III

(PROPERTY INTEREST IN CONTINUED EMPLOYMENT)

65. Plaintiff incorporates and alleges by reference the allegations of paragraphs 1 through 58 above.

66. The revocation of plaintiff's security clearance and access to classified information by NGA was based on solely plaintiff's wife's religion, Islam, her constitutionally protected speech, and her association with, and employment by, an Islamic faith-based organization.

67. Plaintiff has a property interest in his continued employment in the position he previously held at NGA.

68. NGA by its actions has deprived plaintiff of his property interest in his continued employment with the federal government in violations of plaintiff's right to due process under the First, Fifth and Ninth amendments to the Unites States Constitution.

COUNT IV.

(LIBERTY INTEREST IN FUTURE EMPLOYMENT OPPORTUNITIES)

69. Plaintiff incorporates and alleges by reference the allegations of paragraphs 1 through 58 above.

70. The revocation of plaintiff's security clearance and access to classified information by defendant was based solely on plaintiff's wife's religion, Islam, her constitutionally protected speech, and her association with, and employment by, an Islamic faith-based organization.

71. All agencies of the government are required to give reciprocal recognition to security clearance decisions of other agencies. This includes both employees of such agencies and employees of contractors with such agencies in positions that require access to classified information.

72. Federal agencies which do not require a national security clearance as an employment requirement, but which have "Positions of Trust" dealing with sensitive, but non-national security information, also require disclosure of any denial of a security clearance by a prospective applicant for employment with the government or an applicant for

employment with a government contractor, for a Position of Trust. The previous denial of a security clearance will generally cause the denial of employment in a Position of Trust.

73. As a result of NGA's revocation of plaintiff's security clearance and access to classified information, plaintiff is, and will continue to, be denied the opportunity to be employed in any position in the federal, state, or municipal government, or any position with a contractor doing business with the federal, state or municipal government requiring a security clearance, or any position designated a Position of Trust.

74. Defendant's actions are a denial of plaintiff's liberty interest in his unfettered opportunity for employment in violation of his rights under the First, Fifth and Ninth Amendments to the United States Constitution.

COUNT V.

(LIBERTY INTEREST IN REPUTATION AND STANDING IN THE COMMUNITY)

75. Plaintiff incorporates and alleges by reference the allegations of paragraphs 1 through 58 above.

76. The revocation of plaintiff's security clearance and access to classified information by NGA was based solely on plaintiff's wife's religion, Islam, her constitutionally protected speech, and her association with, and employment by, an Islamic faith-based organization.

77. As a result of NGA's actions, plaintiff's reputation and standing in the community as a loyal and trustworthy American citizen has been and will continue to be stigmatized and damaged until he is provided legal redress pursuant to his rights under the First, Fifth and Ninth Amendments to the United States Constitution.

COUNT VI.

(DISCRIMINATION IN EMPLOYMENT)

78. Plaintiff incorporates and alleges by reference the allegations of paragraphs 1 through 58 above.

79. The revocation of plaintiff's security clearance and access to classified information by NGA was based solely on plaintiff's wife's religion, Islam, her constitutionally protected speech, and her association with, and employment by, an Islamic faith-based organization.

80. The actions by NGA in revoking plaintiff's security clearance and access to classified information based on plaintiff's wife's religion, Islam, her constitutionally protected speech, and her association with, and employment by, an Islamic faith-based organization was an unreasonable classification in violation of plaintiff's right to the equal protection of the law under the First, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution.

WHEREFORE, plaintiff prays: (1) that the decision of the NGA revoking plaintiff's security clearance and access be reversed; (2) that NGA be ordered to

reinstate plaintiff's Top Secret security clearance and reinstate plaintiff to the position he held at the time he was terminated; (3) that plaintiff be awarded back pay and benefits from the time the Agency stopped paying him; and (4) that plaintiff be awarded his attorney's fees and costs.

PLAINTIFF REQUESTS A TRIAL BY JURY OF ALL ISSUES SO TRIABLE.

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