IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CASE NO. 07-3271

Dr. WAGIH H. MAKKY,
Plaintiff-Appellant

v.

MICHAEL CHERTOFF, Secretary of the Department of Homeland Security; KIP HAWLEY, Director, Transportation Security Administration, in his official capacity; DEPARTMENT OF HOMELAND SECURITY; and TRANSPORTATION SECURITY ADMINISTRATION,
Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF FOR APPELLANT
AND JOINT APPENDIX VOLUME I, PAGES 1-66

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Dr. Wagih Makky respectfully requests oral argument.

STATEMENT OF JURISDICTION

The district court had jurisdiction to review the Merit Systems Protection Board's ruling regarding Dr. Makky's claims because he filed a "mixed case," i.e., one containing allegations of both employment discrimination under Title VII of the 1964 Civil Rights Act and procedural violations under the Civil Service Reform Act. 5 U.S.C. § 7703(b)(2); *Butler v. West*, 164 F.3d 634 (D.C. Cir. 1999) (outlining judicial review framework); *Discenza v. England*, 2007 WL 150477, at *6 (D.N.J. Jan. 17, 2007).

Following the district court's final decision disposing of all of Dr. Makky's claims, Dr. Makky timely filed a notice of appeal on July 27, 2007. Under 28 U.S.C. § 1291, this court has appellate jurisdiction over the district court's final judgment.

STATEMENT OF ISSUES

1. Under Supreme Court and Third Circuit precedent, courts cannot review the merits of the executive branch's security clearance determination, but they can adjudicate employment claims that do not challenge the validity of a security clearance determination. Plaintiff alleges that the government suspended him for independent discriminatory reasons while a final decision regarding his clearance was pending. Thus, did the district court err in dismissing Plaintiff's Title VII claim, even though the Plaintiff can prove, and the government can defend, the Title VII claim under a mixed-motives theory without court review of the merits of the clearance determination? *See* Jt. App'x, Vol. I ("JA(I)") 32-38 (district court opinion).

2. Did the district court err in ruling, JA(I) 35, that it could not consider circumstantial evidence in support of Plaintiff's Title VII claim, despite the Supreme Court's ruling to the contrary in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003)?

3. Did the district court err in failing to assume the truth of Plaintiff's allegations in support of his employment discrimination claim, and in assuming the truth of the government's factual defense to that claim, in evaluating the government's motion to dismiss? *See* JA(I) 36-38.

4. Transportation Security Administration regulations require that an employee being suspended receive notice of the reasons for the suspension and a description of the evidence supporting them. This type of notification requirement has, under governing law, been held to mean that an employee suspended before an adverse security clearance determination is final must be given enough information to permit him to make a meaningful reply to the charges against him. Thus, did the district court err in holding, JA(I) 46-50, that the agency complied with its notification requirement when it told Plaintiff it was suspending him because of his "associations with foreign nationals," without providing any more specific information?

STATEMENT OF RELATED CASES AND PROCEEDINGS

There are no active cases or pending proceedings related to this case.

STANDARD OF REVIEW

The district court granted the government's motion to dismiss Plaintiff's Title VII claim, a ruling this Court reviews de novo. *Pa. Employees Benefit Trust Fund v. Zeneca, Inc.*, 499 F.3d 239, 242 (3d Cir. 2007). In this case, Plaintiff's Title VII claim depends entirely on facts alleged in the Complaint. "When ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual

allegations contained in the complaint." *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007).

The district court granted the government summary judgment on Plaintiff's petition for review of the decision of the Merit Systems Protection Board ("MSPB"). Orders granting summary judgment are reviewed *de novo*, using the same standard applicable in the district court. *Saldana v. Kmart Corp.*, 260 F.3d 228, 231 (3d Cir. 2001). A decision by the MSPB shall be set aside if it is not in accordance with law. 5 U.S.C. § 7703(c)(1).[1] The MSPB, in turn, reviews agency personnel decisions and may not sustain a challenged decision if it involved harmful error in the application of the agency's procedure. 5 U.S.C. § 7701(c)(2)(A). Here, as before the district court, Plaintiff claims that the MSPB committed an error of law in concluding that the agency properly applied its own regulations. Issues of law are reviewed de novo. *Ilchuk v. Att'y Gen.*, 434 F.3d 618, 621 (3d Cir. 2006).

STATEMENT OF THE CASE

On September 7, 2005, Dr. Makky was indefinitely suspended from his employment with the Transportation Security Administration ("TSA"). *See* JA(I) 28. Dr. Makky timely appealed his suspension to the Merit Systems Protection

[1] Despite statutory language suggesting this standard applies only to cases in the Federal Circuit, the district court held it applies to this case as well, *see* JA(I) 29-31, and Plaintiff does not appeal that holding.

Board ("MSPB"). On April 4, 2006, an administrative judge ("AJ") affirmed the TSA's action against Dr. Makky. *Id.* at 8-18. The MSPB denied Dr. Makky's petition for full board review and adopted the AJ's decision as the final decision of the Board on August 16, 2006. *Id.* at 19-22.

On September 14, 2006, Dr. Makky filed this case in the District of New Jersey because his place of employment and a substantial part of the event from which his administrative claims arise was Atlantic City, New Jersey. *See* 28 U.S.C. 1931(c). Dr. Makky's complaint raised Title VII and other federal claims, and petitioning for review of the MSPB's decision regarding Dr. Makky's procedural claims under the Civil Service Reform Act ("CSRA"). JA(I) at 29. On May 31, 2007, the district court granted the government's motion to dismiss the Title VII and due process claims and granted the government's motion for summary judgment as to the remainder of Dr. Makky's claims. *Id.* at 23-65. Claiming error as to the dismissal of the Title VII claim and the grant of summary judgment regarding the CSRA claim that the agency provided inadequate notice before suspending him, Dr. Makky timely appealed to this Court on July 27, 2007. *Id.* at 66.

STATEMENT OF FACTS

Dr. Makky seeks redress for injuries resulting from his unlawful termination by a supervisor who, motivated by hostility toward Dr. Makky's Arab heritage and

Muslim faith, forced Dr. Makky out of the civil service after more than a decade of faithful service to the the United States. *See* Jt. App'x, Vol. II ("JA(II)"), 68-70 (Complaint).

Dr. Makky is an Egyptian immigrant who came to the United States 30 years ago, married, became a naturalized citizen, and rose to prominence as a researcher, university professor and technical expert in the field of aviation security. JA(II) at 68. After the deadly bombing of a Pan American Airways airliner over Lockerbie, Scotland, the U.S. government asked Dr. Makky to create a special unit within the Federal Aviation Administration ("FAA") to prevent terrorist attacks on American passenger jets. *Id.* The FAA later became part of the TSA. For thirteen years, Dr. Makky worked to protect Americans from terrorist attacks. His job was to develop technology to detect and prevent explosives from being detonated aboard commercial planes and passenger trains. Dr. Makky is a world-renowned expert in this field, having contributed to the design of major international research and development projects on explosives detection, chaired national and international symposia, and authored numerous scientific papers. *See id.* at 73-75. Dr. Makky was granted "secret" level security clearance in 1987, while working for the Naval Oceans Systems Center, and was again granted "secret" clearance in 1990 when he began his employment with the FAA. *Id.* at 74. In 1996, without apparent incident

or question, Dr. Makky's security clearance was renewed and upgraded to "top secret." *Id.* at 76.

As the only Muslim and the only person of Arab descent in his division, Dr. Makky had long been treated differently at his job, despite his excellent performance record. He was told by the person who hired him that it had been a mistake to hire an Arab; another supervisor once commented that "Muslims have no brains." *Id.*

In 2002, Dr. Makky came under the supervision of Robin Burke. *Id.* at 77. Although Dr. Makky had faced increasing prejudice and hostility at his job since September 11, 2001 due to his background, the arrival of Burke marked the beginning of a campaign singling him out for adverse action. The very first time Burke met Dr. Makky, he questioned Dr. Makky about his Arab ethnic background. Burke met individually with no other non-supervisory employee, and only asked Dr. Makky questions about his national origin. *Id.* at 77-78.

In March 2002, Dr. Makky submitted a routine application for the renewal of his security clearance. *Id.* A representative from the Office of Personnel Management met with Dr. Makky regarding his application the following year, after Dr. Makky had come under Burke's supervision. *Id.* at 76. At that meeting, Dr. Makky noticed that the date on his application had been altered from March

13, 2002, to November 20, 2002. Dr. Makky notified Burke that someone may have tampered with his application, but Burke refused to investigate. *Id.* at 77-78.

On the day the United States invaded Iraq in March 2003, Burke placed Dr. Makky on administrative leave and specifically instructed him not to come to work. *Id.* at 79. That day effectively marked the end of Dr. Makky's distinguished career as a security expert for the U.S. government.

Dr. Makky initially received no explanation for the sudden suspension; he had not been apprised of any change in his security clearance status and had been awaiting the processing of his renewal application when Burke suddenly placed him on leave. *Id.* at 77-78. A week later, Dr. Makky received a letter from Burke stating cryptically that he had been placed on administrative leave "as a result of questions concerning [his] security clearance." *Id.* at 79. Dr. Makky later learned that Burke, despite having no official role in the security clearance process, had somehow improperly obtained an FBI investigative file regarding Dr. Makky. *Id.* at 78. Burke did not obtain such files for any other employees in Dr. Makky's lab. *Id.* at 79. Remarkably, instead of forwarding Dr. Makky's FBI file to the Office of Transportation Vetting and Credentialing ("OTVC"), the entity with authority over security clearances, Burke kept the FBI file on Dr. Makky in his personal safe. *Id.*

Even though he had no authority over security clearances, Burke continued to take an active interest in Dr. Makky's application for renewal of his security

clearance. Burke insisted that Dr. Makky complete a second clearance application and threatened to fire him if he did not. He ordered Dr. Makky's work computer searched for evidence of use for non-official purposes; none was found. He demanded regular updates from other agency officials regarding the status of Dr. Makky's clearance renewal. *Id.* at 80.

In January 2005, the agency notified Dr. Makky that his security clearance was being suspended preliminarily pending further review. *Id.* at 115-17 (Notice of Intitial Determination to Deny Clearance). The notice cited several security concerns, including concerns about Dr. Makky's foreign relatives and associates. *Id.* However, Dr. Makky had qualified for security clearance for fifteen years without incident, and had filed truthful applications for clearance as required, with no material changes over the years. *Id.* at 77 (Complaint). Whatever foreign relatives and associates Dr. Makky had, they had not prevented him from qualifying for security clearance until after Burke took an interest in him. *See id.*

In August 2005, after learning that several dozen employees were set to be transferred out of Burke's authority within the next two months, Burke began proceedings to remove Dr. Makky from employment. *See id.* at 81-82. On August 8, 2005, at Burke's direction, Dr. Makky was given a Notice of Proposed Suspension for an Indefinite Period; this notice cited as justification the revocation of Dr. Makky's security clearance, even though the review process for the

clearance was still ongoing and Dr. Makky was in the midst of appealing the initial determination. *See id.* at 81-82 (Complaint); *cf. id.* at 125 (notice). Despite the fact that Dr. Makky's clearance revocation was not yet final, and despite the fact that at least one other employee had been reassigned to another job within the agency after a security clearance revocation, Burke decided on September 7, 2005 to suspend Dr. Makky indefinitely without pay. *See id.* at 83-84 (Complaint). Agency regulations require that any proposed suspension be approved by a supervisor higher in the chain of the employee's command than the supervisor who proposed the suspension. *See id.* at 82. In clear violation of these regulations, Burke had not only drafted the Notice of Proposed Suspension and directed that it be issued to Dr. Makky, but also approved the suspension without referring the matter to a supervisor higher in the chain of command. *Id.*

Dr. Makky continued to pursue his administrative appeals, and on March 7, 2006, the TSA issued its Final Denial of Security Clearance to Dr. Makky. *Id.* at 84. In its notice of this decision to Dr. Makky, the agency stated that Dr. Makky had successfully mitigated all concerns about his security clearance except one: concerns about his foreign relatives and associates, whose identities were not disclosed. *Id.* (Complaint); *cf. id.* at 119-22 (notice). The agency stated that its concerns about Dr. Makky's foreign contacts stemmed from information contained in his FBI investigative report. *See id.* at 121.

Dr. Makky previously had requested information from his background file, including his FBI file, as part of the administrative appeals process. *Id.* at 81. A heavily redacted portion of the FBI file was released to Dr. Makky on August 18, 2005. *See id.* at 155. These released portions, which constituted only four pages of a ten-page report, failed to indicate the names of any of Dr. Makky's foreign relations and associates. *See id.* at 158-61. Thus, the portions released to Dr. Makky were of little assistance in mitigating the TSA's concerns about his foreign relations associations.

With no viable way of addressing concerns about foreign contacts whose identities he did not know and could not infer from the information available to him, the remaining administrative appeals available to Dr. Makky proved to be pro forma. *See id.* at 84-88. The AJ's decision affirmed his suspension on April 4, 2006. *See* JA(I) 8. The MSPB's affirmance followed on August 15, 2006. *See id.* at 19. Dr. Makky's final appeal of his security clearance revocation was denied on August 18, 2006. *See* JA(II) 124.

On January 5, 2007, sixteen months after Dr. Makky was suspended without pay and almost two years after Dr. Makky requested his FBI file under the Freedom of Information Act, the FBI provided him with additional portions of the file. *See id.* at 163. Included in these additional portions were the names of several of Dr. Makky's foreign relations and associates – five individuals, one

company, and one other organization. Compare *id.* at 170-73 (pages 7-10 of the file, Jan. 5, 2007 release) *with id.* at 160-61 (pages 7 and 10 of the file, Aug. 18, 2005 release; pages 8-9 withheld). Thus, critical information from the FBI file that was the ostensible basis for the effective termination of his employment – and that was not classified and thus did not need to be shielded from Dr. Makky – was not released until more than a year after that termination had taken effect and not until Dr. Makky's administrative appeals had been exhausted.

Dr. Makky was the victim of employment discrimination, and was needlessly denied access to information that he could have used to defend himself and his livelihood. He has suffered financial and emotional hardship as a result of his discriminatory treatment at the hands of Burke and the agency, and as a result of the government's denial of procedural rights to which he was entitled. He and his wife had to put their house up for sale, he lost his health insurance, and he has faced difficulty finding employment in his field. *Id*. at 84-85.

SUMMARY OF ARGUMENT

This case involves claims that the TSA discriminated against and violated the procedural rights of one of its employees, Dr. Makky, in suspending him from his job on the basis of his national origin and religion, without adequate notice of the reasons for the suspension. This case does *not* raise the question whether the ultimate revocation of Dr. Makky's security clearance, or any of the preliminary

determinations leading up to that action, was correct. The district court's misconception that Dr. Makky was trying to challenge the validity of the security clearance decision forms the central basis from which many of the district court's other errors developed.

Specifically, the district court made three errors of law in dismissing Dr. Makky's Title VII claim. First, the court's overly broad interpretation of the Supreme Court's decision in *Department of the Navy v. Egan*, 484 U.S. 518 (1988), does not comport with this Court's decision in *Stehney v. Perry*, 101 F.3d 925 (3d Cir. 1996). *Egan* holds that the merits of a security clearance determination are unreviewable, but in *Stehney* this Court made clear that the *Egan* bar does not extend to challenges to other employment actions made during the same time frame as a security clearance review.

The court's second and related error was its misreading of Title VII law to conclude that Dr. Makky's attack on his suspension necessarily implicated the correctness of the distinct decision not to renew his security clearance. The district court held that it was necessary to examine Plaintiff's alleged discriminatory reasons *and* the government's proffered non-discriminatory reasons for the adverse employment action to determine whether discriminatory animus was the motivating factor. *See* JA(I) 36. Under the mixed-motives theory of employment discrimination, however, a plaintiff need only prove that discrimination was *a*

reason for the action against him, not that discrimination was the *only* reason or that the employer's proffered reason was pretextual. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). Contrary to the district court's understanding, then, the mixed-motives theory permits Dr. Makky to prove – and the government to defend – the discrimination claim without ever asking the court to review the merits of the security clearance decision. The district court also erroneously held that Dr. Makky was limited to the use of direct evidence to prove his Title VII claim despite the Supreme Court's unanimous hold that circumstantial as well as direct evidence may be used. *See Desert Palace*, 539 U.S. at 101-02.

Third, the district court, instead of taking the allegations in the Complaint to be true, evaluated evidence proffered by the Defendants and used this evidence to discredit Dr. Makky's allegations. Rule 12 dismissal procedures, of course, require a plaintiff's allegations to be assumed as true, and forbid courts from evaluating the factual sufficiency of the pleadings on a Rule 12 motion. *E.g.*, *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). The district court failed to heed either of these well-established rules.

Regarding Dr. Makky's claim that the TSA provided inadequate notice of the reasons for his suspension, the district court misapplied the governing body of law in granting summary judgment. The Federal Circuit, whose decisions are binding on the agency charged with reviewing personnel decisions and, as such,

provide the governing law in this case, has extensively considered a statutory notice provision materially indistinguishable from TSA's regulation at issue here. The Federal Circuit concluded that this type of notification provision, as applied to an employee suspended while a security clearance review is pending, requires that the employee be provided with enough notice so that he can meaningfully respond to the underlying security concerns. *Cheney v. Dep't of Justice*, 479 F.3d 1343, 1350 (Fed. Cir. 2007); *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996). Applying the correct legal standard, this Court should hold that the notice provided to Dr. Makky was inadequate as a matter of law.

Finally, the district court held in the alternative that any notification error was harmless. However, because the MSPB made no finding on that issue, the proper course under Supreme Court precedent is to remand to the agency so it may determine the question in the first instance. *INS v. Ventura*, 537 U.S. 12 (2002) (per curiam). Furthermore, even in reaching the question of the harmfulness of the error, the district court applied the wrong legal standard, asking whether the additional information likely *would* have changed the outcome rather than whether the agency's decision *might* have been different but for the error. *See Mercer v. Dep't of Health & Human Servs.*, 772 F.2d 856, 859 (Fed. Cir. 1985).

ARGUMENT

I. BECAUSE DR. MAKKY STATED A VALID CLAIM FOR RELIEF UNDER A MIXED-MOTIVES THEORY OF DISCRIMINATION THAT DID NOT CHALLENGE THE MERITS OF HIS SECURITY CLEARANCE DETERMINATION, THE DISTRICT COURT ERRED IN DISMISSING HIS TITLE VII CLAIM.

In dismissing Plaintiff's Title VII claim, the district court committed three errors of law. First, the court erred in overextending the doctrine of *Department of the Navy v. Egan*, 484 U.S. 518 (1988), in contravention of this Court's decision in *Stehney v. Perry,* 101 F.3d 925 (3d Cir. 1996). As alleged in the Complaint, TSA supervisor Robin Burke suspended Dr. Makky without pay on account of Dr. Makky's national origin and religion, in violation of Title VII of the Civil Rights Act of 1964. Although proceedings surrounding his security clearance had been commenced at the time of Burke's actions, Dr. Makky's allegations nevertheless clearly state a Title VII claim that does not in any way depend on an analysis of whether the ultimate suspension or revocation of his security clearance was proper.

This is the key point that the district court's analysis fails to acknowledge: Dr. Makky does not challenge the underlying validity of his security clearance revocation; he challenges a separate decision to suspend him without pay, independently motivated by discriminatory animus. While the former challenge would be foreclosed by *Egan*, the second is clearly not. Nevertheless, the district court improperly created a dangerous blanket rule that would foreclose Title VII

(or related) challenges to discriminatory employer conduct any time an agency is simultaneously in the process of making a security clearance decision. Such a rule is expressly contrary to this Court's decision in *Stehney*, 101 F.3d at 932.

Second, the court misapplied the "mixed-motives" theory for Title VII employment discrimination alleged by Dr. Makky. Under a mixed-motives analysis, the defendant is liable under Title VII if a plaintiff demonstrates that discrimination was *a* reason for an adverse employment action; a plaintiff need not demonstrate that the defendant's proffered reason is pretextual. *See Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). Thus the district court's conclusion that it had to inquire into the government's proffered non-discriminatory reason – the security clearance revocation – was incorrect. Dismissal was wholly inappropriate because Dr. Makky made ample allegations that would support a determination that discrimination was a reason – even if not the only or ultimate reason – for his termination. Furthermore, the Supreme Court has unanimously held that, in considering whether a discriminatory motivation is present, a trier of fact may look to direct *or* circumstantial evidence. *Id.* at 101-02. The district court ignored the Supreme Court's instruction and concluded that the inquiry must be limited to direct evidence alone.

Finally, in dismissing the complaint, the district court failed to assume the truth of Dr. Makky's allegations, as it was clearly required to do under Federal

Rule of Civil Procedure 12(b). Indeed, the district court actually reversed the applicable presumptions in evaluating a motion to dismiss, by assuming as true facts *proffered by Defendants* and then using those facts to discredit allegations in the Complaint.

This case neither presents nor suggests any judicial right to review the merits of a security clearance determination made by the executive branch; rather, this case presents serious allegations of employment discrimination based on religion and national origin. The district court's decision creates a safe haven for discrimination, under which an employer can discriminate based on any forbidden ground without legal repercussion whenever an employee's security clearance is under consideration. This Court should reverse the dismissal of the discrimination claim and apply the proper mixed-motives test to prevent legally-sanctioned employment discrimination and vindicate the values of Title VII.

A. The District Court Erred in Interpreting *Department Of The Navy v. Egan* More Broadly Than Permitted by This Court's Decision in *Stehney v. Perry*.

In *Department of the Navy v. Egan*, 484 U.S. 518 (1988), the Supreme Court held that the merits of a security clearance decision were unreviewable.[2] The district court's interpretation of *Egan* here was overly broad, however, effectively

[2] *Egan* addressed agency review of security clearance decisions; lower courts have extended *Egan* to bar federal court review of security clearance decisions as well. *See, e.g., Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996); *Brazil v. Dep't of Navy*, 66 F.3d 193, 197 (9th Cir. 1995).

eliminating any recourse for government employees whose clearances are under review but who independently suffer unlawful discrimination. Specifically, the district court's interpretation conflicts with the Third Circuit's decision in *Stehney v. Perry*, 101 F. 3d 925, 932 (3d Cir. 1996), a case appropriately constraining *Egan* to its underlying rationale. This Court should reverse the district court's dismissal because under this Court's sensible reading of *Egan*, while a court may not take jurisdiction to review the merits of a security clearance decision, the mere presence of such a decision does not prohibit the court from reviewing claims that are independent of that decision.

Dr. Makky's allegations of employment discrimination are independent of the security clearance determination. For example, in his Complaint he alleged that upon supervisor Robin Burke's initial visit to Dr. Makky's lab, Burke took an unusual interest in Dr. Makky's race and ethnicity. JA(II) 77-78. Thereafter, Burke undertook a number of improper actions to ensure Dr. Makky's termination, including the procurement of Dr. Makky's FBI investigative file (even though Burke had no official role in the security clearance process and did not obtain files for any of his other employees); the procurement of a non-final version of a preliminary determination regarding Dr. Makky's clearance; the failure (in violation of agency regulations) to provide Dr. Makky with sufficient information to contest his proposed suspension; and the approval of a suspension that he

himself had ordered proposed (also in violation of agency regulations). *Id.* at 78-83. Finally, Dr. Makky alleges that Burke failed to offer him employment opportunities that did not require a security clearance even though this had been done for another employee. *Id.* at 83-84. Dr. Makky's allegations state a claim for employment discrimination independent of the correctness of the security clearance determination, which Dr. Makky does not contest.

The district court simply ignored the independent relevance of Dr. Makky's allegations of discrimination by Burke and concluded that the adjudication of their validity was foreclosed by *Egan* because the court "cannot review the propriety of the non-discriminatory reason for the action, i.e., the revocation of Dr. Makky's security clearance." JA(I) 38. This conclusion fails to recognize that Burke's actions on behalf of the TSA concerning an employee he supervises are separate from those of the OTVC in granting or denying that employee's security clearance. *Egan* protects the executive's prerogatives as to the latter, but *Egan* says nothing about the reviewability of the former. Traditionally, employment decisions like Burke's – whether or not they are made during the pendency of a security clearance review – are reviewable by the judicial branch under Title VII. Extending *Egan* to preclude review of traditional employment decisions would grant the federal government license to discriminate at will whenever an

employee's security clearance is under review – a situation unacceptable under the anti-discrimination policy of Title VII.

Fortunately, under this Court's precedent, this is not the law. In *Stehney*, the NSA fired a mathematician who refused to take a polygraph test, and she sued, alleging equal protection and due process violations, among other claims. 101 F.3d at 929. The district court dismissed the claims under *Egan*. The Third Circuit reversed the district court's categorical application of *Egan*. This Court explained: "If Stehney had asked for review of the merits of an executive branch decision to grant or revoke a security clearance, we would agree. But not all claims arising from security clearance revocations violate separation of powers or involve political questions." *Id.* at 932; *see also Webster v. Doe*, 486 U.S. 592, 603-04 (1988) (holding that colorable constitutional claims arising from security clearance revocations are reviewable); *Nat'l Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 289-90 (D.C. Cir. 1993) (declining to "stretch" *Egan* to preclude review of the methods used in security clearance evaluation); *Dubbs v. CIA*, 866 F.2d 1114, 1119-20 (9th Cir. 1989) (finding jurisdiction to review blanket CIA policy of denying security clearance to homosexuals). The Third Circuit affirmed that *Egan* prohibited judicial second-guessing of the merits of a security clearance determination, but the court made the critical distinction between claims regarding the *merits* of a security clearance decisions and separate claims arising from the

clearance revocation process. *Stehney*, 101 F.3d at 932. Consequently, the Third Circuit took jurisdiction to review the merits of Stehney's claims for due process, equal protection, and state law employment violations, as separate claims arising from the clearance revocation process but not precluded by *Egan*.

Stehney controls the present case. Dr. Makky does not challenge the merits of the security clearance decision. Rather, Dr. Makky claims that the TSA, through Robin Burke, unlawfully discriminated against him during the pendency of the security review and after the OTVC made an initial determination that the clearance should not be renewed. Like Stehney, Dr. Makky sought judicial review of a colorable claim separate from the denial of the security clearance itself. Dr. Makky alleges that after OTVC's initial determination, Mr. Burke could have taken other action, for example transferring Dr. Makky to a different job, or waiting until the clearance determination became final. *See* JA(II) 82, 83-84. Dr. Makky alleges that Burke's choice to suspend him instead was motivated by Dr. Makky's religion and national origin, a claim that does not implicate the security clearance determination. Even assuming that the security clearance determinations were correct (as this Court must under *Egan*), Dr. Makky presents a viable claim.[3]

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[3] The district court supported its extension of *Egan* by relying upon *Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996), but that case is distinguishable. In *Becerra*, the plaintiff challenged the motives behind the *instigation* of a security clearance review. The Fourth Circuit held that the decision to initiate a security clearance determination was not reviewable because it is indistinguishable from the merits of

B. The District Court Misapplied the Mixed-Motive Analysis by Conflating it With a Pretext Analysis and by Adopting an Evidentiary Standard the Supreme Court Has Rejected.

In dismissing Dr. Makky's discrimination claim, the district court misapplied the Title VII mixed-motives test in two important respects. First, the district court erroneously assumed that Dr. Makky's case could not proceed because the court could not inquire into the validity of all of the government's proffered non-discriminatory reasons for the suspension. This is incorrect: under the mixed-motives analysis, what a plaintiff must prove is that discrimination was a part of the reason for the employer's decision, not that the employer's proffered reasons are pretextual. Nor does the partial affirmative defense available to the government – that it would have taken the same action anyway – require the government to prove the validity of its non-discriminatory reasons. Even assuming the validity of the security clearance determination, Dr. Makky can prove – and the government can defend – the Title VII claim under the mixed-motives theory.

Second, the court erred in adopting the "direct evidence" requirement, which the Supreme Court has unanimously repudiated in the mixed-motives context.

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the determination in terms of the need for deference to sensitive executive judgments. *Id.* at 149. Here, by contrast, Dr. Makky does not challenge the decision to initiate the clearance renewal process; he challenges the separate decision, by a different decisionmaker, to suspend him without pay while the clearance review was ongoing. The district court erred in failing to distinguish these two separate decisions as this Court did in *Stehney*.

Accordingly, this Court should reverse the dismissal of Dr. Makky's Title VII claims

1. The District Court Erroneously Concluded That Under a Mixed Motives Theory Plaintiff Must Demonstrate That the Defendants' Proffered Non-Discriminatory Reason Was Pretextual.

Title VII of the Civil Rights Act of 1964, as amended, prohibits government discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-16. Since the enactment of statutory protections against employment discrimination, the judicial and legislative branches have created two ways of carrying out Congress' intent: the "pretext" and the "mixed-motives" theories of employment discrimination. Under the pretext analysis, (1) the employee alleges discrimination, (2) the employer proffers valid reasons for the adverse action, and then (3) the plaintiff must demonstrate that the proffered reasons are in fact a pretext for discrimination. *McDonnell Douglas v. Green*, 411 U.S. 792, 805 (1973). Under this test, a court must examine the merits of the employer's proffered reasons to decide whether unlawful discrimination occurred. And, under this pretext theory, a court could properly dismiss a Title VII complaint where the defendant's proffered non-discriminatory reason was the revocation of a security clearance because the court would be foreclosed by *Egan* from ascertaining whether the revocation was correct or pretextual. *See, e.g., Ryan v. Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999).

However, after decades of experience with employment discrimination claims, lawmakers and judges realized that illegal discrimination could not always be detected through a search for pretext, because discriminatory motives often infect an employment decision even where valid, non-pretextual reasons for the decision also exist. *See, e.g., Price Waterhouse v. Hopkins*, 490 U.S. 228, 247 (1989) (plurality opinion) ("Where a decision was the product of a mixture of legitimate and illegitimate motives . . . it simply makes no sense to ask whether the legitimate reason was the true reason for the decision . . . ." (citation and internal quotation marks omitted)); *id.* at 260 (1989) (White, J., concurring in judgment) ("In mixed-motives cases, however, there is no one "true" motive behind the decision. Instead, the decision is a result of multiple factors . . . ."). Therefore, in *Price Waterhouse v. Hopkins* the Supreme Court adopted the "mixed-motives" analysis, subsequently codified and expanded by Congress in the Civil Rights Act of 1991, to protect victims of this type of decision as well as decisions motivated purely by discriminatory animus. Under the mixed-motives framework, the plaintiff must show, either through direct or circumstantial evidence, *Desert Palace*, 539 U.S. at 101, that a forbidden characteristic "played a motivating part in an employment decision," *Price Waterhouse*, 490 U.S. at 244 (plurality opinion). Once discrimination is shown, the defendant may partially defend by proving that "even if it had not taken [the forbidden characteristic] into account, it would have

come to the same decision." *Id.* at 242; *Desert Palace*, 539 U.S. at 94-95. This defense, even if completely successful, serves to limit the available remedies, but it does not serve to absolve liability as a matter of law. *Desert Palace,* 539 U.S. at 94-95; *Watson v. S.E. Penn. Transp. Auth.*, 207 F.3d 207, 216 (3d Cir. 2000); *see also Dominguez-Curry v. Nev. Transp. Dep't*, 424 F.3d 1027, 1041-42 (9th Cir. 2005). A plaintiff who has demonstrated that an impermissible consideration was *a* motivating factor is still entitled to "declaratory relief, certain types of injunctive relief, and attorney's fees and costs," even where, at trial, the employer completely proves his defense. *Desert Palace*, 539 U.S. at 94 (citing 42 U.S.C. § 2000e-5(g)(2)(B)).

The distinction between "pretext" and "mixed-motives" is critical in cases like Dr. Makky's, for while the pretext analysis requires judicial evaluation of the legitimacy of the employer's claimed reasons proffered by the employer for the employment action, the mixed-motives analysis does not. In *Watson v. Southeastern Pennsylvania Transporation Authority*, 207 F.3d 207, 219 (3d Cir. 2000) (Alito, J.), this Court cogently distinguished the mixed-motives inquiry from the pretext inquiry. Under the mixed-motives test, the primary inquiry for the Court concerned the existence of any discrimination, for the mixed-motives test "mandates liability in a set of cases . . . in which consideration of a protected trait was a motivating factor in the adverse employment action even though permissible

factors independently explain the outcome." *Id.* at 216. Under the mixed-motives analysis, then, the primary inquiry concerns the existence of any discrimination, not the validity of non-discriminatory reasons asserted by the government.

This is the key distinction that the district court failed to recognize. The court reasoned, "In undertaking mixed-motives analysis, the Court *must* look to the alleged non-discriminatory reason. . . . [T]he Court cannot conduct this analysis when the non-discriminatory reason proffered by the Defendants is that the Plaintiff is not qualified for the position because he cannot maintain the required security clearance." JA(I) 36 (emphasis added). Though *Egan* prevents the court from evaluating the merits of a security clearance decision, such an evaluation is – contrary to the district court's conclusion – not necessary in a mixed-motives analysis. Under a mixed-motives theory, Dr. Makky need only prove that discrimination was *a* motivation for his suspension. *Desert Palace*, 539 U.S. at 101; *Watson*, 207 F.3d at 216. Dr. Makky has amply alleged that it was, by citing numerous instances demonstrating Burke's unusual interest in his background and his subsequent singling out of Dr. Makky for adverse action. JA(I) 77-84; *see also supra* Part I.A. The validity of Dr. Makky's security clearance revocation is in no way inconsistent with Burke's having acted upon his own independent discriminatory hostility toward Dr. Makky. Thus, even if this Court assumes the

validity of the clearance revocation (as it should under *Egan*), Dr. Makky can make out his prima facie case, and dismissal is inappropriate.

Indeed, even when the government presents as its defense the security clearance revocation, the validity of that security clearance decision would not be at issue. As noted, once discrimination is shown, the burden shifts to the employer to show it would have taken the same action anyway. This partial defense to liability does not depend on a showing that all proffered non-discriminatory reasons are valid: a non-discriminatory reason – such as a security clearance revocation – can be a valid reason for taking an adverse action and yet an employer might fail to demonstrate that it would have taken the same action in the absence of discrimination.

For example, in this case, if Dr. Makky shows that Burke was motivated by discriminatory animus, the fact that the security clearance revocation was valid (as we must assume it was) is, in light of Plaintiff's allegations, neither necessary nor sufficient for the government to make out its defense: the government's showing that it would have suspended Dr. Makky anyway depends on its ability to prove that an employee in Dr. Makky's situation would have been suspended regardless of national origin or religion. Dr. Makky has specifically alleged the contrary, citing an example in which the government had previously moved another employee who lost her clearance to a post not requiring a security clearance.

JA(II) 83-84 ("[O]n at least one previous occasion, an employee who worked for Dr. Makky's agency and whose security clearance was *revoked* (not merely called into question) was reassigned to another division and even promoted."). Dr. Makky is entitled to have a jury – not a judge – decide whether this allegation of post-revocation discriminatory treatment, if proven, would demonstrate that the government would not have suspended him anyway. And, this factual determination does not in any way depend on the validity of the clearance determination.

Moreover, even if the government proves its defense at trial, this would only provide a basis for limiting available remedies, not for absolving liability. *See Desert Palace*, 539 U.S. at 94-95; *Watson*, 207 F.3d at 216. As such, dismissal as a matter of law was wholly inapprorpirate.

2. The District Court Erred in Applying the Direct Evidence Standard, Which Has Been Repudiated by the Supreme Court.

The district court also erred in adopting the "direct evidence" standard for proving discrimination in a mixed-motives test. *See* JA(I) 35 ("Under *Price Waterhouse*, when [a] plaintiff alleging unlawful termination presents 'direct evidence' that his [religion and national origin] was a substantial factor in the decision to fire him, the burden of persuasion . . . shifts . . . ."). In so doing, the Court relied on *Fakete v. Aetna, Inc*., 308 F.3d 335, 338 (3d Cir. 2002), whose standard regarding direct evidence is no longer good law. In *Desert Palace*, the

Supreme Court unanimously held that *direct or circumstantial* evidence may be utilized to prove. *Desert Palace*, 539 U.S. at 101-02. The district court clearly erred in adopting an evidentiary standard restricted to direct evidence, because circumstantial evidence is admissible under the proper mixed-motives standard articulated in *Desert Palace*, 539 U.S. at 101-02.

Dr. Makky alleged ample circumstantial evidence in support of his prima facie case, which must be assumed to be true at this stage, *see* Part I(c), *infra*, including the procedurally inappropriate actions Burke undertook to expedite Makky's suspension, *see* JA(II) 82-83, and that Burke was well aware of Dr. Makky's national origin and religion during the actions alleged. *Id.* Further, Dr. Makky alleged important circumstantial evidence that would contradict the government's defense that it would have taken the same action anyway. *See id.* at 83-84 (alleging that the TSA had previously reassigned a similarly-situated employee to a job not requiring a secuirty clearance). Thus, a proper evidentiary standard that allows the use of circumstantial evidence is critical to enable Dr. Makky to prove his case.

C. The District Court Erred By Failing to Assume the Truth of the Allegations Made in Plaintiff's Complaint.

The district court violated well-settled presumptions under Federal Rule of Civil Procedure 12 in granting the government's motion to dismiss Dr. Makky's Title VII claim. Not only did the district court fail to assume the truth of Plaintiff's

allegations, but it also affirmatively questioned the factual sufficiency of the allegations by relying on disputable evidence proffered by the government.

It is well-settled that allegations of a complaint must be assumed to be true and liberally construed in favor of the plaintiff for the purposes of evaluating a motion to dismiss. *See, e.g.*, *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969); *Gibson v. United States*, 457 F.2d 1391, 1393 (3d Cir. 1972). As such, Rule 12 "does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations." *Neitzke v. Williams*, 490 U.S. 319, 327 (1989). Additionally, as a general rule, when ruling on a motion to dismiss, a court may not consider matters extraneous to the pleadings. *See, e.g.*, *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

In the complaint, Dr. Makky alleged that his supervisor Robin Burke acted based on unlawful animus when he suspended Dr. Makky without pay pending a final determination regarding his security clearance. JA(II) 77-84. Dr. Makky alleged that Burke's actions were motivated by Dr. Makky's national origin and religion, in which Burke had taken an interest throughout his entire course of action against Dr. Makky. *Id* at 83. Dr. Makky also alleged that, had it not been for Burke's discriminatory animus, he might have taken a different action instead

of suspending Dr. Makky, such as reassigning him to another position, as had occurred in the case of another employee who had lost her clearance. *Id.* at 83-84.

The district court relied on a document called the "Whitford Memorandum" – put into the record by the government in support of its legally independent motion for summary judgment on non-Title VII claims – to discredit these allegations. *See* JA(I) 36-38 (opinion); *cf.* JA(II) 110-11 (Whitford Memorandum). The Memorandum's subject is the use of indefinite suspensions generally, but in providing examples of their proper use, the Memorandum states that "an indefinite suspension is appropriate where an employee's security clearance has been denied or revoked and the matter is pending further review or appeal." JA(II) 111. On the basis of this Memorandum, the district court concluded that the decision to suspend Dr. Makky was "permitted by internal directive, if not suggested or even required." JA(I) 36. The district court went on to use the Memorandum to reject a possible alternative action that Dr. Makky suggests Burke could have taken instead of suspending him: the court found the possibility "that Mr. Burke could have allowed him to remain on administrative leave pending a final determination by the Board[] is *discredited by the Memorandum . . . .*" *Id.* at 37-38 (emphasis added).[4]

[4] As to the possibility of transfer, the district court, ignoring the allegations in Dr. Makky's Complaint that this option had been exercised in the past, simply engaged in speculation about why the agency might not have wanted to transfer him. *See id.* at 38 n. 14 ("For example, because Dr. Makky lost his security

Thus, the district court, in violation of two fundamental tenets of Rule 12 motion practice, used factual evidence proffered by the defendants to discredit allegations in the Complaint.

Under a proper analysis, the court should have ignored matters extraneous to the pleadings and assumed all allegations in the complaint to be true. Applying this standard, the court should have assumed the truth of Dr. Makky's allegations that Burke's decision to suspend him was motivated by Dr. Makky's religion and national origin. JA(II) 77-84. The court also should have assumed that Burke could have transferred Dr. Makky instead of suspending him, as Dr. Makky alleged had been done on at least one occasion with a similarly-situated employee. *Id.* at 83-84.[5]

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clearance due to national security concerns, the agency may not have wanted Dr. Makky to work for the governmental entity in charge of national security . . . .").

[5] In using the Whitford Memorandum, the district court was perhaps trying to invoke an exception to the usual motion-to-dismiss standards: the court may, on a motion to dismiss, consider matters of public record or indisputably authentic documents when they are explicitly referenced in or attached to the complaint. *E.g., Pension Ben. Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993); *cf.* JA(I) 31 (citing *Mele v. Federal Reserve Bank of New York*, 359 F.3d 251, 255 n.5 (3d Cir. 2004), and *Sentinel Trust Co. v. Universal Bonding Ins. Co.*, 316 F.3d 213, 216 (3d Cir. 2003)). However, neither prong of this exception applies to the Whitford Memorandum: it was not even mentioned, let alone relied upon or attached to, Dr. Makky's Complaint, and a document purporting to be a memorandum from a government administrator is hardly the type of "public record or *other indisputably authentic* document[] underlying the plaintiff's claims," that this Court seemed to have in mind when it relied on a decision of the Tennessee Chancery Court. *See Sentinal Trust*, 316 F.3d at 216 (emphasis added).

Moreover, however persuasive the Whitford Memorandum might be before a jury or even at summary judgment, a pleading-stage dismissal based on untested evidence submitted by the defendants undermines the entire civil litigation process carefully laid out in the Federal Rules of Civil Procedure. For example, it might emerge through depositions that the Whitford Memorandum was not consistently applied, was superceded, or did not apply to employees in Dr. Makky's division. At this stage, endless speculation about the applicability or significance of the Memorandum is possible – which is precisely why the Federal Rules of Civil Procedure preclude a court from assuming it to be true before discovery has even commenced.

Dr. Makky alleged every element necessary to state a claim for discrimination under Title VII. The district court erroneously assumed plaintiff's allegations to be false, and the Whitford Memorandum to be applicable, current, and true. This inverted logic constituted plain error, and is an independent reason this Court should reverse the dismissal of Dr. Makky's Title VII claim.

II. BECAUSE TSA'S NOTICE OF THE REASONS FOR DR. MAKKY'S SUSPENSION WAS INADEQUATE UNDER GOVERNING FEDERAL CIRCUIT LAW, THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON DR. MAKKY'S CSRA NOTICE CLAIM.

Dr. Makky alleges that the TSA committed harmful procedural error in the application of its own regulations by denying him adequate notice of the

underlying reasons for his suspension. *See* JA(II) 90-91. Specifically, Dr. Makky has alleged that the TSA violated the notice provisions of TSA Management Directive ("MD") No. 1100.75-3, the TSA procedure that provides for the removal of employees for cause. JA(II) 90-91 (Complaint); *id.* at 102-03 (MD 1100.75-3 § 6(H)(3)(a)(1)).

In evaluating Dr. Makky's claim that the TSA violated MD 1100.75-3, the MSPB was bound to follow the Federal Circuit's rule on adequate notice, as set forth in *King v. Alston*, 75 F.3d 657, 661 (Fed. Cir. 1996), and its successor cases, *Cheney v. Department of Justice*, 479 F.3d 1343, 1350 (Fed. Cir. 2007), and *Robinson v. Department of Homeland Security*, 498 F.3d 1361, 1365 (Fed. Cir. 2007) (per curiam). *See, e.g., Schibik v. Dep't of Veterans Affairs*, 98 M.S.P.R. 591, 595 (2005) (Federal Circuit law binding on MSPB); *Fairall v. Veterans Admin.*, 33 M.S.P.R. 33, 39 (1987) (same), *aff'd*, 844 F.2d 775 (Fed. Cir. 1987).

In *Alston*, the Federal Circuit considered the extent and nature of the notice required when a federal agency suspends an employee's security clearance pending an investigation, and then, before the clearance revocation becomes final, suspends the employee without pay because of his clearance status. 75 F.3d at 661. Applying the notice requirements of 5 U.S.C. § 7513, which are materially indistinguishable from those applicable to TSA employees, such as Dr. Makky, under MD 1100.75-3, the Federal Circuit concluded that the agency must give the

employee notice of the reasons for the clearance suspension. *See id*. at 661-62. Furthermore, the notice must give the employee "adequate opportunity to make a meaningful reply." *Id*. at 662.

In its opinion below upholding the MSPB's affirmance[6] of Dr. Makky's removal from employment, the district court held that the TSA did not violate MD 1100.75-3 because the TSA's notice to Dr. Makky specifying the reasons for the suspension of his security clearance gave him adequate opportunity to make a meaningful response, *see* JA(I) 50, or, in the alternative, that the TSA did not commit harmful error in removing Dr. Makky from employment. *See id.* at 53. The district court's first conclusion is erroneous because it misapplied the Federal Circuit precedent that governed the MSPB's decision regarding the adequacy of the TSA's notice to Dr. Makky. The district court's second conclusion was both inappropriate and erroneous: because the MSPB never made a determination in the first instance as to whether the TSA's error was harmful, the district court erred in conducting a de novo harmful error analysis on its own, rather than remanding to the MSPB. Moreover, the district court itself applied a definition of harmful error that conflicts with the Federal Circuit standard.

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[6] Because the MSPB's decision was based on the AJ opinion, the district court reviewed this opinion in determining whether to uphold the MSPB. *See* JA(I) 44.

A. The District Court Misapplied Binding Federal Circuit Precedent in Concluding That Dr. Makky Was Adequately Informed of the Reasons for His Suspension.

In reaching the conclusion that the TSA gave Dr. Makky an adequate opportunity to make a meaningful response, the district court misapplied Federal Circuit precedent that was binding on the MSPB. That district court decision, involving an interpretation of law, is reviewed de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

1. Because Federal Circuit Precedent Is Binding on the MSPB, Federal Circuit Law Provides the Correct Standard for Determining Whether the TSA Provided Dr. Makky With Legally Sufficient Notice.

The correct standard for determining the adequacy of notice provided to federal employees who are removed for loss of security clearance was set forth by the Federal Circuit in *Alston* and related cases. *See Alston*, 75 F.3d at 661; *Cheney*, 479 F.3d at 1350; *Robinson*, 498 F.3d at 1365.

The Federal Circuit is the court of original jurisdiction for claims of procedural error under the CSRA, and thus is expert in this area of the law. *See* 5 U.S.C. § 7703(b) (Federal Circuit has exclusive jurisdiction over all petitions for review of MSPB decisions except those involving employment discrimination). Other courts have authority to hear petitions for review of MSPB decisions only in "mixed cases," such as the instant matter, that involve claims of employment discrimination in addition to claims of procedural error. *See* 5 U.S.C. §

7703(b)(2). Because the Federal Circuit is the primary appellate court in this field, specified by Congress as the exclusive venue for nearly all petitions for review regarding personnel claims, the MSPB is bound by and must apply Federal Circuit precedent. *E.g.*, *Schibik*, 98 M.S.P.R.at 595; *Fairall*, 33 M.S.P.R. at 39. Thus, a court reviewing an appeal from an MSPB decision – such as in this case – should ascertain whether the MSPB erred in its application of Federal Circuit law.

The Federal Circuit's rule from *Alston* and its progeny is applicable here because the notice provision applied in those cases, 5 U.S.C. § 7513, is materially indistinguishable from the notice provision of MD 1100.75-3, the procedure that Dr. Makky claims the TSA violated in removing him. The statute applied in *Alston* entitles an employee facing a proposal of adverse action with "advance written notice . . . stating the specific reasons for the proposed action." 5 U.S.C. § 7513. The TSA regulation at issue here provides that the process for initiating an adverse action "requires the issuance of a proposal" that includes "[t]he charge(s) and specification(s) for each charge and [a] descri[ption of] the evidence that supports the charge(s)," along with "a copy of the material relied upon to support each charge and specification . . . [or] an opportunity to review the material." JA(II) 102-03 (MD 1100.75-3 §§ 6(H)(3)(a)(1)(a) & (*i*)).

Although the two rules use different language, their import as to notice is substantially the same; indeed, to whatever extent they differ, MD 1100.75-3

provides greater procedural rights than § 7513. Both procedures require that, before adverse action is taken, the employee is entitled to notice. *Compare* 5 U.S.C. § 7513(b)(1) (requiring 30 days advance notice of proposed action), *with* JA(II) 102 (MD 1100.75-3 § 6(H)(3)(a) (requiring issuance of proposal of action)). Both procedures require the written proposals to set forth the specific reasons for which the employee's removal has been proposed. *Compare* 5 U.S.C. § 7513(b)(1) ("advance written notice . . . stating the specific reasons for the proposed action"), *with* JA(II) 102 (MD 1100.75-3 § 6(H)(3)(a)(1)(a) (proposal must include "[t]he charge(s) and specification(s) for each charge and [a] descri[ption of] the evidence that supports the charge(s)")).[7]

If anything, the notice requirements of MD 1100.75-3 are more comprehensive and require more detailed disclosures than 5 U.S.C. § 7513 does.

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[7] Although these aspects of the procedures are not at issue here, it is notable that the two rules also provide employees similar rights regarding the rest of the process of instituting adverse action. For example, both procedures require that the employee have the opportunity to respond orally and in writing. *Compare* 5 U.S.C. § 7513(b)(2) (employee must be given reasonable time, not less than seven days, to answer orally and in writing, and to provide documentary evidence), *with* JA(II) 102 (MD 1100.75-3 § 6(H)(3)(a)(1)(d) (employee has right to answer orally and in writing within seven days)). The employee then is entitled to written notice of the agency's final decision. *Compare* 5 U.S.C. § 7513(b)(4) (employee entitled to written decision), *with* JA(II) 102 (MD 1100.75-3 § 6(H)(3)(a) (procedure requires final written decision)). And the reasons for the final decision must be stated with specificity in the written decision. *Compare* 5 U.S.C. § 7513(b)(4) (written decision must include "the specific reasons therefor"), *with* JA(II) 104 (MD 1100.75-3 § 6(H)(3)(a)(4)(a) (final decision "must address each charge," and include the agency's "determination on each charge including the basis for the determination")).

Whereas § 7513 requires notification only of the "specific reasons" for the proposed adverse action, 5 U.S.C. § 7513(b)(1), the TSA regulation at issue here requires, in addition to the "specification(s) for each charge and [a] descri[ption of] the evidence that supports the charge(s)," JA(II) 102 (MD 1100.75-3 § 6(H)(3)(a)(1)(a)), that the employee "be provided with a copy of the material relied upon to support each charge and specification . . . [or] an opportunity to review the material," *id.* at 103 (MD 1100.75-3 § 6(H)(3)(a)(1)(*i*)). Under MD 1100.75-3, the proposal also must include the proposed penalty and a "discussion of any aggravating factors that were considered in determining the proposed penalty." JA(II) 102 (MD 1100.75-3, §§ 6(H)(3)(a)(1)(b)-(c)).

In sum, this Court should apply the law of the Federal Circuit set forth in *Alston* and its progeny because Federal Circuit law was the body of law the MSPB was required to, and did, apply, *see* JA(I) 11 (AJ's decision, citing *Alston*); *Schibik*, 98 M.S.P.R.at 595 (Federal Circuit law binding); *Fairall*, 33 M.S.P.R. at 39 (same), and because the notice requirements of 5 U.S.C. § 7513(b), applied in *Alston*, are materially indistinguishable from (or, in the alternative, less strict than) the notice requirements of MD 1100.75-3 applicable here.

2. The TSA's Notice of the Reasons for Dr. Makky's Suspension Was Inadequate Because the Agency Forced Him To Guess the Reasons for the Charges Against Him.

Although "no one has a 'right' to a security clearance," *Egan*, 484 U.S. at 528, government employees are "entitled to several procedural protections" related to a proposed suspension or removal, even where they cannot challenge the merits of the denial of their security clearance. *Id*. at 530. Thus, in cases where a federal agency seeks to remove an employee for cause due to suspension of the employee's security clearance, the MSPB has the authority to review whether procedural requirements were satisfied, even though the MSPB has no authority to review whether the decision to revoke clearance was correct on the merits. *Alston*, 75 F.3d at 661-62.

In *Alston*, the Federal Circuit held that where a federal agency suspends an employee's security clearance preliminarily pending an investigation, then acts to remove the employee for loss of security clearance before the clearance revocation is complete, the employee is entitled under 5 U.S.C. § 7513 to notice of the reasons for the clearance suspension. *See Alston*, 75 F.3d at 661-62; *see also Cheney*, 479 F.3d at 1352. " 'Merely providing the employee with information that his access to classified information is being suspended, without more, does not provide the employee with sufficient information to make an informed reply to the agency' before being suspended." *Cheney*, 479 F.3d at 1352 (quoting *Alston*, 75 F.3d at

662). The policy underlying this rule is that, when the suspension of security clearance is still preliminary, as it was in Dr. Makky's case, the employee still has a chance to argue in favor of retaining clearance and eliminating the government's cause for removal. *See Robinson*, 498 F.3d at 1369 (Plager, J., concurring).

In this case, the government removed Dr. Makky from employment and suspended his pay indefinitely while an investigation and decision on his security clearance were still pending.[8] The stated reason for his suspension was the status of his security clearance. JA(II) 125.[9] Therefore, under *Alston*, Dr. Makky was entitled to notice of the reasons for the suspension of his security clearance. 75 F.3d at 661-62.

The Federal Circuit held in *Alston* and its successor cases that the type of notice requirement provided by MD 1100.75-3 means the employee must receive notice sufficient to enable him "to make a meaningful reply to the agency before

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[8] The timeline was as follows: On January 18, 2005, the TSA issued Dr. Makky a "Notice of Initial Determination to Deny Clearance," an initial suspension of clearance to which Dr. Makky was permitted a reply. JA(II) 115. On August 8, 2005, the TSA issued notice of its proposal to place Dr. Makky on indefinite suspension. *Id.* at 125. On September 7, 2005, the TSA issued notice of its final decision to place Dr. Makky on indefinite suspension, effective the following day. *Id*. at 127. It was not until March 7, 2006 – six months after his suspension without pay – that the TSA issued notice of its final decision to revoke Dr. Makky's clearance. *Id.* at 118. Dr. Makky appealed, and his appeal was not denied until August 18, 2006. *Id.* at 124.

[9] The government's August 8, 2005, Notice of Proposed Indefinite Suspension refers to the "decision to revoke" Dr. Makky's security clearance. *See* JA(II) 125. However, at that point, Dr. Makky still had appeals remaining, and the revocation of his security clearance was not yet final. *See id.* at 118, 124.

being placed on enforced leave." *Id*. at 662; *see also Cheney*, 479 F.3d at 1352. The notice should be detailed enough so that the employee does not "have to guess" at the reasons for the actions against him. *Alston*, 75 F.3d at 662; *see also Cheney*, 479 F.3d at 1352.

Applying this standard in *Cheney*, the Federal Circuit found that the notice provided to a DEA agent facing suspension was inadequate because it failed to indicate "when the alleged conduct took place and what it involved." 479 F.3d at 1352. The notice provided by the federal agency in *Cheney* stated that the employee had "inappropriately queried" a law enforcement database. *Id*. The Federal Circuit found this notice to be intolerably vague because it was impossible for the employee to determine which database queries had caused the security concern; during his employment, the employee had had occasion to query the database on a regular basis. *Id*. at 1352-53. The court likened the notice to telling the employee "that his security clearance was being suspended for robbing a bank, without telling him where the bank was and when he had robbed it . . . ." *Id*. at 1353.

By contrast, in *Alston*, the notice to the employee stated that his security clearance was being suspended due to a "medical condition which requires further investigation." *Alston*, 75 F.3d at 659. Although the specific condition was not identified in the notice, the court held that it need not have been under the

circumstances; because the employee knew what his medical condition was, he was able to, and did, "meet with agency officials and offer[] medical evidence." *Id.* at 662. Thus the notice was adequate because the employee did not "have to guess" about the grounds for his suspension; the employee himself "d[id] not assert otherwise." *Id.*

Under *Alston* and *Cheney*, Dr. Makky did not receive adequate notice because what the agency told him did not enable him to meaningfully respond to the proposed suspension. The initial notice to Dr. Makky regarding the reasons for the suspension of his security clearance cited four concerns: his dual United States/Egyptian citizenship, foreign relatives and associates, foreign travel, and alleged misuse of information technology systems. *See* JA(II) 115-17. Dr. Makky successfully "mitigated" (i.e., rebutted) the concerns related to his citizenship, his travel, and computer usage. *See* JA(II) 119-22 (Final Denial of Clearance).

The only concern he could not mitigate was the one about which he was left guessing – his association with foreign nationals. *See id.* at 120. The initial notice to Dr. Makky stated only that Dr. Makky had "immediate family members [who] are foreign nationals," and that he had "failed to report, where required, associations with foreign nationals," but the notice did not provide any indication of which associations Dr. Makky had allegedly failed to report. *See id.* at 115-16. All Dr. Makky could submit in reply was that his two brothers were his only

relatives still living in Egypt. However, in denying Dr. Makky's clearance, the TSA cited not his two brothers but, rather, concerns about Dr. Makky's "association with foreign nationals" stemming from "information contained in a classified report from the Federal Bureau of Investigation." *Id.* Dr. Makky previously had requested information regarding his FBI file, *see id.* at 86 (Complaint), but by the time he was suspended, in September 2005, all Dr. Makky had received was a version of the FBI file that contained only four heavily redacted pages out of the ten pages in the file, and which contained no names. *See id.* at 158-61 (Aug. 18, 2005 release). Dr. Makky was completely at a loss to respond to charges about supposed associations with foreign nationals who had never been identified to him.

Subsequently, the FBI provided Dr. Makky with additional information from the file, including the names of some of Dr. Makky's foreign associates contained in the file. *See* JA(II) 170-73 (Jan. 5, 2007 release). However, this information was not released until long after Dr. Makky was suspended (in September 2005, *see* JA(II) 127), and even after the MSPB had affirmed Dr. Makky's indefinite suspension (in August 2006, *see* JA(I) 19).

Dr. Makky has alleged that, had he been given access to this information from his FBI file, he would have been better able to contest the TSA's vague allegations regarding his foreign associates. JA(II) 91 (Complaint). Without it, the

only reply Dr. Makky was able to make was to name his two brothers in Egypt. *See id.* at 119-20 (Final Denial of Clearance). Unlike the employee in *Alston*, who was able to counter charges about his medical condition with medical evidence, *see Alston*, 75 F.3d at 662, Dr. Makky could not directly address the TSA's concerns about the foreign associates in his FBI file with evidence about foreign associates in his FBI file. Instead, like the employee in *Cheney*, who had to guess which database queries were of concern to the government, *see Cheney*, 479 F.3d at 1352, Dr. Makky had to guess not only which foreign associates were named in his FBI file, but also which ones were of concern to the government. Therefore the notice Dr. Makky received was inadequate under TSA regulations and the law of the Federal Circuit.

3. In Concluding That Dr. Makky Received Adequate Notice, the District Court Misapplied Federal Circuit Law.

Instead of applying the complete and coherent body of Federal Circuit case law that was binding on the MSPB, the district court engaged in a selective application that was logically inconsistent and based on unsound distinctions. The district court's conclusion that *Alston* applies to Dr. Makky's case, *see* JA(I) 47 n.19, but *Cheney* does not, *see id.* at 49, is logically incongruous, because *Cheney* is an interpretation and application of the rule laid down in *Alston*. *See Cheney*, 479 F.3d at 1351-52. In fact, the chief reason the district court believed *Cheney* to be distinguishable – that it involved a statute the district court considered

distinguishable from the regulation at issue here, JA(I) 49 – would apply equally to *Alston*, which interpreted the same statute as *Cheney*. More fundamentally, the district court's conclusion that 5 U.S.C. § 7513, the notice procedures that were at stake in *Cheney*, required more detailed disclosures than the TSA's MD 1100.75-3, JA(I) 49, is not supported by a plain reading of these procedures. As demonstrated previously, the notice provisions of the two regulations entitle employees to essentially the same information; if anything, the regulation at issue here requires the government to provide *more* notice than the statute at issue in *Alston* and *Cheney*. *See supra* Part II.A.1.

The district court also decided not to follow *Cheney* because it believed *Cheney* conflicted with *Jamil v. Secretary, Department of Defense*, 910 F.2d 1203 (4th Cir. 1990). This is simply incorrect. In *Jamil*, the court held that an agency did not need to provide an employee with any reason for his termination beyond the bare fact of his failure to maintain a security clearance. 910 F.2d at 1208. However, in that case – unlike in *Alston*, *Cheney*, and Dr. Makky's case – the employee's security clearance had been *revoked*, not merely suspended in a preliminary fashion pending further review. *See id.* The agency in *Jamil* was able to rely on the completed revocation of clearance, which was an uncontestable fact, rather than relying, as in *Alston* and *Cheney*, on an initial suspension of clearance,

which was subject to appeal by the employee. *See Alston*, 75 F.3d at 661-62; *Cheney*, 479 F.3d at 1351-52.

Federal Circuit case law holds this distinction to be of critical importance to the type of notice an agency must provide. In *Robinson v. Department of Homeland Security*, 498 F.3d 1361 (Fed. Cir. 2007) (per curiam), the Federal Circuit held that once revocation of clearance was "a completed matter in which he fully participated," the employee was not entitled to any further process regarding his security clearance. *Id*. at 1365. *Jamil* is in accord with this holding. However, *Robinson* explicitly distinguished *Cheney* and *Alston* from the latter cases, where the employees were entitled to greater process because their security clearance determinations were not "a completed matter." *Robinson*, 498 F.3d at 1365.

Concurring in *Robinson*, Judge Plager elaborated on the rationale underlying the line between cases in which the security clearance has become final before the adverse employment action occurs (as in *Robinson* and *Jamil*) and cases in which the security clearance determination is still pending when the adverse employment action is taken (as in *Alston* and *Cheney*):

> The rationale is that there is still an ongoing investigative and adjudicative process regarding the security clearance in which the employee can participate. The employee should therefore have the opportunity to address the agency's concerns and allegations before being subjected to an adverse action – indefinite suspension of employment – based on the suspension, but not yet the revocation, of his security clearance.

Id. at 1469 (Plager, J., concurring).

In finding that the Fourth Circuit decision in *Jamil* conflicts with the Federal Circuit decision in *Cheney*, the district court found a circuit split where none existed. *Alston*, *Cheney*, *Jamil*, and *Robinson* do not conflict, but rather, when read together, stand for a single, sensible rule: if the adverse employment action takes place while a security clearance determination is pending, the agency must give the employee adequate notice of the reasons for the suspension of clearance so that the employee can make a meaningful response, *Alston*, 75 F.3d at 661-62; *Cheney*, 479 F.3d at 1351-52; in contrast, if the adverse employment action commences after the clearance revocation is completed, the agency owes the employee no further notice of the reasons for the clearance revocation, *Jamil*, 910 F.2d at 1208; *Robinson*, 498 F.3d at 1365. Dr. Makky's case is governed by *Alston* and *Cheney* rather than *Jamil* and *Robinson*, because the adverse employment action occurred while a determination on Dr. Makky's security clearance was still pending. *See supra* note 8 (timeline).

Affirming the district court's opinion distinguishing *Cheney* would not (as the district court believed) pick one side of an existing circuit split, but rather would create an entirely new one, putting the Third Circuit at odds with the coherent rule established by the cases of the Federal and Fourth Circuits. Although decisions of sister courts are not given automatic deference, courts have an

"intermediate obligation" to their sister courts, and recognize an interest in the uniformity of federal law. *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987).

A split with the Federal Circuit would be particularly undesirable in this circumstance: it would not only introduce disparities in outcome between identical cases filed in different circuits, as all circuit splits do, but would also create situations in which different rules could conceivably govern different stages *of a single case*. As observed previously, Federal Circuit decisions are binding on the MSPB, while other circuits' decisions have persuasive value only. *E.g.*, *Fairall*, 33 M.S.P.R. at 39. Thus, if the Third Circuit adopted the district court's rejection of *Cheney*, the MSPB would still be obliged to follow *Cheney*, but in "mixed cases" reviewed in this Circuit, the MSPB could be subsequently overturned based on a conflicting rule the agency itself could not have followed.[10] This potential for uncertainty and conflict, which contravenes the interest in uniformity that underlay Congress's decision to allocate primary appellate responsibility in this area to the

[10] The MSPB could not know in advance whether any given "mixed case" would be reviewed in the Federal Circuit or one of the district courts, because the employee could choose not to pursue review of the employment discrimination claim, resulting in the Federal Circuit acquiring exclusive jurisdiction over the appeal. *See* 5 U.S.C. § 7703(b). Furthermore, even if the employee chose to pursue review of the employment discrimination claim, the MSPB might be unable determine which circuit's law to apply, because the employee may be able to select among various venues depending on the location of the key events and parties.

Federal Circuit, *see Kean v. Stone*, 926 F.2d 276, 282 (3d Cir. 1991), weighs strongly against affirming the district court's rejection of *Cheney*.

Having erroneously distinguished *Cheney*, the district court characterized the description given to Dr. Makky of the reasons for his clearance suspension as "thorough." JA(I) 49. This characterization is difficult to justify: as demonstrated previously, Dr. Makky could make no reply regarding the foreign associates in his FBI file other than to guess who they were. Moreover, the question is not whether Dr. Makky received a "thorough" description, but rather whether the description left him guessing. *See Cheney*, 479 F.3d at 1353. For example, in *Cheney* the employee received seven different reasons for the suspension of his clearance. *Id*. at 1356-57 (McKinney, J., dissenting). The Federal Circuit nonetheless deemed this notice insufficient. *Id*. at 1352. The adequacy of the notice hinges not on the number of reasons given, but rather on their specificity; fifty vague reasons cannot replace one clear reason that does not force the employee to guess why his clearance is being suspended. *See id*. at 1353.

Finally, the district court concluded that it could not "review the agency's specific decisions about the type and extent of the information disclosed" because *Egan* leaves national security determinations to the executive branch. JA(I) 50. But this characterization of the issue sidesteps the point: there plainly was *unclassified* information, later released to Dr. Makky but not provided in time to

enable him to meaningfully contest his suspension, that could have provided him with more specific notice, as required under *Alston* and *Cheney*. The issue here is not, as the district court suggests, "the agency's specific decisions about the type and extent of the information disclosed," JA(I) 50, but, rather, whether the TSA withheld at the critical time unclassified information that was necessary for Dr. Makky to have an adequate opportunity to make a meaningful reply to the proposed suspension. As the FBI's January 5, 2007, letter plainly indicates, such unclassified information did, in fact, exist, and was, in fact, withheld. *See* JA(II) 163, 170-73.

By misapplying Federal Circuit case law based on an unsound distinction between the statute at issue there and the regulation at issue here, and based on a failure to recognize the distinction between a revoked security clearance and a clearance preliminarily suspended, the district court reached the erroneous conclusion that the notice Dr. Makky received was adequate under TSA regulations. Following the clear rule laid down by the Federal Circuit and binding on the MSPB, this Court should correct that error and hold that notice was inadequate because it unnecessarily left Dr. Makky guessing as to the reasons underlying his suspension even though unclassified information could have been provided to enable him to make a meaningful response.

B. The District Court Erred in Conducting a De Novo Harmful Error Analysis Rather Than Remanding to the MSPB and Also in Applying an Erroneous Standard for Assessing Harmful Error.

In finding that the TSA did not commit harmful error, the district court conducted a de novo analysis of the harmfulness of the TSA's failure to provide Dr. Makky with the information he sought, and the court concluded that Dr. Makky was not harmed. *See* JA(I) 51-53. But because the MSPB erroneously concluded Dr. Makky received adequate notice, it had not reached the question of the harmfulness of any error. Therefore, the appropriate course would have been to remand to the agency to make this determination in the first instance; this is the step this Court now should order with respect to Dr. Makky's CSRA claim.

1. Because the MSPB Never Made a Determination As to the Harmfulness of the TSA's Error, the District Court Erred in Failing To Remand Dr. Makky's Appeal Back to the Agency.

The Supreme Court has held that, when an agency has failed to make an initial determination about a matter that the law places primarily in the agency's hands, a court with power to review an agency decision should remand the matter to the agency, rather than conduct a de novo review on its own. *INS v. Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam). The agency can then bring its expertise to bear on the matter. *Id.* at 17.

In its decision upholding Dr. Makky's removal from employment, the MSPB concluded that the TSA had complied with its regulations and provided Dr.

Makky with adequate notice of the reasons for his clearance suspension. *See* JA(I) 10-11. Therefore, the agency never reached the question of whether the procedural failure it should have found, *see supra* Part II.A, constituted harmful error.

Because the MSPB never reached this question, the district court erred in conducting a de novo review instead of remanding on the question of harmfulness. The district court found that "Dr. Makky has not shown that but for the agency's . . . delay in producing unclassified documents . . . the agency likely would not have suspended him." JA(I) 51. Thus, the district court engaged in the kind of de novo determination by a reviewing court that the Supreme Court found to be inappropriate where an agency with authority to decide a question has yet to do so. *See Ventura*, 537 U.S. at 16-17.

Remand was especially appropriate here because, on January 5, 2007, Dr. Makky received additional information from the FBI that could have aided him in making a reasonable response to the agency. *See* JA(II) 170-73. When the FBI first provided portions of Dr. Makky's FBI file to Dr. Makky – on August 18, 2005, when he still had a chance to contest both the preliminary security clearance decision and the proposed indefinite suspension – most of the pertinent information was redacted. *See id.* at 155-61. The January 5, 2007, letter from the FBI revealed more information from Dr. Makky's FBI file: the names of several of his associates who were in the file. *See id.* at 170-73 (revealing names of five

individuals, one company, and one organization). Furthermore, the newly revealed portions gave an indication as to what names were in the remainder of the FBI file, by revealing that the names were obtained from an interview with Dr. Makky himself. *See id.* at 170 ("Dr. Makky was asked about his knowledge regarding a list of individuals and entities."). This information, in combination with the previously-revealed reference to the specific interview in question, *see id.* ("[I]nterview was conducted at the FAA offices in Pomona, NJ, on 10/22/2002."), could have enabled Dr. Makky to try to recall which individuals the FBI had asked about at that particular interview, and then to deduce which individuals were referenced in the redacted portions of the FBI file. Thus, even if the January 2007 information would not explicitly have given Dr. Makky the information he sought, it would have steered him in the right direction so that, like the employee in *Alston*, he could have "focus[ed] his response on" the evidence against him. *See Alston*, 75 F.3d at 662.

At the time the AJ issued his opinion, he assumed that the information withheld from Dr. Makky was classified. *See* JA(I) 11. We know now that it was not. Having the advantage of hindsight, the district court should have recognized that remand was appropriate, so that the MSPB could consider in the first instance the harmfulness of the TSA's failure to timely provide Dr. Makky with the additional information to which he was entitled.

2. Even If De Novo Analysis of Harmful Error Was Appropriate, the District Court Applied an Inappropriately Stringent Standard for Assessing the Harmfulness of the Error.

As defined by agency regulations, harmful error under 5 U.S.C. § 7703 is one "that is likely to have caused the agency to reach a conclusion different from the one it would have in the absence or cure of the error." 5 C.F.R. § 1201.56(c)(3). The Supreme Court and Federal Circuit have both interpreted this requirement to mean something less than an error that likely *would have* changed the outcome. Rather, the Supreme Court considered it "natural . . . to assume Congress intended the term 'harmful error' in § 7701(c)(2)(A) to have the same meaning that it has in the judicial context, that is, error that has *some likelihood* of affecting the result of the proceeding." *Cornelius v. Nutt*, 472 U.S. 648, 657, n.9 (1985) (emphasis added). Likewise, the Federal Circuit has held that an employee need not show that the result of the challenged decision likely *would* have differed had the error not been made, but rather only that it *might* have. *Mercer v. Dep't of Health & Human Servs.*, 772 F.2d 856, 859 (Fed. Cir. 1985). Thus, Dr. Makky need not prove that the outcome of the administrative proceedings that resulted in his removal likely *would* have been different had he had access to the belatedly released information from his FBI file, but rather that the outcome *might* have been different.

In its opinion, the district court states that Dr. Makky failed to show that, but for the government's failure to produce documents, "the agency likely would not have suspended him," and that Dr. Makky does not "point to one document that was belatedly produced that he could have relied on in appealing to the agency that it incorrectly denied his security clearance." JA(I) 51-52. Here, the court applied an incorrect and unnecessarily stringent standard. To succeed on his claim, Dr. Makky need only have proved that the information he sought *might* have changed the outcome of the proceedings, not that it "likely would have" prevented the agency from suspending him. *See Mercer*, 772 F.2d at 859. In *Mercer*, the Federal Circuit overturned an MSPB decision finding no harmful error in a case in which the MSPB used language similar to that used by the district court here. *See id.* ("In the initial decision . . . the presiding officials stated: '[I]t is still the appellant's burden to show . . . how it *would* have affected the outcome of the agency's decision.' " (emphasis added by the court)).

In addition, the district court's factual premise is incorrect. Dr. Makky *did* point to evidence that he could have used in appealing the denial of his security clearance: the additional material from his FBI file, provided belatedly in January 2007, that would have helped Dr. Makky to deduce the names in his FBI file and answer the charge against him directly. *See* JA(II) 170-73.

Thus, at the very least, a question of material fact exists over whether a correction of the error *might* have led to a different outcome in the proceedings; therefore, summary judgment was inappropriate.

CONCLUSION

For the reasons set forth, this Court should reverse the dismissal of Dr. Makky's Title VII claim and remand to the district court for further proceedings. As to Dr. Makky's CSRA claim, this Court should reverse the grant of summary judgment and remand to the district court with instructions to grant the petition for review and remand the case to the MSPB to conduct the harmful error inquiry in the first instance under the appropriate legal standard.

Dated: November 5, 2007
Newark, New Jersey

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CERTIFICATION OF BAR MEMBERSHIP

I certify that I am an attorney in good standing of the Bar of this Court.

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I certify that this brief exceeds 30 pages but complies with Fed. R. App. P. 32(a)(7)(B) because:

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/s/ Baher Azmy

CERTIFICATION OF SERVICE

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