No. 04-1131

In The

Supreme Court of the United States

TERRY L. WHITMAN,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION ET AL.,

Respondents.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The central question presented by this case is whether federal employees can seek equitable relief against allegedly unconstitutional government practices. In sharp contrast to their position before the district court and the court of appeals, respondents now finally acknowledge that nothing in the Civil Service Reform Act (CSRA) "overcome[s] the presumption in favor of judicial review of constitutional claims." Resp. Br. 47. Petitioner and respondents differ only in how that review is to be obtained.

Petitioner contends that the Federal Aviation Administration (FAA) has repeatedly and routinely subjected him to unconstitutional drug testing. As petitioner's opening brief demonstrated, that claim falls squarely within the traditional jurisdiction of federal district courts. The claim falls within the district court's federal question jurisdiction, see 28 U.S.C. 1331, and because petitioner is seeking only equitable relief, is not barred by the United States' sovereign immunity, see 5 U.S.C. 702 (waiver of sovereign immunity). See Pet. Br. 14-15, 18-19. Neither the CSRA as a whole, nor 5 U.S.C. 7121(a) – which simply requires federal collective bargaining agreements to contain grievance procedures and describes the role those procedures play vis-à-vis other administrative processes – strips federal district courts of the jurisdiction they would otherwise possess over claims such as petitioner's. See Pet. Br. 21-35.

Respondents concede that Congress "did not avert [sic] to this problem [of how to provide judicial review of claims like petitioner's] directly" in the CSRA. Br. 48. And they concede that petitioner's position that the congressional silence leaves undisturbed the district courts' jurisdiction "is perhaps more straightforward" than other mechanisms for providing judicial review. *Id.* at 49. But to salvage the judgment in this case and to implement a policy preference of the Executive Branch that *Congress* has nowhere articulated, respondents propose that this Court rewrite several provisions

of the CSRA as well as the applicable collective bargaining agreement. First, respondents would delete from section 7121(a) the word "administrative," deliberately inserted by Congress in 1994, and in its place insert an exhaustion requirement. Second, respondents ask this Court to "read[] in[to]" section 7123(a)(1) an "exception for constitutional claims," Resp. Br. 48, despite that section's express limitation of court of appeals jurisdiction over Federal Labor Relations Authority (FLRA) judgments involving arbitral awards that do not involve unfair labor practices. Finally, respondents' position on exhaustion necessarily requires that individual employees be given the right to invoke arbitration, contrary to the governing statute and the collective bargaining agreement in this case. See 5 U.S.C. 7121(b)(1)(C)(iii); J.A. 26, 27.

This Court's practice is to "decline to accept respondents' ambitious invitation to rewrite the statutes before [it.]" *United States Dep't of Def.* v. *FLRA*, 510 U.S. 487, 498 (1994). See also *Honig* v. *Doe*, 484 U.S. 305, 323 (1988) (finding unpersuasive a request to "rewrite" a statute to remedy an assertedly "inadverten[t]" congressional "oversight"). Instead, this Court should hold that district courts retain their longstanding power to hear constitutional claims by federal employees seeking equitable relief. See Pet. Br. 14-27; Pet. Cert. 16-19. Indeed, under circumstances such as these, the district court is also available to hear petitioner's statutory claim under 49 U.S.C. 45104(8), which requires that drug testing use "nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently." Congress has neither clearly precluded such review nor expressly channeled such review into another judicial forum. See Pet. Br. 44-46. In fact, Congress amended the CSRA in 1994 precisely to ensure that employees are able to pursue judicial relief for otherwise cognizable claims that are also covered by a negotiated grievance procedure.

I. PETITIONER'S COMPLAINT ALLEGES SIGNIFICANT CONSTITUTIONAL VIOLATIONS THAT THE GOVERNMENT CONCEDES ARE WITHIN THE JURISDICTION OF THE FEDERAL COURTS.

Much of respondents' argument rests on a desire to prevent a flood of litigation over "minor personnel matter[s]." See Resp. Br. 3; see also *id.* at 12, 21, 22, 27, 37. But that concern simply has no bearing on this case.

1. Petitioner's constitutional claim is not a "minor personnel matter." Petitioner's complaints allege that he was subjected to a sustained pattern of non-random, suspicionless, warrantless drug and alcohol testing involving both breathalyzers and urine testing. See J.A. 6-10. In addition, petitioner alleges that after he filed his initial complaint he was unconstitutionally subjected to a retaliatory unconstitutional drug test, which he alleged "likely grew out of the filing of the complaint." *Id.* at 13 (capitalization omitted). There can be no question that these are serious constitutional claims. "Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis" implicates "concerns about bodily integrity" and therefore constitutes a search within the meaning of the Fourth Amendment. *Skinner* v. *Railway Labor Executives Ass'n*, 489 U.S. 602, 617 (1989). "Nor can it be disputed that the process of collecting the [urine] sample to be tested * * * itself implicates privacy interests." *Ibid.* See *Chandler* v. *Miller*, 520 U.S. 305, 313 (1997) (same); *Nat'l Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 665 (1989) (same). The Constitution prohibits a regime of employee drug testing that is "subject 'to the discretion of the official in the field,'" *Von Raab*, 489 U.S. at 667 (quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967)), because such a scheme creates "the grave potential for 'arbitrary and oppressive interference with the privacy and personal security of individuals' that the

Fourth Amendment was designed to prevent," *id.* at 672 n.2 (quoting *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976)). Petitioner has alleged that precisely such unconstitutional interference occurred in his case.

To be sure, because petitioner complied with all of the agency's demands that he repeatedly undergo drug and alcohol testing, he did not *also* suffer the additional consequence of losing his job.[1] But as Justice Scalia pointed out in *Von Raab*, being subjected to drug testing is "a type of search particularly destructive of privacy and offensive to personal dignity" and inflicts an injury entirely distinct from whatever tangible consequences might flow from failing (or refusing to take) a urine test. See 489 U.S. at 680 (Scalia, J., dissenting). That this injury does not also constitute a major "adverse action" as that term is used in the CSRA does not render petitioner's claim a "minor" complaint.

2. Accepting petitioner's arguments would not open the federal courts to a flood of minor personnel disputes. Although respondents raise that specter, Br. 46, they point to no evidence whatsoever that federal employees routinely seek judicial review of everyday supervisory decisions or reframe

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[1] For reasons that petitioner sets out fully in his opening brief, he was not required to refuse to submit to the FAA's demands for breath or urine samples in order to challenge the constitutionality of its testing regime at the Anchorage facility. See Pet. Br. 38-39; *Abbott Labs.* v. *Gardner*, 387 U.S. 136 (1967). Respondents suggest that *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994), somehow undercuts the applicability of *Abbott Laboratories*. See Resp. Br. 36 n.17. That suggestion is misguided. In *Thunder Basin*, this Court noted that on those facts the plaintiffs would not "face any serious prehearing deprivation" because the penalties would become due "only after full review by both the Commission and the appropriate court of appeals." 510 U.S. at 217-18. That would clearly not be true here if petitioner were to refuse to comply with a testing demand. Moreover, unlike the plaintiffs in *Thunder Basin*, petitioner was not trying to avoid a congressionally crafted administrative process. See *infra* at 18-20.

minor disputes as constitutional matters. Cf. *id.* at 13 (describing such lawsuits as "exceedingly rare"). Their failure to provide such evidence is particularly telling given that any data regarding the frequency of such suits is surely within respondents' knowledge and control. See also Brief of *Amicus Curiae* National Treasury Employees Union ("NTEU Br.") at 21.

Allowing petitioner to seek review in the district court will not affect the procedures for resolving the most commonly litigated constitutional complaints. For example, unlike petitioner's claim in this case, many other constitutional claims likely to lead to litigation – those involving terminations and significant discipline – are already expressly subject to the Merit Systems Protection Board (MSPB) process.[2]

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[2] Although respondents argue that "the MSPB, the FLRA, and the OSC are all able to address and resolve constitutional claims" in certain cases, Br. 13, the telling fact is that none of them can entertain *petitioner*'s constitutional claim. See Pet. Br. 3-5, 37. With respect to the MSPB, petitioner can avail himself of its processes only by refusing to submit to a test and raising his constitutional claims as a defense against the ensuing "major adverse personnel action." With respect to the FLRA, that agency has already explained, *to petitioner in this very case*, that drug tests do not implicate its authority over unfair labor practices. See Pet. Br. 9; *infra* at 9.

Despite OSC's recent decision to "correc[t]" its website, Resp. Br. 35 n.16, the underlying statutes governing its authority remain clear that OSC enjoys jurisdiction over FAA employees' claims only if they relate to whistleblowing. At one point, respondents appear to suggest that an unconstitutional drug test might constitute a "prohibited personnel practice" within the meaning of 5 U.S.C. 2302(b)(12) and therefore be amenable to OSC review. See Resp. Br. 5-6. At another, they seem to concede that they are not. See *id.* at 47 (citing *Bush* v. *Lucas*, 462 U.S. 367, 385 n.28 (1983) (stating that "warrantless searches * * * would not be defined as 'personnel actions' within the statutory scheme")). But even if drug tests were

In any event, whether it would be wise to craft an alternative scheme for claims like petitioner's is a question for Congress. As we now show, to reach the results urged by respondents would require a major rewriting of the CSRA.

II. RESPONDENTS' ATTEMPT TO IMPOSE AN EXHAUSTION REGIME ON CLAIMS LIKE PETITIONER'S WOULD REQUIRE THIS COURT TO REWRITE THE CSRA.

Respondents have now conceded that "the structure of the CSRA would not be a sufficient basis to overcome the presumption in favor of judicial review of constitutional claims" and that "[t]he language of the CSRA does not appear to meet the 'heightened showing' required to foreclose judicial review of constitutional claims." Br. 47 (quoting *Webster* v. *Doe*, 486 U.S. 592, 603 (1988)). Thus, they

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generally amenable to OSC review, it would not help petitioner. With respect to FAA employees, respondents inexplicably ignore Congress's directive that "[t]he provisions of title 5 shall not apply to the [FAA's] new personnel management system * * * with the exception of * * * (A) *section 2302(b), relating to whistleblower protection*, including the provisions for investigation and enforcement as provided in chapter 12 of title 5." 49 U.S.C. 40122(g)(2) (emphasis added). The most natural reading of this language – a reading adopted in a 1997 opinion of the Office of Legal Counsel – is that although 5 U.S.C. 2302(b) then listed eleven prohibited personnel practices, section 40122(g)(2)(A) "adopts for the FAA personnel management system only those [prohibited personnel practices] 'relating to whistleblower protection,' which are found in subsection (8) of section 2302(b)." Authority to Investigate Complaints by Employees of the Federal Aviation Administration Alleging Reprisal for Whistleblowing, 1997 OLC LEXIS 34, at *3 (Sept. 23, 1997). When Congress amended section 40122(g)(2)(A) to give OSC jurisdiction over FAA employees' whistleblower claims, it did not also disapprove OLC's conclusion that section 40122(g)(2)(A) does not incorporate other prohibited personnel practices against the FAA, and therefore does not give OSC any enforcement power over those practices.

necessarily agree with petitioner that the Ninth Circuit erred in holding to the contrary.

Nonetheless, respondents argue that the judgment of the Ninth Circuit should be affirmed because petitioner did not "exhaust" what they contend are the mandatory negotiated grievance procedures described in section 7121(a). See Resp. Br. 39, 44. Although their position is not entirely clear, it appears that respondents would permit a federal employee to seek judicial review of a constitutional claim only by appealing from a final order issued by the FLRA that reviews the results of an arbitration proceeding conducted between the employee's union and his employer – an arbitration to which the employee, of course, is not even a party. 5 U.S.C. 7121(b)(1)(C)(iii); J.A. 26, 27.

Respondents' request that the Court impose this exhaustion requirement must be rejected. First, imposing any exhaustion requirement is inconsistent with the 1994 amendment of section 7121(a), which made clear that Congress did not intend for negotiated grievance procedures to affect employees' rights to seek relief directly in federal court. Second, as respondents admit, Br. 48, adopting their exhaustion requirement would require substantial judicial rewriting of section 7123(a)(1), the provision granting federal courts of appeals jurisdiction to review final FLRA orders. That this provision – and several others they do not mention – would have to be revised to convert the existing negotiated grievance system into a plausible administrative exhaustion process is formidable evidence that Congress did not intend it to serve that purpose. Congress plainly knows how to impose an across-the-board exhaustion requirement. See, *e.g.*, 42 U.S.C. 1997e(a) (requiring exhaustion for all prison conditions cases); see *Woodford* v. *Ngo*, No. 05-416 (Nov. 14, 2005) (granting certiorari to review the application of the exhaustion requirement). And it plainly knows how to impose more narrowly targeted exhaustion requirements as well. Indeed, the CSRA explicitly sets forth exhaustion requirements and other prerequisites for judicial review with

respect to a number of categories of federal employment claims. That Congress chose not to impose similar requirements for the limited subset of claims at issue in this case is itself reason enough to conclude that Congress did not intend to require exhaustion for such claims, not a reason to believe that Congress's handiwork requires correction by this Court.

1. As an initial matter, respondents do not explain why they should be permitted to propose to this Court that it craft an exhaustion requirement they never proposed to either the district court or the court of appeals. While respondents cite dicta by the district court to the effect that petitioner "fail[ed] to exhaust his administrative remedies," Br. 10-11, 44 n.18 (quoting Pet. App. 14a n.17), their position before the district court and the court of appeals was *not* that petitioner should have exhausted his administrative remedies before seeking judicial review, but that he was precluded altogether from *ever* seeking judicial review because section 7121(a) foreclosed all judicial review of claims within the scope of negotiated grievance procedures.

Thus, the district court dismissed petitioner's complaint not for failure to exhaust – which would have been a dismissal without prejudice, permitting him to refile his complaint once he had properly exhausted, see *Booth* v. *Churner*, 532 U.S. 731, 735 (2001) – but rather for lack of subject-matter jurisdiction, see Pet. App. 14a, a judgment that would bar petitioner from *ever* seeking judicial review.[3] The Ninth Circuit affirmed that dismissal. *Id.* at 11a. The

[3] That decision, while it was technically a dismissal without prejudice with respect to the substantive question whether the FAA's practices comported with the Constitution and 49 U.S.C. 45104(8), was "with prejudice on the issue * * * which was litigated" in the case: namely, whether section 7121(a) strips *all* federal courts of jurisdiction to hear claims like petitioner's. *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1194 (CADC 1983) (Scalia, J.) (ellipses in the original; internal quotations omitted).

consequences of the judgment below thus differ materially from the consequences of the judgment that respondents now suggest should have been entered, since that latter judgment would have left open petitioner's ability to obtain judicial review.

2. In any event, respondents' exhaustion arguments must be rejected. As respondents recognize, Br. 48, the exhaustion process they would engraft onto the statute cannot be squared with the plain text of the CSRA.

First, the CSRA itself does not explicitly provide a basis for judicial review of petitioner's claims, much less establish prerequisites for such review. Petitioner's right to judicial review arises outside of the CSRA, see Pet. Br. 14-15, and nothing in the CSRA purports to impose any preconditions on the exercise of that right. While the text of section 7121(a) makes clear that, with exceptions not relevant here, petitioner's only right to *administrative* review, as an employee represented by a union, is the negotiated grievance procedure, it says nothing about his right to *judicial* review of constitutional claims, much less conditions that right on invocation of the grievance process.

Second, as written, section 7123(a) – the statutory provision authorizing judicial review of FLRA decisions – authorizes judicial review of only a very circumscribed subset of employee grievances, a subset that does not include petitioner's claims. While an employee can theoretically raise a constitutional claim in a grievance, section 7123(a)(1) is absolutely clear that only those grievances that implicate an "unfair labor practice" are subject to eventual judicial review. See *ibid.* (excluding judicial review of relevant FLRA orders "unless the order involves an unfair labor practice"); Pet. Br. 5. The phrase "unfair labor practice" is a term of art, confined to a narrow class of actions relating to labor relations. 5 U.S.C. 7116. It manifestly does not include claims such as petitioner's, as the FLRA has already held in this very case, see Pet. App. 3a; Pet. Br. 9; Resp. Br. 9.

Accordingly, as respondents candidly admit, their view requires this Court both to pare back section 7123(a)'s restriction on judicial review and to expand the original jurisdiction of the federal courts of appeals over employee grievances. See Resp. Br. 48-49.

Third, respondents' view requires this Court to rewrite yet another statutory provision, 5 U.S.C. 7121(b)(1)(C)(iii), and also to amend the provisions of the collective bargaining agreement that govern *who* may institute the proceedings from which judicial review may eventually be sought. Section 7123(a) authorizes judicial review of FLRA decisions reviewing exceptions to the arbitration of an employee grievance. Thus, for there to be a possibility for judicial review, there must have been an arbitration, and one of the parties to the arbitration must have filed exceptions with the FLRA. However, under both section 7121(b)(1)(C)(iii) and the collective bargaining agreement that governs petitioner, an individual employee has no right to invoke arbitration of his grievance or to be a party to the arbitration. That right is given solely to his union and the agency. See 5 U.S.C. 7121(b)(1)(C)(iii); J.A. 26, 27. If the union declines to request arbitration, there will be no arbitration decision, no review of that arbitration decision by the FLRA, and no possibility for judicial review, even under respondents' rewritten version of section 7123(a)(1).[4]

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[4] Any suggestion that Congress intended to deny judicial review to employees whose unions decline to request arbitration is both implausible and incompatible with this Court's requirement that Congress clearly express its intent to preclude judicial review of constitutional claims. See Pet. Br. 21-27. Indeed, respondents cite no other statute in which Congress has given a third party the right to veto an individual's right of access to judicial review of individual constitutional claims. See Pet. Br. 39-40.

Respondents appear to suggest, see Br. 23, 44, that employees can prevent this usurpation of individual rights by filing an unfair labor practice claim against any union that fails to request

Accordingly, for an employee to obtain eventual judicial review of his constitutional claim – a right to which respondents concede he is entitled – this Court would have to "read into" section 7121(b)(1)(C)(iii) a right to invoke arbitration or "read into" section 7122(a) a right to file exceptions to an arbitration conducted between a union and an agency. Thus, rewriting section 7123(a) is only the beginning of this Court's task as a "council[] of revision," *United States* v. *Rutherford*, 442 U.S. 544, 555 (1979), under respondents' proposal.[5]

Fourth, respondents' exhaustion rule would require this Court to further revise the CSRA to create some opportunity for administrative review and exhaustion of grievances that fall outside the terms of the grievance process created by a

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arbitration on the employee's behalf. But this is a red herring: respondents are careful never to assert that such a claim would be *successful*. As explained by *amici*, there is a wide range of reasons unrelated to the merits of an individual employee's claim why his union might justifiably decline to demand arbitration. See NTEU Br. at 22-23 (pointing to limited resources and competing priorities as two such reasons); Brief of *Amici Curiae* American Federation of Government Employees and National Federation of Federal Employees ("AFGE Br.") at 11 (same). As long as a union's decision not to demand arbitration is reasonable and nondiscriminatory, that decision will not constitute an unfair labor practice. Cf. *Vaca* v. *Sipes*, 386 U.S. 171, 191-92 (1967). Indeed, it would be an odd statutory regime that provided the union an option to decline to request arbitration but nonetheless defined that refusal to be unlawful in every instance.

[5] Unless this Court were also to rewrite section 7121(b)(1)(C)(iii), it is unclear whether rewriting section 7123(a)(1) would give individual employees the right to seek judicial review even if their union did pursue their grievance all the way through the FLRA's processes. Cf. *Hanlon* v. *FLRA*, 859 F.2d 971, 974 (CADC 1988) (refusing to permit individual employees to seek judicial review under section 7123(a) when the union abandoned the case).

particular CBA and for claims by employees who are not subject to any collective bargaining agreement at all. As *Congress* wrote it, section 7121(a)(2) permits a CBA to exclude from the grievance process particular complaints or categories of complaints (for example, complaints regarding drug testing). And of course, by its terms, section 7121(a) does not apply to employees who are not covered by a CBA because they are not members of a bargaining unit. These employees' only recourse is to an internal agency procedure that does not culminate in judicial review. See AFGE Br. 12. Respondents simply fail to explain how these employees are to exhaust their constitutional claims through any grievance procedure.

3. Locating an exhaustion regime within an administrative process that culminates in FLRA review is, in any event, ill conceived. Other than the fortuity of section 7123(a)'s providing judicial review of an extraordinarily narrow class of initially grieved claims – those claims that a union chooses to arbitrate that involve unfair labor practices – respondents provide no rationale whatsoever for locating an exhaustion requirement within the FLRA process. Quite simply, the FLRA – an agency charged with the specialized and circumscribed task of overseeing labor organizing and collective bargaining – has no expertise whatsoever with respect to questions of constitutional law like those raised by petitioner. It is hard therefore to take seriously respondents' discussion of the role that administrative expertise might play in the exhaustion regime that they ask this Court to cobble together.[6]

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[6] As it now exists, only two stages of the negotiated grievance process are within petitioner's control, and they are hardly the sort of processes that normally lead to deferential review in a court of appeals. "Step 1" requires that the grievance "be discussed informally by the aggrieved employee" and his supervisor. J.A. 23. It provides no right to call witnesses, submit documents, or cross-examine the other side. "Step 2" requires the employee to reduce

Moreover, respondents never suggest – nor could they reasonably do so – that either an arbitrator or the FLRA would have any power to provide a meaningful remedy for constitutional claims unrelated to unfair labor practices. Among other things, both the FLRA and the arbitrator are "incapable of granting the relief sought [an injunction against unconstitutional testing] before irreparable injury occurs." *Nat'l Fed'n of Fed. Employees* v. *Weinberger*, 818 F.2d 935, 940 n.6 (CADC 1987), *cert. denied sub nom. Nat'l Fed'n of Fed. Employees* v. *Cheney*, 493 U.S. 1056 (1990).

4. There is no need for this Court to rewrite sections 7121, 7122, and 7123 in order to provide a sensible avenue for judicial review of petitioner's constitutional claims. Instead, existing federal law already creates a clear path for employees like petitioner to obtain judicial review of their constitutional claims. See Pet. Br. 14-21. Under 28 U.S.C. 1331, federal "district courts shall have original jurisdiction of all civil actions arising under the Constitution." This grant of district court jurisdiction has traditionally extended to constitutional claims for injunctive relief, *Bell* v. *Hood*, 327 U.S. 678, 681-84 (1946), even when the suit requests injunctive relief against a government official, *Davis* v. *Passman*, 442 U.S. 228, 242 (1979).

As petitioner has also already explained, that traditional route was taken by the employees who sought an injunction against the Customs Service's warrantless, suspicionless drug testing program in *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989). This Court never questioned its jurisdiction to consider the employees' claims, even

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his grievance to writing, requires the Facility Manager or his designee to make a "decision," J.A. 24, and presupposes that a "meeting" will be held "[b]y mutual consent," *id.*, but again it provides none of the procedural rights that accompany the quasi-adjudicative processes of the MSPB or the FLRA. After these two steps, control over the grievance process passes entirely out of the employee's hands.

though the issue of subject-matter jurisdiction had been litigated before the district court. *Nat'l Treasury Employees Union* v. *Von Raab*, 649 F. Supp. 380, 384-85 (E.D. La. 1986). See Pet. Br. 19.

Respondents concede that broad challenges to the constitutionality of drug testing programs are subject to direct review, but suggest that district courts' jurisdiction over as-applied challenges is somehow more limited. Br. 42-43. Given the variety of reasons for preferring that plaintiffs pursue narrow challenges rather than broad ones, respondents' argument would create an "anomalous" and "bizarre" set of incentives. *Brannum* v. *Lake*, 311 F.3d 1127, 1130 (CADC 2002) (following *United States* v. *Salerno*, 481 U.S. 739 (1987)). In any event, respondents fail to provide any explanation for the argument that district courts enjoy greater jurisdictional power over broad programmatic challenges.

Contrary to respondents' suggestion, Resp. Br. 42, neither *McNary* v. *Haitian Refugee Center*, 498 U.S. 479 (1991), nor *Bowen* v. *Michigan Academy*, 476 U.S. 667 (1986), supports their position. In each of those cases, this Court *rejected* the government's argument that district court jurisdiction was foreclosed. It did so on the basis of a combination of plain language review and the presumption of reviewability, and did so despite the fact that the statutes at issue explicitly disapproved judicial review in a way that section 7121(a) simply does not. In contrast to section 7121(a), which neither contains the phrase "judicial review" nor refers to district court jurisdiction, the statute at issue in *McNary* stated squarely that "*[t]here shall be no administrative or judicial review*" except under limited circumstances and that "[t]here shall be judicial review * * * *only* in the judicial review of an order of exclusion or deportation." 8 U.S.C. 1160(e)(1), (3)(A) (emphases added). Similarly, the statute at issue in *Bowen* stated that "[n]o action * * * shall be brought under section 1331 * * * of title 28 to recover on any claim arising under this subchapter." 42

U.S.C. 405(h). Thus, both cases stand for the proposition petitioner has advanced: that this Court will read statutes that foreclose judicial review narrowly. Given that the plain text of section 7121(a) says nothing about judicial review at all, it simply cannot be read to prohibit district courts from exercising their traditional power conferred by Congress.

5. A final reason for rejecting respondents' suggestion that petitioner should have been forced to exhaust his claims before the FLRA as a prerequisite to seeking judicial review rests on the circumstances of this case. Penalizing petitioner for not complying with a judicial exhaustion process created for the first time in this Court would be fundamentally unfair. Prior to filing suit, petitioner provided the FAA with extensive notice of his claims, see J.A. 7-8, 13-17, and agency officials responded to his complaint without resolving his concerns. To apply a new exhaustion requirement retroactively would be incompatible with the judicial role.

III. PETITIONER CAN ALSO SEEK INJUNCTIVE RELIEF ON HIS STATUTORY CLAIM.

Having conceded that the CSRA does not deprive individuals like petitioner of the right to seek judicial review of their constitutional claims in *some* judicial forum, Resp. Br. 45-49, respondents still cling to their position that the Act nonetheless categorically deprives him of his right to seek judicial review of at least his statutory claim. Respondents, however, offer no basis for concluding that Congress intended to apply different rules for access to judicial review to petitioner's constitutional and statutory claims.

1. Respondents point to no language in the CSRA that precludes judicial review of petitioner's claim that the FAA has violated his statutory right to be free from discriminatory non-random drug testing under 49 U.S.C. 45104(8). As petitioner has already explained, given the rights-creating language of section 45104(8), the government bears a "heavy burden" in overcoming the strong presumption that federal

courts have jurisdiction over claims alleging a violation. *Bowen*, 476 U.S. at 672; Pet. Br. 44-46.

Instead of relying on anything in the CSRA that specifically addresses the right of employees to challenge discriminatory or biased drug testing regimes, or to raise other statutory claims, respondents point to this Court's statement in *United States* v. *Fausto*, 484 U.S. 439, 452 (1988), that Congress's intention to foreclose judicial review of a backpay claim by a nonpreference eligible federal employee was "'*fairly discernible* in the statutory scheme.'" Resp. Br. 18 (emphasis added by respondents). But that statement cannot bear the weight respondents give it.

Contrary to respondents' suggestion, Br. 15, *Fausto* did not hold that the "comprehensive nature of the CSRA" precludes all employee suits outside the framework of the Act. Indeed, this Court specifically disavowed any intent to find that the CSRA would support the implied repeal of a pre-existing statutory right to judicial review. 484 U.S. at 452-53. Instead, *Fausto* simply declined to find an implied right of action for a very *particular* class of employees ("nonpreference" members of the excepted service). *Ibid*. And it did so based on a careful reading of the CSRA's treatment of that particular class of employees with respect to those particular statutory claims. See *id.* at 445-47.[7] Indeed, if respondents were right that the comprehensiveness of the CSRA were in itself sufficient to preclude judicial review in all cases, the Court would have had no need in *Fausto* to extensively examine the other features of the statutory scheme that demonstrated Congress's intent to exclude review of

[7] Thus, for example, the Court worked its way carefully through Chapters 23, 43, and 75 of the CSRA to show how "nonpreference" employees were sometimes included and sometimes omitted from provisions applicable to other workers. See *Fausto*, 484 U.S. at 445-47.

these particular claims by nonpreference excepted service employees. [8]

2. The "comprehensive nature of the CSRA," Resp. Br. 15, similarly provides no evidence that Congress intended agencies' drug testing regimes to be immune from statutory challenges. Indeed, respondents themselves acknowledge that the CSRA contemplates judicial review, since employees terminated for failing a drug test or refusing to submit to one can defend themselves before the MSPB by arguing the test violated section 45104(8), and, if that defense fails, can renew that challenge in court. See Resp. Br. 35. Respondents have pointed to no reason Congress would have intended to preclude employees who seek injunctive relief against future statutory violations from going to court to prevent what is, after all, an irreparable injury: being subjected to an unfair drug test that violates the constitutional and statutory rights to "nondiscriminatory and impartial methods," 49 U.S.C. 45104(8).

3. Any fear that permitting statutory claims like petitioner's would somehow inundate the federal courts with minor personnel disputes is misplaced. Petitioner does not argue that employees may file suit in federal court alleging general unfair treatment, violations of collective bargaining agreements, or infringement of rights established by the CSRA itself (unless the CSRA authorizes such review). Petitioner seeks a judicial forum only for rights Congress deemed important enough to enshrine in statutes enforceable through an independent private right of action.

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[8] Respondents' reliance on *Karahalios* v. *National Federation of Federal Employees*, 489 U.S. 527 (1989), is similarly misplaced. Resp. Br. 16. *Karahalios* is inapposite because that case involved a type of claim for which the CSRA provided a clear administrative remedy leading to judicial review. *Karahalios*, 489 U.S. at 535-37. By contrast, even under respondents' reading of section 7121(a), see Br. at 7, 21, 47, the negotiated grievance procedures within an employee's own control provide no opportunity for judicial review.

Moreover, petitioner acknowledges that where the CSRA itself expressly imposes administrative prerequisites to judicial review, employees must use those procedures. See Pet. Br. 43. Thus, the right to bring suit that petitioner advances here arises in only the small class of cases that are not within the CSRA's scheme of administrative remedies. The right to file suit on a statutory claim does not arise in cases that involve a major "adverse action" that must be challenged through the MSPB, or in cases that fall within the jurisdiction of some other federal agency such as the FLRA or the Equal Employment Opportunity Commission. See also *supra* at 5.

4. Section 7121(a) does nothing to strip district courts of the jurisdiction they would otherwise possess. Contra Resp. Br. 26-27. On the contrary, Congress amended section 7121(a) in 1994 to confirm that the provision had no effect on judicial causes of action. As petitioner has already explained, section 7121(a) does not address judicial power at all. Rather, the plain text of section 7121(a) simply requires the establishment of negotiated grievance procedures as part of federal collective bargaining agreements and channels represented employees' grievances into those procedures, rather than other procedures a particular agency might also have. See Pet. Br. 31-32. This interpretation is confirmed by Congress's 1994 amendment. See *id.* at 21, 28-35; see also NTEU Br. 13-19 (setting out in detail the legislative history of the 1994 amendments).

Respondents ignore most of petitioner's argument. For example, they never explain why section 7121(a), which refers to the mandated negotiated grievance process as the "exclusive administrative procedur[e]" for resolving grievances, should be read to constitute the "exclusive administrative *or judicial* procedure," given that Congress has repeatedly used the phrases "administrative or judicial" and "administrative and judicial" when it means to encompass both sets of fora. See Pet. Br. 30-31. Nor do they explain why section 7121(a), which never mentions judicial review at

all, should be read to preclude judicial review, given that Congress has used explicit language to preclude judicial review of numerous other statutory claims. See Pet. Br. 24-25, 45.

Instead, respondents rest virtually their entire analysis of section 7121(a) on a strained explanation for why Congress inserted the word "administrative" into the statute in 1994. As petitioner and his *amici* have already pointed out, in fact, Congress enacted the 1994 amendment to override the Federal Circuit's en banc opinion in *Carter* v. *Gibbs*, 909 F.2d 1452 (CAFC), *cert. denied*, 498 U.S. 811 (1990). The language of section 7121(a) had its genesis in an earlier bill, introduced by Representative McCloskey, the legislator who also sponsored the amendment to section 7121(a). The report that accompanied the earlier bill explained that the addition of the word "administrative" was intended to convey that section 7121 "is not intended to limit judicial remedies otherwise provided by law." Federal Employee Fairness Act of 1994, H.R. Rep. No. 103-599, pt. 2, at 75 (1994). And when Representative McCloskey reintroduced the provision that ultimately was enacted as section 7121(a), the only testimony regarding the language reiterated that it was intended to restore federal employees' right to seek judicial relief. See Pet. Br. 32-35; see also *United States* v. *Enmons*, 410 U.S. 396, 404 n.14 (1973) (earlier remarks "are wholly relevant" to an understanding of an ultimately enacted bill when "the operative language of the original bill was substantially carried forward into the Act"; "[s]urely an interpretation placed by the sponsor of a bill on the very language subsequently enacted by Congress cannot be dismissed out of hand * * * simply because the interpretation was given * * * earlier.").

To explain away this evidence, respondents manufacture a "tension" between 5 U.S.C. 7121(f) and the pre-amendment section 7121(a). See Resp. Br. 28. As the complete silence in the legislative history suggests, no one perceived such a tension at the time. The availability of judicial review under

section 7121(f) for employees subjected to major employment related consequences under 5 U.S.C. 4303 or 5 U.S.C. 7512 was never in doubt. In light of the actual legislative history, it would be odd indeed to interpret the 1994 amendment as resolving a problem that never existed and failing to confront the problem at which the language was clearly directed.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioner's opening brief, the judgment should be reversed.

Respectfully submitted,

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APPENDIX

Title 5 U.S.C. provides in pertinent part:

§ 7103. Definitions; application

(a) For the purposes of this chapter –

* * *

(9) "grievance" means any complaint --

(A) by any employee concerning any matter relating to the employment of the employee;

(B) by any labor organization concerning any matter relating to the employment of any employee; or

(C) by any labor organization, or agency concerning

i. the effect or interpretation, or the claim of a breach, of a collective bargaining agreement; or

ii. any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

* * *