No. 11-45

IN THE
Supreme Court of the United States

MICHAEL B. ELGIN, AARON LAWSON, HENRY TUCKER, AND CHRISTON COLBY,
Petitioners,

v.

DEPARTMENT OF THE TREASURY, ET AL.,
Respondents.

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

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners brought facial constitutional challenges to two federal statutes, both unrelated to the Civil Service Reform Act, and one unrelated to federal employment altogether. The district court has authority to review equitable constitutional claims, and, as the Government correctly concedes, no language in the Civil Service Reform Act takes it away.

Nevertheless, the Government insists that because Petitioners happen to be challenging the statutes in response to termination of their federal employment, Congress impliedly intended that their claims bounce between one tribunal that lacks power to provide the relief Petitioners seek and another that lacks ability to develop a relevant factual record. The impracticality of the Government's proposed procedure illustrates that Congress did not intend, and could not have intended, that result. Rather, as this Court has held in similar cases, constitutional claims that are "wholly collateral" to an administrative review scheme belong in district court.

I. District Courts Are Authorized to Review Petitioners' Equitable Constitutional Claims.

It is well established that district courts have the authority to review equitable constitutional claims. *See* 28 U.S.C. § 1331; Pet. Br. 20-25. Because nothing in the Civil Service Reform Act (CSRA) removes this authority, Petitioners may bring their claims in district court on that basis alone. Pet. Br. 26-32; *see Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) (Alito, J.) ("The power of the federal courts to grant equitable relief for constitutional violations

has long been established."); *Hubbard v. U.S. Envtl. Prot. Agency, Adm'r*, 809 F.2d 1, 11 n.15 (D.C. Cir. 1986).

Nevertheless, the Government asserts, citing *Bush v. Lucas*, 462 U.S. 367 (1983), that Petitioners lack a right of action. Resp. Br. 31-32. But *Bush* foreclosed only a legal action for *damages*, and Petitioners do not seek damages. Petitioners bring equitable constitutional claims, which can be decided in the district court absent a statute explicitly conferring a right of action and absent the implication of a new judicial remedy. *See* Pet. Br. 23-24.

The Government also suggests that the Petitioners are barred from bringing their claims under the Administrative Procedure Act (APA) because the CSRA provides an "adequate remedy" within the meaning of 5 U.S.C. § 704. Resp. Br. 31-32; *see* Joint Appendix (JA) 6, Complaint ¶ 5. But this assumes the conclusion that the CSRA provides an adequate remedy. For the reasons discussed below, the CSRA does not provide such a remedy, and so Petitioners may proceed in the district court under the APA, as well as directly under the Constitution. Moreover, Petitioners may also bring their claim for a declaration that the statutes are unconstitutional in the district court under the Declaratory Judgment Act, 28 U.S.C. § 2201 (entitled "Creation of remedy"). *See* JA 6.

II. Congress Did Not Intend to Preclude District-Court Review of Petitioners' Constitutional Claims in Favor of the Byzantine and Inefficient Framework Urged by the Government.

As Petitioners have explained, Pet. Br. 26-29, preclusion of district-court review of Petitioners' constitutional challenges requires a heightened showing of congressional intent. *See Webster v. Doe*, 486 U.S. 592, 603 (1988). The Government concedes that the CSRA does not meet this heightened standard but argues that it does not apply here because Petitioners could obtain judicial review under the CSRA in the Federal Circuit. Resp. Br. 18. However, even if *Webster*'s heightened standard does not apply, the Government still must show that Congress's intent to preclude district-court review of facial constitutional challenges is "'fairly discernible' in the detail of the statutory scheme." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 157 (1970)); *see* Pet. Br. 33. To be sure, the CSRA "prescribes in great detail the protections and remedies applicable to" adverse personnel actions and creates the Merit Systems Protection Board (MSPB) to adjudicate cases implicating those "protections and remedies" and, thus, precludes district-court review in some cases. *United States v. Fausto*, 484 U.S. 439, 443, 455 (1988).

But Petitioners are not seeking the CSRA's "protections and remedies." Instead, they bring facial constitutional challenges to two federal statutes unrelated to the CSRA. Congress cannot have

intended the MSPB to hear these claims because, as the Government concedes, the MSPB lacks the authority to declare a statute unconstitutional. Resp. Br. 54.[1]

According to the Government, Congress intended Petitioners to appeal a jurisdictional dismissal by the MSPB to the Federal Circuit, which would then remand the case to the MSPB for factual development before a second MSPB dismissal and appeal. *Id.* at 36, 39-45. This Rube Goldberg scheme of administrative and judicial review defies logic and is certainly not "fairly discernible" in Congress's handiwork. No rational Congress would have intended to preclude district-court review in favor of a forum that cannot decide the constitutional questions and establish a procedural framework that would require two dismissals by the MSPB and two appeals to the Federal Circuit before any decision on the merits. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3150 (2010) (rejecting the Government's proposed "odd

[1] The Government questions whether Petitioners' challenge is facial. Resp. Br. 15. Petitioners' claims are facial because Petitioners maintain that 50 U.S.C. app. § 453(a) is unconstitutional as to all men who must register with the Selective Service and that 5 U.S.C. § 3328 is a bill of attainder as to men older than 25 who failed to register. The distinction between as-applied and facial challenges is sometimes difficult to draw, but resolution of this case does not demand that the distinction be drawn. Here, the significance of the "facial" label is that Petitioners seek a declaration that two federal statutes are unconstitutional, and, as the Government concedes, the MSPB is powerless to accord the requested relief.

procedure" for administrative review of constitutional claims in favor of district-court jurisdiction).

A. The Government cites *Briggs v. Merit Systems Protection Board*, 331 F.3d 1307 (Fed. Cir. 2003), for the proposition that the Federal Circuit will hear claims like Petitioners' even when the MSPB cannot decide them. Resp. Br. 44. But unlike in *Briggs*, a factual record is necessary to decide Petitioners' constitutional claims. *See Briggs*, 331 F.3d at 1312-13 (citing the lack of need for a factual record as a factor in deciding to review the constitutional claim for the first time on appeal); Pet. Br. 44-53.[2]

Because the MSPB lacks authority to decide Petitioners' constitutional claims, any MSPB record would contain facts bearing on the MSPB's jurisdictional dismissal but no evidence bearing on the constitutional claims. When Petitioner Elgin appealed to the MSPB, the resulting administrative record contained only his personal information, details of his employment, and the Office of Personnel Management's (OPM's) determination that he had knowingly and willfully failed to register with the Selective Service. First Cir. Br. for Defs.-Appellees 26-27. None of this evidence has anything to do with Petitioners' bill of attainder or equal protection claims. In the administrative-exhaustion context, when there is "complete divergence"

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[2] As explained previously, in general, the Federal Circuit adheres to standard appellate practice, holding that its jurisdiction is coextensive with the jurisdiction of the lower tribunal under review. Pet. Br. 41 & n.4 (citing cases).

between the factual issues presented by a constitutional claim and the claims that an agency ordinarily hears, the exhaustion requirement is excused, and plaintiffs may proceed directly to district court. *Andrade v. Lauer*, 729 F.2d 1475, 1492 (D.C. Cir. 1984). Similarly, the complete divergence between the facts necessary to Petitioners' constitutional claims and the facts in Petitioner Elgin's MSPB record demonstrates that Congress did not intend to shoehorn claims like Petitioners' into the CSRA review scheme.

The insufficiency of an MSPB record would affect both the employee and the Government on appeal to the Federal Circuit. Petitioners have consistently contended that their equal protection claim will require extensive factual development. Pet. Br. 47-53. The Government says that the same is not true of Petitioners' bill of attainder claim. Resp. Br. 39-40. But the Government's own conduct demonstrates otherwise. The Government submitted evidence about OPM's practices that assisted the district court in finding for it on the bill of attainder claim. *See* Dist. Ct. Doc. 53, at 13 & n.9. That evidence was not in the MSPB record and would have been unavailable to the Federal Circuit on appeal. By contrast, a district court would compile a record that included such evidence. *Cf. McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 497 (1991) ("[S]tatutes that provide for only a single level of judicial review in the courts of appeals 'are traditionally viewed as warranted only in circumstances where district court factfinding would unnecessarily duplicate an adequate administrative

record . . . .'" (quoting Br. for Am. Bar Ass'n at 7)).

B. The Government claims that "many [facial] challenges . . . do not require a factual record." Resp. Br. 39. But that is not this case. At a minimum, a factual record is required for Petitioners to prevail on their equal protection claim. Pet. Br. 47-53. Moreover, Petitioners' claims are hardly unique. Courts often require a factual record to resolve constitutional challenges. In *Turner Broadcast Systems, Inc. v. FCC*, 512 U.S. 622, 667-68 (1994) (plurality opinion), for example, this Court vacated a grant of summary judgment on a facial challenge under the First Amendment because the Government presented a "paucity of evidence" regarding whether the law was narrowly tailored. *See also Davis v. Fed. Election Comm'n*, 554 U.S. 724, 732 (2008) (describing agency's objection to expedited decision on facial challenge as based on agency's asserted need for "extensive discovery"). Indeed, the equal protection decision that Petitioners seek to revisit involved a facial challenge with a five-volume record. *Goldberg v. Rostker*, 509 F. Supp. 586, 588 (E.D. Pa. 1980), *rev'd*, 453 U.S. 57 (1981). The kind of well-developed record on which the judges and Justices relied in *Rostker* would not be available to the Federal Circuit under the Government's scheme because the MSPB would have dismissed the claim without the production of any record, let alone discovery.[3]

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[3] Facial challenges to statutes frequently demand creation of a factual record. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 192, 195 n.12, 202-03 (2008) (plurality opinion); (cont.)

The Government next argues that, if a factual record were necessary, the Federal Circuit could use judicial notice to create a record, noting that the parties in *Rostker* stipulated to the record and that *Rostker* was decided, in this Court, on the basis of congressional testimony. Resp. Br. 40-41.

But the Government's reference to a stipulated record in *Rostker* is misleading. The stipulation did not replace discovery but rather represented an agreement to forgo an evidentiary hearing after extensive discovery. *See Goldberg*, 509 F. Supp. at 588 n.3. The five-volume record to which the parties stipulated included depositions of government officials. *See id.* at 599-602 nn.17-20, 24-26. Because the Federal Circuit cannot order or oversee discovery, the parties would not have the same opportunity to develop the record under the Government's framework. And, as demonstrated by the Government's refusal to produce documents without a discovery request in this case, it is unlikely

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Fla. Bar v. Went For It, Inc., 515 U.S. 618, 625-28 (1995); *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 677-78 (1989); *Toomer v. Witsell*, 334 U.S. 385, 397-99 & nn.28, 30 (1948); *H.B. Rowe Co. v. Tippett*, 615 F.3d 233, 240, 257 (4th Cir. 2010); *Hutchins v. District of Columbia*, 188 F.3d 531, 541-42 (D.C. Cir. 1999); *Kalman v. Cortes*, 723 F. Supp. 2d 766, 790-91, 795-96 (E.D. Pa. 2010); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 953-73 (N.D. Cal. 2010), *aff'd sub nom. Perry v. Brown*, ___ F.3d ___, 2012 WL 372713 (9th Cir. Feb. 7, 2012); *Gen. Elec. Co. v. Whitman*, 257 F. Supp. 2d 8, 25 n.9 (D.D.C. 2003), *rev'd sub nom. Gen. Elec. Co. v. Envtl. Prot. Agency*, 360 F.3d 188 (D.C. Cir. 2004); *McConnell v. Fed. Election Comm'n*, 251 F. Supp. 2d 176, 206-07 (D.D.C.), *aff'd in part, rev'd in part*, 540 U.S. 93 (2003).

that the Government would permit *Rostker*-like depositions and other discovery absent a court order. JA 42-43. Without this evidence, there would be no record to which to stipulate.

The claim that this Court's decision in *Rostker* turned on congressional hearings, of which the Federal Circuit might take judicial notice, is also misleading. *See* Resp. Br. 41. First, there is no guarantee that the same wealth of contemporaneous congressional testimony would be available to the Court in this or another similar case. Second, even in *Rostker*, judges and Justices went beyond publicly available materials. Justices White and Marshall both cited deposition testimony from the record. *Rostker v. Goldberg*, 453 U.S. 57, 84 (1981) (White, J., dissenting); *id.* at 108, 111 (Marshall, J., dissenting). And the trial court denied the Government's early motion for summary judgment because it "needed an amplification of the record before [it] could decide the [claims]." *Goldberg*, 509 F. Supp. at 589 n.5; *see id.* at 599-602 nn.17-20, 24-26 (citing depositions). It is true, as the Government contends, Resp. Br. 41, that Petitioners cited many publicly available materials in their opening brief. But that is because discovery has not yet been taken, and Petitioners lack the more compelling evidence that could be obtained in discovery.[4]

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[4] The Government says that "nothing prohibits an employee, in his initial appeal to the MSPB, from supplementing the record with materials that are relevant to his constitutional arguments." Resp. Br. 41. But something *does* prohibit the employee from doing so in a case like Petitioners': the MSPB's (cont.)

C. The Government's suggestion that the Federal Circuit could remand the case back to the MSPB to address an insufficient record would be an abnormal use of remand, cannot be defended by appeals to agency expertise, and raises concerns about who would serve as factfinder.

First, the cases cited by the Government for the proposition that the Federal Circuit could remand to the MSPB for additional record development all involved remand to an agency that indisputably had authority to decide the claim on its merits. *See* Resp. Br. 42-43 (citing cases). But here, the MSPB could not have decided the merits of Petitioners' claims even on remand, and the Government does not contend otherwise. Ordinarily, a tribunal that lacks the authority to decide the merits would also lack the authority to do anything else—including oversight of factual development. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998). In deciding this case, this Court could take the unprecedented step of imbuing the MSPB with that authority, but positing that outcome only underscores the peculiarity of the Government's proposed scheme.

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immediate dismissal because it lacks authority to grant the requested relief. And the MSPB regulation the Government cites allowing the proffer of evidence excluded at a hearing, *see id.*, presumes that the MSPB actually holds a hearing, something it does not do when it lacks jurisdiction—and, therefore, did not do in Petitioner Elgin's case. Pet. App. 95a n.1. More importantly, even if Petitioners could have lodged evidence with the MSPB, they could not have taken discovery.

Second, remand makes sense when the agency is expert in the case's subject matter or possesses evidence important to the record. *See, e.g.*, *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). But the MSPB's expertise lies in federal employment and manager-employee disputes. Pet. Br. 8-9. It is not expert on questions of constitutional interpretation (and certainly not on the constitutional issues posed by Petitioners' "wholly collateral" claims, *see infra* 17-20). The MSPB may have discovery powers similar to those of a district court, *see* Resp. Br. 43, but there is no reason to prefer remand to the MSPB over district-court adjudication on the basis of the MSPB's subject-matter expertise or possession of pertinent evidence.

Finally, the Government fails to identify who within its conjured framework would serve as factfinder. It asserts that the Federal Circuit should remand the case and that the MSPB should oversee discovery and compile a record. Resp. Br. 41-43. What is not clear from the Government's brief is what would happen next. Would the MSPB make factual findings even though it cannot render legal conclusions or order the relief requested? Some questions that Petitioners raise—such as whether men and women are sufficiently similarly situated with regard to military service—are mixed questions of law and fact. They would require the MSPB to draw a narrow line at where its authority to find facts ends and where its inability to make legal conclusions on the constitutionality of statutes begins. *Cf. Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 491-92 (1979) (Rehnquist, J., dissenting)

(discussing complexities of mixed questions of law and fact in equal protection cases). On the other hand, if the MSPB lacks authority to find facts where it is powerless to render a decision, the Federal Circuit would be forced into a fact-finding role that appellate courts almost invariably eschew. *See Pullman-Standard v. Swint*, 456 U.S. 273, 291-93 (1982). To be sure, this Court could require the Federal Circuit to find facts in the first instance. But the Government's failure to propose an answer highlights the problems inherent in either solution and exposes the oddity of requiring Petitioners to proceed in the MSPB and the Federal Circuit. By contrast, district-court consideration of claims like Petitioners' does not raise these concerns, as the district court would find facts and make conclusions of law, and the circuit court would assume its ordinary appellate role.

D. It is possible, though not sensible, that Congress might have devised the scheme the Government describes. But the question here is whether the CSRA *implicitly* does so. Given that the CSRA does not expressly adopt the Government's scheme, any intent must be inferred—and be fairly discernible—from the CSRA's text. *See Block*, 467 U.S. at 351. The complexities of the Government's hypothetical framework demonstrate that Congress did not intend that Petitioners' constitutional challenges would be subject to that framework.

Indeed, the procedures imagined by the Government would actually undermine the benefits of the preclusion scheme that the Government invokes. "[C]hanneling constitutional claims through

an agency," the Government says, "has the benefits of (1) promoting judicial efficiency . . . ; (2) allowing the agency to bring its expertise to bear on the constitutional issues; and (3) providing the agency an opportunity to 'produce a useful record for subsequent judicial consideration.'" Resp. Br. 28-29 (citations omitted) (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)). The Government's scheme frustrates each of these purposes.

First, the Government's framework undermines judicial efficiency by requiring employees, government attorneys, the MSPB, and the Federal Circuit to engage in perfunctory litigation procedures that all parties involved know cannot result in a decision on the merits. Employees must file and the Government must oppose a claim at the MSPB that all know must be dismissed. "Wheels would spin for no practical purpose." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978) (per curiam). The Federal Circuit must then entertain an appeal that it and both parties know cannot be decided on the current record. Then, the Federal Circuit must remand the case to the MSPB, which the Federal Circuit knows cannot decide the merits. Finally, as noted earlier (at 10-12), the MSPB must oversee discovery in a case that it knows it lacks authority to decide. Only then, after the MSPB dismisses and the plaintiff appeals to the Federal Circuit for a second time, would there be a decision on the merits.

Second, as noted above (at 11), the MSPB lacks expertise that bears on Petitioners' facial constitutional challenges; rather, it adjudicates "disputes between agency managers and their

employees." S. Rep. No. 95-969, at 4, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2727. The Government nevertheless endorses channeling so the MSPB can "weigh in on any statutory, regulatory, or factual issues as to which [its] expertise may be helpful." Resp. Br. 13. Petitioners do not contend that their employment record played any role in their terminations; they do not contend that their terminations were contrary to statute or regulation; and they do not contend that any agency misinterpreted any statute. (The Government contends none of these things either.) *See Free Enter. Fund*, 130 S. Ct. at 3150 ("[W]e presume that Congress does not intend to limit [district court] jurisdiction . . . if the claims are 'outside the agency's expertise.'" (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994))).[5]

The case is nearly bereft of facts related to Petitioners' employment. The only possible factual question the MSPB could consider with regard to Petitioners' claims would be whether Petitioner Tucker was constructively removed. *See* Resp. Br. 15. But the MSPB would dismiss Tucker's constitutional claim immediately, as it did Petitioner Elgin's, without deciding this factual question, because it cannot grant the relief requested.

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[5] The Government also invokes the expertise of the Federal Circuit but never explains why the Federal Circuit is more expert than other courts of appeals in deciding whether Selective Service statutes are unconstitutional. *See* Resp. Br. 52. This is not, after all, a patent appeal. *See* 28 U.S.C. § 1295(a)(1), (4).

Third, the Government's framework does not provide "an opportunity to produce a useful record." Resp. Br. 29 (quoting *McCarthy*, 503 U.S. at 145) (internal quotation marks omitted). As explained above (at 5-7), because the MSPB cannot decide Petitioners' constitutional claims, the MSPB record cannot—and did not in Petitioner Elgin's case—contain information relevant to those claims.

E. The CSRA provides some employees with greater protections and remedies than others; not all federal employees may appeal adverse employment actions to the MSPB. *See* 5 U.S.C. § 7511(a)(1), (b) (listing which employees are protected by the merit system and which are excluded); 5 U.S.C. § 7513(a), (d) (describing protections and MSPB appeal rights). The Government's framework would lead to the bizarre result that employees who may not bring claims in the MSPB under the CSRA would have more robust judicial review of constitutional claims than employees who may bring such claims. In *Fausto*, this Court held that the plaintiff, an employee without MSPB appeal rights, could not bring a Back Pay Act claim in the Court of Federal Claims. 484 U.S. at 451. The Court explained that Congress intended the CSRA to preclude judicial review of nonconstitutional monetary claims, even for employees who could not bring claims in the MSPB. *Id.*[6]

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[6] At the time *Fausto* was decided, excepted-service employees like Fausto could not appeal employment actions to the MSPB. *See* 484 U.S. at 448. Congress has since granted many excepted-service employees MSPB appeal rights, *see* 5 U.S.C. (cont.)

But the CSRA would not have prevented Fausto from bringing *constitutional* claims in the district court, including, if he had been terminated for failing to register with the Selective Service, claims identical to Petitioners'. As the Government concedes, Resp. Br. 18, the CSRA does not meet *Webster*'s heightened-showing requirement and so, unless he had access to district court, Fausto would have been impermissibly "den[ied] any judicial forum." *Webster*, 486 U.S. at 603.

The Government's proposed procedure turns *Fausto* on its head, imposing the very "inverted preference" that *Fausto* rejects. 484 U.S. at 450. The supposedly disfavored employees without MSPB appeal rights could obtain more meaningful judicial review of constitutional challenges—that is, an extra layer of review and more immediate access to a tribunal with the authority to decide the claim—than the supposedly favored employees. This discussion of federal employees who do not have access to MSPB review is hardly academic: According to the MSPB, only "about two-thirds of the full-time civilian work force[] currently have appeal rights to the Board." Jurisdiction, U.S. Merit Sys. Protection Bd., http://www.mspb.gov/About/jurisdiction.htm (last visited Feb. 14, 2011).

In sum, the Government's framework runs headlong into the principles that underlie the CSRA, the justifications for channeling claims to agencies,

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§ 7511(a)(1)(C), but, as explained in the text, many other federal employees may not proceed in the MSPB.

the standard progression from trial to appellate courts, and those courts' respective roles.

III. The CSRA Does Not Impliedly Preclude District-Court Authority to Hear Petitioners' Claims Because They Are Wholly Collateral to the CSRA's Review Scheme.

Even if it were fairly discernible that Congress intended the CSRA to impliedly preclude some constitutional suits, that intent would not extend to constitutional claims unrelated to the subject matter of the CSRA's review scheme. The Government says that the CSRA requires Petitioners' claims to be brought to the MSPB because Petitioners were federal employees. But, as our opening brief explains (at 36-40), Petitioners' challenge is "wholly collateral" to the CSRA. *See Thunder Basin*, 510 U.S. at 212 (quoting *Heckler v. Ringer*, 466 U.S. 602, 618 (1984)) (internal quotation marks omitted).

A. The Government argues that the claims are not collateral because one of the remedies that Petitioners seek—reinstatement—is "essentially the same" as a remedy the CSRA provides. Resp. Br. 51. However, whether a claim is "wholly collateral" to a review scheme does not depend on the relief sought.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), the plaintiff brought a constitutional challenge to an administrative review scheme and requested reinstatement of his social security benefits—exactly the remedy the administrative scheme provided. *Id.* at 324-25. Nevertheless, this Court held that his due process claim was "collateral" to his claim for

benefits and, therefore, he could bring his claim in district court. *Id.* at 330-32.

Similarly, in *Johnson v. Robison*, 415 U.S. 361 (1974), the plaintiff sought both a declaration that the statute denying him veterans' benefits was unconstitutional and a declaration that he was entitled to those benefits. *Robison v. Johnson*, 352 F. Supp. 848, 850 (D. Mass. 1973), *rev'd*, 415 U.S. 361. Entitlement to benefits was what the veterans' benefits administrative scheme regularly adjudicated. However, this Court held that the plaintiff's constitutional claim was unrelated to the administrative scheme and permitted suit in district court. *Johnson*, 415 U.S. at 373.

The Government's argument is also wrong on its own terms. Yes, the MSPB can order reinstatement in the run-of-the-mill case. But the MSPB *could not* do so here because it could not render the predicate declaration on which reinstatement hinges: that 5 U.S.C. § 3328 and 50 U.S.C. app. § 453(a) are unconstitutional.

Petitioners' constitutional claims are far removed from the types of employee-manager disputes the CSRA is designed to address. Indeed, they are more removed than were the claims held collateral in *Mathews*, 424 U.S. at 330, and *McNary*, 498 U.S. at 498-99. Both were challenges to the very administrative schemes the Government argued precluded district-court review. Petitioners' claims, by comparison, are *doubly* collateral: They present neither a claim that can be adjudicated by the review scheme nor a challenge to the review scheme itself. Rather, Petitioners challenge elements of the

Selective Service system—which has nothing to do with adjudication of federal employee-manager disputes. If Petitioners' claims are not collateral to the statutory scheme, it is hard to imagine a claim that would be.[7]

B. The Government argues that Petitioners' claims are not collateral because they are more like the claims in *Thunder Basin*, where this Court held that the plaintiff's claims were precluded, than the claims in *Mathews* and *McNary*. *See, e.g.*, Resp. Br. 25, 29-30, 36. In *Thunder Basin*, a mine operator believed a union had violated federal labor law and argued that mandatory administrative review procedures of the Federal Mine Safety and Health Amendments Act (Mine Act) violated its due process rights. 510 U.S. at 204-05. This Court held that district-court review of the plaintiff's pre-enforcement statutory and constitutional claims was precluded by the Mine Act. *Id.* at 215-16.

The Government argues that the CSRA and the Mine Act are "quite similar" because both provide for administrative-agency adjudication followed by court-of-appeals review. Resp. Br. 25. But whether a claim is collateral depends on more than the nature of the administrative scheme; it depends on how

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[7] The collateral nature of Petitioners' claims is highlighted by the fact that if Petitioners sought a declaration that they were eligible to work for the federal government in the future, no one would dispute that the district court would have authority to hear those claims. Yet aside from Petitioners' request for reinstatement, that case would be identical to the one now before this Court. *See also* Pet. Br. 39 n.3.

removed the constitutional claims are from the types of claims the agency typically adjudicates and in which the agency has expertise. Viewed from this perspective, the Government's comparisons to *Thunder Basin* are inapposite.

In *Free Enterprise Fund*, this Court explained that, "[i]n *Thunder Basin*, the petitioner's primary claims were statutory" and benefitted from the agency's expertise. 130 S. Ct. at 3151. Here, like the plaintiffs in *Free Enterprise Fund*—and unlike the plaintiff in *Thunder Basin*—Petitioners have no statutory claims, and, as explained (at 11), their constitutional claims are unrelated to the agency's expertise. Though the administrative scheme in *Free Enterprise Fund* also provided for review of agency decisions in a court of appeals, this Court held that the plaintiffs were not required to shoehorn their constitutional challenge into the "odd procedure[s]" proposed by the Government because their constitutional claim was wholly collateral to the review scheme and outside the agency's expertise. *Id.* at 3150-51.

The Government is right that "this is an easier case than *Thunder Basin*," Resp. Br. 25, but not in the direction it argues. As explained above, Petitioners are more entitled to district-court review than the plaintiff in *Thunder Basin* and, indeed, in any of the cases in the "wholly collateral" line of authority.

IV. District-Court Review of Equitable Constitutional Claims Would Not Impose a New Burden on the Judiciary.

The Government expresses concern at leaving courts and the MSPB with concurrent jurisdiction over constitutional claims brought by federal employees. The Government argues that if Petitioners' claims are not precluded, future plaintiffs with equitable constitutional claims will file duplicative suits in the MSPB and district court seeking relief on the same underlying facts. Resp. Br. 28-29, 51. The Government is wrong.

First, the Government contends that constitutional challenges to statutes are "often raised in conjunction with nonconstitutional arguments," raising the specter of a flood of litigation. Resp. Br. 51. However, the Government cites no cases in support of its claim, only the First Circuit's statement that constitutional claims are frequently raised in discharge cases, a statement that, in turn, cites no examples or authority. Pet. App. 12a. Tellingly, the Government's assertion is contrary to its earlier argument that federal employees' constitutional claims for equitable relief are "infrequently litigated." Cert. Opp. 15.

Second, claim splitting and preclusion doctrines would bar duplicative suits in the MSPB and district court. A court can dismiss a suit when it determines that a claim involving the same facts and parties is pending in a different court. *Katz v. Gerardi*, 655 F.3d 1212, 1217-18 (10th Cir. 2011). The other suit need not have reached final judgment for the rule to apply. "[T]he test for claim splitting is not whether

there is finality of judgment, but whether the first suit, assuming it were final, would preclude the second suit." *Id.* at 1218; *see also Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000). Moreover, final MSPB decisions have preclusive effect in district court. *Morgan v. Fed. Aviation Admin.*, 657 F. Supp. 2d 146, 153 (D.D.C. 2009); *Arakawa v. Reagan*, 666 F. Supp. 254, 261 (D.D.C. 1987). Thus, as a practical matter, employees would have to choose whether to pursue claims in the MSPB or in the district court. They could not do both.

The Government also claims that authorizing claims like Petitioners' in district court would create "impractical circuit conflicts." Resp. Br. 53. Circuit conflicts on constitutional questions are a fact of our federal judicial system. In any event, preclusion of equitable constitutional claims will do little to prevent circuit splits. As noted above (at 15-16), many federal employees—those who cannot appeal to the MSPB—are already able to obtain constitutional review of agency action in district court. These suits may be decided differently in different courts, and circuit conflicts will arise.

Finally, the Government contends that a holding that Petitioners' claims are collateral to the CSRA will spawn litigation over whether claims are collateral. Resp. Br. 47-48. The Government's desired holding could reduce litigation over the "collateral" test—as could overruling *Mathews*, *McNary*, and *Johnson*—but it could also increase other litigation. Indeed, relegating this suit to the MSPB may encourage federal employees with equitable constitutional claims to argue that they are not

subject to the CSRA's review scheme so that they may litigate in district court rather than the MSPB. *See Webster*, 486 U.S. at 603. Much litigation already exists concerning who is an "employee" entitled to appeal to the MSPB. *See* 5 U.S.C. § 7511(a)(1). In December 2011 alone, the MSPB decided this question in nine cases.[8] To employees who are on the margins of MSPB jurisdiction and who have colorable constitutional claims, the Government's desired holding would create increased incentive to litigate these difficult questions.

* * *

Petitioners challenge two Selective Service statutes as facially unconstitutional. They do not bring a run-of-the-mill employment dispute that the CSRA intended to channel through the MSPB, nor do they challenge any aspect of the CSRA.

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[8] *Calderon v. U.S. Postal Serv.*, No. DE-3443-12-0071-I-1, 2011 MSPB LEXIS 7620 (M.S.P.B. Dec. 29, 2011); *Nimmo v. Dep't of Homeland Sec.*, No. NY-0752-11-0326-I-1, 2011 MSPB LEXIS 7608 (M.S.P.B. Dec. 27, 2011); *Williams v. Dep't of Veterans Affairs*, No. SF-0752-12-0111-I-1, 2011 MSPB LEXIS 7578 (M.S.P.B. Dec. 23, 2011); *Daly v. Dep't of Homeland Sec.*, No. NY-315H-11-0325-I-1, 2011 MSPB LEXIS 7519, at *7 (M.S.P.B. Dec. 21, 2011); *Atkinson v. Dep't of Defense*, No. CH-0752-12-0005-I-1, 2011 MSPB LEXIS 7287, at *4-5 (M.S.P.B. Dec. 19, 2011); *Mendez v. Dep't of Defense*, No. AT-0752-11-0894-I-1, 2011 MSPB LEXIS 7371, at *3-8 (M.S.P.B. Dec. 15, 2011); *Carr v. Dep't of Defense*, No. DC-0752-12-0117-I-1, 2011 MSPB LEXIS 7448 (M.S.P.B. Dec. 14, 2011); *Holland v. Dep't of the Army*, No. NY-0752-12-0031-I-1, 2011 MSPB LEXIS 7353 (M.S.P.B. Dec. 13, 2011); *Selover v. Dep't of the Army*, No. DC-315H-12-0116-I-1, 2011 MSPB LEXIS 7155 (M.S.P.B. Dec. 5, 2011).

Nevertheless, the Government contends that Congress impliedly precluded traditional district-court authority to hear the equitable constitutional claims of federal employees. Congress, however, is presumed not to have intended to limit jurisdiction "if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Free Enter. Fund*, 130 S. Ct. at 3150 (quoting *Thunder Basin*, 510 U.S. at 212-13). Because Petitioners' claims meet all of these criteria, the CSRA does not impliedly preclude district-court review.[9]

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[9] Petitioners contend that the CSRA does not preclude district-court review of their equitable constitutional claims. However, if the only available avenue for review of Petitioners' claims is appeal to the Federal Circuit via the MSPB, Petitioner Elgin should be permitted to seek review of his MSPB decision in the Federal Circuit under the doctrine of equitable tolling. Elgin filed this case in district court one week after the MSPB's order dismissing his claim for lack of jurisdiction became final, long before the sixty-day review period would have expired. *See* 5 U.S.C. § 7703(b)(1). This Court has endorsed equitable tolling when a plaintiff timely files in the wrong forum. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990). *Bowles v. Russell*, 551 U.S. 205 (2007), does not apply here because the time limit for seeking review from the MSPB is a "claims-processing rule," not a jurisdictional prerequisite. *See Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1205 (2011). Therefore, if Elgin does not prevail here, he should be allowed to argue to the Federal Circuit that the sixty-day time period has been equitably tolled.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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