No. 11-45

In the Supreme Court of the United States

MICHAEL B. ELGIN, ET AL., PETITIONERS

v.

DEPARTMENT OF THE TREASURY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, precludes petitioners from seeking equitable relief in district court based on allegations that they were unconstitutionally terminated from federal employment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 641 F.3d 6. The opinion of the district court granting petitioners' motion for partial summary judgment and denying in part and granting in part respondents' motion to dismiss (Pet. App. 65a-93a) is reported at 594 F. Supp. 2d 133. The opinion of the district court granting respondents' motion for reconsideration (Pet. App. 39a-64a) is reported at 697 F. Supp. 2d 187.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2011. The petition for a writ of certiorari was filed on July 7, 2011 and was granted on October 17,

2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-16a.

STATEMENT

1. a. Before 1978, federal employment law consisted of an "outdated patchwork of statutes and rules built up over almost a century." *United States* v. *Fausto*, 484 U.S. 439, 444 (1988) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 3 (1978) (S. Rep. 95-969)). There was no systematic scheme for review of personnel actions. Some employees were afforded administrative review of adverse personnel action by statute or executive order; others had no right to such review. Federal employees often sought judicial review of agency personnel decisions in "district courts in all Circuits and the Court of Claims," through "various forms of actions * * * including suits for mandamus, injunction, and declaratory judgment." *Id.* at 444-445 (citations omitted); accord S. Rep. No. 95-969, at 63.

"Criticism of this 'system' of administrative and judicial review was widespread." *Fausto*, 484 U.S. at 445. There was "particular * * * dissatisfaction" with the lack of uniformity that stemmed from having cases adjudicated "under various bases of jurisdiction" in numerous district courts and the Court of Claims. *Ibid.* In addition, "beginning the judicial process at the district court level, with repetition of essentially the same review on appeal in the court of appeals, was wasteful and irrational." *Ibid.*; accord *Lindahl* v. *OPM*, 470 U.S. 768, 797-799 (1985).

b. Congress responded by enacting the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (5 U.S.C. 1101 *et seq.*). *Fausto*, 484 U.S. at 445. The CSRA "comprehensively overhauled the civil service system," *Lindahl*, 470 U.S. at 773, and established "an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration," *Fausto*, 484 U.S. at 445. The personnel system created by the CSRA provides a "comprehensive" scheme of protections and remedies for federal employment disputes, *id.* at 448, and "prescribes in great detail the protections and remedies applicable * * * , including the availability of administrative and judicial review," *id.* at 443.

The CSRA essentially creates a three-tiered system providing graduated procedural protections based on the seriousness of the personnel action at issue. Greatly simplified, the CSRA provides as follows: (1) "for major personnel actions specified in the statute ('adverse actions')," there is an explicit right to administrative proceedings followed by judicial review in the Federal Circuit, *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983); (2) for specified "personnel actions infected by particularly heinous motivations or disregard of law ('prohibited personnel practices')," there are administrative proceedings followed by judicial review in the Federal Circuit under specified circumstances, *ibid.*; and (3) for minor personnel matters involving bargaining-unit employees, there is a grievance procedure followed by binding arbitration and limited judicial review in the courts of appeals, 5 U.S.C. 7121, 7122, 7123.

c. Of particular relevance here are the CSRA procedures applicable when an employing agency takes an

adverse action, including removal, against a non-probationary competitive-service employee "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a); see 5 U.S.C. 7501(1), 7511-7514, 7701-7703 (2006 & Supp. IV 2010). As an initial matter, when an employing agency takes such an action, it must provide the employee with advance written notice of the action and the specific reasons for it, 5 U.S.C. 7513(b)(1); give the employee a chance to respond, either orally or in writing, and to submit documentary evidence supporting that response, 5 U.S.C. 7513(b)(2); allow the employee to be "represented by an attorney or other representative" during that process, 5 U.S.C. 7513(b)(3); and provide a final "written decision," including the agency's final reasoning, "at the earliest practicable date," 5 U.S.C. 7513(b)(4).

An employee who remains aggrieved following these internal agency procedures may appeal the agency's action to the Merit Systems Protection Board (MSPB), "an independent Government agency that operates like a court." 5 C.F.R. 1200.1; see 5 U.S.C. 7513(d); see also 5 U.S.C. 1201, 1204; 5 C.F.R. 1201.3. The employee is entitled to a hearing before the MSPB and to be represented by an attorney or other representative. 5 U.S.C. 7701(a); see also 5 C.F.R. 1201.11-1201.113 (regulations describing MSPB procedures). To assist in the development of evidence, the MSPB (as well as any individual member, administrative law judge, or designated employee) has statutory authority to issue testimonial and documentary subpoenas and to order depositions and interrogatories. 5 U.S.C. 1204(b)(2); see 5 C.F.R. 1201.71-1201.75, 1201.81-1201.85. If the MSPB decides in favor of the employee and reverses the employing agency's removal action, it is empowered to ensure that

the employee is "returned to the status quo ante" by ordering appropriate relief, including reinstatement and backpay, and it may also award attorney fees. *Smith* v. *Department of the Army*, 458 F.3d 1359, 1364 (Fed. Cir. 2006) (citation omitted); see 5 U.S.C. 1204(a)(2), 7701(g).

If an employee does not obtain the relief he seeks from the MSPB, he "may obtain judicial review" of the MSPB's order or decision. 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). The Federal Circuit's jurisdiction in such circumstances is "exclusive." 28 U.S.C. 1295(a)(9). The Federal Circuit must review the record and "hold unlawful and set aside any agency action, findings, or conclusions found to be" either "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; procedurally improper; or "unsupported by substantial evidence." 5 U.S.C. 7703(c).

2. a. Petitioners are four former federal employees who were discharged (or allegedly constructively discharged) by their employing agencies based on their failure to comply with their legal duty to register for the Selective Service. Pet. App. 3a. The Military Selective Service Act requires all male U.S. citizens and permanent-resident aliens between the ages of 18 and 26 to register for the military draft in the manner prescribed by the President. See 50 U.S.C. App. 453(a). Although President Ford briefly suspended the selective-service-registration requirements in 1975, President Carter reinstituted them in 1980 for men born on or after January 1, 1960, and they remain in force today. 50 U.S.C. App. 453 note. All persons are now deemed by law to have notice of their registration re-

quirements. 50 U.S.C. App. 465(a). Knowing failure to register, or falsified registration, is a federal crime punishable by up to five years of imprisonment, a fine up to $10,000, or both. 50 U.S.C. App. 462(a).

In 1985, Congress passed a law, codified at 5 U.S.C. 3328(a), disqualifying from federal employment anyone who has "knowingly and willfully" failed to comply with selective-service-registration requirements. See Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 1622(a)(1), 99 Stat. 777. Congress further directed the Office of Personnel Management (OPM) to promulgate implementing regulations, including regulations prescribing procedures for determining whether a failure to register was "knowing and willful." 5 U.S.C. 3328(b). OPM's implementing regulations, first issued in 1987, require agencies to advise draft-eligible employees (and applicants) younger than 26, who still have the opportunity to register with the Selective Service, to do so promptly. 5 C.F.R. 300.705(c); see 52 Fed. Reg. 7400-7401 (Mar. 11, 1987). The regulations further require agencies to terminate employees over the age of 26 who never complied with their legal obligation to register with the Selective Service, unless OPM determines in response to the employee's explanation that the failure was not knowing and willful. 5 C.F.R. 300.705(d), .707; see 5 C.F.R. 300.706 (procedures for OPM determination); see also 76 Fed. Reg. 75,351 (Nov. 29, 2011) (proposed regulatory amendments not directly relevant here).

b. The Selective Service system contains no record that any of petitioners registered between the ages of 18 and 26. J.A. 13-14, 16-18. Nevertheless, petitioners were hired and employed for varying periods of time by federal agencies. *Ibid.* When the employing agencies

later discovered petitioners' failure to register, they notified OPM. J.A. 14, 17, 19. In the case of three petitioners, OPM determined that the failure to register precluded eligibility for federal employment, and the employing agencies terminated those petitioners. J.A. 15, 17, 19. The fourth petitioner, Henry Tucker, resigned his federal employment after the matter was referred to OPM, and alleges that he was constructively discharged. J.A. 17; Pet. App. 3a.

Only one petitioner, Michael Elgin, sought any review of his removal under the CSRA procedures described above (pp. 3-5, *supra*). Elgin appealed his removal to the MSPB, arguing (1) that Section 3328 is an unconstitutional bill of attainder and (2) that his termination was gender-discriminatory. J.A. 15. His appeal was referred to an administrative judge for an initial decision. Pet. App. 94a; see 5 U.S.C. 7701(b)(1) (permitting referral of MSPB appeals to administrative judge); see also 5 C.F.R. 1201.111.

The administrative judge dismissed the appeal "for lack of jurisdiction." Pet. App. 95a. She agreed with the argument of Elgin's employing agency (the Department of the Treasury) that the MSPB had no jurisdiction to review a removal premised on a determination that the employee's initial appointment violated an absolute statutory prohibition on employment in the civil service. Pet. App. 100a-101a. She further stated that Elgin's constitutional challenge to Section 3328 did not itself suffice to "confer jurisdiction" on the MSPB, because the MSPB "lacks authority to determine the constitutionality of a statute." *Id.* at 101a.

The decision advised Elgin of his rights to petition for review by the full MSPB and to appeal a final MSPB decision to the Federal Circuit. Pet. App. 105a-107a; see

also 5 C.F.R. 1201.113 and .114 (describing procedures for petitioning for full MSPB review). Elgin pursued neither option. Pet. App. 4a.

3. Petitioners subsequently filed this putative class-action suit in the District of Massachusetts, asserting claims under the Administrative Procedure Act (5 U.S.C. 701 *et seq.*) and the Declaratory Judgment Act (28 U.S.C. 2201 and 2202). J.A. 3-30. They do not presently contest that they knowingly and willfully failed to register for the Selective Service. Pet. App. 3a. Nor do they presently contest that 5 U.S.C. 3328 and OPM regulations required their removal. They instead contend that Section 3328 is unconstitutional, alleging both that it is a bill of attainder and that it (in combination with the selective-service statute) discriminates on the basis of gender in violation of the equal-protection component of the Fifth Amendment. J.A. 26-28; see U.S. Const. Art. I, § 9, Cl. 3 ("No Bill of Attainder * * * shall be passed."); U.S. Const. Amend. V. They seek a declaratory judgment that 5 U.S.C. 3328 is unconstitutional; injunctive relief barring enforcement of Section 3328; and reinstatement to their former positions with full backpay and benefits. J.A. 29-30.

The district court initially dismissed the equal-protection claim but granted partial summary judgment for petitioners on the bill-of-attainder claim. Pet. App. 65a-93a. The court reasoned that the equal-protection issue was controlled by this Court's decision in *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), which rejected an equal-protection challenge to the Military Selective Service Act. Pet. App. 86a-93a. But the court initially took the view that Section 3328 is an unlawful bill of attainder, *i.e.*, "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without pro-

vision of the protections of a judicial trial." *Id.* at 70a (quoting *Nixon* v. *Administrator of Gen. Servs.*, 433 U.S. 425, 468 (1977)); see *id.* at 70a-86a.

The district court subsequently granted the government's motion for reconsideration and dismissed the case. Pet. App. 39a-64a. In its reconsideration motion, the government argued that petitioners' suit was barred because the CSRA provided the exclusive mechanism for challenging their removals. *Id.* at 41a-42a. The district court rejected that argument, *id.* at 43a-51a, but, reconsidering its earlier constitutional analysis, the district court agreed with the government that Section 3328 is not a bill of attainder because "[o]n the day of its enactment, Congress had no way of knowing exactly who would fall into the affected class." *Id.* 63a. "Since no one would be in violation of the statute until six weeks after it passed," the district court explained, "everyone could, in theory, comply." *Ibid.*

4. a. The court of appeals vacated the district court's judgment and remanded with instructions to dismiss petitioners' complaint on jurisdictional grounds. Pet. App. 1a-15a. It reasoned that the CSRA precluded petitioners from challenging their employing agencies' actions in district court. *Id.* at 5a-15a. Petitioners did not dispute, the court of appeals noted, that the CSRA, "where it applies, is the exclusive remedy for an employee challenging removal." *Id.* at 6a. And the court concluded, contrary to petitioners' contentions, that the CSRA provides "a route to direct review of their constitutional claims by an Article III court"—namely, the Federal Circuit. *Ibid.*

The court of appeals determined that petitioners' removals were governed by the CSRA's review scheme for adverse actions taken "for such cause as will promote

the efficiency of the service" (5 U.S.C. 7513(a)), which permits removals to be appealed to the MSPB and then to the Federal Circuit. Pet. App. 7a-10a; see pp. 4-5, *supra*. The government conceded in its brief, and the court of appeals agreed, that the administrative judge in Elgin's case had been wrong to conclude (and the Department of the Treasury had been wrong to contend) that the MSPB lacks jurisdiction in cases where an employing agency removes an employee based on Section 3328's statutory bar. Gov't C.A. Br. 31-35; Pet. App. 10a-11a. The court of appeals reasoned that "[t]he CSRA governs 'removals'; nothing in its language suggests that a case involving a statutory bar follows a different route; and the legislative history * * * refutes any such suggestion." Pet. App. 11a.

The court of appeals acknowledged that even though the MSPB would have jurisdiction over the subject matter in an appeal of petitioners' removals, the MSPB might lack authority to address specific arguments. Pet. App. 13a. In particular, the court noted that administrative agencies like the MSPB may lack authority to declare a federal statute unconstitutional. Pet. App. 13a & n.5. But the court of appeals reasoned that "while the [MSPB] may be powerless to strike down [Section 3328], the Federal Circuit on review of the [MSPB] may do so, 5 U.S.C. § 7703(c), and, if it agreed with [petitioners] on the merits, remand to the [MSPB] to grant relief." *Id.* at 13a (citing *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 23-24 (2000), and *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 215 (1994)); see also *id.* at 14a (concluding that the Federal Circuit would likely agree that it could review constitutional claims in this context). The court of appeals observed that "the MSPB is limited" in addressing constitutional claims "only be-

cause of a doctrine that uniquely applies to administrative agencies and *not* to the Federal Circuit or any other Article III court." *Id.* at 14a.

The court of appeals expressed skepticism about the merits of petitioners' constitutional claims, "given that one conflicts with governing Supreme Court precedent and the other ignores the fact that [petitioners] were free to avoid the [Section 3328] bar by timely registration." Pet. App. 14a. "But," it continued, "the CSRA channels removals covered by the CSRA—and thus petitioners' claims—to the Federal Circuit; that principle serves an important purpose; the CSRA provides a remedy for a meritorious facial challenge; and [petitioners] were obliged to use it." *Id.* at 14a-15a (citation omitted). Thus, the court of appeals concluded, the district court should dismiss petitioners' suit "without prejudice to the pursuit of other remedies under the CSRA to the extent that they may be available at this late date." *Id.* at 15a.

b. Judge Stahl concurred in the judgment. Pet. App. 15a-38a. He believed that the district court had jurisdiction to entertain petitioner's suit, but would have affirmed its merits-based dismissal. *Ibid.*

SUMMARY OF ARGUMENT

The court of appeals correctly concluded that the CSRA provided the exclusive route for petitioners to challenge their removals. Petitioners could have appealed their removals to the MSPB, 5 U.S.C. 7513(d), and then sought judicial review in the Federal Circuit of any adverse MSPB decision, 5 U.S.C. 7703. Even if the MSPB (an executive agency) could not have finally decided their constitutional claims, the Federal Circuit (an Article III court) could have. Petitioners were required to avail themselves of the review procedures that the

CSRA provides, and they cannot circumvent those procedures by filing suit directly in district court.

I. Contrary to petitioners' initial contention—which they raise for the first time in this Court—remedies available under the CSRA for constitutional claims are exclusive, not merely optional. There is no dispute that at least some constitutional claims can be meaningfully addressed by appealing an agency's adverse action to the MSPB and then (if necessary) seeking judicial review in the Federal Circuit. And Congress's intent that such CSRA remedies be exclusive "is fairly discernible in the statutory scheme." *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994) (quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984)).

This Court has already held that the CSRA exhibits the requisite congressional design to preclude alternative remedies, *United States* v. *Fausto*, 484 U.S. 439, 452 (1989), and that holding applies with full force here. One of Congress's primary purposes in enacting the CSRA was to replace freestanding district-court suits challenging certain federal-employment activities with a single consolidated scheme for administrative and judicial review. Allowing any federal employee who can couch an employment-related claim in constitutional terms either to opt out of the CSRA entirely, or to bifurcate his challenge between the district court (for constitutional claims) and the Federal Circuit (for nonconstitutional claims), would undo Congress's efforts by reinstating much of the unwieldy system that the CSRA was enacted to eliminate.

Petitioners' argument in favor of that impractical result rests primarily on the assertion that Congress must provide a clear demonstration of its intent to preclude district-court review of constitutional claims. That

assertion is flawed. Congress needs to provide a clear demonstration of its intent only if it wants to foreclose *all* judicial review of a constitutional claim—an extraordinary step that, this Court has cautioned, would raise a serious constitutional question. But the Court has recognized that no such question is raised, and no express statement is required, when Congress merely *channels* judicial review of a constitutional claim to a particular Article III forum—here, the Federal Circuit. Channeling constitutional claims through a specialized scheme of administrative and judicial review is not only well within Congress's authority, but is affirmatively beneficial. It allows nonconstitutional claims to be addressed first (potentially mooting difficult constitutional questions) and permits the agency to weigh in on any statutory, regulatory, or factual issues as to which its expertise may be helpful.

II. As the court of appeals recognized, the CSRA's procedures for administrative and judicial review were fully capable of resolving petitioners' claims that their removals were unlawful because Section 3328 is unconstitutional. Petitioners lack any legal basis for bypassing those procedures in favor of district-court review.

A. The CSRA provides a path for administrative and judicial review of all adverse actions like petitioners' removals. Any employee has the right to appeal such an action to the MSPB and then to the Federal Circuit. The statutory text contains no explicit or implicit exceptions to those rights or to the MSPB's jurisdiction based on the particular grounds, constitutional or otherwise, on which an employee challenges the agency's action.

Even if the MSPB itself lacked authority to adjudicate petitioners' constitutional claims directly, the Federal Circuit was capable of addressing those claims and

of ordering the MSPB to grant any necessary relief. Although some constitutional claims may lie beyond the power of an agency to resolve, this Court has repeatedly recognized that such claims may be addressed in the first instance by an Article III court—including an appellate court—reviewing agency action. *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 23-24 (2000); *Thunder Basin*, 510 U.S. at 215.

Petitioners err in suggesting that the Federal Circuit cannot resolve constitutional claims like theirs because it will lack an adequate record. Initial judicial review of agency action in an appellate court is quite common, and courts of appeals have several methods for resolving constitutional claims in the first instance. Many constitutional claims (including most facial claims) will require no factual development at all; appellate courts, including this Court, can and do take judicial notice of facts contained in articles, studies, amicus briefs, and the like; and any other factfinding that might in theory be necessary can be performed by the MSPB (either initially or on remand from the Federal Circuit), which has full discovery, subpoena, and evidentiary-hearing authority.

B. Because the CSRA provided an avenue for meaningful judicial review of petitioners' constitutional claims, petitioners were obligated to take that route, rather than to challenge their removals in district court. Petitioners are wrong to suggest that the CSRA, even if otherwise exclusive, nevertheless permits employees to bring "facial constitutional challenges" in district court.

As an initial matter, petitioners' proposed exception to CSRA exclusivity invites extensive, unpredictable, and wasteful litigation about what sorts of claims might fit within it. The dividing line between "facial" and "as-

applied" challenges is imprecise, and it is far from clear that petitioners' own claims are properly characterized as "facial." In any event, petitioners are incorrect in asserting that claims like theirs are "wholly collateral" to the CSRA's review scheme. Petitioners' claims are challenges to their removals—the very type of challenge the CSRA channels to the MSPB and the Federal Circuit. And petitioners raise the same arguments (the asserted unconstitutionality of Section 3328) and seek essentially the same relief (reinstatement with backpay) as they could under the CSRA's specialized scheme.

Moreover, channeling constitutional claims like petitioners' through the CSRA makes good sense. In many cases, an employee challenging the constitutionality of a statute will challenge his removal on other grounds as well, and principles of administrative exhaustion and judicial economy militate in favor of keeping such related claims together before the MSPB and the Federal Circuit. Even if a particular employee forgoes any nonconstitutional claims, channeling his constitutional claims though the CSRA allows any underlying factual issues (such as the constructive-removal allegations of petitioner Tucker here) to benefit from the MSPB's expertise, and assures that any statutory-construction issues (such as issues of constitutional avoidance) tied up with the constitutional questions are resolved by the Federal Circuit. The Federal Circuit would undisputedly be the primary court to review statutory-interpretation issues outside the context of a constitutional challenge to a statute, and Congress would not have intended to discard that court's expertise, and invite inter-circuit conflicts, whenever such issues are intertwined with such a challenge.

ARGUMENT

The CSRA "replaced [a] patchwork system" under which federal personnel decisions could be challenged in a variety of different courts "with an integrated scheme of administrative and judicial review" of certain employment-related agency actions. *United States* v. *Fausto*, 484 U.S. 439, 445 (1987). The procedures the CSRA prescribes, including its procedures for judicial review of constitutional claims, are exclusive. The court of appeals correctly concluded that those procedures gave petitioners a direct path to meaningful judicial review by an Article III court—the Federal Circuit—of their constitutional arguments challenging their removals. Petitioners should not be permitted to subvert the CSRA's careful design by sidestepping Federal Circuit review in favor of an unauthorized suit in district court.

I. FEDERAL EMPLOYEES MAY NOT BYPASS JUDICIAL REVIEW AVAILABLE UNDER THE CSRA BY FILING SUIT IN DISTRICT COURT

In the court of appeals, petitioners "[d]id not contest the view that the statutory route" specified by the CSRA, "where it applies, is the exclusive remedy for an employee challenging removal." Pet. App. 6a. Petitioners' primary argument in this Court, however, is that district courts can entertain "all equitable constitutional claims brought by federal employees," Pet. Br. 20, "whether or not" such claims could be redressed under the CSRA, *id.* at 19. On petitioners' view, even if the CSRA provides adequate judicial review of a constitutional claim, the employee may nevertheless circumvent the CSRA altogether (by filing only his constitutional claim in district court) or split his challenge to a single employment action between two different forums (by

filing his constitutional claim in district court and pursuing other claims under the CSRA). Such an impractical result cannot be reconciled with the structure and purpose of the CSRA and with this Court's precedents.

A. A Specialized Statutory Review Scheme Precludes Freestanding Constitutional Claims When Congressional Intent Of Exclusivity Is "Fairly Discernible"

1. Two background premises are undisputed. First, there is no dispute that federal employees can obtain meaningful judicial (and administrative) review of at least some constitutional challenges to adverse actions by following the procedures prescribed in the CSRA. Pet. Br. 19, 33; see pp. 3-5, *supra*. In *Bush* v. *Lucas*, 462 U.S. 367 (1983), for example, this Court recognized that even under the pre-CSRA scheme, constitutional claims (there, that an employee had been demoted in retaliation for the exercise of First Amendment rights) could properly be raised in an administrative appeal of an employing agency's adverse action. *Id.* at 385-387 & n.33. Petitioners accordingly acknowledge in this case that federal employees may raise certain constitutional claims before the MSPB under the CSRA. Pet. Br. 33. And following presentation of such a claim to the MSPB, judicial review would be available in the Federal Circuit. 5 U.S.C. 7703(a)-(c).

Second, there is no dispute that if judicial review were *not* available under the CSRA for a particular employment-related constitutional claim, a federal employee would be entitled to bring a freestanding action for equitable relief. Although the CSRA provides an avenue for judicial review of many types of employment-related actions, including the adverse actions at issue here, it is possible that an agency could take an

employment-related action that would not be judicially reviewable under the CSRA and yet would rise to the level of constitutional significance. See *Bush*, 462 U.S. at 385 n.28. This Court's decision in *Webster* v. *Doe*, 486 U.S. 592 (1988), requires Congress to make a "heightened showing" of its intent "to deny any judicial forum for a colorable constitutional claim." *Id.* at 603. The government acknowledges that the CSRA does not contain a "heightened showing" of congressional intent to foreclose review of constitutional claims altogether. Accordingly, if the CSRA itself provides no avenue for an employee to obtain judicial review of an employment-related constitutional claim, the employee (after exhausting any administrative remedies) could bring his claim under the Administrative Procedure Act, which provides a cause of action for judicial review of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704.

2. The dispute between the parties, with respect to petitioners' primary argument, concerns an employee's ability to bring an employment-related constitutional claim in district court *even though* he could obtain judicial review (from the Federal Circuit) of that same claim under the CSRA. Contrary to petitioners' contention (Pet. Br. 26-27), *Webster*'s "heightened showing" rule does not provide the proper framework for resolving that issue. Rather, the proper test is simply whether Congress's intent that the CSRA be exclusive "is fairly discernible in the statutory scheme." *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994) (quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984)).

The question in *Webster*—as well as the other cases on which petitioners primarily rely, including *Johnson*

v. *Robison*, 415 U.S. 361 (1974)—was whether a federal statute should be "construed to deny *any judicial forum* for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (emphasis added); see *Robison*, 415 U.S. at 364-365; *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975) (discussing *Robison*); see also *McNary* v. *Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 484, 496-499 (1991) (declining to entirely foreclose meaningful review of a constitutional claim) (cited at Pet. Br. 32, 37-38); *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 678 (1986) (similar) (cited at Pet. Br. 26). The Court has recognized that not only would such a construction be "extraordinary," but it would also "raise[] a serious constitutional question of the validity of the statute as so construed." *Salfi*, 422 U.S. at 762. Mindful of those concerns, the Court requires a clear demonstration of congressional intent before it will interpret a statute to bar the door of *every* court to a plaintiff challenging agency action on colorable constitutional grounds. *Ibid.*; *Webster*, 486 U.S. at 603.

Petitioners err in contending that the same rule applies to the question whether judicial review under the CSRA, when available, is exclusive. Their error lies in overlooking "the distinction that this Court has often drawn between a total preclusion of review" (the issue in *Webster* and *Johnson*) and "postponement of review" or "channeling" of review through a particular statutory scheme. *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 19 (2000) (citing cases). The issue petitioners raise—whether a plaintiff is required to challenge agency action (such as a removal) under a special statutory review procedure (such as the CSRA provides), or may alternatively bring suit in district court under the general federal-question-jurisdiction provi-

sion (28 U.S.C. 1331)—is a question of channeling, not of total preclusion. See, *e.g.*, *Illinois Council*, 529 U.S. at 13 (classifying the requirement that claimants challenge certain agency action under a special statute, rather than bringing suit in district court under 28 U.S.C. 1331, as an issue of "channeling"); *Salfi*, 422 U.S. at 762 (distinguishing the total preclusion issue in *Robison* by observing that "[i]n the present case, the Social Security Act itself provides jurisdiction for constitutional challenges to its provisions"). Channeling review of a constitutional claim does not present the same concerns as foreclosing it entirely. As this Court has recognized, channeling "is not only of unquestionable constitutionality," but "is also manifestly reasonable," since it can assure an agency the first crack at resolving a plaintiff's objections to its actions, while still allowing for judicial review at the end of the administrative process. *Salfi*, 422 U.S. at 762.

Because channeling "does not implicate the strong presumption that Congress did not mean to prohibit *all* judicial review," no heightened or express showing of congressional intent is required to divest a district court of jurisdiction over the subject matter covered by the special statutory review scheme. *Thunder Basin*, 510 U.S. at 207 n.8 (emphasis added); see also *id.* at 215 n.20; *Illinois Council*, 529 U.S. at 19-20; *Salfi*, 422 U.S. at 762. Instead, the Court applies the same standard, originally described in *Block* v. *Community Nutrition Institute*, that it applies in determining whether nonconstitutional claims are precluded. *Thunder Basin*, 510 U.S. at 207. The *Block* standard is not a strict clear-statement rule, but instead examines a statute's "language, structure, and purpose, its legislative history, and whether the claims can be afforded meaningful re-

view" to determine whether Congress's intent to foreclose alternative methods of judicial review is "'fairly discernible in the statutory scheme.'" *Ibid.* (quoting *Block*, 467 U.S. at 351); see also *Block*, 467 U.S. at 349 (exclusivity of statutory review scheme may be demonstrated "by inferences of intent drawn from the statutory scheme as a whole").

In *Block* itself, for example, the Court held that the Agricultural Marketing Agreement Act of 1937 implicitly precluded individual consumers from bringing suit in district court to challenge (on nonconstitutional grounds) certain agricultural marketing orders issued by the Secretary of Agriculture. 467 U.S. at 352. The Court reasoned that the statute expressly permitted judicial review (following exhaustion of administrative remedies) only for dairy handlers, not consumers; that the Act contained no "express provision for participation by consumers in any proceeding"; and that "[a]llowing consumers to sue the Secretary would severely disrupt [the Act's] complex and delicate administrative scheme" by allowing consumers, but not handlers, an exhaustion-free path to court. *Id.* at 345-348. See also, *e.g.*, *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (inferring preclusion because of the "omission" of affirmative authorization from a "statute's precisely drawn provisions"); *United States* v. *Ruzicka*, 329 U.S. 287, 294 (1946) (inferring preclusion because "Congress has provided a special procedure for" reviewing certain administrative orders); *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297, 306 (1943) (inferring preclusion because Congress "drew a plain line of distinction" by allowing only certain types of judicial review); cf. *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 835 (1976) (concluding that particular provision implicitly "provides the

exclusive judicial remedy for claims of discrimination in federal employment").

In *Thunder Basin Coal Co.* v. *Reich*, the Court applied the *Block* standard to conclude that Congress had implicitly channeled a constitutional claim exclusively through procedures provided in the Federal Mine Safety and Health Amendments Act of 1977 (Mine Act). 510 U.S. at 202-216. Those procedures set forth a mechanism whereby mine operators could seek administrative and judicial review of certain enforcement actions initiated by the Secretary of Labor. *Id.* at 207-208. Although the Mine Act specified that its procedures were the exclusive avenue for raising "challenges to agency enforcement proceedings," the Mine Act was "facially silent" about the preclusion of "pre-enforcement claims" (*i.e.* suits filed in advance of any Department of Labor enforcement action). *Id.* at 208. The Court nonetheless held that the Mine Act "prevent[ed] a district court from exercising subject-matter jurisdiction over a pre-enforcement challenge to the Act" that included a constitutional claim (a due-process challenge to the adequacy of the Mine Act's procedures). *Id.* at 202; see *id.* at 205, 215. The Court observed that the Mine Act provided a "detailed structure" for review of enforcement actions by an independent administrative commission and then by a court of appeals, *id.* at 207-208, and that even if the mine commission could not address the constitutional claim in the first instance, the court of appeals could do so in reviewing the commission's decision, *id.* at 215. The Court concluded that permitting mine operators to "evade the statutory-review process" through a pre-enforcement suit would be "inimical to the structure and the purposes of the Mine Act," and found a "'fairly discernible' intent to preclude district court review in the

present case." *Id.* at 216 (quoting *Block*, 467 U.S. at 351); see *id.* at 208 ("The structure of the Mine Act * * * demonstrates that Congress intended to preclude challenges such as the present one."); see also *Illinois Council*, 529 U.S. at 1, 19-20 (holding that constitutional challenges to Medicare regulations had to be brought under 42 U.S.C. 405(g) rather than 28 U.S.C. 1331 and recognizing distinction from total preclusion); *Salfi*, 422 U.S. at 753, 762 (same for constitutional challenges to Social Security Administration orders).

B. Congress Intended That Judicial Review Of Constitutional Claims Available Under The CSRA Be Exclusive

As with the statutes at issue in *Block* and *Thunder Basin*, Congress's intent to preclude alternative forms of judicial review is "fairly discernible" from the CSRA's statutory scheme. Indeed, the Court has already expressly recognized that the CSRA satisfies that standard.

1. In *United States* v. *Fausto*, the Court held that, in light of the CSRA's "integrated scheme of administrative and judicial review," 484 U.S. at 445, the absence of a provision in the CSRA for excepted-service employees to obtain judicial review of a suspension meant such employees were precluded from seeking such review under the Back Pay Act of 1966, 5 U.S.C. 5596. *Fausto*, 484 U.S. at 448. The Court concluded that the comprehensive nature of the CSRA made it "evident that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review for adverse action of the type [at issue]." *Id.* at 448-449. Addressing the

objection of an amicus who believed that the CSRA should not be interpreted to preclude judicial review, the Court specifically stated that "[h]ere, as in *Block*, we think Congress' intention [to preclude judicial review] is fairly discernible," based on "'inferences of intent drawn from the statutory scheme as a whole.'" *Id.* at 452 (quoting *Block*, 484 U.S. at 452).

Petitioners attempt to distinguish *Fausto* in two ways. Neither has merit. First, they observe (Pet. Br. 27-28, 39-40) that the precluded claim in *Fausto* was statutory, rather than constitutional. But, as explained in the previous section, this Court has applied the "fairly discernible" standard from *Block* not only to the preclusion of statutory claims (the issue in *Fausto*) but also to the channeling of constitutional claims (the issue here). *Thunder Basin*, 510 U.S. at 207, 215. Second, petitioners point out (Pet. Br. 29) that the specific holding of *Fausto* was limited to preclusion only of a specific type of claim, different from the claim at issue here. That is true, but does not make the decision any less relevant. The Court's inquiry into the CSRA's comprehensiveness and exclusivity examined the same provisions "govern-[ing] major adverse action[s]" that are at issue here. 484 U.S. at 446-447. Furthermore, one of the "structural elements" of the CSRA that the Court deemed "important" to its holding was "the primacy of the MSPB for administrative resolution of disputes over adverse personnel action, and the primacy of the United States Court of Appeals for the Federal Circuit for judicial review." *Id.* at 449 (citing, *inter alia*, 5 U.S.C. 7513(d), 7701, 7703). The "primacy" of the Federal Circuit's "judicial review" is even more directly relevant here than it was in *Fausto* (in which the alternate remedy sought by the plaintiff would itself have been re-

viewed by the Federal Circuit, see *id.* at 443), and there is no reason why the *Block* inquiry should turn out differently.

2. Moreover, even assuming *arguendo* that *Fausto* were not directly controlling, the CSRA would satisfy the "fairly discernible" standard as a matter of first impression. As in *Thunder Basin*, it would be "inimical to the structure and the purposes" of the statute to allow circumvention of the statutory review scheme by seeking review directly in district court. 510 U.S. at 216. The structure of the CSRA scheme at issue here is quite similar to the structure of the Mine Act in *Thunder Basin*: both call for review of initial agency action (an adverse employment action or a mine-related enforcement order) first by an independent body (the MSPB or the mine commission) and then by an appellate court (the Federal Circuit or the regional court of appeals). Compare pp. 3-5, *supra*, with *Thunder Basin*, 510 U.S. at 204, 207-209. Indeed, in one important respect, this is an easier case than *Thunder Basin*. Unlike the Mine Act, the CSRA does not require potential plaintiffs to await an administrative enforcement action in order to obtain review, so this case, unlike *Thunder Basin*, presents no issues of delayed review. Rather, the issue here is simply whether an employee who has already been subject to an adverse action, and who could immediately raise a constitutional challenge to that action through the CSRA's review scheme, can sidestep that scheme by filing suit in district court instead.

Fausto is merely one in a series of cases holding that the comprehensive nature of the CSRA demonstrates Congress's intent to limit federal employees to the remedies the statute explicitly provides. Five years before *Fausto*, the Court in *Bush* v. *Lucas* declined to recog-

nize a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), for a federal employee to sue an agency official for damages based on alleged First Amendment violations occurring during the plaintiff's federal employment. 462 U.S. at 368. The Court reasoned that "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States, * * * it would be inappropriate for us to supplement that regulatory scheme with a new judicial remedy." *Ibid.* Although the agency actions at issue in *Bush* took place before the CSRA was enacted, see *id.* at 369-370, the decision discussed the CSRA, see, *e.g.*, *id.* at 385 n.25, and its reasoning applies equally (or even more forcefully) to the CSRA. See, *e.g.*, *Hardison* v. *Cohen*, 375 F.3d 1262, 1264-1265 (11th Cir. 2004); *Spagnola* v. *Mathis*, 859 F.2d 223, 226-228 (D.C. Cir. 1988) (en banc; per curiam); see also *Karahalios* v. *National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 536 (1989).

A year after *Fausto*, in *Karahalios* v. *National Federation of Federal Employees,* the Court concluded that an employee's right under the CSRA to fair representation by his union could not be enforced through an implied cause of action in district court. 489 U.S. at 529. The Court observed that the CSRA "expressly provide[s]" employees with "an administrative remedy" before the Federal Labor Relations Authority (FLRA) for a union's breach of its duty and allows for judicial review of the FLRA's decision. *Id.* at 533. The Court explained that "[t]o hold that the district courts must entertain such cases in the first instance would seriously undermine what we deem to be the congressional

scheme, namely to leave the enforcement of union and agency duties under the Act to the General Counsel and FLRA and to confine the courts to the role given them under the Act." *Id.* at 536-537.

Although these cases do not directly address the *Block* standard, their reasoning strongly supports an inference of CSRA exclusivity in this context. Indeed, consolidation of judicial review, and preclusion of district-court suits in particular, was a "leading purpose" for enacting the CSRA. *Fausto*, 484 U.S. at 444. Before the CSRA, "[s]ince there was no special statutory review proceeding relevant to personnel action," employees were often able to bring the very type of suit at issue here: a district-court suit directly challenging an agency's employment-related action. *Ibid.* Such suits were considered problematic for two reasons. First, the "concurrent jurisdiction" of different courts led to "wide variations in the kinds of decisions issued on the same or similar matters." *Id.* at 445 (quoting S. Rep. 95-969 at 63) (ellipses omitted). Second, filing suit in district court was "wasteful and irrational," because it initiated two rounds of duplicative judicial review: the district court would review the agency's action, and then on appeal the court of appeals would conduct "essentially the same review" all over again, because no deference would be owed to the district court's initial conclusion. *Ibid.*

When Congress, taking account of "the needs of sound and efficient administration," "replaced the [preexisting] patchwork system with [the CSRA's] integrated scheme of administrative and judicial review," it intended to correct, rather than to perpetuate, the flaws of the previous regime. *Fausto*, 484 U.S. at 445. The necessary implication of petitioners' position is that

Congress failed in that effort. If employees were to have the option of choosing whether they will pursue constitutional claims under the CSRA or in district court, there would still be varying "kind of decisions issued on the same or similar matters," and there would still be duplicative review of agency action by district courts and courts of appeals. *Ibid.*; see *Lindahl* v. *OPM*, 470 U.S. 768, 797 (1985) (rejecting interpretation of CSRA that "would result in exactly the sort of duplicative, wasteful, and inefficient judicial review that Congress in the CSRA [as amended] intended to eradicate") (internal quotation marks omitted); *Fausto*, 484 U.S. at 451 (similar). Worse yet, because the CSRA would remain the exclusive route for raising nonconstitutional claims, employees could bifurcate review of a single agency action between a district court and the MSPB and Federal Circuit. Congress is extremely unlikely to have wanted two different adjudicators to review the same action, and it has provided no procedures for coordinating such proceedings.

Channeling constitutional claims through the CSRA's procedures not only avoids such conflicts, but is affirmatively beneficial. As the court of appeals recognized, "[c]onstitutional claims are common in administrative proceedings—especially equal protection and procedural due process claims—and are part of the ordinary fodder of review in discharge cases. Often such claims are made along with factual claims denying the conduct alleged against the employee and statutory or rule-based claims as well." Pet. App. 12a. Accordingly, as this Court has itself observed, channeling constitutional claims through an agency has the benefits of (1) promoting judicial efficiency and constitutional avoidance by preserving the possibility that a favorable deci-

sion on nonconstitutional grounds will moot the constitutional issue, see, *e.g.*, *Aircraft & Diesel Equip. Corp.* v *Hirsch*, 331 U.S. 752, 772-773 (1947); (2) allowing the agency to bring its expertise to bear on the constitutional issues, see *Ruzicka*, 329 U.S. at 294; and (3) providing the agency an opportunity to "produce a useful record for subsequent judicial consideration," *McCarthy* v. *Madigan*, 503 U.S. 140, 145 (1992).

3. Aside from their mistaken assertion that the *Webster* standard is controlling, petitioners offer little to support their argument that employees with constitutional claims may opt out of the CSRA. First, petitioners point out (Pet. Br. 21-22) that district courts presumptively have jurisdiction over constitutional claims under 28 U.S.C. 1331. But district-court review is not automatically available merely because a claim falls within Section 1331 (as any federal-law claim, whether based on the Constitution, a statute, a regulation, or a treaty would). To the contrary, as already discussed, the Court has repeatedly recognized that Congress can, explicitly or implicitly, channel constitutional claims away from Section 1331's general federal-question jurisdiction and towards a specialized statutory review scheme. See, *e.g.*, *Illinois Council*, 529 U.S. at 1; *Thunder Basin*, 510 U.S. at 202; *Salfi*, 422 U.S. at 753. Indeed, the petitioner in *Thunder Basin* made essentially the same argument that petitioners make here: that a district court should have jurisdiction over a colorable constitutional claim under Section 1331. See Pet. Br. 25, 35-36, *Thunder Basin*, *supra* (No. 92-896). The Court nevertheless held that the Mine Act implicitly "prevent-[ed] the district court from exercising subject-matter

jurisdiction," *Thunder Basin*, 510 U.S. at 202, and there is no reason for a different result here.*

Second, petitioners contend (Pet. Br. 32) that "preclud[ing] district court review of equitable constitutional claims" would "overturn[] a tradition that has existed since the founding of the Nation." That assertion is incorrect. District courts do not occupy any privileged place above other federal courts in the constitutional scheme. The existence of all lower federal courts is wholly within Congress's discretion, as the Constitution simply provides that "[t]he judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1. This Court has long recognized that Congress likewise enjoys discretion to distribute the judicial power among those lower courts as it sees fit: "No one of them can assert a just claim to jurisdiction exclusively conferred on another or withheld from all." *Sheldon* v. *Sill*, 49 U.S. 441, 449 (1850). And Congress often provides for initial review of agency action in the courts of appeals,

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* Just like the implicit Mine Act exclusivity addressed in *Thunder Basin*, CSRA exclusivity is properly considered an issue of subject-matter jurisdiction because it concerns a district court's "statutory * * * power to adjudicate the case." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (emphasis omitted); see *Block*, 467 U.S. at 353 n.4 (stating that "congressional preclusion of judicial review is in effect jurisdictional"). Even if, however, the Court were to conclude that CSRA exclusivity is not a question of subject-matter jurisdiction, all that would change is how dismissals of cases like this should be classified. In this particular case, the proper disposition would be to remand for the lower courts to address whether the government forfeited its ability to seek a nonjurisdictional dismissal based on CSRA exclusivity by failing to raise the issue until its motion for reconsideration in the district court.

rather than the district courts. See, *e.g.*, 28 U.S.C. 2342; 29 U.S.C. 160(f); 33 U.S.C. 921(c); *Thunder Basin*, 510 U.S. at 204.

Finally, petitioners appear to suggest (Pet. Br. 22-25) that because this Court has sometimes recognized an implicit "right of action for equitable relief that arises directly under the Constitution," a district court necessarily has authority to hear any constitutional claim arising out of federal employment. The question whether a cause of action exists, however, is analytically distinct from the subject-matter-jurisdiction question at issue here. See, *e.g.*, *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 642-643 (2002). Just because the Constitution authorizes an implied cause of action in certain circumstances does not mean that Congress lacks constitutional authority to channel jurisdiction over certain matters to particular courts. See, *e.g.*, *Sheldon*, 49 U.S. at 449.

Indeed, petitioners' focus on causes of action simply highlights an additional defect in their argument—namely, that a federal employee who can adequately raise his constitutional challenge under the CSRA has no cause of action that he could assert in district court. The Administrative Procedure Act (on which petitioners' own complaint relies) "authorizes an action for review of final agency action in the District Court" only when "other statutory procedures are inadequate." *FCC* v. *ITT World Commc'ns Inc.*, 466 U.S. 463, 469 (1984); see 5 U.S.C. 703-704; J.A. 6. And petitioners identify no circumstance in which this Court has created an implied cause of action against the United States purely as an alternative to an adequate preexisting scheme. Cf. *Bush*, 462 U.S. at 368 (declining to authorize a damages remedy for First Amendment violations in the context

of federal employment "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States"). Thus, petitioners' theory of CSRA circumvention fails not only because the district courts lack jurisdiction to entertain constitutional claims arising out of adverse actions like the removals at issue here, but also because Congress has conferred no cause of action authorizing plaintiffs to assert claims such as petitioners' outside the context of the CSRA.

II. PETITIONERS WERE REQUIRED TO PURSUE THEIR CONSTITUTIONAL CLAIMS UNDER THE CSRA

As an alternative to their argument that the CSRA is nonexclusive as to all constitutional claims, petitioners argue more narrowly that the CSRA does not provide the exclusive scheme for resolving their particular bill-of-attainder and equal-protection claims. They mainly contend that those claims fall outside the CSRA altogether, because (in their view) those claims cannot receive adequate judicial review under the CSRA. They also appear to contend that even if the CSRA does provide for meaningful judicial review of those claims, and even if Congress generally intended CSRA remedies to be exclusive, they nevertheless were entitled to proceed directly to district court. Both contentions lack merit.

A. Petitioners Could Obtain Full And Fair Judicial Review Of Their Constitutional Claims Under The CSRA

The court of appeals held that removals based on 5 U.S.C. 3328 fall within the CSRA provisions governing adverse actions undertaken "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a); see Pet. App. 7a-11a. Petitioners do not challenge that con-

clusion, and any such challenge would be outside the scope of the question presented. Petitioners nonetheless maintain that the normal statutory procedures for contesting a removal "for such cause as will promote the efficiency of the service"—appeal to the MSPB, followed by judicial review in the Federal Circuit, see 5 U.S.C. 7513(d), 7701, 7703—are effectively unavailable to them based on the nature of the issues they seek to raise. That is incorrect. Petitioners, and other employees who similarly contest adverse actions by challenging the constitutionality of a statute, can fully litigate their claims under the CSRA.

1. The CSRA expressly provides that an employee who is removed by his employing agency "is entitled to appeal to the [MPSB] under section 7701 of this title." 5 U.S.C. 7513(d). Section 7701, in turn, states that an employee who appeals from "any action which is appealable to the [MSPB] under any law * * * shall have the right" both "to a hearing" and "to be represented by an attorney or other representative." 5 U.S.C. 7701(a). The MSPB (or administrative law judge or other employee) "shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing." 5 U.S.C. 7701(b)(1). Following MSPB review, "[a]ny employee * * * adversely affected or aggrieved by a final order or decision of the [MSPB] may obtain judicial review of the order or decision." 5 U.S.C. 7703(a)(1). Except in certain cases involving discrimination claims, the forum for such review is the Federal Circuit. 5 U.S.C. 7703(b)(1).

The plain language of those statutory provisions applies to an employee who challenges his removal on the ground that the statute requiring it is unconstitutional no less than it applies to an employee who challenges his

removal on any other ground. An employee raising a constitutional claim is a removed employee "entitled to appeal to the [MSPB]," 5 U.S.C. 7513(d); entitled to a hearing and a decision before the MSPB, 5 U.S.C. 7701(a)-(b); and entitled thereafter to judicial review in the Federal Circuit, 5 U.S.C. 7703(a)(1) and (b)(1). Nothing in the statute uniquely disqualifies employees raising constitutional challenges to statutes from availing themselves of the review scheme provided as a matter of right to all employees whose removals are covered by 5 U.S.C. 7512 and 7513.

Petitioners accordingly misunderstand the nature of the MSPB's jurisdiction when they assert (Pet. Br. 35-36) that no statute or regulation "grants * * * jurisdiction" to the MSPB to review constitutional challenges to statutes. The MSPB's jurisdiction, as just explained, is premised on the *type* of agency action challenged, not the *grounds* on which it is challenged. As the court of appeals observed, "Congress' desire to consolidate employee removal in a single forum was based on the action taken against the employee rather than the precise arguments made in contesting that action." Pet. App. 12a-13a. Indeed, an employee will often challenge his removal on multiple grounds, be they factual, regulatory, statutory, or constitutional. *Id.* at 12a. Regardless of the particular mix of claims, "[a]n employee against whom an action is taken under [Section 7513] is entitled to appeal to the [MSPB]." 5 U.S.C. 7513(d).

Petitioners have identified no MSPB or Federal Circuit authority to the contrary. In the petition, they cited several nonprecedential administrative opinions, including the administrative judge's opinion in petitioner Elgin's case, suggesting that the MSPB lacks "jurisdiction" to hear the appeal of an employee whose original

appointment was barred by statute. Pet. 28 & n.5; see 5 C.F.R. 1201.113 (decisions of an individual MSPB administrative judge are nonprecedential). But those opinions (in addition to being nonprecedential) address the types of persons and employment actions, not the types of issues, that fall within the statutory scheme. Moreover, the court of appeals correctly concluded—in a portion of its decision that petitioners do not challenge—that those "jurisdictional" rulings are incorrect insofar as they could be read to suggest that Section 3328 removals fall outside the CSRA's review scheme for adverse actions. Pet. App. 10a-11a; see also *Daneshpayeh* v. *Department of the Air Force*, No. 93-3476, 1994 WL 18964, at *2 n.4 (Fed. Cir. Jan. 26, 1994) (per curiam) (characterizing "boiler-plate labelling" of such a decision "as based on 'lack of jurisdiction'" as "harmless error").

2. Petitioners argue (Pet. Br. 35-36) that the CSRA nevertheless fails to provide an adequate avenue for raising their constitutional arguments, reasoning that "the MSPB, an [administrative] agency, cannot decide constitutional challenges to statutes because it lacks the power to declare an Act of Congress unconstitutional." Petitioners are correct that administrative agencies at least sometimes lack such authority, a limitation that this Court has loosely described as implicating the scope of the agency's "jurisdiction." *Thunder Basin*, 510 U.S. at 215; cf. *Kontrick* v. *Ryan*, 540 U.S. 443, 454 (2004) ("'Jurisdiction,' the Court has aptly observed, 'is a word of many, too many, meanings.'") (quoting *Steel Co.* v. *Citizens for a Better Env't,* 523 U.S. 83, 90 (1998)). But even if the MSPB lacks authority to decide certain constitutional claims, that would not render the CSRA's statutory scheme inapplicable to such claims. Instead,

as the court of appeals recognized, all it would mean is that the Federal Circuit would address the constitutional argument in the first instance. Pet. App. 13a.

This Court has previously recognized that a statutory scheme that combines administrative and judicial review can provide meaningful relief for a constitutional claim even when that claim cannot be addressed during the administrative portion of the proceedings. In *Thunder Basin*, the Court considered a scheme that, like the CSRA scheme at issue here, called for initial review of agency action by an independent commission, followed by review of the commission's decision in a court of appeals. 510 U.S. at 204. The Court held that the plaintiff could—indeed, was required to—bring its constitutional claim under that scheme, notwithstanding the possibility that the administrative commission would be unable to address it. *Id.* at 215. The Court reasoned that even if the commission could not grant relief, the "constitutional claims here can be meaningfully addressed in the Court of Appeals." *Ibid.*

Similarly, in *Shalala* v. *Illinois Council on Long Term Care, Inc.*, the Court again concluded that a statutory scheme for administrative and judicial review (there, under the Medicare Act) provided adequate relief for a constitutional claim, notwithstanding limitations on "the extent to which the agency itself will provide the administrative review channel leading to judicial review." 529 U.S. at 23. "The fact that the agency might not provide a hearing for [a] *particular contention*," the Court explained, "is beside the point because it is the 'action' arising under the Medicare Act that must be channeled through the agency." *Ibid.* "After the action has been so channeled, the court will consider the contention when it later reviews the action. And a

court reviewing an agency determination under [the judicial-review statute applicable to Medicare challenges] has adequate authority to resolve any statutory or constitutional contention that the agency does not, or cannot, decide." *Ibid.* (citing *Thunder Basin*, 510 U.S. at 215 & n.20; *Haitian Refugee Ctr.*, 498 U.S. at 494; *Heckler* v. *Ringer*, 466 U.S. 602, 617 (1984); *Salfi*, 422 U.S. at 762).

Here, as in *Illinois Council*, it is "the 'action'" (namely, the removal) "that must be channeled through the agency" (namely, the MSPB). 529 U.S. at 23; see 5 U.S.C. 7513(d) (authorizing appeal of "[a]n action taken under this section"). And here, as in *Thunder Basin*, any constitutional challenges to that action that the agency does not address could be "meaningfully addressed in the Court of Appeals" in the first instance. 510 U.S. at 215. The CSRA expressly authorizes the Federal Circuit to "hold unlawful and set aside" any agency action found to be "not in accordance with law." 5 U.S.C. 7703(c) and (c)(1). An action taken pursuant to an unconstitutional statute would be an action "not in accordance with law" (namely, constitutional law) and thus within the Federal Circuit's power to address. There is no reason why the Federal Circuit, an Article III court, would be precluded from reaching a constitutional issue simply because the MSPB, an executive agency, was unable to address it in the first instance. Pet. App. 14a (any limitation on the MSPB arises "only because of a doctrine that uniquely applies to administrative agencies and *not* to the Federal Circuit or any other Article III court"). Appellate courts reviewing agency action can, and do, address constitutional claims that an agency cannot or did not decide, including facial challenges to statutes. See, *e.g.*, *Preseault* v. *I.C.C.*, 853

F.2d 145, 148-149 (2d Cir. 1988) (facial challenge to statute), aff'd on other grounds, 494 U.S. 1 (1990); *Plaquemines Port, Harbor, and Terminal Dist.* v. *Federal Mar. Comm'n*, 838 F.2d 536, 544-545 (D.C. Cir. 1988); *Reid* v. *Engen*, 765 F.2d 1457, 1460-1461 (9th Cir. 1985).

Indeed, petitioners themselves cite a case—*Briggs* v. *MSPB*, 331 F.3d 1307 (2003) (cited at Pet. Br. 44)—in which the government acknowledged, and the Federal Circuit accepted, that the Federal Circuit has authority to determine the constitutionality of a federal statute underlying an employee's removal, even when the MSPB itself concludes that it lacks authority to address the constitutional claim. *Id.* at 1310-1318 (considering challenges to the Hatch Political Activity Act). Petitioners cite no court of appeals authority to the contrary. See also Pet. App. 14a ("The Federal Circuit has never said that it was powerless to act where removal occurred and the underlying statute that prompted the removal is itself unconstitutional."). Cases they cite (Pet. Br. 41 n.4) for the proposition that the Federal Circuit's jurisdiction is coextensive with the MSPB's concern jurisdiction over a particular *action*, not jurisdiction over particular *arguments*. See *Perez* v. *MSPB*, 931 F.2d 853, 855 (Fed. Cir. 1991) (MSPB, and therefore Federal Circuit, lacked authority to review certain type of personnel action); *Manning* v. *MSPB*, 742 F.2d 1424, 1426-1427 (Fed. Cir. 1984) (same); *Rosano* v. *Department of the Navy*, 699 F.2d 1315, 1318-1320 (Fed. Cir. 1983) (same); see also *Schmittling* v. *Department of the Army*, 219 F.3d 1332, 1335-1337 (Fed. Cir. 2000) (remanding for MSPB to determine whether agency's action fell within MSPB's appellate jurisdiction); *Billops* v. *Department of the Air Force*, 725 F.2d 1160, 1164 (8th Cir. 1984)

(concluding that Federal Circuit's review authority was limited when petitioner had not followed certain statutory procedures).

3. Petitioners further contend (Pet. Br. 40-53) that initial judicial review of constitutional claims by the Federal Circuit will be impossible in many cases (including theirs), because the Federal Circuit will be reviewing an administrative record that may not contain all of the facts necessary to resolve the constitutional issues. That, however, was equally true of the appellate review available in *Thunder Basin*, and the Court nevertheless held that the constitutional claim at issue could be "meaningfully addressed in the Court of Appeals" even if not addressed by the mine commission. 510 U.S. at 215.

The Federal Circuit's administrative-review posture likewise would not prevent it from meaningfully considering challenges to a statute's constitutionality. As an initial matter, many such challenges—particularly those classifiable as "facial," *e.g.*, Pet. Br. 40—present purely legal issues that do not require a factual record for resolution. This Court generally disfavors facial challenges to statutes precisely because (among other things) they "often rest on speculation" and "raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Washington State Grange* v. *Washington State Republican Party*, 552 U.S. 442, 450 (2008) (internal quotation marks and citation omitted). Petitioners themselves recognized that their bill-of-attainder claim required no factual development when they sought summary judgment on it before any discovery. Pet. Br. 15, 45. Although petitioners now assert (*id.* at 46) that the district court made a "*factual* conclusion" in their favor, whatever conclusion the district court

reached could not have been one that required evidentiary development. See No. 07-12391 Docket entry No. 18, at 1 (D. Mass. Mar. 3, 2008) (petitioners' representation that "there are no material facts required to be determined" to decide their summary-judgment motion).

In any event, reviewing courts can, and often do, take judicial notice of the sort of facts that are sometimes necessary to resolve constitutional claims. Legal challenges to the constitutionality of a statute, and especially facial challenges, are very unlikely to turn on credibility determinations or other factual determinations uniquely within the capacity of a trial court. Rather, "constitutional facts"—that is, facts that "assist a court in forming a judgment on a question of constitutional law"—often do not "come into a case through the evidence along with adjudicative facts" (facts about the case at hand), but instead "frequently * * * come to the court's attention through researches of a judge or briefs of counsel." Kenneth Culp Davis, *An Approach to Problems of Evidence In the Administrative Process*, 55 Harv. L. Rev. 364, 403 (1942); cf. Fed. R. Evid. 201(a) (imposing limitations only on judicial notice of "adjudicative fact[s]").

In *Muller* v. *Oregon*, 208 U.S. 412 (1908), for example, this Court took note of "over ninety reports" about labor conditions cited in "the brief filed by Mr. Louis D. Brandeis, for the defendant in error" in deciding whether a law limiting women's working hours was constitutional. *Id.* at 419, 420 n.1. The Court continues to this day, even in cases that originated in trial court, to cite articles, studies, amicus briefs, and similar extra-record materials in deciding constitutional questions. See, *e.g.*, *Brown* v. *Entertainment Merchs. Ass'n*, 131 S. Ct. 2729, 2736-2737 (2011); *Bullcoming* v. *New Mex-*

ico, 131 S. Ct. 2705, 2711 n.1 (2011); see also, *e.g.*, *Brown* v. *Board of Educ.*, 347 U.S. 483, 495 & n.11 (1954). Those are exactly the type of materials petitioners cite in support of their equal-protection argument, see Pet. Br. 47-53, and the Federal Circuit could have taken judicial notice of them. Cf. *Rostker* v. *Goldberg*, 453 U.S. 57, 72-83 (1981) (relying primarily on congressional hearings in rejecting equal-protection challenge to selective-service system); Pet. Br. 48 n.5 (observing that *Rostker* was litigated on a stipulated record).

Finally, even if some case raising a legal challenge to a statute's constitutionality were to require facts beyond judicial notice, an evidentiary record could be developed before the MSPB. To begin with, nothing prohibits an employee, in his initial appeal to the MSPB, from supplementing the record with materials that are relevant to his constitutional arguments. Indeed, the MSPB's evidentiary rules are looser than a district court's. See, *e.g.*, *Johnson* v. *FEMA*, 41 M.S.P.R. 561, 565 n.5 (1989); *Davies* v. *United States Dep't of Agric.*, 5 M.S.P.R. 253, 254 (1981). And even if the MSPB were initially to exclude the evidence for some reason (although it is unclear what that reason might be), a description of the evidence would still by regulation become part of the administrative record, and the Federal Circuit would thereby be made aware of its existence and what it would prove. 5 C.F.R. 1201.61 ("Any evidence and testimony that is offered in the hearing and excluded by the judge will be described, and that description will be made a part of the record.").

Insofar as the Federal Circuit nevertheless considered the initial record insufficient to permit meaningful consideration of a constitutional claim, it could remand the case to the MSPB for further factual development.

The House and Senate bills that became the CSRA both expressly authorized factfinding remands to the MSPB. See S. Rep. No. 95-969, at 226; H. Rep. No. 1403, 95th Cong., 2d Sess. 311 (1978). Although the final version of Section 7703 omitted any express discussion of remands, the Federal Circuit's authority to remand cases to the MSPB for further legal or factual development (calculation of a backpay award, for example) is inherent in the statute's authorization of "judicial review" of agency action. 5 U.S.C. 7703(a). Congress intended that the CSRA "incorporat[e] the traditional appellate mechanism for reviewing final decisions and orders of Federal administrative agencies." S. Rep. No. 1272, 95th Cong., 2d Sess. 143 (1978); H. Rep. No. 1717, 95th Cong., 2d Sess. 143 (1978); see *Lindahl*, 470 U.S. at 794-797. That mechanism has long included the ability of an appellate court to remand a case to an agency "to permit further evidence to be taken or additional findings to be made upon essential points." *Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939); see also *id.* at 373 n.5 (citing cases). Accordingly, the Federal Circuit has understood itself to have authority to remand cases to the MSPB and to order the MSPB to take additional evidence on certain issues. See, *e.g.*, *Adamsen* v. *Department of Agric.*, 563 F.3d 1326, 1328 (2009); *Williams* v. *OPM*, 162 Fed. Appx. 979, 981-982 (2006); *Madrigal* v. *OPM*, 29 F.3d 644 (1994) (per curiam). That understanding is analogous to the understanding of this Court and other courts that remands to an agency are authorized under the Administrative Procedure Act, which likewise lacks an express remand provision. See, *e.g.*, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 419-420 & n.33 (1971) (recognizing remand authority); *Secretary*

of Labor v. *Farino*, 490 F.2d 885, 891-892 (7th Cir. 1971).

A remand for further development of the record is not only the typical course, but also generally the "proper course" in cases where the record is insufficient to allow for meaningful judicial review of agency action. *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 745 (1985); see, *e.g.*, *ITT World Commc'ns*, 466 U.S. at 469 ("If, however, the Court of Appeals finds that the administrative record is inadequate, it may remand to the agency."); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 594 (1980) ("[A]n appellate court is not without recourse in the event it finds itself unable to exercise informed judicial review because of an inadequate administrative record. In such a situation, an appellate court may always remand a case to the agency for further consideration."). The MSPB's statutory authority to "administer oaths, examine witnesses, and take evidence," 5 U.S.C. 1204(b)(1), renders it fully capable of supplementing the record in any way that might be necessary. And its regulations specify detailed procedures through which an aggrieved employee may take depositions and other discovery, 5 C.F.R. 1201.71-1201.75, request the MSPB to take "official notice" of undisputed facts, 5 C.F.R. 1201.64, and subpoena testimony or other evidence, 5 C.F.R. 1201.81-1201.83; see *Gilbreath* v. *Guadalupe Hosp. Found., Inc.*, 5 F.3d 785 (5th Cir. 1993) (per curiam) (enforcing third-party subpoenas issued by MSPB administrative judge).

4. Petitioners offer no persuasive reason why the procedures just described would be unavailable or inadequate to resolve their case or any other. They err in citing the Federal Circuit's decision in *Briggs* for the proposition that "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." Pet. Br. 44. *Briggs* holds that the Federal Circuit can consider a constitutional challenge to a statute, even if that challenge was not addressed by the MSPB, when the administrative record is sufficient. F.3d at 1313. Petitioners overlook the primary point of *Briggs* (that the Federal Circuit has recognized its ability to review constitutional challenges in the first instance) in favor of an unsupported negative implication (that the ability to undertake such review when the record is sufficient necessarily implies an inability to do so otherwise). *Briggs* did not even discuss, much less repudiate, the procedures (judicial notice and remand to the MSPB) through which the Federal Circuit might supplement an otherwise insufficient administrative record.

The availability of those procedures also refutes petitioners' suggestion that only a district court has "the authority to develop an evidentiary record" to resolve a federal-employment-related constitutional claim. Pet. Br. 43 (quoting *Illinois Council*, 529 U.S. at 23-24). Indeed, in the very case from which petitioners extract that quote, the district court's review of constitutional claims was constrained by a statute (42 U.S.C. 405(g)) that authorized only appellate-style review of the administrative record. See, *e.g.*, Resp. Br. 26, *Illinois Council*, *supra* (No. 98-1109) (arguing that the limited nature of the district court's review militated in favor of allowing constitutional challenges under 28 U.S.C. 1331 instead). Thus, although the district court would have had some inherent recordmaking authority as a matter of last resort if the agency itself refused to accept necessary evidence, the primary way for the district court to "to develop an evidentiary record," *Illinois Council*, 529

U.S. at 24, assuming one were necessary, would have been by remanding to the agency. See Reply Br. 15-16, *Illinois Council*, *supra* (No. 98-1109).

Remanding to the agency would also necessarily have been the only way for the appellate court to develop any facts necessary to resolve the constitutional claim at issue in *Thunder Basin.* 510 U.S. at 214; see *Illinois Council*, 529 U.S. at 23 (reaffirming *Thunder Basin*). There may, of course, be some statutory schemes in which a court of appeals' ability to supplement the record would be too limited to provide for meaningful judicial review. In *McNary* v. *Haitian Refugee Center*, for example, this Court expressed concerns about a court of appeals' ability to supplement an administrative record when (1) the agency action the court was permitted to review was not even the same agency action that the plaintiffs wanted to challenge (thereby rendering even the adjudicatory facts in the administrative record largely irrelevant), and (2) the statute at issue expressly provided that review would be "based solely upon the administrative record established at the time of the review." 498 U.S. at 486 n.6 (quoting 8 U.S.C. 1160(e)(3)(B)); see *id.* at 497. But here, as in *Thunder Basin*, no such impediments exist. Cf. 510 U.S. at 213 (rejecting an analogy to *Haitian Refugee Center*). The Federal Circuit has direct appellate jurisdiction to review the very agency action (removal) to which the constitutional challenge relates and can augment the record when necessary. Even if remand-facilitated factual development might arguably be less efficient than district-court factual development, such policy arguments provide no basis for concluding that the statutory scheme is altogether inapplicable. *Id.* at 215; *Harrison*, 446 U.S. at 592-594.

B. The Availability Of Judicial Review Under The CSRA Precludes Petitioners From Suing In District Court

Because the CSRA provides an avenue for judicial review of petitioners' constitutional claims (see Part II.A, *supra*), and because Congress intended judicial review under the CSRA to be exclusive (see Part I, *supra*), the court of appeals properly ordered the dismissal of petitioners' suit. To the extent petitioners suggest (Pet. Br. 32-40) that there should be an exception to CSRA exclusivity for "facial constitutional challenges," that suggestion is misplaced.

1. As a threshold matter, petitioners' proposed rule would be amorphous and difficult to administer. This Court has recognized that "the distinction between facial and as-applied challenges is not so well defined that it has some automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United* v. *FEC*, 130 S. Ct. 876, 893 (2010). A court is not bound by a party's characterization of a claim as "facial" or "as-applied," and it may not be clear to a district court at the outset of the case (when it would have to decide a motion to dismiss) what kind of claim it will turn out to be. *Ibid.*

This case illustrates the point. It is at best unclear whether petitioners' claims in this case may properly be characterized as facial. In a facial claim, "the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). Petitioners' claims do not appear to fit that description. Their bill-of-attainder claim alleges that Section 3328 "legislatively imposes punishment—the lifetime bar to federal employment—on a specific group of men for their irreversible failure to register." Pet. Br. 14. Even assuming such a "specific

group of men" existed when the statute was passed in 1985, it is difficult to see how petitioners' bill-of-attainder argument would void application of Section 3328 to someone who was a child when the statute took effect, only later was required to register for the draft, and still later was denied federal employment based on his failure to register. Cf. *Communist Party* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 81-88 (1961) (addressing bill-of-attainder argument as part of an as-applied challenge to a statute).

Petitioners' equal-protection argument likewise appears to relate only to men of certain ages. Petitioners do not directly contest that *Rostker* v. *Goldberg*, which upheld the selective-service system against an equal-protection challenge, was correct when it was decided. They instead contend that "*Rostker* should be revisited in light of the current role of women in the military." See Pet. Br. 47-53. The necessary implication of that argument is that at some point between 1981 (when *Rostker* was decided) and now, circumstances changed so that the draft-registration requirement became unconstitutional. See *id.* at 49-50. Even if correct, that argument would not preclude application of Section 3328 to someone who was required to, but did not, register for the draft around the time *Rostker* was decided (and who would now be in his late 40s to mid-50s).

In order to encompass their own claims, therefore, petitioners' proposed exception to CSRA exclusivity would seem to depend not on whether a claim is "facial" or "as-applied," but instead on some even more ill-defined set of criteria. Petitioners' proposal would thus invite litigation in nearly every case over whether a particular rule is sufficiently "collateral" (*e.g.*, Pet. Br. 37) to the CSRA's review scheme to permit suit in district

court. Such litigation would be wasteful, likely to generate inconsistent decisions by different courts, and highly dependent on how creatively an employee can frame his complaint. Cf. *General Servs. Admin.*, 425 U.S. at 833 ("It would require the suspension of disbelief to ascribe to Congress the design to allow its careful and thorough remedial scheme to be circumvented by artful pleading.").

The wastefulness problem would be magnified by the practical necessity, in most if not all cases, for an employee filing in district court nonetheless to pursue his CSRA remedy at the same time. An employee who fails to do so runs the serious risk that the district court or court of appeals will order his suit dismissed on CSRA-exclusivity grounds after his time for proceeding under the CSRA has already expired. See 5 C.F.R. 1201.22(b)(1) (general 30-day time limit for MSPB appeal); 5 U.S.C. 7703(b)(1) (60-day time limit for petition for review of MSPB decision by Federal Circuit).

2. Congress is highly unlikely to have intended such an impractical result, and petitioners' argument finds no support in this Court's precedents. Although the Court has sometimes determined that a particular claim falls outside an otherwise-exclusive statutory scheme, see *Thunder Basin*, 510 U.S. at 212-213 (citing cases), it has not done so when the scheme itself provides an adequate and immediately-available alternative path for judicial review of the challenged agency action. Rather, the Court has said that it will "presume that Congress does not intend to limit jurisdiction" over particular claims if "'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Free Enter. Fund* v. *Public Co.*

Accounting Oversight Bd., 130 S. Ct. 3139, 3150 (2010) (quoting *Thunder Basin*, 510 U.S. at 212-213). None of those factors, let alone all three of them, apply here.

First, the CSRA's channel to the Federal Circuit does not "foreclose all meaningful judicial review"—it *provides* judicial review. Employees in petitioners' position may start down a path to judicial review immediately after their adverse action becomes final. See pp. 3-5, *supra*. In contrast, the plaintiffs in the cases on which petitioners primarily rely (Pet. Br. 37-38) needed to be able to challenge agency action in district court in order to be assured of meaningful review. See *Haitian Refugee Ctr.*, 498 U.S. at 484, 496-499 (foreclosing district-court suit would effectively have denied meaningful judicial review); *Robison*, 415 U.S. at 364-365 (same); *Mathews* v. *Eldridge*, 424 U.S. 319, 331 (1984) (plaintiff had "colorable claim" that postponing judicial review would deny him full relief); see also *Free Enter. Fund*, 130 S. Ct. 3150-3151 (existing review mechanism did not fit the plaintiff's situation); *Thunder Basin*, 510 U.S. at 212-214 (discussing cases cited by petitioners).

Second, a claim, including a constitutional claim, made for the purpose of setting aside an employee's removal is not "wholly collateral" to "review provisions" designed for the exact purpose of providing employees with a remedy for wrongful removals. Petitioners' assertion that constitutional arguments like theirs "are entirely collateral to the purpose and structure of the CSRA," Pet. Br. 38 (internal quotation marks omitted), repeats their mistake of treating the CSRA's review scheme as though it covers only particular types of arguments. Just because it is theoretically possible for arguments like petitioners' to be made outside the context of a federal-employment dispute, see, *e.g.*, *id.* at 39

n.3, that does not make those arguments "wholly collateral" to the CSRA when, as in this case, they are made for the purpose of challenging an employment action at the core of what the CSRA covers. As explained above, the CSRA's plain language covers all challenges to particular types of agency actions (including the removals at issue here); the CSRA does not distinguish between the arguments an employee might make in pursuing such a challenge; and full relief is available for an employee who prevails. See pp. 3-5, 32-35, *supra*.

This Court has previously recognized that a suit seeking the same sort of relief already available under a specialized statutory scheme should not be considered "wholly collateral" to that scheme. In *Heckler* v. *Ringer*, the Court held that a district court lacked jurisdiction over a challenge to an agency's policy of refusing Medicare reimbursement for a particular form of surgery, because the plaintiffs were required to follow the special statutory scheme for administrative and judicial review of Medicare benefits claims. 466 U.S. at 605-611, 617. The Court refused to excuse the plaintiffs from exhausting their administrative remedies under that scheme, expressly rejecting the contention that their challenge to the agency's policy was "'wholly collateral' to their claim for benefits." *Id.* at 618 (distinguishing *Eldridge*, 424 U.S. at 330-332). The Court acknowledged that the plaintiffs arguably asserted "procedural" objections to the manner in which the agency had promulgated its policy. *Id.* at 614. But it concluded that, "at bottom," their suit amounted to a claim for benefits, and thus sought a remedy exclusively available only under the specific review scheme that Congress had provided. *Ibid.*; see also *Haitian Refugee Ctr.*, 498 U.S. at 494-495 (discussing *Ringer*).

Petitioners here, like the plaintiffs in *Ringer*, seek essentially the same remedy ("reinstatement * * * with full back pay and benefits," J.A. 30) that a special statutory scheme (the CSRA) is set up to provide. Thus, as in *Ringer*, petitioners' claim cannot be considered "wholly collateral" to Congress's particularized scheme for providing that remedy, and petitioners should not be excused from availing themselves of that scheme.

Third, petitioners are mistaken in suggesting (Pet. Br. 33-36) that the MSPB lacks any relevant expertise, and the CSRA's procedures thus serve no purpose, in cases where an employee challenges a statute's constitutionality. To begin with, challenges to the constitutionality of a statute governing particular agency action, like other types of constitutional claims, are often raised in conjunction with nonconstitutional arguments challenging the same action. See Pet. App. 12a. As previously discussed (see pp. 28-29, *supra*), strong practical considerations favor keeping all of an employee's claims together. An MSPB decision in the employee's favor on nonconstitutional grounds will moot the constitutional question; the MSPB's determination of factual issues can help to inform later judicial review of the constitutional question; the MSPB's interpretation of the statute or applicable regulations can perform the same function; and splitting an employee's challenge to a single agency action (his removal) between two different forums would both undermine the CSRA's "integrated scheme of administrative and judicial review," *Fausto*, 484 U.S. at 445, and create considerable practical problems.

Congress's systemic interest in channeling employment-related claims through the CSRA does not disappear simply because a particular employee chooses to forgo any nonconstitutional claims and to rely solely

on challenging a statute's constitutionality. Petitioner Tucker's claim provides an example. Tucker was not formally removed by his employing agency, but instead resigned while his case was pending with OPM. J.A. 17; Pet. App. 3a. He alleges that he resigned out of fear of being removed pursuant to Section 3328, and that the circumstances amount to a constructive discharge. J.A. 17; Pet. App. 3a. If, however, he is found not to have been constructively removed, but instead to have left preemptively or for unrelated reasons, he would lack standing to seek reinstatement in any court on any ground (because there would be no agency action to challenge). And the factual question whether the circumstances of his resignation truly amount to a constructive discharge lies squarely within the specialized expertise of the MSPB and the Federal Circuit, which regularly address constructive-discharge issues in the context of federal employment. See, *e.g.*, *Carrow* v. *MSPB*, 626 F.3d 1348, 1352-1353 (Fed. Cir. 2010) (citing cases).

Furthermore, even when there are no such adjudicatory factual questions to resolve, it still makes little sense to undermine "the primacy of the United States Court of Appeals for the Federal Circuit for judicial review," *Fausto*, 484 U.S. at 449, by carving out a particular class of claims—those challenging a statute's constitutionality—to be heard instead by district courts and (on appeal) the regional circuits. The Federal Circuit's expertise in interpreting relevant statutes (and in adjudicating other kinds of constitutional claims) would be valuable in resolving constitutional challenges to those statutes. That is particularly so in cases where the constitutional question could be avoided through statutory construction. See *New York* v. *United States*, 505 U.S.

144, 170 (1992) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statue to avoid such problems unless such construction is plainly contrary to the intent of Congress.") (citation omitted). Indeed, allowing different kinds of claims in different courts could lead to impractical circuit conflicts: a regional circuit could interpret a statute one way to avoid a constitutional challenge, while the Federal Circuit (which may not have addressed the constitutional challenge) could interpret the statute a different way in the mine-run of cases.

Congress channeled review to the Federal Circuit precisely to avoid such conflicts. The original 1978 version of the CSRA provided for appellate review of MSPB decisions by the Court of Claims and the regional circuits. 92 Stat. 1143-1144. In 1982, recognizing the "'special need for nationwide uniformity' in certain areas of the law," Congress created the Federal Circuit "to provide 'a prompt, definitive answer to legal questions' in these areas." *United States* v. *Hohri*, 482 U.S. 64, 71-72 (1987) (quoting S. Rep. No. 275, 97th Cong., 1st Sess. 1-2 (1981)). Employment-related claims like petitioners' were one of those areas, and the statute creating the Federal Circuit accordingly amended the CSRA to give the Federal Circuit "exclusive" judicial-review authority in such cases. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 144, 96 Stat. 37-38, 45 (enacting 28 U.S.C. 1295(a)(9) and amending 5 U.S.C. 7703).

This case itself well illustrates the problems of sidestepping that statutory directive. Key portions of petitioners' argument rest on assertions about what the MSPB and Federal Circuit can and cannot do (see Pet. Br. 33-44)—questions that would best be answered, and

that Congress wanted to be answered, by the Federal Circuit in the first instance. For example, this case has been litigated on the premise that the MSPB lacks authority to resolve petitioners' constitutional claims. Although the government agrees with that premise, we are aware of no Federal Circuit decision that has expressly so held, and there is thus a possibility that the Federal Circuit might take a contrary view. See *Thunder Basin*, 510 U.S. at 215 (recognizing that agencies may sometimes be able to adjudicate challenges to a statute's constitutionality).

Finally, it is difficult to conclude that Congress intended to allow claims like petitioners' in district court when it did not even provide a cause of action for such claims. As previously discussed, see pp. 31-32, *supra*, the Administrative Procedure Act does not authorize district-court suits in circumstances where a specialized statutory judicial-review scheme is already available. Rather than taking the considerable step of inferring a cause of action directly under the Constitution, and thereby inviting the various practical problems just discussed, the far more sensible course, and the course that Congress intended, is that employees like petitioners exclusively utilize their existing remedy under the CSRA.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 3328 provides:

Selective Service registration

(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.

2. 5 U.S.C. 7511 provides:

Definitions; application

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service—

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Regulatory Commission; and

(C) an individual in the excepted service (other than a preference eligible)—

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

(2) "suspension" has the same meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policy-making or policy-advocating character by—

(A) the President for a position that the President has excepted from the competitive service;

(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position excepted from the competitive service by statute;

(3) whose appointment is made by the President;

(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign

Service Retirement and Disability Fund, based on the service of such employee;

(5) who is described in section 8337(h)(1), relating to technicians in the National Guard;

(6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;

(7) whose position is within the Central Intelligence Agency or the Government Accountability Office;

(8) whose position is within the United States Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, an intelligence component of the Department of Defense (as defined in section 1614 of title 10), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10, unless subsection (a)(1)(B) of this section or section 1005(a) of title 39 is the basis for this subchapter's applicability;

(9) who is described in section 5102(c)(11) of this title; or

(10) who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title.

(c) The Office may provide for the application of this subchapter to any position or group of positions excep-

ted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.

3. 5 U.S.C. 7512 provides:

Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

4. 5 U.S.C. 7513 provides:

Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5. 5 U.S.C. 7701 provides:

Appellate procedures

(a) An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law

judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available, subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that

payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1) of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the

Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

6. 5 U.S.C. 7703 provides:

Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any 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.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after

the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such

petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

7. 50 U.S.C. App. 453 provides:

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.