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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

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BRIEF FOR ELAINE MITTLEMAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF FOR ELAINE MITTLEMAN
AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

Elaine Mittleman is an attorney with a solo practice and is a member of the Supreme Court bar. She has a long-standing interest in the protection of First Amendment and other constitutional rights for federal employees.

In 1980, after graduating from the University of Michigan Law School, Ms. Mittleman worked at the U.S. Department of the Treasury on the Chrysler Loan Guarantee program. Ms. Mittleman raised concerns about Chrysler's financial condition and its failure to submit required reports. She expressed those concerns to persons on Capitol Hill, including Representative David Stockman. Ms. Mittleman was terminated from her position by Treasury Assistant Secretary Roger C. Altman. *See* Ann Crittenden, *Treasury's Ousted Chrysler Critic*, The New York Times,

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[1] Pursuant to this Court's Rule 37.3(a), *amicus* timely notified all parties of her intention to file this brief. Counsel for petitioners and respondents have consented to the filing of this brief and their written consent has been lodged with the Court. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* or her counsel made a monetary contribution intended to fund the preparation or submission of this brief.

March 6, 1981, at D1; Andy Pasztor, *Chrysler to Get Additional U.S. Support Though It Hasn't Fully Met Prior Terms*, The Wall Street Journal, February 26, 1981, at 2.

In the context of her firing, Ms. Mittleman was suspected by her superiors of leaking to the press. A Treasury Inspector General (I.G.) Report was prepared because Ms. Mittleman took her concerns about monitoring Chrysler to the I.G. Mr. Altman stated in the I.G. Report that there had been several leaks to the press of information regarding Chrysler's financial and operating problems and [based on information Altman received from a congressman], "it was logical to assume that it was she who had passed Chrysler information to the reporter." Altman further stated in the I.G. Report that he ordered Ms. Mittleman to be terminated because she "lacked understanding of the real problems plus she presented a potential risk for damaging news leaks."

Ms. Mittleman sought the assistance of the Office of Special Counsel ("OSC") when she was fired. However, she was a member of the excepted service and was not an employee as defined by the Civil Service Reform Act. As a result, she did not receive any Civil Service protection from being fired. *See* Leslie Phillips, *Whistle-blower measure urges better protection*, USA Today, March 15, 1989, at 4A; David Hess, *Informers' bill clears Congress*, Philadelphia Inquirer, March 22, 1989 (in the last eight years, the special counsel has

turned down more than 99 percent of whistleblowers' complaints without initiating any corrective action; new bill is too late for Mittleman, whose case is cited by the Government Accountability Project's Thomas Devine as a "classic example of the utter failure of the 1978 Whistleblower's Protection Act.").

One provision in the Whistleblower Protection Act of 1989 was based on Ms. Mittleman's unsuccessful experience with the Office of Special Counsel. *See* S. Rep. No. 100-413, at 10-11 (1988) ("Ms. Mittleman not only did not receive any assistance from OSC on her complaint of reprisal, she was actually hurt by her contacting the OSC because of the OSC investigator's negative comments to OPM").

Based on her experience, Ms. Mittleman is extremely concerned that federal workers who engage in speech on a matter of public concern continue to lack adequate protection. *See* Paul M. Secunda, *Sound Off: Federal employees face a stunning lack of protection for free speech*, Legal Times, October 22, 2007. It is extremely important that federal employees have access to federal district courts to bring constitutional claims. Those claims are not addressed by the provisions of the Civil Service Reform Act.

SUMMARY OF ARGUMENT

This case presents complex questions concerning the constitutional claims of federal employees. In analyzing the questions, it is necessary to address the interaction between constitutional claims and statutory provisions, such as the Civil Service Reform Act.

Federal employees must have access to the district courts to present constitutional claims. The statutory provisions of the Civil Service Reform Act, although seemingly comprehensive, in fact omit fundamental constitutional concerns. The statutory scheme of the Civil Service Reform Act cannot serve to preclude federal employees from seeking judicial review of constitutional claims. The Civil Service Reform Act was not designed and does not function as a vehicle by which constitutional claims can be addressed.

Further, judicial review of constitutional claims of federal employees should be available in a timely manner. If constitutional claims can be addressed only after administrative remedies have been exhausted, then any relief may be available only long after it would serve a constructive purpose. The process available to federal employees to seek judicial review of constitutional claims should be similar to the process available to state and municipal employees pursuant to 42 U.S.C..§ 1983.

ARGUMENT

I. The Civil Service Reform Act should not preclude judicial review of constitutional claims.

The Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C.§ 1101 *et seq.*) established "an integrated scheme of administrative and judicial review," which provides protections and remedies for federal employment disputes. *United States v. Fausto*, 484 U.S. 439, 445, 448 (1988).

The Court discussed constitutional claims and the CSRA in *Bush v. Lucas*, 462 U.S. 367 (1983). The Court explained, 462 U.S. at 385-86 (footnotes omitted), that:

> Federal civil servants are now protected by an elaborate, comprehensive scheme that encompasses substantive provisions forbidding arbitrary action by supervisors and procedures – administrative and judicial - by which improper action may be redressed. They apply to a multitude of personnel decisions that are made daily by federal agencies. Constitutional challenges to agency action, such as the First Amendment claims raised by petitioner, are fully cognizable within this system.

The government asserted in its brief in opposition to the petition that "[u]nder the CSRA, a federal employee who believes that an unlawful adverse action, including removal, has been taken against him may appeal the agency's decision to the Merit Systems Protection Board (MSPB). … An employee may seek judicial review of a final determination by the MSPB. 5 U.S.C.§ 7703(a)(1). Except in certain cases involving discrimination claims, the forum for such judicial review is the United States Court of Appeals for the Federal Circuit. 5 U.S.C.§ 7703(b)." U.S. Br. in Opp. at 3.

The government further stated in its brief in opposition in this case that "the CSRA provides an avenue for judicial review of constitutional claims like petitioners' in the Federal Circuit, and thus does not 'foreclose' judicial review of such claims." U.S. Br. in Opp. at 10, n.2.

The government has portrayed the process for judicial review of constitutional claims for federal employees in an overly-simplistic manner. Not all persons who work for the federal government are permitted access to the described procedures, including review in the Federal Circuit. The term used by the government, "federal employee," is not a defined term. It is easy to generalize about federal employees without recognizing that there are different classifications of persons who work for the federal government.

Thus, even though it may appear that the CSRA is a comprehensive scheme, in fact, there are federal employees, such as those who are not civil servants, who are not protected or covered by the CSRA. Moreover, *Bush* recognized that there are actions which are not considered "personnel actions," and therefore would not be covered by this system. *Bush*, 462 U.S. at 385 n. 28.

The concurrence of Judge Stahl in *Elgin v. U. S. Dept. of Treasury*, 641 F.3d 6, 18 n. 12 (1st Cir. 2011) (Stahl, J., concurring), notes the possibility of judicial review of a colorable constitutional challenge in *Pathak v. Dep't of Veterans Affairs*, 274 F.3d 28, 31, 33 (1st Cir. 2001).

However, the courts have frequently found that the CSRA precludes constitutional claims, even if there is not an adequate or complete remedy. *See Hall v. Clinton*, 235 F.3d 202, 205 (4th Cir. 2000); *Hall v. Clinton*, 285 F.3d 74, 81 (D.C. Cir. 2002) (CSRA is the exclusive remedy for federal employees with individualized job grievances, even if it affords incomplete relief). This argument likely confuses whether there is an adequate remedy with whether a claim is precluded. In *Bush*, 462 U.S. at 388, the question was whether the "elaborate remedial system" should be augmented, not "what remedy the court should provide for a wrong that would otherwise go unredressed."

Bush found that an additional remedy did not need to be created when there was an elaborate remedial system. *Bush* did not address what remedy the court should provide for those whose claims would go unredressed in the CSRA. However, courts have relied on *Bush* to deprive persons of any opportunity to address constitutional claims.

Thus, Ms. Mittleman was not able to have her constitutional claims addressed on the merits or to obtain any remedy whatever. *Mittleman v. United States Treasury*, 773 F.Supp. 442, 449, 453 (D.D.C. 1991) (CSRA is the exclusive remedy; the fact that Congress explicitly denied a remedy to Schedule A employees shows an intention to deny them a statutory or constitutional remedy for damages).

These decisions, which deny judicial review of constitutional claims, are based on a sweeping presumption about congressional intent. Congress did not explicitly state that judicial review was not available. Similarly, it is doubtful that Congress explicitly indicated that Schedule A employees should not be permitted to pursue constitutional claims. A system in which Schedule A employees cannot pursue constitutional claims, but other federal employees can, presents constitutional questions of its own. One class of federal employees should not be barred from pursuing constitutional claims.

Moreover, even if a *Bivens* [*Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)] claim is properly found to be precluded by the CSRA, other constitutional claims should be permitted. The courts seem to have generalized from the ruling about preclusion of damages claims to preclusion of all constitutional claims.

The courts also have tended to conflate the question of whether there is an adequate remedy with the question of whether a person or claim is covered by the CSRA. The holding in *Bush* is premised on the "comprehensive nature of the remedies currently available." *Bush*, 462 U.S. at 388. *Hubbard v. Environmental Protection Agency*, 982 F.2d 531, 532 n. 1 (D.C. Cir. 1992) (a federal employee's constitutional damages claim could not proceed where CSRA provided meaningful remedy).

Thus, even though it may appear that federal employees have judicial review of constitutional claims through the CSRA, such review is often unavailable.

In the case of Ms. Mittleman, she respectfully submits that she had a strong First Amendment claim. She was fired because Treasury Assistant Secretary Altman thought she presented a potential risk for damaging news leaks.. Thus, there was prior restraint of her speech. *Fairley v. Andrews*, 578 F.3d 518, 525 (7th Cir. 2009) (threatening penalties for future speech is a prior

restraint, which is the quintessential First Amendment violation). In spite of the obvious First Amendment concerns surrounding her termination, she was not able to obtain judicial review of her First Amendment claims,

The situation involving Ms. Mittleman shows why federal employees need direct access to federal courts. According to the statement of Mr. Altman in the I.G. Report, Ms. Mittleman presented a potential risk of damaging news leaks. However, Ms. Mittleman did not leak to the press. Further, Mr. Altman described Ms. Mittleman as a presenting a risk of leaks, but he did not undertake a leak investigation to determine what, if any, leak had occurred. Ms. Mittleman has suffered because of these false allegations, but has not been able to obtain judicial review to refute them. The CSRA clearly was not designed to cover false leak allegations and suspicions. Unfortunately, because of the finding that the CSRA provides the only review, the false allegations persist.

It cannot be disputed that there are serious constitutional issues involving federal employees which the CSRA was not designed to address and does not, in fact, address. The federal courts must be available to federal employees to pursue constitutional claims. A federal employee should not lose fundamental rights, such as access to the courts, because of the mere existence of the CSRA. Further, if a federal employee does not have a vehicle to seek a remedy for a claim of a violation of

an individual right under the Constitution, that individual right is not protected. If a constitutional violation has occurred, but no remedy is available, then that constitutional right is meaningless.

The importance of judicial review for constitutional claims cannot be overstated. Justice Blackmun emphasized in concurrence in *Fausto* that "this Court long has recognized that the Constitution itself supports a private damages action against a federal official, *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), and that the courts' common-law power to vindicate constitutional rights , see *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980), is not lightly to be set aside." *Fausto*, 484 U.S. at 455 (Blackman, J., concurring).

The government's brief in *Whitman v. Department of Transportation*, 547 U.S. 512 (2006) (per curiam) stated that "[t]he language of the CSRA does not meet the 'heightened showing.' *Webster*, 486 U.S. at 603, required to foreclose judicial review of constitutional claims." U.S. Br. at 47, *Whitman*, *supra* (No. 04-1131).

The statutory analysis conducted pursuant to the CSRA is an entirely different process than an analysis of claims brought under the Constitution. For example, a review under the CSRA may involve technical statutory analysis. *See, e.g., Carson v. Department of* Energy, 398 F.3d 1369 (Fed. Cir. 2005). A statute, such as the CSRA, cannot take

the place of the Constitution and the rights it guarantees.

II. Federal employees should have the same access as state and municipal workers to federal courts for constitutional claims.

State and municipal workers have access to federal courts, pursuant to 42 U.S.C. § 1983, for their constitutional claims. If a state or municipal worker brings a First Amendment speech claim to federal court, the well-known balancing test, as set out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983), is applied.

By contrast, it is apparently assumed that the CSRA permits review of such constitutional claims. However, review pursuant to CSRA procedures is a wholly different process than a § 1983 case in federal court. There likely is no *Pickering/Connick* balancing test under the CSRA. Similarly, it may not be significant whether the employee was speaking on a matter of public concern.

Federal employees must have access to federal courts for their constitutional claims. They should not be in an inferior position to state and municipal workers, who have ready access to federal courts for constitutional claims pursuant to 42 U.S.C. § 1983. Further, constitutional claims often are time-sensitive. Federal employees should

not have to pursue a burdensome administrative process in the hope of ultimately obtaining judicial review in the Federal Circuit. Judicial review of constitutional claims should be immediately available in district courts.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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