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

REPLY BRIEF FOR APPELLANT

Baher Azmy (BA 8406)
Scott Michelman
Jason Brown, L.A.R. 46.3(a)
Scott Hovanyetz, L.A.R. 46.3(a)
SETON HALL LAW SCHOOL
CENTER FOR SOCIAL JUSTICE
833 McCarter Highway
Newark, NJ 07102
(973) 642-8700

Edward Barocas
ACLU of NEW JERSEY
89 Market Street, 7th Floor
Newark, NJ 07101
(973) 642-2084

Arthur B. Spitzer
ACLU of the NATIONAL CAPITAL AREA
1400 20th Street NW, Suite 119
Washington, DC 20036
(202) 457-0804

Attorneys for Plaintiff-Appellant, Dr. Wagih Makky

PRELIMINARY STATEMENT

The government's response brief repeatedly sidesteps the actual questions presented in this appeal by posing different questions it can answer more easily and more favorably to its desired result. The government's arguments are thus entirely misdirected. As Dr. Wagih Makky demonstrated in his opening brief, he has stated a valid Title VII claim that does not require the court to review the merits of his security clearance determination, and the Merit Systems Protection Board ("MSPB") committed an error of law in holding that Dr. Makky received adequate notice of the reasons for his suspension under agency regulation.

The government does not even attempt to defend the district court's erroneous conclusion that Dr. Makky's Title VII claim could not proceed under a mixed-motives theory, a conclusion based on the demonstrably false assumption that the mixed-motives theory requires, as an initial matter, scrutiny of the employer's professed non-discriminatory reason. Instead, the government boils Dr. Makky's entire claim down to a question of his "qualification," incorrectly asserts that this is an ineluctable element of *every* Title VII prima facie case and, replicating a fundamental error in the district court's analysis, declares that Dr. Makky cannot ultimately prevail in the face of *Department of the Navy v. Egan* *Egan* because he cannot show he was "qualified" for a job requiring a security clearance.

This modified theory sounds simple enough, but it is incorrect: the Supreme Court and Third Circuit have rejected such an inflexible definition of the Title VII prima facie case and the government's proposed regimented pleading requirement, in view of the fact that not all Title VII claims require the same showing. The question this appeal presents is not whether Dr. Makky is "qualified," but rather whether Dr. Makky has sufficiently alleged a Title VII case that could succeed under a mixed-motives theory without questioning the correctness of his security clearance determination. Dr. Makky has shown that he has, and that the district court erred in concluding otherwise; the government responds to these arguments by changing the subject. To Dr. Makky's distinct claim that the district court improperly ventured beyond the pleadings when considering the motion to dismiss, the government responds in a mere footnote with an incomplete and inaccurate statement of the law.

Regarding Dr. Makky's Civil Service Reform Act ("CSRA") claim, the government also attacks a series of straw men. For example, the government argues strenuously that Dr. Makky is not entitled to classified information, even though Dr. Makky has made clear that is not what he seeks. Similarly, the government is adamant that Dr. Makky may not receive his job back and on this basis argues that no remedy is available to him, but ignores Dr. Makky's claim that he is entitled to back pay, a remedy to which *Egan* presents no bar and which

courts are plainly authorized to provide. Finally, unable to refute Dr. Makky's demonstration that he did not receive adequate notice of the reasons for his suspension under the notice requirements applicable to Dr. Makky at the time of his suspension, the government again changes the subject, arguing instead that Dr. Makky's entitlement to notice of the reasons for his suspension was somehow obviated because of events that occurred *after* that suspension.

When this Court addresses the questions properly presented by this appeal, it should reverse the district court's dismissal of Dr. Makky's Title VII claim and the grant of summary judgment as to Dr. Makky's CSRA claim. It should remand Dr. Makky's Title VII claim to the district court for further proceedings and, pursuant to *INS v. Ventura*, order the district court to remand Dr. Makky's CSRA claim to the MSPB for adjudication under the proper legal standard.

ARGUMENT

I. BECAUSE DR. MAKKY IS NOT REQUIRED TO DEMONSTRATE THAT HE WAS "QUALIFIED" AT THE PLEADING STAGE AND BECAUSE *EGAN* IS NOT A BAR TO HIS ABILITY TO PROCEED UNDER A MIXED-MOTIVES THEORY, DISMISSAL OF HIS TITLE VII CLAIM WAS ERRONEOUS.

Avoiding Dr. Makky's argument that a proper reading of *Egan* does not preclude his ability to proceed under a mixed motives theory, and the clear support for Dr. Makky's position from this Court's decision in *Stehney v. Perry*, the

government attempts to recast *Egan* as a categorical bar against establishing a prima facie case under Title VII, for any plaintiff whose security clearance has been called into question. Under the government's theory, any such individual would, under the *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), framework, become "unqualified" to keep a position for which a clearance is required and, therefore, could never make out a prima facie case of discrimination in a complaint.

The apparent simplicity of the government's proposed formulation of Title VII law masks several fatal errors. First, the Supreme Court has expressly rejected the government's argument. Recognizing that there are various ways for a plaintiff ultimately to prevail on a Title VII claim, the Court has specifically held that the *McDonnell Douglas* elements are not pleading requirements. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002).

Second, as the Supreme Court recognized in rejecting the government's proposed heightened pleading requirement for Title VII cases, it would make no sense for Dr. Makky to have to plead each of the elements of the *McDonnell Douglas* framework; since Dr. Makky intends to proceed under a mixed-motives theory, these are not the elements he must ultimately prove. Under the mixed-motives framework, a plaintiff prevails if the defendant's discriminatory animus was *a* motivating factor for the adverse employment action; Dr. Makky has amply

alleged that it was. Indeed, the government's attempt to import *Egan* into the pleading stage merely replicates the error of the district court in proposing an overbroad reading of *Egan*'s bar on inquiry into security clearance determinations. Under the district court's holding, and the government's proposed standard, no employee whose clearance has been questioned could ever present a viable Title VII claim. Finally, contrary to the government's strained argument, the district court erred in relying on evidence outside the pleadings in evaluating the government's motion to dismiss.

A. The Elements of *McDonnell Douglas* Are Not Pleading Requirements.

The government's only response to the Title VII arguments made in Dr. Makky's opening brief, is that Dr. Makky failed to specifically plead – and could not plead – that he was qualified and thus (regardless of the district court's apparent errors) he cannot establish a prima facie case under the *McDonnell Douglas* Title VII framework. *See* Brief for the Appellees (hereinafter "Gov. Br.") 28 n.12. In *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), however, a unanimous Supreme Court rejected this position. The Court held that the *McDonnell Douglas* prima facie case – which includes the requirement that the plaintiff be "qualified" for his position – is "an evidentiary standard, *not a pleading requirement*." *Swierkiewicz*, 534 U.S. at 510 (emphasis added).

The Court explained that the prima facie case relates only to "the employee's burden of presenting evidence that raises an *inference of discrimination*," which is a far broader category than the particular type of evidence presented in *McDonnell Douglas* and cases proceeding under that theory. *Id.* at 511 (emphasis added). The Court concluded, "it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. . . . It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits . . . ." *Id.* at 511-12. The Court's rationale is squarely on point here, for Dr. Makky seeks to proceed under the mixed-motives theory instead of the *McDonnell Douglas* pretext theory. *See* Opening Brief for Appellant (hereinafter "Opening Br.") 24-28.

The notice pleading standard of Federal Rule of Civil Procedure 8(a) "requires only a short and plain statement of the claim showing that the pleader is entitled to relief. Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (citation, internal quotation marks, and court's alteration marks omitted). The plaintiff in *Swierkiewicz* met his notice pleading burden, and his claim could not be dismissed for failing to plead all

the elements of a prima facie case, because his "complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." *Swierkiewicz*, 534 U.S. at 514. Likewise, Dr. Makky pled ample facts upon which relief could be granted under a mixed-motives framework. *See* Opening Br. at 18-19, 26-27 (reviewing Dr. Makky's allegations).

Third Circuit case law similarly demonstrates that the prima facie case in employment discrimination claims is not categorically tied to the *McDonnell Douglas* elements. *E.g., Jones v. Sch. Dist. of Phila.*, 198 F.3d 403, 411 (3d Cir. 1999) ("We often have remarked that the elements of a prima facie case depend on the facts of the particular case. Thus, a prima facie case cannot be established on a one-size-fits-all basis." (citations omitted)). Even one of the cases the government itself cites in support of its restrictive understanding of the prima facie case, takes note of the Supreme Court's 30-year-old admonition that "'The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from [plaintiff] is not necessarily applicable in every respect to differing factual situations.'" *Pivirotto v. Innovative Sys. Inc.*, 191 F.3d 344, 352 (3d Cir.1999) (quoting *McDonnell Douglas*, 411 U.S. at 802 n.13) (alteration in *Pivirotto*). Given the evolution of Title VII law and the development of the mixed-motives framework as an alternative to *McDonnell Douglas*, this observation is

even more apt today than when it was first made, as Dr. Makky's case demonstrates.

B. Dr. Makky Has Adequately Pled Facts That Would Entitle Him to Relief Under a Mixed-Motives Theory of Title VII Employment Discrimination Regardless of Whether He Is Ultimately "Qualified."

Dr. Makky showed in his opening brief what the government studiously avoids discussing in its response: the mixed-motives framework, unlike the *McDonnell Douglas* pretext inquiry, is concerned with whether discrimination was *a* reason for the challenged employment action. *See* Opening Br. 24-28; *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003). If discrimination was one reason among others for the adverse action, the government is liable, even if the government proves the partial defense that it would have taken the same action anyway. *See* Opening Br. 25-26. The key point is that *even a plaintiff who cannot show he was qualified* can still prevail under the mixed-motives analysis, if he can demonstrate that discrimination motivated the adverse action, even only in part. *Watson v. S.E. Pa. Transp. Auth.*, 207 F.3d 207, 216 (3d Cir. 2000) (Alito, J.). Therefore, requiring such a plaintiff to plead his qualifications at the outset is "incongruous" because it would force the plaintiff "to plead more facts than he may ultimately need to prove to succeed on the merits." *Swierkiewicz*, 534 U.S. at 511-12. What Dr. Makky has alleged, with particularly, is that discrimination played a motivating role in his indefinite suspension. *See* Opening Br. at 18-19,

26-27. Because that is all he must show *to prevail* under the mixed-motives analysis, that is all he must plead in his complaint to survive a motion to dismiss.

Even assuming that Dr. Makky's qualifications are relevant to his prima facie case, and even assuming he was, following the initial determination regarding his clearance, unqualified for the job he then held, he was not necessarily unqualified for any of the jobs to which he could have been transferred. Dr. Makky specifically alleged that he could have been transferred instead of suspended without pay. 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."). Notably, in responding to this central contention, the government repeats the same mistake as the district court, relying on materials outside of the pleadings in evaluating a motion to dismiss. *Compare* Gov. Br. 30-31, *and* JA(I) 36-38 (opinion below), *with* Opening Br. 29-33, *and infra* Part I.D. The existence of a question of fact on this issue likewise renders dismissal inappropriate.

C. The Government's Argument, Like the District Court's Holding, Would Give the Government License To Discriminate Against Any Employee Who Holds a Security Clearance.

The government's attempt to import *Egan*'s non-justiciability rule into the Title VII pleading requirements confirms that accepting the government's position

and affirming the district court would have the very effect the government disavows: it would create an absolute bar to Title VII claims whenever the plaintiff's security clearance was called into question before the employment decision was made. *Cf.* Gov. Br. 24 (characterizing plaintiff's argument to this effect as a "straw man"). The government's proposed rule would force such a plaintiff to plead an issue he is barred from ultimately raising – the correctness of a security clearance determination – to demonstrate that he is "qualified." In effect, every attempt by such an employee to plead a Title VII violation would be defeated by *Egan*, even if the substance of a plaintiff's discrimination claim (such as Dr. Makky's) does not implicate the separation-of-powers concerns that animated *Egan*. *See Stehney v. Perry*, 101 F.3d 925, 932 (3d Cir. 1996) ("[N]ot all claims arising from security clearance revocations violate separation of powers or involve political questions[.]").

A simple example demonstrates the sweeping and unacceptable effects of the government's proposed rule. Imagine a government agency that has a practice of transferring any employee whose security clearance is suspended to the most suitable position for which a clearance is not required. Suppose an African-American employee at that agency has his clearance suspended but is fired instead of being transferred. In such a case, even if the employee had overwhelming evidence of race discrimination, including a witness who overheard the agency

decision-maker saying "we have too many blacks here," under the government's theory this employee could never make out a prima facie Title VII violation, because the mere fact that his security clearance had been suspended would bar the employee from demonstrating he was "qualified." That certainly is not the law, and this Court should decline the government's invitation to make it so. Rather, as this Court recognized in *Stehney*, not all claims that implicate events contemporaneous with security clearance review violate the separation of powers, and therefore some claims by employees whose clearances have been revoked can go forward. *Id.* at 932.[1]

D. Contrary to the Government's Argument, the District Court Clearly Erred in Relying on Evidence Outside the Pleadings in Evaluating the Motion To Dismiss.

As Dr. Makky has shown, the district court inverted the traditional presumptions applicable to motions to dismiss by accepting as true untested evidence (the Whitford Memorandum) proffered by the government rather than the plaintiff's pleadings. *See* Opening Br. 29-33. The government, responding to plaintiff's argument in a footnote, claims that the resort to extra-record evidence is justified either because it was "part of the administrative record that plaintiff's

[1] The government also asserts that a provision of Title VII "fortifies" its understanding of *Egan, see* Gov. Br. 26 n.11, but the authorities it cites suggest nothing more than that Congress codified the *Egan* rule for Title VII cases brought by employees of private corporations whose jobs require security clearances, not that the statute applies *Egan* in the overbroad manner the government urges.

Complaint also challenges," or because courts may sometimes go outside the pleadings to answer factual questions bearing on jurisdiction. *See* Gov. Br. 31 n.15. Both of these arguments are misplaced.

First, the presence of the Whitford Memorandum in the administrative record is irrelevant to Dr. Makky's Title VII claim. Unlike procedural claims, the Title VII claim is reviewed de novo in federal court. See 5 U.S.C. § 7703(c); JA(I) 31 (district court opinion). De novo review means that "the court's inquiry is not limited to or constricted by the [agency] record, nor is any deference due the conclusion under review." *Luby v. Teamsters Health, Welfare & Pension Trust Funds*, 944 F.2d 1176, 1184 (3d Cir. 1991) (citation, quotation marks, and court's alteration marks omitted). Therefore, the government cannot obtain dismissal of a Title VII claim at the pleading stage in federal court by simply recycling evidence it presented before the agency and proclaiming its truth.

Similarly, the government's attempt to shoehorn the Whitford Memorandum into the category of a "document integral to or explicitly relied upon in the complaint," *see* Gov. Br. 31 n.15, is unavailing. The complaint self-evidently does not mention, rely on, or otherwise refer to the Whitford Memorandum in any respect. The Whitford Memorandum is only at issue here because the government submitted it; it is nothing more than defense evidence, not any part of the plaintiff's case or pleadings.

Second, though the government is correct that in some limited circumstances courts may venture outside the pleadings to assess jurisdiction, this is not such a circumstance. The government's selective quotation from this Court's decision in *Gotha v. United States*, 115 F.3d 176, 179 (3d Cir. 1997), leaves out a crucial qualification to the rule permitting courts to go beyond the pleadings to assess jurisdiction. As this Court explained in two of the cases cited (but not discussed) by the government, venturing beyond the pleadings is appropriate only to assess "factual" challenges that dispute jurisdiction "quite apart from the pleadings," not "facial" challenges that dispute jurisdiction based on the pleadings themselves. *Mortensen v. First Federal Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977); *Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000).

The government's jurisdictional challenge here is a facial challenge: the government has all along asserted that *Egan* presents a jurisdictional or justiciability bar to the case, under any set of facts. The factual controversy over the Whitford Memorandum relates not to *Egan*'s purported jurisdictional bar, but to the merits of Dr. Makky's discrimination claim and the government's potential defense that it would have suspended Dr. Makky irrespective of any discriminatory animus. *Watson*, 207 F.3d at 216. The district court's resort to evidence outside the pleadings was thus inappropriate and reversible error. *Mortensen*, 549 F.2d at

891; *see also Gould Elecs., Inc., v. United States*, 220 F.3d 169, 176 (3d Cir. 2000) ("In reviewing a facial attack [on jurisdiction], the court must only consider the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff.").

II. THE GOVERNMENT'S ATTEMPTS TO DISTINGUISH APPLICABLE FEDERAL CIRCUIT AUTHORITY ARE UNAVAILING, AND A REMAND IS REQUIRED BECAUSE, CONTRARY TO THE GOVERNMENT'S ASSUMPTION, A REMEDY IS AVAILABLE TO DR. MAKKY.

A. The Government's Various Attempts To Distinguish *Cheney v. Department of Justice* Are Unavailing.

Dr. Makky demonstrated that, under a straightforward application of Federal Circuit precedent, the MSPB erred as a matter of law in holding as sufficient the agency's notice of the reasons for Dr. Makky's suspension. *See* Opening Br. 40-51. In response, the government makes a variety of assertions that these precedents, particularly *Cheney v. Department of Justice*, 479 F.3d 1343 (Fed. Cir. 2007), do not apply. None of the government's arguments withstands scrutiny.

Specifically, the government's attempt to distinguish the regulation at issue here from the statute at issue in the Federal Circuit cases, and the government's assertion that telling an employee his clearance has been called into doubt is sufficient notice when suspending an employee whose clearance is still under review, reflect misreadings of the relevant regulation, statute, and case law. Two of the government's other arguments rely on straw men: contrary to the

government's characterizations, Dr. Makky is not claiming that he is entitled to his job back, but merely to back pay for the period for which he has been wrongfully suspended. Nor is Dr. Makky claiming that he was entitled to see classified information; rather, he was entitled to see unclassified information that could have shed light on the reasons for suspending him. Finally, the government's argument that this Court should defer to the agency's interpretation of its own regulation ignores a crucial fact: TSA did not, in fact, interpret its own regulation – the MSPB, a different agency, did – and therefore no deference is warranted.

1. Because a Plain Reading of the Applicable TSA Regulation Reveals That It Requires at Least As Much Notice As 5 U.S.C. § 7513, the Government Is Incorrect That Federal Circuit Cases Applying § 7513 Are Inapposite.

The government's attempt to distinguish the regulation at issue here, TSA Management Directive ("MD") No. 1100.75-3, from the statute at issue in the Federal Circuit cases relied upon by Dr. Makky, 5 U.S.C. § 7513, is based on an untenable reading of the two provisions. The government claims that MD 1100.75-3, unlike 5 U.S.C. § 7513, "does not require an explanation of the 'specific reasons' for any action" – the standard considered in the Federal Circuit cases supporting Dr. Makky. Gov. Br. 35. This is simply incorrect. As Dr. Makky has already noted, MD 1100.75-3 "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*)); *see also* Opening Br. 37-39. The government, tellingly, cites only half of this language in its brief. *See* Gov. Br. 35 (quoting § 6(H)(3)(a)(1)(*i*), but omitting any reference to the requirement in § 6(H)(3)(a)(1)(a) that the agency provide "[t]he charge(s) and specification(s) for each charge and [a] descri[ption of] the evidence that supports the charge(s)").

Unless the agency is acting in a completely arbitrary fashion, the TSA requirement that the agency provide the employee with "[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*)), would as a matter of course require the agency to "stat[e] the specific reasons for the proposed action," 5 U.S.C. § 7513. If anything, the regulation provides the employee with more specificity, in that the agency cannot rely on a mere "stat[ement]" of its reasons, but must go further, both describing and revealing to the employee the evidence on which the agency relies. In any event, to hold that "stating" the specific reasons is somehow a more substantial requirement than "describ[ing] the evidence that

supports" the charge and providing "a copy of the material relied upon," would elevate verbiage over substance.

Perhaps sensing the weakness of its textual argument, the government falls back on a theory about congressional intent. According to the government, in exempting TSA from certain CSRA provisions including § 7513, Congress permitted TSA more flexibility than other agencies have in discharging civil servants. *See* Gov. Br. 36-37 & n.19. Whatever flexibility TSA was afforded, however, does not answer the question of how or whether it used that flexibility to depart substantially from CSRA standards. As demonstrated, the text of the applicable TSA regulations indicates TSA in fact chose not to depart, at least with respect to notice requirements. The Court should decline to interpret the text in an implausible manner simply because the agency *could have* written its regulation another way.[2]

Finally, though the government has not disputed that Federal Circuit law binds the MSPB and is therefore the relevant governing authority for review in this appeal, *see* Opening Br. 36-37, the government does dispute the applicability of

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[2] The government further suggests that the MSPB's decision to reject Dr. Makky's claim of entitlement to view additional materials regarding his suspension was "supported by substantial evidence." Gov. Br. 38. This argument is misdirected: Dr. Makky claims he was entitled to additional notice as a matter of law, a separate ground for reversal of an MSPB decision. *See* 5 U.S.C. § 7703(c) (listing three separate bases for overturning MSPB decision); Opening Br. 3 ("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.").

Cheney, on the ground that it is factually distinguishable from this case. But the government is incorrect to liken Dr. Makky's case to the facts in *King v. Alston*, 75 F.3d 657 (Fed. Cir. 1996), rather than those in *Cheney*. *See* Gov. Br. 43-44. Requiring an individual to prove the innocence of every contact he has ever had with a foreign national, as was required of Dr. Makky, is much more akin to requiring someone prove the innocence of every one of thousands of database searches, *see Cheney*, 479 F.3d at 1348, 1352-53 (holding notice insufficient), than it is to requiring a person to provide information about his own medical condition, *see Alston*, 75 F.3d at 662 (holding notice sufficient). The notice provided to Dr. Makky was insufficient because it left him, like Mr. Cheney, guessing as to the reasons for his suspension. *See Cheney*, 479 F.3d at 1353; Opening Br. at 43-45, 50-51.

2. Contrary to the Government's Contention, Merely Telling Dr. Makky That He Had Failed To Maintain a Security Clearance, Is Insufficient Notice As a Matter of Law.

As Dr. Makky has already demonstrated, under Federal Circuit precedent, an employee has a greater entitlement to notice if his clearance is still under review than if it has been finally revoked when the adverse employment action is taken. *See* Opening Br. 46-48; *see also Robinson v. Dep't of Homeland Sec.*, 498 F.3d 1361, 1365 (Fed. Cir. 2007) (per curiam) (distinguishing *Cheney* and *Alston* from the case of an employee whose clearance revocation was "a completed matter" by

the time he was fired). The government does not dispute this distinction, and in fact cites no authority holding that mere notice of a security clearance suspension is sufficient when the employee's clearance is still under review.

Ignoring Dr. Makky's argument and the distinction made by the Federal Circuit, the government persists in pressing the applicability of cases such as *Parker v. Department of the Navy*, 86 Fed. App'x 415 (Fed. Cir. 2004), and *Jamil v. Secretary, Department of Defense*, 910 F.2d 1203 (4th Cir. 1990), *see* Gov. Br. 34 n.17, 36, 38-39, even though the employees in those cases, unlike Dr. Makky, had had their clearances finally denied or revoked before adverse employment actions were taken against them. *Parker*, 86 Fed. App'x at 418; *Jamil*, 910 F.2d at 1208. The government argues that these cases apply because "plaintiff's situation is now (and was when the district court ruled) wholly distinguishable from that of Mr. Cheney, because . . . plaintiff's security clearance has been fully and finally adjudicated." Gov. Br. 38. But Dr. Makky's current status has nothing to do with this litigation. The relevant fact is that Dr. Makky's clearance was still under review *at the time he was suspended by TSA*, *see* JA(II) 117 (Jan. 18, 2005, "Notice of Initial Determination to Deny Clearance") ("This is not a final decision. You have the right to respond in writing . . . ."); *id.* at 127 (Sep. 7, 2005, final TSA decision to indefinitely suspend Dr. Makky without pay). The clearance revocation

did not become final until months after the job suspension took effect. *See id.* at 118 (Mar. 7, 2006, "Final Denial of Security Clearance").

By pointing to Dr. Makky's clearance status as of the time of the district court's decision, the government appears to be claiming that Dr. Makky's entitlement to notice *as of the time of his suspension* depends on the status of his security clearance *as of the time of subsequent court review*. This is incorrect as a matter of law: in both *Cheney* and *Alston*, the Federal Circuit focused on the status of the employee's clearance as of the time of his suspension, not as of the time that suspension was subsequently reviewed by a court. *See Alston*, 75 F.3d at 661 (holding that an employee is entitled "to notice of the reasons for the suspension of his access to classified information when that is the reason for *placing the employee on enforced leave pending a decision on the employee's security clearance*" (emphasis added)); *Cheney*, 479 F.3d at 1352 (same).

The government's proposed rule is not only contrary to precedent but is also illogical. Under such a rule, neither agencies nor employees could predict how much notice is required when an agency takes an employment action against an employee whose clearance is under review, because the putatively determinative factor – the final determination regarding the clearance – would not yet have taken place. Fortunately, Federal Circuit precedent does not support such an arbitrary and unpredictable regime; instead, the quantum of notice required at the time of an

employee's suspension depends on whether the employee's clearance revocation has become final by the time of the suspension. Dr. Makky, as an employee whose clearance was under review when he was suspended, falls under the rule applied in *Alston* and *Cheney*, not the rule applied in *Jamil*, *Robinson* and *Parker*.

3. Contrary to the Government's Suggestion, an Employee's Claim of Inadequate Notice Is Not Rendered "Moot" by a Subsequent Clearance Revocation and Termination, Because the Remedy of Back Pay Is Still Available.

The government's most startling argument is that the revocation of Dr. Makky's clearance and his subsequent discharge render his notice claim "moot." *See* Gov. Br. 39-40. But his discharge does not retroactively cure the defect in his suspension, which remains remediable via an award of back pay even where reinstatement is unavailable. The courts (or the MSPB on remand) are authorized to award an employee back pay for the period during which he or she was wrongfully suspended. *E.g.*, *Gose v. U.S. Postal Serv.*, 451 F.3d 831, 840 (Fed. Cir. 2006); *McFarland v. Dep't of the Navy*, 62 M.S.P.R. 161, 165-66 (1994). The length of that period can be determined on remand. Back pay was the very relief the Federal Circuit ordered in *Cheney*, 479 F.3d at 1353. Thus, Dr. Makky seeks back pay for to compensate him for what he would have been paid had he been able to properly contest his proposed suspension with all the information to which he was entitled. This form of relief can be granted without requiring reversal of

the security clearance determination.[3] Because relief is available to Dr. Makky, his claim is not moot. *E.g., In re Zinchiak*, 406 F.3d 214, 223 n.9 (3d Cir. 2005) ("[A]n appeal is not moot if, upon reversal, some meaningful relief can be granted to the appellant even though the parties cannot be returned to the status quo ante.").

4. Contrary to the Government's Characterization, Dr. Makky's Notice Claim Does Rest on an Entitlement to Classified Information.

The government mischaracterizes Dr. Makky's CSRA claim as a demand for access to classified information. *See* Gov. Br. 40-41. Because this is simply not what Dr. Makky seeks, the government's argument about why he cannot see classified information is wholly irrelevant. As Dr. Makky has explained, TSA's notice violation in this case arises from its failure to provide him with *unclassified* information in a timely fashion. *See* Opening Br. 53-54. Before it suspended him without pay on September 7, 2005, the agency should have released to Dr. Makky the unclassified information it only finally provided him on January 5, 2007 – i.e., more than a year after he was suspended. Armed with this information, Dr. Makky would not have had to guess at the agency's concern about his foreign associations by trying to discern which individuals or entities, out of all those he has ever met or contacted, were of concern to the government.

[3] Furthermore, the government's position, if adopted, would invite future abuses by providing a perverse incentive to deny a clearance under review to avoid all possibility of liability for back pay during the period between a job suspension and the final denial of clearance.

As elsewhere in its brief, the government provides a direct response to Dr. Makky's actual argument only in a footnote. *See* Gov. Br. 32 n.16. The government's response – that Dr. Makky was not entitled, at any earlier date, to see the material he ultimately received on January 5, 2007 – makes the unsupported factual assumption that the material was classified until January 2007. This is not reflected in the record. Instead, what appears to have happened is that the government, in response to Dr. Makky's lawsuit (which in the district court included FOIA claims for precisely this information), reviewed its initial release and recognized it had to disclose more information than it had previously. *See* JA(II) 163 (cover letter to Jan. 5, 2007, release) ("*After further review* . . . we have determined that we are able to release additional material . . . ." (emphasis added)). Thus, there is no reason to believe that the information was actually classified at the time Dr. Makky should have received it.

5. The Government's Suggestion That This Court Must Defer to TSA's Interpretation of Its Own Regulation Is Misplaced.

In passing, the government attempts to invoke the general administrative law principle that an agency is entitled to deference when interpreting its own regulation. *See* Gov. Br. 36 (citing *Auer v. Robbins*, 519 U.S. 452 (1997)). This argument is inapplicable here: the TSA did not interpret its own regulation; the MSPB interpreted the TSA regulation. The government cites no authority that one

agency (the MSPB), is entitled to deference when interpreting *another* agency's regulation (the TSA's).

The government's argument might be read to suggest that TSA itself somehow "interpreted" its own regulation in the very act of suspending Dr. Makky. This argument is not only unsupported by precedent, but if implemented would dramatically contract the scope of judicial review of agency action to the point that only the most patently unreasonable agency actions would be reversible. The government cites *Auer v. Robbins*, 519 U.S. 452 (1997), for the proposition that an agency's interpretation of its own ambiguous regulation is controlling unless plainly erroneous or inconsistent with the regulation. Gov. Br. 36. Three years after *Auer*, however, in *Christensen v. Harris County*, 529 U.S. 576 (2000), the Supreme Court clarified that informal agency pronouncements, such as those contained in opinion letters, policy statements, agency manuals, and enforcement guidelines, do not warrant deference because they are not the product of formal agency consideration. *Id.* at 587; *see also Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 154-55 (3d Cir. 2004). Along similar lines, the Supreme Court subsequently held that a tariff classification ruling by the Customs Service does not receive deference because it is binding only between the government and the particular importer to whom it is issued, and because such rulings are generated by the Service from 46 different offices at a rate of more than 10,000 per year. *See*

United States v. Mead Corp., 533 U.S. 218, 231-34 (2001). In light of these holdings, a single personnel decision by a mid-level supervisor – not the product of any formal process, carrying no precedential value, and surely one of a great many personnel decision made every year by an agency – cannot be entitled to deference.

If precedent did not foreclose the argument that every agency application of its regulations is inherently an "interpretation" entitled to deference, common sense surely would. Under what appears to be the government's view, every application of a regulation, by any agency bureaucrat, would become law unto itself: the very act of applying the regulation would insulate that application from all but the most deferential judicial review. Such a rule would produce chaos within large agencies, where thousands of bureaucrats would suddenly be empowered to create authoritative interpretations of agency regulations without the necessity of any internal review or harmonization. *Cf. Mead Corp.*, 533 U.S. at 233 ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting.").

Because TSA never actually interpreted its own regulation, no deference is appropriate here. This Court should apply the law of the Federal Circuit, which binds the agency that decided Dr. Makky's case, and hold that under *Cheney* the notice provided to Dr. Makky was inadequate.

B. Because The Government Is Incorrect That the MSPB's Result Was Inevitable, a *Ventura* Remand Is Required.

In asserting that a remand to the agency is unnecessary because the agency would be bound to reach the same result, the government once again incorrectly assumes that the only relief Dr. Makky can obtain is reinstatement to his former job. The government here reprises the *Egan* catch-all defense, claiming that the MSPB could not have reached a different result because it cannot consider the merits of a security clearance determination. *See* Gov. Br. 48. Dr. Makky agrees that the MSPB cannot grant him his job back. But as discussed earlier, *see supra* Part II.A.3, Dr. Makky can obtain back pay for the period of his improper suspension from his job. The result of a remand is therefore not at all foreordained.

Regardless of the precise formulation of the harmless error standard, *compare* Opening Br. 55-57, *with* Gov. Br. 45-46, the MSPB could, for example, find that Dr. Makky, knowing what he knows now about the agency's concerns, and deducing further from the information he has, *see* Opening Br. 53-54, likely would have made a meaningful response to the TSA that would have staved off his suspension at least until his clearance was finally revoked. Even though the MSPB cannot reverse the security clearance revocation, it could award Dr. Makky back pay for the intervening period between the suspension without pay and the final decision to revoke his clearance the following year.

Because the agency made an error of law in holding the notice adequate, and therefore never reached the question whether the inadequate notice was harmful, the proper course is to remand to the agency for a determination of this question in the first instance. *INS v. Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam); *see also Mercy Catholic Med. Ctr. v. Thompson*, 380 F.3d 142, 151 (3d Cir. 2004) ("[W]e may affirm the agency's decision only on grounds on which the agency actually relied, and not on the basis of alternative rationales or justifications put forward by counsel on appeal." (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

CONCLUSION

For the reasons set forth here and in Appellant's Opening Brief, this Court should reverse the dismissal of Dr. Makky's Title VII claim and remand for further proceedings. This Court should also reverse the grant of summary judgment as to the CSRA claim and order a remand to the MSPB to conduct the harmful error inquiry in the first instance under the correct legal standard.

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SETON HALL LAW SCHOOL
CENTER FOR SOCIAL JUSTICE
833 McCarter Highway
Newark, NJ 07102
(973) 642-8700

By: /s/ Baher Azmy
Baher Azmy (BA 8406)
Scott Michelman
Jason Brown, L.A.R. 46.3(a)
Scott Hovanyetz, L.A.R. 46.3(a)

Edward Barocas
ACLU of NEW JERSEY
89 Market Street, 7th Floor
Newark, NJ 07101
(973) 642-2084

Arthur B. Spitzer
ACLU of the NATIONAL CAPITAL AREA
1400 20th Street NW, Suite 119
Washington, DC 20036
(202) 457-0804

Attorneys for Plaintiff-Appellant,
Dr. Wagih Makky

CERTIFICATION OF COMPLIANCE WITH RULE 32(a)

I certify that this brief complies with Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,533 words, excluding parts of the brief excluded by Fed. R. App. Pro. 32(a)(7)(B)(iii). /s/ Baher Azmy

CERTIFICATION OF SERVICE

I hereby certify that on December 14, 2007, I am serving the forgoing Reply Brief for Appellant, via electronic delivery and First Class Mail, upon the Court and the following counsel for Defendants:

STEVEN YALE BRESSLER
U.S. Department of Justice
20 Massachusetts Avenue, NW
Washington, DC 20530
202-514-4781

ALEX KRIEGSMAN
Office of the U.S. Attorney
970 Broad Street, Room 700
Newark, NJ 07102
973-645-2847

MARLEIGH D. DOVER
U.S. Department of Justice
10th & Pennsylvania Avenues, NW, Room 3127
Washington, DC 20530
202-514-3511 /s/ Baher Azmy

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