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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

PETITIONERS' BRIEF

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QUESTION PRESENTED

Do federal district courts have jurisdiction over constitutional claims for equitable relief brought by federal employees, or does the Civil Service Reform Act impliedly preclude that jurisdiction?

PARTIES

Petitioners:
Michael B. Elgin
Aaron Lawson
Henry Tucker
Christon Colby

Respondents:
United States of America
U.S. Department of the Treasury
U.S. Department of the Interior

Petitioners initially also sought equitable relief against the President of the United States and the individual heads of Respondent federal agencies in their official capacities. The district court granted Petitioners' motion to dismiss their claims against the individual defendants, and those defendants are no longer parties.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (Pet. App. 1a) is published at 641 F.3d 6. The district court's decision granting Respondents' motion for reconsideration (Pet. App. 39a) is published at 697 F. Supp. 2d 187. The district court's decision granting Petitioners' motion for partial summary judgment and denying in part and granting in part Respondents' motion to dismiss (Pet. App. 65a) is published at 594 F. Supp. 2d 133.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2011. Pet. App. 2a. The Petition for a Writ of Certiorari was filed on July 7, 2011, and was granted on October 17, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

5 U.S.C. § 3328 bars men who fail to register with the Selective Service from federal Executive agency employment. It provides:

(a) An individual—

> (1) who was born after December 31, 1959, and is or was required to register under section 3 of the Military Selective Service Act (50 U.S.C. App. 453); and
>
> (2) who is not so registered or knowingly and willfully did not so register before the requirement terminated or became inapplicable to the individual, shall be ineligible for appointment to a position in an Executive agency.

> (b) The Office of Personnel Management, in consultation with the Director of the Selective Service System, shall prescribe regulations to carry out this section. Such regulations shall include provisions prescribing procedures for the adjudication of determinations of whether a failure to register was knowing and willful. Such procedures shall require that such a determination may not be made if the individual concerned shows by a preponderance of the evidence that the failure to register was neither knowing nor willful. Such procedures may provide that determinations of eligibility under the requirements of this section shall be adjudicated by the Executive agency making the appointment for which the eligibility is determined.

50 U.S.C. app. § 453, which requires men to register with the Selective Service, is reproduced in the appendix to this brief at 1a.

The Civil Service Reform Act of 1978 outlines administrative procedures available to certain federal employees for certain adverse employment actions. Pub. L. No. 95-454, 92 Stat. 1111 (codified as amended in scattered sections of 5 U.S.C.). Relevant portions of the Civil Service Reform Act are reproduced at Pet. App. 108a.

STATEMENT OF THE CASE

Petitioners Michael B. Elgin, Aaron Lawson, Henry Tucker, and Christon Colby are former federal employees. Joint Appendix (JA) 3. Each was

terminated or constructively terminated from his federal employment under 5 U.S.C. § 3328, which imposes a lifetime bar to federal Executive agency employment on men who do not register with the Selective Service between the ages of 18 and 26. JA 3-5. Petitioners brought this action in district court against their former employers, Respondents United States, U.S. Department of the Treasury, and U.S. Department of the Interior. JA 6-8. Petitioners challenged 5 U.S.C. § 3328 as a bill of attainder and, along with 50 U.S.C. app. § 453, as violative of their constitutional rights to equal protection on the basis of sex, seeking injunctive and declaratory relief. JA 5. The district court rejected Respondents' assertion that it lacked jurisdiction to review Petitioners' claims because the Civil Service Reform Act (CSRA), 92 Stat. 1111, impliedly precludes federal district courts from granting equitable relief for constitutional injuries. Pet. App. 49a-51a. However, after initially allowing Petitioners' motion for summary judgment on the bill of attainder claim, *id.* at 66a-67a, the district court ultimately rejected both of Petitioners' claims on their merits. *Id.* at 39a-40a.

A divided panel of the Court of Appeals for the First Circuit agreed with the Government that the CSRA impliedly precludes jurisdiction over Petitioners' claims. *Id.* at 6a-7a. Accordingly, it vacated the district court's decision and remanded for entry of a new judgment denying Petitioners relief for lack of subject matter jurisdiction, *id.* at 15a.

To understand why the First Circuit erred, it is necessary to first describe, in Part A below, the

provision of the Military Selective Service Act that Petitioners challenge, the CSRA, and the Merit Systems Protection Board (MSPB)—the administrative adjudicator to which the Government maintains Petitioners were required to present their claims even though it lacked authority to resolve them. Part B explains how the bar to government employment for men who do not register with the Selective Service affected Petitioners. Finally, Parts C and D discuss the proceedings below.

A. Statutory and Regulatory Background

1. The Military Selective Service Act requires all men between the ages of 18 and 26 to register with the Selective Service upon proclamation of the President. 50 U.S.C. app. § 453(a). Since 1980, a presidential proclamation has required registration, and all persons are, by statute, "deemed" to know about the registration requirement. Proclamation No. 4771, 45 Fed. Reg. 45,247 (July 2, 1980); 50 U.S.C. app. § 465(a). Failure to register is a crime, punishable by a fine of up to $10,000 and up to five years in prison. *Id.* § 462(a). Men can be prosecuted until their 31st birthdays. *Id.* § 462(d). In 1985, Congress enacted 5 U.S.C. § 3328, which further penalizes men who knowingly and willfully fail to register by imposing a lifetime bar to federal Executive agency employment. Pub. L. No. 99-145, § 1622(a)(1), 99 Stat. 777. Regulations provide for the termination of employees who fail to register. 5 C.F.R. § 300.707. The Office of Personnel Management (OPM) is responsible for determining whether the failure to register was knowing and willful. *Id.* Though an employee may appeal the

initial determination within OPM, OPM's ultimate determination is final and is not subject to further administrative review. 5 C.F.R. § 300.706(c).[1]

2.a. The CSRA was intended to streamline the process by which managers in federal agencies hire, remove, and discipline their employees. *See* 92 Stat. 1111. When the CSRA was enacted in 1978, the civil service system had not been comprehensively overhauled since passage of the Pendleton Act in 1883. H. Manley Case, *Federal Employee Job Rights: The Pendleton Act of 1883 to the Civil Service Reform Act of 1978*, 29 How. L.J. 283, 297 (1986). The Pendleton Act was concerned primarily with eliminating the politically motivated, merit-blind hiring that prevailed in the late 1800s. Pendleton Act of 1883, ch. 27, § 7, 22 Stat. 403, 406 (1883). It created the Civil Service Commission (CSC) to oversee merit-based examinations for federal employment. 124 Cong. Rec. 27,544 (daily ed. Aug. 24, 1978) (statement of Sen. Stevens). The Pendleton Act, however, was silent regarding the discipline, demotion, and removal of employees. As a result, politically motivated and arbitrary removals of federal employees remained unregulated. *See* Egon Guttman, *The Development and Exercise of*

[1] On November 29, 2011, OPM proposed regulations that would revise 5 C.F.R. §§ 300.701-.707. Statutory Bar to Appointment of Persons Who Fail To Register Under Selective Service Law, 76 Fed. Reg. 73521 (proposed Nov. 29, 2011). The proposed changes would not affect the procedure outlined here, except that the employing agency, rather than OPM, would make the initial knowing and willful determination. *Id.* at 73522-23, 73525.

Appellate Powers In Adverse Action Appeals, 19 Am. U. L. Rev. 323, 324 (1970).

By the 1970s, a patchwork of statutes and executive orders regulated the removal and discipline of federal employees. S. Rep. No. 95-969, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 2723, 2725. First, the Lloyd-LaFollette Act established a just-cause requirement for adverse actions against federal employees, requiring that the employee be given reasons in writing and an opportunity to respond, but providing no clear way to enforce those rights beyond the employing agency. *See* Lloyd-LaFollette Act of 1912, ch. 389, § 6, 37 Stat. 539, 555. Second, the Veterans' Preference Act authorized veterans to appeal adverse actions to the CSC and the CSC to order agencies to comply with its decisions, but did not clarify how employee rights could be enforced in court. Veterans' Preference Act of 1944, Pub. L. No. 78-359, ch. 287, 58 Stat. 390. Finally, in 1962, Executive Orders 10,987 and 10,988 extended the Veterans' Preference Act's CSC appeal provisions to cover non-veteran employees and required individual agencies to also process employee appeals. 27 Fed. Reg. 550 (Jan. 17, 1962); 27 Fed. Reg. 551 (Jan. 17, 1962). During this period, the CSC created a Board of Appeals and Review to handle appeals from its initial decisions. Guttman, 19 Am. U. L. Rev. at 332-33.

The result was a process "so lengthy and complicated that managers often avoid[ed] taking disciplinary action" against employees even when it was clearly warranted. S. Rep. No. 95-969, at 9, *reprinted in* 1978 U.S.C.C.A.N. at 2731-32. A federal

employee could appeal to the employing agency and/or pursue two stages of CSC review. Case, 29 How. L.J. at 293. No pre-CSRA employment statute clearly provided a basis for or scope of court review of an agency action, but employees brought claims challenging the adverse employment actions in district court or damages claims in the Court of Claims under a wide variety of theories whether or not the employee exhausted administrative review. *See United States v. Fausto*, 484 U.S. 439, 444-45 (1988). District courts "uniformly concluded" that they had jurisdiction over these claims, but could not agree on why. *See* Richard C. Johnson, Richard G. Stoll, *Judicial Review of Federal Employee Dismissal and Other Adverse Actions*, 57 Cornell L. Rev. 178, 180 (1971-1972). Like any other district court case, employees' claims were then subject to federal appellate review.

Moreover, the CSC had developed two potentially contradictory roles: It retained its function as the "provider of services to agency management" in employee evaluation and hiring, but now had to "maintain[] sufficient neutrality to adjudicate disputes between agency managers and their employees." S. Rep. No. 95-969, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 2727. These "role conflicts" led the CSC to become "progressively less credible in all of its roles." *Id.*

b. Congress enacted the CSRA to streamline the review of adverse employment actions by agency managers. *See* 92 Stat. 1111. It abolished the CSC and divided the CSC's managerial and adjudicatory functions between two agencies. *Id.* The CSRA

created OPM to regulate the merit-based hiring and management of employees. *Id.* § 201. It endowed the MSPB, an expert adjudicatory agency, with the power to review claims by employees appealing adverse actions by agency managers. *See* 5 U.S.C. § 7701. The MSPB's mission is "to ensure that Federal employees are protected against abuses by agency management, that executive branch agencies make employment decisions in accordance with the merit system principles, and that Federal merit systems are kept free of prohibited personnel practices." U.S. Merit Sys. Prot. Bd., *An Introduction to the Merit Systems Protection Board* 5 (1999). The MSPB is empowered to hear employee appeals regarding adverse employment actions and to order any federal agency or employee to comply with its order. 5 U.S.C. § 1204(a)(1)-(2). The MSPB may evaluate certain rules and regulations issued by OPM. 5 U.S.C. § 1204(a)(4).

In evaluating personnel actions, the MSPB uses a series of "merit system principles" and "prohibited personnel actions"—all of which concern the manager-employee relationship. *See* 5 U.S.C. §§ 2301, 2302. The "merit system principles" provide for open, merit-based hiring; fair and equitable treatment of employees; equal pay for work of equal value; high standards of integrity for employees; efficient and effective use of the federal work force; retention of employees based on the adequacy of their performance; protection of employees "against arbitrary action, personal favoritism, or coercion for partisan political purposes"; and prohibition of retaliation for whistleblowing. 5 U.S.C. § 2301(b)(1)-

(8). The "prohibited personnel practices," too, regulate the manager-employee relationship, providing that employees in supervisory positions may not discriminate on the basis of race, age, sex, disability, or marital status; consider employees for hire or promotion on the basis of non-merit recommendations; coerce the political activity of employees; obstruct the open competition for employment; evaluate employees or applicants on any basis not approved by law; hire or promote a relative; retaliate for exercising any protected right; violate the veterans' preference; or take any action that would violate any law, rule, regulation, or the merit principles. 5 U.S.C. § 2302(b)(1)-(12).

The MSPB has jurisdiction to adjudicate manager-employee disputes. The MSPB has original jurisdiction over actions brought by its Office of Special Counsel charging agency managers with engaging in prohibited personnel practices. 5 U.S.C. §§ 1214-1216; 5 C.F.R. § 1201.2(a). It also has jurisdiction to hear appeals by employees of a range of actions taken by agency managers, including actions for unacceptable job performance under 5 U.S.C. § 4303(e); adverse actions "for cause that will promote the efficiency of the service" under 5 U.S.C. §§ 7511-7514; reduction-in-force actions; determinations affecting retirees; failure to re-employ former employees after their detail to other agencies; suitability disqualifications of employees or applicants; and employee terminations within the probationary period when the employee alleges partisan political discrimination. 5 C.F.R. § 1201.3.

Although the MSPB may review a wide range of

actions by agency managers, as an agency, the MSPB may not review the facial constitutionality of a federal statute underlying an agency action. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (citing *Johnson v. Robison*, 415 U.S. 361, 368 (1974)). As a result, the MSPB has held, and the Government has acknowledged, that when an employee challenges a statute's constitutionality, the MSPB does not have authority to hear the case on its merits. Pet. App. 101a; Cert. Opp. 10-11.

c. The CSRA provides that an "employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision" in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. § 7703(a)(1), (b). The Federal Circuit is then instructed to "review the record and hold unlawful and set aside any agency action, findings, or conclusions" that it finds "arbitrary, capricious, an abuse of discretion," "otherwise not in accordance with law," or "unsupported by substantial evidence." 5 U.S.C. § 7703(c)(1), (3).

Congress created direct appellate review of MSPB decisions under a generally deferential standard with the intent to "eliminate[] an unnecessary layer of judicial review" that had existed prior to the CSRA, and "avoid[] burdening the courts with unnecessarily detailed review of agency actions by establishing as the scope of review the traditionally limited appellate review the courts provide agency actions in other areas." S. Rep. No. 95-969, at 49; *reprinted in* 1978 U.S.C.C.A.N. at 2774.

B. Factual Background

The Selective Service System has no record of registration for any of the Petitioners. Three of them—Elgin, Tucker, and Colby—became aware of the registration requirement only after their 26th birthdays, when it was too late to register. JA 13-14, 16, 17, 18. The fourth—Lawson—knew about the requirement and maintains that he registered, but the Selective Service System does not have a record of his registration. *Id.* at 16. Elgin, Lawson, and Colby sought determinations that their failure to register was not knowing and willful, but OPM denied their requests. *Id.* at 14-15, 16-17, 19, 22.

1. Michael B. Elgin was first hired in 1991 by the Internal Revenue Service (IRS), an agency of the Treasury Department. JA 14. As part of a routine background investigation when offering Elgin a promotion in 2002, the IRS learned that Elgin had not registered with the Selective Service and passed that information on to OPM. *Id.*

Elgin sought a determination from OPM that his failure to register was not knowing and willful under 5 U.S.C. § 3328. *Id.* If OPM determined that Elgin's failure to register was not knowing and willful, his employment would be permitted. 5 C.F.R. § 300.707. Elgin argued that his failure to register was not knowing and willful because he had not been aware of the registration requirement; at age 18, he was struggling to complete high school and support his son while being virtually homeless. JA 13-14. OPM, however, determined that Elgin's failure to register was knowing and willful. *Id.* at 14. With the support of both Massachusetts Senators, the IRS asked OPM

to reconsider and find that Elgin's failure to register was unintentional, explaining that Elgin was a valued IRS employee whose termination would negatively affect the agency. *Id.* at 14-15. OPM denied the IRS's request. *Id.* at 15. Elgin was terminated on July 27, 2007. *Id.*

2. Aaron Lawson has been a wildfire fighter since 1997. *Id.* at 16. He is a specialist in directing helicopter crews fighting forest fires. *Id.* In 2003, the Bureau of Land Management, a division of the Interior Department, hired him as a wildfire fighter. *Id.* Lawson later accepted a new position with the U.S. Forest Service as a wildfire fighter helicopter captain. Dist. Ct. Doc. 45-3, Affidavit of Aaron Lawson 1-2. After he was hired for the new position, the Bureau and the Forest Service learned that the Selective Service has no record of Lawson's registration. *Id.* Lawson maintains that he completed the registration forms at his local post office at the time of his 18th birthday. JA 16. The Bureau and the Forest Service requested a determination from OPM that Lawson's failure to register was not knowing and willful, a determination that would have made him eligible for employment. Dist. Ct. Doc. 45-3, at 2. OPM denied the request, and Lawson was terminated. JA 17.

3. In 2007, Henry Tucker was a Financial Institution Specialist at the Federal Deposit Insurance Corporation, where he had worked for 17 years. *Id.* He had never been aware of the requirement to register with the Selective Service; Tucker's mother left him when he was 16, and he moved frequently as a teenager. *Id.* In December

2007, the Federal Deposit Insurance Corporation learned that Tucker had not registered with the Selective Service and referred the matter to OPM. *Id.*

Fearing that he would be fired, Tucker resigned and applied for a position with the National Institutes of Health, which offered him a job as a Budget Analyst. *Id.*; Dist. Ct. Doc. 45-4, Affidavit of Henry Tucker 1. It withdrew the offer, however, after learning that Tucker had not registered with the Selective Service. JA 17-18.

4. Christon Colby began working at the IRS in 2001. *Id.* at 18. Colby received consistently excellent performance reviews and was promoted to positions with increasing responsibility. *Id.* at 19. In 2003, the IRS informed Colby that it had become aware of his failure to register with the Selective Service. *Id.* Colby sought a determination from OPM that his failure to register was not knowing and willful. Colby explained that he had moved out of his parents' home at age 18 and was unaware of the registration requirement until he was too old to register. *Id.* at 18-19.

In 2006, OPM determined that Colby's failure to register was knowing and willful. *Id.* at 19. Colby's supervisor at the IRS appealed the determination within OPM, but OPM affirmed its decision, and Colby was terminated on August 3, 2007. *Id.* at 19-22.

C. Proceedings Before the MSPB and the District Court

Shortly after being terminated under 5 U.S.C. § 3328, Petitioner Elgin appealed to the MSPB,

presenting two facial constitutional challenges: that 5 U.S.C. § 3328 is a bill of attainder and that he was subject to unconstitutional sex discrimination because the Selective Service registration requirement applies only to men. Pet. App. 101a. On November 16, 2007, at Respondent Treasury Department's urging, the MSPB dismissed Elgin's appeal for lack of jurisdiction. *Id.* at 100a-01a; *see* JA 31-32. The MSPB agreed with the Government that it lacked jurisdiction over appeals from employees terminated under absolute statutory prohibitions on employment, such as 5 U.S.C. § 3328. Pet. App. 100a-01a. The MSPB also held that it lacked authority to rule on the constitutionality of a statute. *Id.* at 101a-02a.

After Elgin's MSPB appeal was dismissed, on December 28, 2007, Elgin brought this action challenging the constitutionality of 5 U.S.C. § 3328 and 50 U.S.C. app. § 453 in the United States District Court for the District of Massachusetts against the Treasury Department. Dist. Ct. Doc. 1, Compl. ¶ 1. Petitioner Elgin amended the complaint in February 2008 to add Lawson, Tucker, and Colby as named plaintiffs, to add the United States of America and the Department of the Interior as defendants, and to add a class action allegation. JA 3, 6-11.

In their amended complaint, Petitioners contend that 5 U.S.C. § 3328 is a bill of attainder prohibited by Article I, Section 9, Clause 3 of the Constitution because it legislatively imposes punishment—the lifetime bar to federal employment—on a specific group of men for their irreversible failure to register.

JA 26-27. Petitioners also contended that because 50 U.S.C. app. § 453 and 5 U.S.C. § 3328 apply to men only, both statutes unlawfully discriminate under the equal protection component of the Fifth Amendment. JA 28. Petitioners sought declaratory and injunctive relief, including reinstatement. *Id.* at 29-30. The claims were brought under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Administrative Procedure Act, 5 U.S.C. § 702, and jurisdiction was premised on 28 U.S.C. §§ 1331, 1343, and 1346. JA 6.

The Government moved to dismiss, arguing that Petitioners' claims failed on the merits. Pet. App. 66a. The Government did not, at that time, contest the district court's jurisdiction. Petitioners responded by opposing the motion to dismiss as to the equal protection claim, arguing that discovery and the development of a factual record about the role of women in the military should be permitted. Dist. Ct. Doc. 12, Pls.' Opp. to Mot. to Dismiss 2-4, 8-11. Petitioners also sought partial summary judgment as to liability on the bill of attainder claim. Dist. Ct. Doc. 13. The district court granted Petitioners' motion for partial summary judgment, holding that 5 U.S.C. § 3328 was a bill of attainder, and granted the Government's motion to dismiss in part, holding that the Selective Service scheme did not violate Petitioners' rights to equal protection. Pet. App. 66a-67a.

Petitioners then sought a preliminary injunction reinstating Petitioners and filed a motion for class certification. Dist. Ct. Doc. 45; Dist. Ct. Doc. 57. The Government filed a motion for reconsideration of the

district court's grant of summary judgment on the bill of attainder claim, contending that the claim failed on the merits and arguing for the first time that the district court did not have subject matter jurisdiction over any of Petitioners' claims because the CSRA precludes district court review of federal employment decisions. Pet. App. 41a-42a. The district court held that it did have jurisdiction, but granted the motion for reconsideration because it determined, on reexamination, that 5 U.S.C. § 3328 was not a bill of attainder. *Id.* at 51a, 63a-64a.

D. The First Circuit's Decision

The First Circuit agreed that Petitioners' claims should be dismissed, but was divided on whether the district court had jurisdiction over Petitioners' constitutional claims for equitable relief. *Id.* at 14a-15a. The majority agreed with the Government that the CSRA provides the exclusive remedy for the termination or constructive termination of federal employees, even for facial constitutional challenges like this one. *Id.* at 5a, 14a-15a. As explained in Part A above, the CSRA permits certain federal employees to appeal their terminations to the MSPB and, eventually, to the Federal Circuit, if they were removed for, among other things, "such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a); *see id.* §§ 7511-7514. The majority held that Petitioners' terminations, even though they were based solely on failure to register under 5 U.S.C. § 3328, were nonetheless terminations made for "efficiency of the service" under 5 U.S.C. § 7513(a) and thus subject to the CSRA's review procedures. Pet. App. 7a-9a; *see* JA 41.

The majority recognized that there would be a serious concern if the CSRA precluded all judicial remedies for Petitioners' constitutional claims. Pet. App. 13a. Though the majority did not dispute that the MSPB was powerless to strike down a statute as unconstitutional, it reasoned that the Federal Circuit had the authority to do so on appeal from the MSPB. *Id.* at 13a-14a. Therefore, according to the majority, the merits of Petitioners' constitutional claims could be decided at the Federal Circuit, if not the MSPB.

Petitioners had argued that their constitutional claims could not have been heard in the Federal Circuit because the Federal Circuit has itself repeatedly stated that its jurisdiction on appeal from the MSPB is coextensive with the jurisdiction of the MSPB, which would not have had jurisdiction over Petitioners' claims. *Id.* at 7a-8a, 14a. The majority disagreed, reasoning that the Federal Circuit had never addressed the question under these precise circumstances and had posited that *Webster v. Doe*, 486 U.S. 592 (1988), would require it to entertain constitutional claims seeking equitable relief. Pet. App. 14a (citing *Riggin v. Office of Senate Fair Emp't Practices*, 61 F.3d 1563, 1570 (Fed. Cir. 1995); *Brockmann v. Dep't of Air Force*, 27 F.3d 544, 546-47 (Fed. Cir. 1994)). Even if the Federal Circuit would have held that it lacked jurisdiction to review Petitioners' constitutional claims, the majority explained, Petitioners could still have sought adjudication of their claims on certiorari in this Court. Pet. App. 14a.

Judge Stahl disagreed with the majority that Petitioners' constitutional claims could have been

addressed in the Federal Circuit, but would have dismissed the claims on the merits. *Id.* at 15a. He explained that the Federal Circuit's jurisdiction over appeals from the MSPB has never exceeded the scope of the MSPB's jurisdiction, even when the appellant asserted constitutional claims beyond the MSPB's jurisdiction. *Id.* at 20a-22a (citing *Hubbard v. Merit Sys. Prot. Bd.*, 319 Fed. App'x 912 (Fed. Cir. 2009) (unpublished)). Judge Stahl noted that in *Brockmann v. Department of the Air Force*, relied on by the majority, the Federal Circuit hypothesized about the possibility of reviewing constitutional claims but did not actually state that it would or could do so. *Id.* at 21a-22a (discussing *Brockmann*, 27 F.3d at 546-47). Therefore, Judge Stahl reasoned, the better reading of the Federal Circuit's decisions was that it would not have had jurisdiction, and the CSRA process would not have provided any review of Petitioners' constitutional claims. *Id.* at 22a.

SUMMARY OF THE ARGUMENT

I. District courts have jurisdiction over and authority to provide an equitable remedy for federal employees' constitutional injuries. The federal courts have always had authority to consider claims to enjoin unconstitutional conduct by government officials, and 28 U.S.C. § 1331 puts those constitutional claims within the jurisdiction of the federal district courts. Here, Petitioners claim that 5 U.S.C. § 3328 and 5 U.S.C. app. § 453 are unconstitutional, and they seek to enjoin the enforcement of those statutes. Petitioners' claims present exactly the types of issues that Congress intended federal district courts to adjudicate.

Without explicit direction from Congress, courts may not assume that Congress removed district courts' authority to grant equitable relief for constitutional claims. *Webster v. Doe*, 486 U.S. 592, 603 (1988). It is undisputed that Congress did not address constitutional claims in the CSRA, and the CSRA's comprehensive statutory scheme for resolving day-to-day federal employment disputes is not sufficient to indicate that Congress intended to remove the district court's authority to resolve constitutional claims for equitable relief. Because the CSRA does not expressly remove that authority, district courts retain their authority to determine equitable constitutional claims whether or not the MSPB also has jurisdiction and authority to resolve the employee's claim. For this reason alone, the First Circuit's decision should be reversed.

II. Even if the CSRA impliedly removes the district court's authority to adjudicate some or all as-applied constitutional claims for equitable relief that the MSPB would hear on the merits, district courts still have the authority to resolve Petitioners' claims. Congress did not impliedly eliminate the district court's authority to grant relief on equitable constitutional claims like Petitioners' that challenge the statutes under which they were terminated and seek a declaration that the statutes are facially unconstitutional.

The CSRA's structure and history indicate that MSPB review was not designed to deal with collateral challenges to statutes. The MSPB was designed to adjudicate management-employee disputes. It is undisputed that the MSPB does not

have the authority to declare an Act of Congress unconstitutional. For that reason, Congress could not have intended, without saying so, that claims like Petitioners' should go to an administrative forum that cannot adjudicate them instead of one that can—the district court.

That the CSRA provides for on-the-record appellate review of ordinary MSPB decisions in the Federal Circuit does not indicate, as the Government maintains, that Congress intended that constitutional claims like Petitioners' would be heard for the first time on appeal in the Federal Circuit. To the contrary, Congress could not have desired such an anomalous form of appellate review for constitutional claims because, like other appellate courts, the Federal Circuit cannot create the record needed to resolve claims that were not heard on their merits by the tribunal below.

ARGUMENT

I. The Federal District Courts Are Authorized to Award Equitable Relief for Federal Employees' Constitutional Claims.

Federal district courts have original jurisdiction over constitutional claims and, furthermore, district courts can grant equitable relief for constitutional violations. Because the CSRA does not remove district courts' authority to decide equitable constitutional claims, district courts have that authority with respect to all equitable constitutional claims brought by federal employees.

A. Federal District Courts Have Jurisdiction Over Constitutional Claims.

Federal district courts are best situated to hear constitutional claims for equitable relief. District courts have the ability to develop the record and make factual determinations that other tribunals, including appellate courts, do not. *See England v. La. State Bd. of Med. Examiners*, 375 U.S. 411, 416-17 (1964). Congress conferred federal question jurisdiction on the district courts in the Jurisdiction and Removal Act of 1875, the direct precursor to 28 U.S.C. § 1331. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470. Under § 1331, the district courts have "original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." Because Petitioners' bill of attainder and equal protection claims arise under the Constitution, the district court has original jurisdiction over them.

This Court has consistently held that § 1331 grants jurisdiction over colorable constitutional claims to the federal district courts. In *Bell v. Hood*, 327 U.S. 678, 681 (1946), for example, the Court held that the district court had jurisdiction over the plaintiff's colorable claim that a federal officer was liable to him for a constitutional wrong whether or not the plaintiff had actually stated a valid cause of action. The Court explained that "it is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Id.* at 684. In a case involving the CSRA, this Court similarly noted the breadth of the jurisdiction conferred by the "very familiar" § 1331, and indicated that § 1331 would

confer jurisdiction over a federal employee's constitutional claims unless it could be shown that the CSRA affirmatively divested the district court of jurisdiction over such claims. *Whitman v. Dep't of Transp.*, 547 U.S. 512, 513-14 (2006) (per curiam). Thus, because Petitioners have pled colorable constitutional claims, § 1331 places their claims squarely within the jurisdiction of the district court.

B. Federal Courts Have the Power to Grant Relief for Equitable Constitutional Claims.

It is well established that federal courts have the authority to enjoin unconstitutional actions by the government—that is, there exists a right of action for equitable relief that arises directly under the Constitution. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). From the founding of the country, the judiciary has been "in a peculiar manner the guardian of those rights." *See* Statement of James Madison, 1 Annals of Cong. 457 (1789) (presenting the Bill of Rights to Congress). This tradition is rooted in the language of the Constitution itself, which states that the "judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made." U.S. Const. art. III, § 2, cl. 1.

Federal court review of such matters is integral to the vitality of the Constitution. *See Davis v. Passman*, 442 U.S. 228, 242 (1979). Unless the rights

secured by the Constitution are to become "merely precatory," individuals whose constitutional rights have been violated must be able to invoke the power of the federal courts to enforce those rights. *Id.* at 242.

This Court has never questioned the authority of the federal courts to hear and decide equitable constitutional claims. In *Osborn v. Bank of the United States*, for example, the Court entertained a challenge to a state tax levied against the Bank. 22 U.S. (9 Wheat.) 738 (1824). Although there existed no statute granting the Bank the right to challenge the state tax as unconstitutional, once this Court determined that the state tax intruded on Congress's Article I power to constitute the Bank, it could find "no plausible reason" why it should not award an injunction to restrain the state from collecting the tax. *Id.* at 844. In *Ex Parte Young*, the Court affirmed the proposition that the Constitution, coupled with federal question jurisdiction, was sufficient to permit a federal district court to provide an equitable remedy for a constitutional injury. 209 U.S. 123, 145 (1908); *see* Hart and Weschler's *The Federal Courts and the Federal System* 891 (6th ed. 2009) ("Young has long been regarded as significant because it [] recognized a cause of action for injunctive relief directly under the Fourteenth Amendment . . . .").

In *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954), the Court found that segregation in the District of Columbia public school system violated the plaintiffs' Fifth Amendment right to due process. Although *Bolling* did not elaborate on why the plaintiffs were

able to obtain a judicial remedy, it seems clear that a cause of action arose directly under the Fifth Amendment.[2] This Court has continued to hear challenges to the constitutionality of federal statutes in the absence of specific statutory authority to sue. *E.g.*, *Gonzales v. Raich*, 545 U.S. 1, 8 (2005); *Carlson v. Green*, 446 U.S. 14, 42 (1980) (Rehnquist, J., dissenting) ("The broad power of federal courts to grant equitable relief for constitutional violations has long been established."); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 400-05 (1971) (Harlan, J., concurring) (discussing the "presumed availability of equitable relief" against federal officials to enforce constitutional norms); *see also Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) (Alito, J.); *Hubbard v. U.S. Envtl. Prot. Agency*, 809 F.2d 1, 11 n.15 (D.C. Cir. 1986).

Whether a federal court will grant relief for an otherwise meritorious claim over which it has jurisdiction may depend on the type of relief requested. As the cases discussed above demonstrate, the federal courts have always been open to granting equitable relief to redress constitutional violations. Federal courts, however, have been more hesitant to recognize causes of action claiming money damages for constitutional violations. *See Carlson*, 446 U.S. at 42-43 (Rehnquist, J. dissenting). When a plaintiff

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[2] Although a court today might have relied on the statutory cause of action provided by 42 U.S.C. § 1983, that statute did not apply to officials acting under the authority of the District of Columbia when *Bolling* was decided. *See District of Columbia v. Carter*, 409 U.S. 418 (1973).

seeks monetary relief, this Court has held that such relief is unavailable when "special factors counsel[] hesitation" in awarding the remedy or when Congress has expressly foreclosed it. *See Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) (quoting *Bush v. Lucas*, 462 U.S. 367, 377-78 (1983)). But "[j]ust because 'special factors counselling hesitation' militate against the creation of a new non-statutory damages remedy, it does not necessarily follow that the long-recognized availability of injunctive relief should be restricted as well." *Mitchum*, 73 F.3d at 35-36.

In *Bush v. Lucas*, this Court held that the CSRA's comprehensive remedial scheme was a "special factor counselling hesitation" against extending judicially created monetary remedies and declined to provide relief for federal employees bringing suit for money damages to redress constitutional injuries. 462 U.S. at 381, 390; *see also Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988). This Court reasoned that deciding whether a federal employee should recover damages from his supervisor for disciplinary action is a policy decision best left to Congress. *Bush*, 462 U.S. at 390. Conversely, this Court has never said that whether a federal court can enjoin unconstitutional conduct—that is, award equitable relief—is a policy choice that Congress should make. In other words, though the presence of a statutory scheme might counsel hesitation in extending a damages remedy, it is irrelevant in deciding whether an equitable remedy is available.

C. The CSRA Does Not Divest District Courts of the Ability to Review the Equitable Constitutional Claims of Federal Employees.

1. District Courts Are Divested of the Ability to Adjudicate Equitable Constitutional Claims Only Where Congress Removes That Jurisdiction Explicitly, and It Did Not Do So Here.

The adjudication of "constitutional issues is a primary responsibility of the courts." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974). Thus, there is a "strong presumption" favoring the availability of judicial review of constitutional questions. *See Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 681 (1986).

Accordingly, unless "a statute in so many words, or by a necessary or inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Mitchell v. Robert DeMario Jewelry*, 361 U.S. 288, 291 (1960) (quoting *Brown v. Swann*, 328 U.S. 497, 503 (1836)). That is, a district court will retain the ability to adjudicate constitutional claims unless Congress expressly precludes its jurisdiction. *Whitman*, 547 U.S. at 514 ("The question, then, is not whether [the statute at issue] confers jurisdiction, but whether [the statute] (or the CSRA as a whole) removes the jurisdiction given to the federal courts . . . ."). And, as this Court has explained, "where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603 (1988).

Ultimately, in light of the judiciary's role in protecting constitutional rights, the unbroken tradition of federal court enforcement of constitutional rights, and the text of 28 U.S.C. § 1331, Congress may only divest the district courts of authority to review equitable constitutional claims if it does so expressly. The Government concedes that the CSRA does not meet this "heightened standard" of preclusion, *id.* at 603, because it does not expressly bar suits in district court seeking equitable constitutional relief. Cert. Opp. 10 n.2.

To be sure, as the Government points out, Cert. Opp. 8, in *United States v. Fausto*, 484 U.S. 439 (1988), the Court held that the CSRA, which did not provide judicial review of suspensions for certain categories of federal employees, precluded those employees from bringing Back Pay Act claims under the Tucker Act in the Court of Claims. However, *Fausto* is inapposite and does not support the contention that the CSRA precludes the district court's authority to award the equitable relief sought by Petitioners here.

Fausto concerned the interaction between two statutes, the CSRA and the Back Pay Act, rather than the interaction between the CSRA and the Constitution. 484 U.S. at 443. There, an Interior Department employee sought back pay after being suspended for the misuse of a government vehicle. 484 U.S. at 442-43. After his appeal was denied by the Department, the employee brought a Tucker Act suit in the Claims Court, *see* 28 U.S.C. § 1491, under the Back Pay Act, 5 U.S.C. § 5596. *Fausto*, 484 U.S. at 443. The Federal Circuit held that although the

CSRA did not provide the plaintiff a right of appeal to the MSPB, it did not preclude the judicial review traditionally available under the Back Pay Act. *Id.* This Court was then confronted with the question whether the CSRA, by neglecting to expressly provide for a right of review for the class of employees to which the plaintiff belonged, prevented those employees from bringing suit under the Back Pay Act. *Id.* Specifically, the Court had to determine whether the CSRA altered the traditional interpretation of the Back Pay Act, which allowed for judicial review in the Court of Claims. *Id.* at 453. In deciding that it did so, thus precluding judicial review, the Court was quick to note that "[a]ll we find to have been 'repealed' by the CSRA is the judicial interpretation of the Back Pay Act—or, if you will, *the Back Pay Act's implication*—allowing review in the Court of Claims of the underlying personnel decision giving rise to the claim for backpay." *Id.* (emphasis added).

The Court's decision in *Fausto* that Congress intended the CSRA to alter an earlier judicial interpretation of a similar statute is different in kind from the First Circuit's conclusion below that Congress intended the CSRA to preclude federal employees from seeking judicial review to vindicate their equitable rights under the Constitution. Pet. App. 6a. Congress, after all, is free to amend or repeal statutes, but it cannot amend or repeal the Constitution. *Cf. Webster*, 486 U.S. at 603 (explaining that a "'serious constitutional question' would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional

claim") (internal citations omitted); *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974) (noting that "judicial cognizance of constitutional challenges to veterans' benefit legislation" was not contrary to a statutory clause precluding judicial review of specific decisions made by the Veterans' Administration under that legislation). In addition, *Fausto* found that the CSRA precluded judicial review under the Back Pay Act only "for the type of personnel action covered by that chapter [of the CSRA]." *Fausto*, 484 U.S. at 448. By contrast, here, as explained below in Part II.A.2, Petitioners' facial constitutional claims are collateral to the CSRA and have nothing to do with the types of day-to-day personnel actions adjudicated by the MSPB.

2. The Presence of a Comprehensive Statutory Scheme Is, Without More, Insufficient to Demonstrate That Congress Intended to Preclude District Court Review of Equitable Constitutional Claims.

The presence of a comprehensive statutory remedial scheme does not imply that Congress meant to deny federal district courts authority to review equitable constitutional claims. The existence of a comprehensive scheme matters when the plaintiff seeks money damages. In *Bush v. Lucas*, 462 U.S. 367, this Court declined to recognize a "new" judicial damages remedy under *Bivens* because the claims arose "out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies." *Id.* at 368. The Court in *Bush*, therefore, faced a different question from that presented here, where

Petitioners seek only equitable relief for their constitutional injuries. Although the regulatory scheme established by the CSRA was a "special factor" counseling against the creation of a new damages remedy, this "special factor" does not weigh against the granting of equitable relief here. *See United States v. Stanley*, 483 U.S. 669, 683 (1987).

This Court's treatment of constitutional claims in the military context demonstrates that the existence of a comprehensive regulatory scheme will not preclude judicial review of equitable constitutional claims. There, Congress has established "a comprehensive internal system of justice to regulate military life," *id.* at 679 (quoting *Bush*, 462 U.S. at 302), and the Court has "long recognized two systems of justice, to some extent parallel, one for civilians and one for military personnel." *Chappell v. Wallace*, 462 U.S. 296, 303-04 (1983). Nevertheless, even in the military context, where judicial deference to the political branches is at its apogee, the Court "has never held . . . that military personnel are barred from all redress in civilian courts for constitutional wrongs suffered in the course of military service." *Id.* at 304; *see also Frontiero v. Richardson*, 411 U.S. 677, 691-92 (1973) (holding that discrimination on the basis of sex in the administration of military benefits programs violates the Due Process Clause of the Fifth Amendment). This Court, moreover, has repeatedly entertained equitable constitutional challenges to military regulations arising from district courts. *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) (free exercise challenge to Air Force regulation restricting the wearing of religious

headgear); *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981) (Fifth Amendment challenge to exclusively male draft registration).

In *Johnson v. Robison*, 415 U.S. 361, this Court addressed a preclusion issue similar to the one in this case: whether district court authority to determine constitutional claims for equitable relief was precluded by a statute giving the Veterans' Administration (VA) exclusive jurisdiction over claims relating to veterans' benefits. The plaintiffs, conscientious objectors who had performed alternative civilian service, sought a declaratory judgment that the statutes denying them benefits because they did not serve in the armed forces violated their constitutional rights to equal protection and religious freedom. *Id.* at 364. The Court recognized that although the claims related to veterans' benefits in a general sense, the "questions of law presented in these proceedings arise under the Constitution, not under the statute whose validity is challenged." *Id.* at 367 (quoting *Robison v. Johnson*, 352 F. Supp. 848, 853 (D. Mass. 1973)). Thus, even though the statute provided that "the decisions of the [VA] on any question of law or fact under any law administered by the [VA] . . . shall be final and conclusive," 38 U.S.C. § 211(a) (repealed by Act of Aug. 6, 1991, P.L. 102-83, § 2(a), 105 Stat. 378 (1991)), this Court held that the preclusive effect of the statute "does not extend . . . to actions challenging the constitutionality of laws." *Johnson*, 415 U.S. at 373.

Johnson noted that § 211(a)—like the CSRA here—did not explicitly address whether

constitutional claims were barred. *Id.* It held that courts should defer in such circumstances to the agency, which, like the MSPB here, had determined that it lacked the authority to decide constitutional questions. *Id.* at 367-68. Additionally, the Court found that precluding constitutional claims was unnecessary because constitutional challenges to benefits legislation "cannot be expected to burden the courts by their volume," and do not "involve technical considerations of [agency] policy," two concerns that motivated the VA preclusion statute. *Id.* at 373.

Similarly, though Congress has, in the CSRA, established a regulatory scheme that channels review of certain personnel actions away from the district courts, the scheme should not be read to silently remove district court authority to grant equitable relief for constitutional claims. Congress is presumed to legislate with full knowledge of this Court's decisions and the rules of statutory construction employed by the courts. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). In light of this presumption, Congress should not be presumed to have intended to preclude district court review of equitable constitutional claims, thereby overturning a tradition that has existed since the founding of the Nation.

II. The Federal District Court Has Authority to Grant Equitable Relief on Petitioners' Challenges to the Constitutionality of Federal Statutes.

Petitioners contend above that all equitable constitutional claims of federal employees may be brought in district court. But even if the CSRA precludes a district court from adjudicating

constitutional claims for which the MSPB can provide relief, such as federal employees' as-applied First or Fourth Amendment claims against their managers, it does not preclude facial challenges to the constitutionality of federal statutes.

A. The Structure and History of the CSRA Demonstrate That the CSRA Does Not Preclude District Court Review of Constitutional Challenges to Federal Statutes.

1. The MSPB Was Not Designed to Adjudicate Facial Constitutional Challenges, and It Cannot Do So.

Under *Webster*, 486 U.S. at 603, court review of equitable constitutional claims cannot be precluded absent a clear statement of congressional intent to that effect. Even if, as the Government contends, *Webster*'s heightened standard does not apply, this Court has long supported "the general rule that you have to be clear when you take cases out of the Federal courts." *Mims v. Arrow Fin. Servs., LLC*, No. 10-1195, Tr. of Oral Argument 48 (argued Nov. 28, 2011) (Scalia, J.); Cert. Opp. 10 n.2. Congressional intent to preclude district court review of the type of claim at issue must be "fairly discernible in the statutory scheme" as evidenced by "the structure of the statutory scheme, its objectives, [and] its legislative history." *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351, 345 (1984); *see* Cert. Opp. 10 n.2. Inferences that a court might draw from the CSRA cannot suffice; the statutory jurisdiction of the federal courts "should not be disturbed by a mere implication flowing from" Congress's handiwork. *Colo. River Water Conservation Dist. v. United*

States, 424 U.S. 800, 808 (1976) (quoting *Rosencrans v. United States*, 165 U.S. 257, 262 (1897)). Indeed, absent an explicit intent to repeal jurisdiction, "the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Morton v. Mancari*, 417 U.S. 535, 550 (1974). Because the CSRA is concerned with the federal manager-employee relationship, no such irreconcilable conflict exists between the CSRA and 28 U.S.C. § 1331, which grants the district court jurisdiction over constitutional claims.

Relegating Petitioners' constitutional claims to administrative review—particularly when, as here, that review cannot grant the requested relief—would be inconsistent with the CSRA's structure and purpose. The CSRA was not intended to preclude facial constitutional challenges to statutes because such challenges are outside the MSPB's purview and expertise. *See Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994) (judicial review of claims that are "wholly collateral to a statute's review provisions and outside the agency's expertise" is not precluded by that statute) (internal quotations omitted).

The MSPB seeks "to ensure that Federal employees are protected against abuses by agency management, that Executive branch agencies make employment decisions in accordance with the merit system principles, and that Federal merit systems are kept free of prohibited personnel practices," U.S. Merit Sys. Prot. Bd., *An Introduction to the Merit Systems Protection Board* 5 (1999). That mission reflects its exclusive concern with regulating the federal employer-employee relationship. In assigning

to the MSPB the role of adjudicator of "disputes between agency managers and their employees," S. Rep. No. 95-969, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 2727, Congress could not have intended the MSPB to adjudicate facial constitutional challenges to federal statutes. A federal employee challenging the constitutional validity of the law under which he is fired is not in a dispute with his manager. That is particularly true when, as here, the statutes in question—which reflect national policy regarding Selective Service registration—have nothing to do with the terms or conditions of the workplace. Rather, the employee's dispute is with the law itself, and his claim is against the United States. *See Johnson*, 415 U.S. at 367.

The MSPB's expertise is reflected in its jurisdiction, which is generally limited to manager-employee disputes. *See* 5 U.S.C. § 7701; S. Rep. No. 95-969, at 4, *reprinted in* 1978 U.S.C.C.A.N. at 2727. The MSPB only has jurisdiction where it is granted by law, rule, or regulation. *Noble v. Tenn. Valley Auth.*, 892 F.2d 1013, 1014 (Fed. Cir. 1989). Those grants are limited to adverse actions against supervisors for prohibited personnel practices; actions taken against employees for unacceptable job performance; and actions taken against employees for "efficiency of the service." 5 U.S.C. § 7513; *see* 5 C.F.R. §§ 1201.3; *see also Fausto*, 484 U.S. at 445-47. None of these specific grants of jurisdiction includes constitutional challenges to statutes.

Furthermore, it is undisputed that the MSPB, an Article I agency, cannot decide constitutional challenges to statutes because it lacks the power to

declare an Act of Congress unconstitutional. *See Johnson*, 415 U.S. at 368; *May v. Office of Pers. Mgmt.*, 38 M.S.P.R. 534, 538 (1988); *Malone v. Dep't of Justice,* 13 M.S.P.B. 81, 83 (1983) ("[I]t is well settled that administrative agencies are without authority to determine the constitutionality of statutes."); Cert. Opp. 10-11. As a result, when the MSPB is presented with a claim like Petitioners', it must immediately dismiss the claim before any proceedings on the merits, including any record development. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Indeed, that is precisely what happened here to Petitioner Elgin, who sought relief before the MSPB, only to be met with the Government's immediate motion to dismiss, which the MSPB granted, relying on a long line of precedent that prevented it from reaching the merits of Elgin's claims. Pet. App. 101a-02a.

In sum, in funneling the review of employment actions to the MSPB, whose expertise is limited to manager-employee disputes, Congress could not have also intended for facial constitutional challenges to be raised in the MSPB because it lacks the power to strike down federal statutes.

2. The CSRA Does Not Preclude Petitioners' Constitutional Challenges in the District Court Because They Are Collateral to the CSRA's Review Provisions.

Because Petitioners' facial constitutional challenges to 5 U.S.C. § 3328 and 50 U.S.C. app. § 453 are collateral to the scheme created by the CSRA, the CSRA does not preclude district court authority to grant the relief requested. Claims that

"are wholly collateral to a statute's review provisions and outside the agency's expertise" are not precluded by that statute. *Thunder Basin*, 510 U.S. at 212 (internal quotations omitted); *see also Heckler v. Ringer*, 466 U.S. 602, 618 (1984); *Mathews v. Eldridge*, 424 U.S. 319, 330 (1976); *Steadman v. Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (D.C. Cir. 1990) ("[When] the constitutional claim raises issues totally unrelated to the CSRA procedures . . . a party [can] come directly to district court.").

This Court has consistently found that the district court can review equitable constitutional claims even where there is a statutory review scheme when the claims are collateral to that scheme. For instance, in *Mathews v. Eldridge*, the Court held that district court jurisdiction over a constitutional due process claim was not precluded because it was "entirely collateral" to the comprehensive review scheme governing entitlement to Social Security benefits. 424 U.S. at 330-31. In *Johnson v. Robison*, the Court found that district court jurisdiction over equal protection claims "challenging the constitutionality of laws providing benefits" was not precluded by a statute creating exclusive administrative review procedures for decisions concerning administration of those benefits. 415 U.S. at 373.

And despite a comprehensive scheme allowing only administrative review of immigration status, in *McNary*, 498 U.S. at 494, the Court explained that, because the plaintiff's "action [did] not seek review on the merits of a denial of a particular application, the district court's general federal-question

jurisdiction under 28 U. S. C. § 1331 to hear this action remain[ed] unimpaired."

Given that Petitioners' claims are "entirely collateral" to the purpose and structure of the CSRA and "outside . . . the expertise" of the MSPB, the CSRA does not preclude their review in the district court. *See Thunder Basin*, 510 U.S. at 212-13 (quoting *Mathews*, 424 U.S. at 330). The CSRA created a scheme whereby the MSPB would adjudicate disputes between agency managers and their employees. A facial challenge to the constitutionality of a statute under which an employee was fired would not "involve the courts in day-to-day determination and interpretation" of agency policy; they are wholly collateral to the policy the MSPB is charged with administering. *See Johnson*, 415 U.S. at 372. Administrative review schemes have been held by this Court to preclude only those constitutional challenges that involve the types of claims the scheme was designed to handle, not challenges to the background statutes themselves. *Thunder Basin*, 510 U.S. at 212; *McNary*, 498 U.S. at 492.

Petitioners' claims are even further removed from the Congressional review scheme than the claims in, for example, *Johnson* because the statutes at issue here—5 U.S.C. § 3328 and 50 U.S.C. app. § 453—are not even a part of the review scheme that purportedly precludes the district court's authority to award equitable relief. Far from being a part of the CSRA, 5 U.S.C. § 3328 and 50 U.S.C. app. § 453 implement policies relating to the Selective Service

registration requirement, not to the adjudication of employer-employee disputes.[3]

The Court's decision in *Fausto*, by contrast, underscores the collateral nature of Petitioners' constitutional challenge. As discussed above (at 27-29), this Court's holding in *Fausto* is inapposite because it involved the question whether the CSRA precluded a *statutory* claim, not a *constitutional* claim. *Fausto* also held that the CSRA precluded a statutory Back Pay Act claim that was the type of employment dispute the MPSB was designed to consider: whether an employee engaged in the unauthorized use of a government vehicle. *See* 5 C.F.R. § 1201.3(a)(2); 31 U.S.C. § 1349(b). Here, unlike the claim in *Fausto*, Petitioners' claims are not based on a dispute between management and its employees, but rather on the facial constitutional defects of federal statutes. In other words, not only did *Fausto* not involve a constitutional claim, it was

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[3] The "wholly collateral" nature of Petitioners' claims is underscored by the following hypothetical. Assume that the plaintiff, a Selective Service non-registrant, seeks a district court declaration that he may not be subjected to the criminal penalties set forth in 50 U.S.C. app. § 462(a) because the men-only Selective Service registration requirement violates his constitutional right to equal protection. The district court would indisputably have authority to resolve such a claim, and the Government would, Petitioners believe, concede that neither the MSPB nor the Federal Circuit on appeal from the MSPB would have authority to resolve it. Petitioners' equal protection claims are identical in substance to the one described in the hypothetical, and those claims are "wholly collateral" to the CSRA, to the same degree as the hypothetical claim, because they have nothing to do with the terms and conditions of federal employment.

not a collateral challenge to the statute under which the employee was fired.

For these reasons as well, Petitioners' claims are not precluded by the CSRA.

B. The Federal Circuit Cannot Provide Petitioners With a Remedy for Their Constitutional Injuries.

Petitioners challenge 50 U.S.C. app. § 453(a), which requires that men—but not women—register with the Selective Service, as a denial of equal protection. Petitioners also challenge 5 U.S.C. § 3328, which provides that men who knowingly and willfully fail to register with the Selective Service System are ineligible for Executive agency employment, as both a denial of equal protection and a bill of attainder. JA 26-28. Beyond the reasons set out above, Petitioners' claims are properly brought in district court because, as a practical matter, Petitioners cannot obtain a remedy by bringing their constitutional challenges in the MSPB and, thereafter, appealing to the Federal Circuit.

To reiterate: No one disputes that the MSPB lacks authority to hear and decide Petitioners' facial constitutional claims. *See* Cert. Opp. 10-11; *Thunder Basin*, 510 U.S. at 215; *Johnson*, 415 U.S. at 368. Similarly, no one contends that the parties could take discovery in the MSPB or that the MSPB could make a record on a constitutional claim that it lacked the power to remedy. Rather, the First Circuit below assumed that the Federal Circuit would take on the constitutional question for the first time on appeal. Pet. App. 11a. The jurisdictional gymnastics

endorsed by the First Circuit are problematic because they not only disregard the MSPB's and the Federal Circuit's practices and rulings regarding their own jurisdictions, but also because they leave Petitioners without a forum to develop the factual record necessary to prevail on the merits.

1. The Federal Circuit Cannot Properly Evaluate the Merits of Petitioners' Constitutional Claims Because the Tribunal Below Did Not Develop a Factual Record.

The Federal Circuit cannot review Petitioners' equitable constitutional claims, which require resolution of mixed questions of law and fact, because its jurisdiction is derivative of the MSPB's jurisdiction and the facts relevant to their claims would not have been developed before the MSPB. *See* 5 U.S.C. § 7703(c) ("[T]he Federal Circuit shall review the record.").[4]

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[4] *See also Schmittling v. Dep't of Army*, 219 F.3d 1332, 1337 (Fed. Cir. 2000) ("If the Board lacks jurisdiction, we also are without authority to hear the merits of the appeal."); *Perez v. Merit Sys. Prot. Bd.*, 931 F.2d 853, 855 (Fed. Cir. 1991) ("Since the MSPB had no jurisdiction, the merits of Perez's challenge . . . were not before the MSPB for decision; nor are they before us."); *Manning v. Merit Sys. Prot. Bd.*, 742 F.2d 1424, 1427 (Fed. Cir. 1984) ("If the MSPB does not have jurisdiction, neither do we . . . ."); *Rosano v. Dep't of Navy*, 699 F.2d 1315, 1318 (Fed. Cir. 1983) ("[T]he scope of the subject matter jurisdiction of this court is identical to the scope of the jurisdiction of the board."); *Billops v. Dep't of Air Force*, 725 F.2d 1160, 1164 (8th Cir. 1984) ("[T]he Federal Circuit would not give [a plaintiff] a remedy he desires, a review of the merits of his case" because it is "limited to considering the limited

Petitioners' claims are not unique in requiring the development of a factual record; constitutional claims typically "turn upon the resolution of contested factual issues," *England*, 375 U.S. at 416, and even many facial constitutional claims, like those pressed here, require a factual record for decision. *See Citizens United v. FEC*, 130 S. Ct. 876, 933 (2010) (Stevens, J., concurring in part and dissenting in part) (noting that "through the normal process of litigation, the parties could have developed a [factual] record" regarding the relevant facial challenge); *see also, e.g.*, *Turner Broad. Sys., Inc., v. FCC*, 512 U.S. 622, 664-65 (1994); *FEC v. Colo. Republican Fed. Campaign Comm.*, 96 F.3d 471, 472-73 (10th Cir. 1996).

Here Petitioners' constitutional claims cannot be evaluated by the Federal Circuit because the Federal Circuit's review is limited to the record created before the MSPB, 5 U.S.C. § 7703(c); *see* Fed. R. App. P. 16(a), and that record would not contain facts needed to decide the constitutional claims. For example, Petitioner Elgin appealed to the MSPB, which dismissed his constitutional claims for lack of jurisdiction. The record contained no information relevant to Elgin's facial constitutional challenges. As the government agreed, First Cir. Br. for Defs.-Appellees 26-27, the MSPB record only established Elgin's year of birth, the length of his federal service, the nature of his job, the record of OPM's determination that he knowingly and willfully failed

ground of the Board's decision to dismiss for lack of jurisdiction.").

to register for selective service, and the agency's notice of his proposed termination. *See* Pet. App. 95a-98a. Though Elgin raised his bill of attainder and equal protection claims in the MSPB, because the MSPB lacks the power to decide that an Act of Congress is unconstitutional, the record did not include any facts related to, for example, the role of women in the military—facts that would be crucial for considering his constitutional claims. Thus, to "subject [Petitioners] to the processes of an impotent administrative tribunal"—one that cannot provide a remedy or create a factual record for judicial review of their facial constitutional challenges—would be to "command [them] to perform a useless action." *Republic Indus., Inc. v. Cent. Penn. Teamsters Pension Fund*, 693 F.2d 290, 296 (3d Cir. 1982).

In addition, unlike a district court, the Federal Circuit, like other courts of appeals, is not a forum in which the parties may develop the necessary factual record in the first instance. *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). In *Shalala v. Illinois Council on Long Term Care, Inc.*, a plaintiff brought statutory and constitutional challenges to Medicare-related regulations against the Secretary of Health and Human Services in the district court. 529 U.S. 1, 6-7 (2000). The Court held that the plaintiff was required to first proceed in the federal agency, which might not be able to decide the constitutional claim, because the reviewing district court, unlike the Federal Circuit here, had "the authority to develop an evidentiary record" to resolve the claim. *See id.* at 23-24.

But, as an appellate court, the Federal Circuit does not have the authority to develop an evidentiary record; it cannot accept new evidence and make factual determinations regarding the evidence presented. *See* Fed. R. App. P. 16(a), 17. The Federal Rules of Appellate Procedure include no rule authorizing discovery. Litigants in the Federal Circuit, as in other courts of appeals, cannot propound interrogatories, take depositions, or request documents. Equally important, the litigants cannot make an appellate record on their own through submission of declarations, documents, and other evidence. And the Federal Circuit cannot resolve contested issues of fact, as a district court can. *See Icicle Seafoods, Inc. v. Worthingon*, 475 U.S. 709, 714 (1986); *Mittal Steel Point Lisas Ltd. v. United States*, 542 F.3d 867, 875 (Fed. Cir. 2008). Recognizing this, the Federal Circuit does not decide an issue for the first time on appeal when a factual record is necessary to determine the issue but has not been developed below. *See Briggs v. Merit Sys. Prot. Bd.*, 331 F.3d 1307, 1313 (Fed. Cir. 2003).

2. Petitioners' Claims Cannot Be Adjudicated Without a Factual Record.

The factual record required by this case illustrates that federal employees' equitable constitutional claims belong in a forum in which a factual record can be created. To be sure, a district court may choose to decide a facial constitutional claim as a pure matter of law without developing a record, but the district court may also determine that it needs a record. *See Goldberg v. Rostker*, 509 F. Supp. 586, 589 n.3 (E.D. Pa. 1980), *rev'd* 453 U.S.

57. Petitioners ask this Court to hold that the district court has authority to consider Petitioners' claims and to reverse and remand to the First Circuit, where they will reiterate their request for a remand to the district court for discovery and the development of a factual record.

a. Bill of Attainder

In the district court, Petitioners did not seek to conduct discovery on their bill of attainder claim, but the Government found it necessary to create a factual record in the district court to support its argument that 5 U.S.C. § 3328 is not a bill of attainder. Petitioners had argued that § 3328 violates Article I, Section 9, Clause 3 of the U.S. Constitution, which prohibits bills of attainder, because the statute identifies an easily ascertainable group—men 26 and over who failed to register—and subjects that group to punishment (a bar to federal employment) without judicial trial. The district court initially granted Petitioners' motion for partial summary judgment on their bill of attainder claim, finding that § 3328's bar to federal employment identified an ascertainable class of men based on immutable past conduct and operated as a punishment without trial. Pet. App. 66a-67a. The district court noted twice that OPM treated "the 'knowingly and willfully' element as essentially an irrebuttable presumption," *id.* at 75a, 85a, thus rejecting the Government's argument that it is difficult to ascertain which men, among those who have not registered for selective service, would be found by OPM to have knowingly and willfully failed to register. *See Selective Serv. Sys. v. Minn. Pub.*

Interest Research Grp., 468 U.S. 841, 847 (1984) (holding that an unconstitutional bill of attainder must specify the affected persons).

With its motion for reconsideration, the Government submitted the declaration of an OPM Human Resources Specialist, who supplied determination letters for employees other than Petitioners in which OPM had found that the failure to register was not knowing or willful. Dist. Ct. Doc. 53-2, Decl. of Kimberly T. Call. The purpose of the Government's submission was to persuade the district court to abandon its initial *factual* conclusion that a person's non-registration for the Selective Service created an irrebuttable presumption that such a failure was "knowing" and "willful." Dist. Ct. Doc. 53, Memo. of Law Defs.' Mot. for Recons. 13 n.9. Later, the district court requested a report, for inclusion in the record and, presumably, potential fact-finding, regarding OPM's guidelines and policies for making "knowing and willful" determinations. Dist. Ct. Doc. 66, Tr. of Prelim. Inj. Hr'g 63:19-64:3; *see* JA 42.

If the bill of attainder claim had been adjudicated for the first time in the Federal Circuit, arriving at that court from an administrative adjudicator that had immediately dismissed the claim for lack of jurisdiction, there would have been no means of addressing the contested factual issue whether § 3328 identifies an easily ascertainable group for bill of attainder purposes.

b. Equal Protection

In *Rostker v. Goldberg*, relying heavily on contemporaneous congressional testimony, this Court held that the exclusion of women from Selective Service registration did not violate the right to equal protection guaranteed by the Fifth Amendment's Due Process Clause. 453 U.S. at 78-79. The district court here dismissed Petitioners' equal protection claim under *Rostker*. Pet. App. 87a. But that conclusion misconceived *Rostker's* holding as well as Petitioners' claims. Petitioners challenge *Rostker* by contending that the facts underpinning it are no longer true. To that end, they have repeatedly and consistently asked for an opportunity to take discovery on this issue. Dist. Ct. Doc. 12, Pls.' Opp. to Defs.' Mot. to Dismiss 8-11; First Cir. Br. of the Pls./Appellants 2, 46-61; First Cir. Oral Arg. at 13:06, *available at* http://www.law.georgetown.edu/clinics/ipr/Elgin1stCircuitargument.mp3.

i. Petitioners Need a Factual Record to Show That the Increasing Involvement of Women in Combat Operations Undercuts *Rostker*'s Factual Premise.

Rostker's 6-3 decision was premised, among other factual bases, on the ineligibility of women for combat positions. *Rostker*, 453 U.S. at 77-78. Because women and men were not "similarly situated" with regard to their eligibility for combat positions, the Court concluded that they need not be treated in the same manner just to "engage in gestures of superficial equality." *Id.* at 78-79. As a result, the Court did not address the question

whether excluding women from registration "substantially" furthers the important government interest in "raising and supporting armies," as required to satisfy constitutional challenges to gender-based statutory classifications. *Id.* at 70, 75; *see Craig v. Boren*, 429 U.S. 190, 204 (1976). Rather, the Court held only that excluding women from registration is "sufficiently" and "closely related to" the congressional purpose in mobilizing troops for combat duty. *Rostker*, 453 U.S. at 79.[5]

Rostker was based entirely on what the Court characterized as "the current thinking as to the place of women in the Armed Services." *Id.* at 71. The thrust of Petitioners' claim is that the "current thinking" in regard to women's role in the military has changed dramatically in the past thirty years. JA 3. Because Petitioners' equal protection claim alleged sufficient facts challenging *Rostker*'s premise that men and women are not similarly situated with respect to combat positions, Petitioners should have the opportunity to demonstrate, through the development of a factual record, that *Rostker* should be revisited in light of the current role of women in the military. Petitioners' factual allegation that women and men are now similarly, albeit not identically, situated attacks *Rostker*'s factual premise and thus the constitutionality of the male-only registration requirement. Indeed, the force of *stare decisis* is at its low point when the underlying

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[5] In *Rostker*, although the three-judge panel that heard the case "contemplated a hearing to develop a factual record," the parties were able to agree to a five-volume Joint Documentary and Stipulated Record. *Goldberg*, 509 F. Supp. at 589 n.3.

facts are so changed that they can no longer justify the decision. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 129 S. Ct. 1800, 1822 (2009) (Thomas, J., concurring); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992) (Overruling precedent may be legitimate when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."). "In cases involving constitutional issues" that turn on a particular set of factual assumptions, the court "must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly ascertained." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting).

The role of women in the military, particularly in combat, has changed substantially since 1981. *See generally* Maj. Scott E. Dunn, *The Military Selective Service Act's Exemption of Women: It is Time to End It*, 2009 Army Law. 1 (2009). Statutes and policies excluding women from combat, on which *Rostker* relied, have been repealed or changed. 453 U.S. at 77-78. In 1991, Congress repealed a statute forbidding women from serving as combat pilots in the Air Force and Navy. JA 24; 10 U.S.C. § 8549, *repealed by* Pub. L. No. 102-190 § 531(a)(1), 105 Stat. 1365 (1991). In 1993, Congress repealed a statute restricting women from serving on Navy combat ships. JA 24; 10 U.S.C. § 6015, *repealed by* Pub. L. No. 103-160 § 541(a), 107 Stat. 1659 (1993). In 1994, Secretary of Defense Les Aspin replaced the "risk rule," which prohibited the assignment of women in noncombat positions if the likelihood of being

exposed to "direct combat, hostile fire, or capture are equal to or greater than" the risks for the combat units they supported, with the "direct ground combat rule," which prohibits women from "engaging an enemy on the ground . . . while being exposed to hostile fire and to a high probability of direct physical contact with the hostile force's personnel." Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 Minn. L. Rev. 96, 140-42 (2008). The direct ground combat rule opened up many positions in which women were prohibited from serving in 1981. *See* U.S. Gov't Accountability Office, GAO/NSIAD-96-169 *Physically Demanding Jobs: Services Have Little Data on Ability of Personnel to Perform* 2 (1996).

Furthermore, although the direct ground combat rule prohibits women from being assigned to units in direct combat on the ground, Petitioners seek to develop a factual record in the district court demonstrating that the realities of recent wars have routinely placed women in such positions. Because there is no front line separating combat units from noncombat units, female soldiers regularly face combat, and, in fact, their units are more frequently targeted by insurgents than male soldiers in direct combat units. JA 25-26; Margaret C. Harrell, et al., *Assessing the Assignment Policy for Army Women* 5-6, Rand Nat'l Defense Research Inst. (2007), http://www.rand.org/pubs/monographs/MG590-1. Thousands of women received "Combat Action Badges," which are awarded for "special recognition to Soldiers who personally engage the enemy or are engaged by the enemy during combat operations." JA

25. Adm. Michael G. Mullen, Chairman of the Joint Chiefs of Staff, stated that "women are assigned to units and positions that may necessitate combat actions." Nominations before the S. Armed Servs. Comm., 111th Cong. 1286 (2009).

Petitioners want to develop a record showing that women are presently engaged in what historically has been considered combat. *See, e.g.*, Dave Moniz, *Female Amputees Make Clear that All Troops are on Front Lines: Reality in Iraq has Overtaken Long-Running Debate at Home*, USA Today, Apr. 28, 2005, at A1. Unlike in 1981, when women were in fact excluded from all combat positions, women are now excluded from some combat positions by policy but nevertheless end up engaging in combat. *See* 152 Cong. Rec. S8542 (daily ed. Aug. 1, 2006) (statement of Sen. Robert Menendez) ("The Army has expanded the role of women in ground-combat operations."). Thus, concluding that women are not similarly situated with men because of the mechanical line the direct combat unit exclusion policy draws "risk[s] 'bypass[ing] any equal protection scrutiny.'" *United States v. Virginia*, 518 U.S. 515, 529 (1996) (second alteration in original).

ii. Petitioners Need a Factual Record to Show That the Male-Only Registration Requirement Does Not Substantially Further an Important Government Interest.

Once Petitioners establish that men and women are sufficiently similarly situated with regard to combat positions, the Government must prove, with facts, that excluding women from Selective Service

registration substantially furthers the important government interest in "raising and supporting armies." *See Rostker*, 453 U.S. at 70. Petitioners want to develop a factual record to establish that the government cannot meet its burden.

First, the Court in *Rostker* noted that "any future draft . . . would be characterized by a need for combat troops." *Id.* at 76. But that was when the draft was needed to supply combat troops to repel a Soviet invasion of Europe. As we engage in the global war on terrorism, it is unclear whether the primary purpose of any future draft would be to supply front-line combat troops.

Petitioners want to create a record on the link between conscription and combat. Specifically, Petitioners need to know in what positions draftees will likely serve. At minimum, Petitioners expect to prove through development of a factual record that future draftees likely would serve in hard-to-fill roles, such as Arabic translators, doctors, nurses, and computer specialists. *See, e.g.*, 50 U.S.C. app. § 460(h)(1); Eric Rosenberg, *Special Skills Draft on Drawing Board*, S.F. Chronicle (Mar. 13, 2004). This factual development would buttress Petitioners' argument that prohibiting female nurses, translators, and computer experts from registering with Selective Service, while requiring blind men, amputees, those with mental deficits or illnesses, and convicted felons to register, would not substantially help meet the military's future needs. JA 23-24. Indeed, in Afghanistan, female soldiers do what male soldiers often cannot: gather intelligence from and frisk Afghan women. Lolita C. Baldor,

Death Highlights Women's Role in Special Ops Teams, Associated Press, Oct. 25, 2011, *available at* http://news.yahoo.com/death-highlights-womens-role-special-ops-teams-195034667.html.

Moreover, any additional burden created by including women in Selective Service registration plans would not be a valid justification for sex discrimination. *See Craig*, 429 U.S. at 198. In anticipation of the government's possible argument that the economic burden of registering women justifies disparate treatment, Petitioners want to develop a factual record showing that the cost of requiring women to register with Selective Service would not be unduly burdensome. *See, e.g.*, U.S. Gov't Accountability Office, 1 GAO/NSIAD-98-199, *Gender Issues–Changes Would be Needed to Expand Selective Service Registration to Women*, *available at* http://www.gao.gov/archive/1998/ns98199.pdf (estimating that Selective Service would need only 17 to 20 additional staff to expand registration to women).

In sum, Petitioners' constitutional claims require the creation of a factual record and factual determinations. For this reason as well, it is implausible to ascribe to Congress the intent to impliedly remove the authority of the district court to resolve Petitioners' constitutional claims.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

50 U.S.C. app. § 453. Registration

(a) Except as otherwise provided in this title [sections 451 to 471a of this Appendix], it shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder. The provisions of this section shall not be applicable to any alien lawfully admitted to the United States as a nonimmigrant under section 101(a)(15) of the Immigration and Nationality Act, as amended (66 Stat. 163; 8 U.S.C. 1101), for so long as he continues to maintain a lawful nonimmigrant status in the United States.

(b) Regulations prescribed pursuant to subsection (a) may require that persons presenting themselves for and submitting to registration under this section provide, as part of such registration, such identifying information (including date of birth, address, and social security account number) as such regulations may prescribe.