No. 10-5014

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WILFRED SAMUEL RATTIGAN,

Plaintiff-Appellee,

v.

ERIC HOLDER, Attorney General,
United States Department of Justice,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Columbia

# APPELLEE'S RESPONSE TO APPELLANT'S PETITION FOR REHEARING EN BANC

Jonathan C. Moore
BELDOCK LEVINE & HOFFMAN LLP
99 Park Avenue, Suite 1600
New York, New York 10016
(212) 490-0400 // Fax: (212) 557-0565
jmoore@blhny.com

James R. Klimaski, #243543
KLIMASKI & ASSOCIATES, P.C.
1625 Massachusetts Avenue NW, Suite 500
Washington, D.C. 20036-2245
(202) 296-5600 // Fax: (202) 296-5601
Klimaski@Klimaskilaw.com

On the response:
Joshua S. Moskovitz
BELDOCK LEVINE & HOFFMAN LLP

## INTRODUCTION

The government petitions for rehearing en banc based on its deeply flawed reading of *Department of the Navy v. Egan*, 484 U.S. 518 (1988)—a reading that no court has ever adopted. The government contends that *Egan* should be expanded for the first time to give Executive Branch agencies impunity to violate Title VII of the Civil Rights Act, so long as the illegal discrimination or retaliation is carried out under the guise of reporting entirely unfounded "security concerns." However, the government overlooks the fact that *Egan* addressed only a "narrow question" and held that the Merit Systems Protection Board, which superseded the Civil Service Commission, lacked statutory authority to "review the substance of an underlying decision [by the Navy] to deny or revoke a security clearance in the course of reviewing an adverse [employment] action." 484 U.S. at 520. Instead, the government insists that *Egan*'s narrow holding—that an Executive agency's determination to deny or revoke a security clearance cannot be judicially reviewed—should be drastically expanded to foreclose a factually unique claim in this case in which *the agency did not deny or revoke the plaintiff's security clearance*. In fact, the agency here determined that the false security concerns lodged by the plaintiff's supervisors in retaliation for his having filed a discrimination complaint were "unfounded." As the district court explained, "[the] [p]laintiff does not challenge th[e] [agency's security clearance] determination—he embraces it." *Rattigan v. Holder*, 636 F. Supp. 2d 89, 93 (D.D.C. 2009).

Thus, the plaintiff's claim does not involve the crux of the *Egan*'s Court's concern,

*i.e.*, the second-guessing of the substance of a security-clearance determination. Accordingly, it does not implicate the rationale underlying the Court's decision—that the Executive's discretionary authority to deny a security clearance entails a judgment call that "is not reasonably possible for an outside nonexpert body to review." 484 U.S. at 529. Instead of attacking any such judgment, the plaintiff challenges the reporting of false accusations about his loyalty by agency employees without the expertise or authority to make the type of judgment that *Egan* shields. The jury correctly found that the decision to report these false accusations was unlawful retaliation in violation of Title VII; and the district court and panel majority correctly applied *Egan* to uphold the jury's verdict.

Nevertheless, in its en banc petition, the government persists in mistakenly arguing that *Egan* should be wrenched from its doctrinal and prudential moorings and inflated to shield agency actions separate and apart from its security-clearance determinations. The government has made this argument at least four times in this litigation, and each time it has been rejected: The district court rejected it before trial, and again after the jury returned a plaintiff's verdict; and two judges of this court rejected it after initial hearing, and again after panel rehearing. The reason that judges have repeatedly rejected the government's argument is that its argument is wrong on the law and facts.

The government's en banc petition merely rehashes these failed arguments and does not adequately explain why this case will benefit from en banc rehearing. The panel majority's opinions do not conflict, but comport with *Egan*, and do not conflict with any

prior decision of this court. *See* Fed. R. App. P. 35(a)(1), (b)(1)(A). Moreover, since the majority correctly rejected the government's invitation to bar valid Title VII claims, this proceeding does not present a question of exceptional importance; nor does the panel decision conflict with precedent. *See* Fed. R. App. P. 35(a)(2), (b)(1)(B). The plaintiff's claim is factually unique and nearly *sui generis*: Both the district court and the panel recognized that no reported case in the 48-year history of Title VII, and 24 years since *Egan* was decided, has addressed an adverse employment claim based on the making of a false security report, where the employee's security clearance was *not* revoked, and thus, the security clearance determination was not under attack. Therefore, we urge the court to deny the government's petition to rehear this case en banc.

## BACKGROUND

While serving as the FBI's Legal Attaché in Riyadh, Saudi Arabia, Wilfred Rattigan protested discrimination by several supervisors in the Office of International Operations (OIO); and in October 2001, he filed a discrimination complaint with the Equal Employment Opportunity (EEO) Office. Over the next few months, Rattigan's OIO supervisors conspired to report him to the FBI's Security Division based on false charges. The invidious purpose and effect of this report was clear: As one of the OIO supervisors acknowledged in his trial testimony, being the subject of a security investigation can harm an FBI agent's career.[1] As expected, the Security Division investigated Rattigan; however,

[1] Indeed, although not a part of the record below, this Court should know that Rattigan continues to be adversely affected by the retaliatory conduct that the defendants subjected him to. Since the trial in this

it determined that the reported security concerns were "uncorroborated" and "unfounded." After concluding that there was "no security risk present relative to the issues of [Rattigan's] allegiance, foreign influence, or personal conduct"—the grounds for the OIO supervisors' alleged security concerns—the Security Division closed its investigation and Rattigan's security clearance was not revoked. Rattigan in no way challenges the substance of the Security Division investigation.

Rattigan sued the FBI in federal court, claiming, among other things, that the agency, through his OIO supervisors, violated Title VII of the Civil Rights Act of 1964 by reporting unfounded charges about him in retaliation for his filing a discrimination complaint. On the eve of trial, the government sought to dismiss Rattigan's claim based on the Supreme Court's decision in *Egan*. In a well-reasoned opinion, the district court rejected the government's flawed argument. *See Rattigan v. Holder*, 636 F. Supp. 2d 89, 93 (D.D.C. 2009). The case went to trial and the jury returned a plaintiff's verdict.

The government appealed, and before a panel of this court, the government advanced the same expansive reading of *Egan* that the district court correctly rejected. In two opinions (on initial hearing and after panel rehearing) by Judge Tatel and joined by Judge Rogers, with Judge Kavanaugh dissenting, the panel majority twice rejected the government's argument. *See Rattigan v. Holder* ("*Rattigan I*"), 643 F.3d 975 (D.C. Cir. 2011); *Rattigan v. Holder* ("*Rattigan II*"), No. 10-5014 (D.C. Cir. July 10, 2012).

---

matter, Rattigan has applied for fifty-six openings with the FBI, all of which he was eminently qualified for, but has been turned down each and every time.

In *Rattigan I*, the majority explained that *Egan* shields from judicial review an agency's ultimate determination to deny or revoke a security clearance; but it does not shield every aspect of what the government coins, "the security clearance process," by which it means any report of a security concern, no matter how patently false, and even if reported by government employees with no expertise in or authority to render security clearance decisions. Gov't Pet'n 1. As the majority explained, the doctrinal foundation for *Egan*'s core holding is that the President has the constitutional authority, which he can delegate to Executive agencies, to determine who should be allowed access to sensitive information, such that "an underlying decision to deny or revoke a security clearance in the course of reviewing an adverse [employment] action" is not subject to judicial review. *Egan*, 484 U.S. at 520; *Rattigan I*, 643 F.3d at 980.

The *Rattigan I* majority explained why this holding is limited to security-clearance determinations, and does not shield every part of the security-clearance process:

> [T]he decision to grant or deny security clearance [i]s essentially an act of "[p]redictive judgment" that "must be made by those with the necessary expertise in protecting classified information.' By contrast, "it is not reasonably possible for an outside nonexpert body to review the substance" of the agency's predictive judgment to determine "whether the agency should have been able to make the necessary affirmative prediction with confidence" or "what constitutes an acceptable margin of error in assessing the potential risk."

*Rattigan I*, 643 F.3d at 980 (quoting *Egan*, 484 U.S. at 528-29). Thus, the majority explained that although *Egan* shields an agency's ultimate determination to deny or revoke a security clearance—that is, a substantive determination based on predictive judgment by

expert officials—it does not insulate other decisions that do not require predictive judgment and are not made by officials with special expertise to render such judgment. *Id.* at 982-83; *see also Rattigan*, 636 F. Supp. 2d at 93-94.

The majority then correctly applied *Egan* to conclude that Rattigan's claim was justiciable. The majority agreed with the district court that under the facts of this case, officials in the FBI's Security Division have the expertise to make the necessary predictive judgment about an employee's fitness for access to sensitive information; and thus, employees in the Security Division are the agency officials tasked with making the agency's ultimate security-clearance determinations. *Id.* Both the district court and the panel majority understood that Rattigan's claim does not contest the Division's ultimate security clearance determination, but "embraces it." *Id.* Because Rattigan challenged decisions by his OIO supervisors, and not predictive judgments of expert officials in the Security Division, his claim was not barred by *Egan*. *Id.*

The majority responded to the government's argument that because Executive Order 12,968 requires agency employees like Rattigan's OIO supervisors to report security concerns, any reporting decision should be shielded from judicial review:

> The decision by a non-expert employee to refer a colleague for a potential security investigation is categorically unlike the predictive judgment made by 'appropriately trained adjudicative personnel' who make security clearance *decisions* pursuant to delegated Executive authority and subject to established adjudicative guidelines designed to channel their discretion. Given that nothing in *Egan* requires us to extend its principles beyond employees possessing the requisite training and experience, we decline to do so, thus preserving to the maximum extent possible Title VII's important

protections against workplace discrimination and retaliation.

*Rattigan I*, 643 F.3d at 984 (emphasis added) (citations omitted). Having concluded that Rattigan's claim was justiciable, the panel majority held that the jury instructions may have "invited" the jury to "review[] the substance of discretionary Security Division decisions," and thus, remanded. *Id.* at 984-86.[2]

In response to *Rattigan I*, the government petitioned for rehearing, contending that the majority's opinion would chill executive agency employees from complying with Executive Order 12,968's mandate to report "any" security concerns. The panel granted panel rehearing, ordered new briefing on the government's chilling concerns, again heard oral argument, and in July, issued its opinion in *Rattigan II*. The *Rattigan II* majority "adhere[d] to [its] holding that *Egan*'s absolute bar on judicial review covers only security clearance-related decisions made by trained Security Division personnel and does not preclude all review of decisions by other FBI employees who merely report security concerns." *Rattigan II*, at 7. However, the majority clarified that justiciable Title VII claims premised on employee reports of alleged security concerns are limited to "claims based on *knowingly false* reporting." *Id.* at 11.

The government now seeks en banc rehearing to challenge the conclusion that

[2] We respectfully disagree with the conclusion that the jury instructions were flawed or the outcome would have been any different with different instructions. A review of the instructions shows that the jury was properly focused not on questioning any decision of the FBI's Security Division but solely on the retaliatory and discriminatory referral made by the OIO employees to the Security Division. Rattigan's counsel repeatedly re-emphasized this point in both the opening statement and closing argument. Moreover, the purportedly flawed instructions were instructions *the government* requested and Rattigan strenuously opposed. Thus, even if there was indeed error in the instructions, the government forfeited any error. *See Jimenez v. Wood Cnty., Tex.*, 660 F.3d 841, 845-47 (5th Cir. 2011) (en banc).

Rattigan's claim is not shielded by *Egan*. Although we respectfully disagree that precedent compels a "knowingly false" standard, the evidence in this case meets that standard. Thus, this case need not be heard en banc, and we address why the government's arguments for en banc rehearing are meritless.

## ARGUMENT

The government petitions for en banc review based on three mistaken contentions about the panel majority's opinions: (1) that they conflict with *Egan*, (2) that they are "inconsistent" with decisions of this court and other courts of appeals, and (3) that they will chill agency security reporting. None of these contentions bears fruit.

### A. The panel majority opinions do not conflict, but comport with *Egan*.

The government erroneously argues that the panel majority opinions conflict with *Egan*, advancing the same misreading of that decision that courts have repeatedly rejected. *Rattigan II*, at 7; *Rattigan I*, 643 F.3d at 982-83; *Rattigan*, 636 F. Supp. 2d at 93-94. The government contends that *Egan* grants immunity to Executive agencies for every act of discrimination or retaliation by an agency employee at any level, regardless of the fact that she has no security-clearance-granting authority, as long as the discrimination or retaliation is said to relate to a security clearance. *Egan*'s narrow holding does not support this contention. *Egan* was focused on an Executive agency's authority to grant or deny security clearances, and sought to avoid judicial interference with the substance of security-clearance determinations. *Egan*, 484 U.S. at 529-30.

The district court and the panel majority correctly applied *Egan* to hold that Rattigan's Title VII is reviewable because of two distinctions that make Rattigan's claim unique from other cases that have run up against *Egan*: (1) Rattigan's claim does not challenge the substance of the FBI's security-clearance determination—*because that determination was in Rattigan's favor*; instead, "he embraces it." *Rattigan*, 636 F. Supp. 2d at 93; *Rattigan I*, 643 F.3d at 983-84. (2) Rattigan's claim does not seek judicial review of a predictive judgment made by an official with the necessary expertise in protecting classified information; instead, his claim is based on the decision of OIO supervisors to report unfounded security concerns about him. That decision did not require predictive judgment. As the government has repeatedly insisted "Executive Order 12,968 requires employees to report '*any* information that raises doubts,' without making a judgment as to the information's veracity or relevance to national security." *Rattigan II*, at 7 (emphasis in original) (citing Exec. Order No. 12,968, § 6.2(b)) (citation omitted). In other words, the Executive has not delegated to every employee of every executive agency his constitutional discretion to decide whether another employee is fit to access sensitive information; instead, he has ordered them to report relevant information to those decisionmakers whom he *has* delegated that predictive authority. Accordingly, Rattigan's OIO supervisors were *not* agency officials responsible for making security clearance determinations. They did not have the necessary expertise and training to make a predictive judgment about who is fit to access classified information. Thus, *Egan* does not

shield from judicial review the OIO supervisor's decision to refer Rattigan for what they knew to be an unwarranted investigation by the Security Division.

At bottom, there are two fundamental flaws running though the government's arguments about why *Rattigan I* and *II* conflict with *Egan*. First, the government misperceives the critical distinction between (a) an agency's predictive judgment about its employees' fitness to access sensitive information, and (b) non-discretionary, non-predictive, non-expertise-driven decisions to report security concerns about another employee. It is axiomatic that the former are shielded by *Egan*, while the latter are not. This is the pillar of the panel majority's decisions. The government mistakenly believes that these decisions are one-and-the-same, but this would unhinge *Egan* from its central holding that only predictive judgments by agency employees with the necessary expertise and responsibility for making such judgments are non-justiciable.

Second, the government misreads the majority opinions in *Rattigan I* and *II* as "insist[ing] that *Egan* only shields security-related decisions made by agency employees with certain job titles or certain (unspecified) levels of training." Gov't Pet'n 8. Instead, the majority correctly, and wholly consistent with *Egan*, concluded that some *types* of agency determinations are shield by *Egan* and others are not—that is, the predictive judgment of a decisionmaker tasked with, and trained in, determining whether an employee is fit to access sensitive agency information, *is* shielded by *Egan*; whereas, an everyday-reporting-decision made by every agency employee, is *not* shielded by *Egan*.

The district court and the panel correctly applied this test to the facts of this case and determined that in the FBI, employees in the Security Division are the agency officials tasked with making predictive judgments about an employee's fitness for a security clearance. Thus, the district court and the majority correctly concluded that only determinations by officials of the Security Division could fall within *Egan*'s shield. The majority opinions make it clear that in another case, the district court must undertake a careful review of the relevant decision and decisionmaker in order to decide whether the claim can proceed. Oddly, the government does not disagree; in fact, it expressly admits that "[t]he separation-of-powers concerns precluding judicial review [explained in *Egan*] arise from the *type* of determination being made – *i.e.*, predictive judgments about whether an individual poses a security risk." Gov't Pet'n 7, 8.

There is no conflict between *Egan* and the panel majority opinions. The government's misreading of *Egan* and misapplication of that decision's principles to the facts of this case does not justify the court rehearing this case en banc.

**B. The panel majority opinions do not conflict with any prior decision of this court or any other court of appeals.**

The panel majority's decisions are not, as the government contends, inconsistent with decisions of this Court or any other court of appeals applying *Egan*. Gov't Pet'n 1, 8-10 (citing *Bennett v. Chertoff*, 425 F.3d 999 (D.C. Cir. 2005); *Ryan v. Reno*, 168 F.3d 520 (D.C. Cir. 1999); *Panoke v. U.S. Army Mil. Police Brig.*, 307 F. App'x 54 (9th Cir. 2009); *Hill v. White*, 321 F.3d 1334 (11th Cir. 2003); *Becerra v. Dalton*, 94 F.3d 145 (4th

Cir. 1996)). As the district court and the panel majority explained, in every one of these cases, the employee's security clearance was denied or revoked and the employee's lawsuit challenged that determination. *Rattigan I*, 643 F.3d at 981-82; *Rattigan*, 636 F. Supp. 2d at 91-92. In all of those cases, the plaintiff's claim would have required judicial second-guessing of the Executive's predictive judgment in denying or revoking a security clearance. Rattigan, by contrast, "embraces" the agency's determination to not revoke his security clearance. "For that reason, the precise issue presented by this case is one of first impression." *Rattigan I*, 643 F.3d at 982; *see also Rattigan*, 636 F. Supp. 2d at 92.

The government attempts to get around this distinction by asserting that *Bennett* and *Ryan* "held that *Egan* bars Title VII claims purporting to challenge security-related actions other than the denial or revocation of security clearances." Gov't Pet'n 8. That is incorrect: In both *Bennett* and *Ryan*, the employee's suit at bottom challenged the denial or revocation of a security clearance. *See Bennett*, 425 F.3d at 1000 (the agency "interposed the defense of [the plaintiff's] inability to sustain a security clearance in response to her" Title VII claim); *Ryan*, 168 F.3d at 542 ("[T]he waiver denials were tantamount to clearance denials and were based on the same sort of 'predictive judgment' that *Egan* tells us 'must be made by those with the necessary expertise in protecting classified information,' without interference from the courts."). The same is true of the other cases the government cites: the plaintiff's claim rested, in one way or another, on a challenge to the agency's security clearance determination. Such is not the case here since Rattigan

embraces the agency's vindication of his fitness for a security clearance. Moreover, the courts in those cases applied the same legal standard the majority applied here in determining justiciability: whether the claim questioned predictive judgments underpinning Executive agency security-clearance determinations. Thus, those cases are inapposite and not in conflict with the majority opinions in *Rattigan I* and *II*.

### C. This case is not of exceptional importance because the panel majority opinions will not chill security reporting, do not set forth an unworkable standard, and will not create "perverse incentives."

The government finally contends that this case is of exceptional importance; however, the government's arguments are misplaced and wrong.

First, the government argues that the majority's opinion in *Rattigan I* will chill security reporting, but the government almost completely ignores the majority's subsequent opinion in *Rattigan II*, which limited Title VII claims based on security reporting to "knowingly false reporting." *See Rattigan II*, at 2, 11. Although we respectfully disagree with the knowingly-false standard, it does not undermine, but in fact complements, the security reporting expected of government employees. "However critical it is for employees to report doubtful or unreliable information, the Security Division cannot possibly be assisted by employees who knowingly report false information—that is, outright lies—about fellow employees." *Id.* at 12. Dissuading knowingly false claims by the threat of a lawsuit by the employee wronged acts no different than these internal disciplinary procedures, while at the same time preserving a

grievant's remedy under Title VII for retaliation. Indeed, the government already dissuades false security reports by subjecting employees to "internal discipline for false or inaccurate reporting." *Id.* (citing Appellant's Reh'g Br. 8, 30-31). Indeed, "internal agency proceedings carry a more immediate threat of discipline [than a Title VII action], up to and including removal." *Id.* at 13 (internal quotation marks omitted) (quoting *Rattigan I*, 643 F.3d at 991 (Kavanaugh, J., dissenting), in turn quoting 71 Fed. Reg. 64,562, 64,563 (Nov. 2, 2006)). Thus, the *Rattigan I* and *II* majority opinions are fully in line with the government's expressed interests in encouraging the broad reporting of legitimate security concerns and discouraging false reports.

Second, the government contends that the knowingly-false standard is unworkable because (i) a plaintiff can simply just allege that the report was knowingly false, and (ii) it is unclear what should happen where only some of the reported allegations are knowingly false. The panel majority already addressed this first point: "[A]lthough allegations of knowing falsity may be easy to make, they are, in our experience, far from easy to prove. If this evidentiary difficulty fails to deter unfounded claims, district courts can be counted upon to weed them out at summary judgment." *Rattigan II*, at 14. Indeed, myriad claims have long required similar allegations and have proved to be workable; for example, a fraud claim requires allegations of knowing falsities, and an essential allegation of a malicious prosecution claim is "malice on the part of the defendant," *Pitt v. Dist. of Columbia*, 491 F.3d 494, 501 (D.C. Cir. 2007). As to the government's second

contention—that there is no roadmap for dealing with mixed-reporting claims, that is, claims that a security report included both true and knowingly-false allegations—in fact, such claims will have a tried-and-true recipe to follow: The mixed-motives doctrine. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 241-42 (1989) ("Title VII [is] meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations."). Therefore, the government is mistaken that the knowingly-false standard is unworkable.

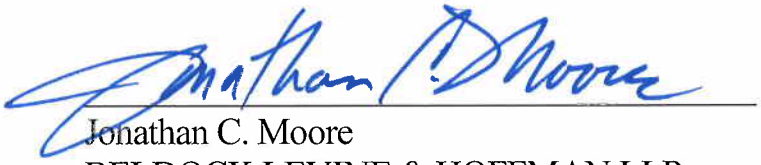
Finally, the government contends that by permitting claims to proceed when the security-clearance determination is favorable to the employee—but not when it is negative—the panel's decision "would also create perverse incentives, encouraging agencies to prophylactically insulate their actions from judicial review by revoking security clearances once an investigation has begun." Gov't Pet'n 10 n.3. Despite the government's cynical view, it is hard to imagine that Executive agencies will find it expedient to revoke a security clearance every time there is a security investigation, simply to avoid the prospect, however unlikely, of judicial review. Moreover, it is disconcerting for the government to suggest that if this court refuses to shield Executive agencies from Title VII liability then they will surreptitiously find a way to shield themselves.

## CONCLUSION

As the foregoing explanation demonstrates, this case fails to meet either of the enumerated grounds for en banc rehearing, which "is not favored and ordinarily will not be

ordered." Fed. R. App. P. 35(a). Therefore, we urge the Court to deny the government's petition.

Respectfully submitted,



Jonathan C. Moore
BELDOCK LEVINE & HOFFMAN LLP
99 Park Avenue, Suite 1600
New York, New York 10016
(212) 490-0400 // Fax: (212) 557-0565
jmoore@blhny.com
Counsel for the Plaintiff-Appellee

/s/ James R. Klimaski
James R. Klimaski, #243543
KLIMASKI & ASSOCIATES, P.C.
1625 Massachusetts Avenue NW, Suite 500
Washington, D.C. 20036-2245
(202) 296-5600 // Fax: 202-296-5601
Klimaski@Klimaskilaw.com
Local Counsel for Plaintiff-Appellee

On the response:

Joshua S. Moskovitz
BELDOCK LEVINE & HOFFMAN LLP

Dated: September 26, 2012

## CERTIFICATE OF SERVICE

I certify that the foregoing Opposition to Appellant's Petition for Rehearing En Banc will be served electronically to the following counsel for Appellant in this case automatically on September 26, 2012, subsequent to properly filing the items in the approved electronic Portable Document Format (Adobe PDF) through this Court's Case Management and Electronic Case Filing notification system operated on a secure sector of this Court's website.

Marleigh D. Dover
(202) 514-3511
Charles W. Scarborough
(202) 514-1927
Appellate Staff Attorneys
Civil Division - Room 7244
U.S. Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530-0001

/s/ Jon Pinkus

Jon Pinkus
KLIMASKI & ASSOCIATES, P.C.
1625 Massachusetts Avenue NW,
Suite 500
Washington, D.C. 20036-2245