No. _____

IN THE
Supreme Court of the United States

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

v.

UNITED STATES DEPARTMENT OF THE TREASURY, ET AL.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Do federal district courts have jurisdiction over constitutional claims for equitable relief brought by federal employees, as the Third and D.C. Circuits have held, or does the Civil Service Reform Act impliedly preclude that jurisdiction, as the First, Second, and Tenth Circuits have held?

PARTIES

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

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

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Michael B. Elgin, Aaron Lawson, Henry Tucker, and Christon Colby respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

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

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2011. Pet. App. 2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

5 U.S.C. § 3328 bars men who fail to register with the Selective Service from federal agency employment. In full, it provides:

> (a) An individual—
>
> (1) who was born after December 31, 1959, and is or was required to register under section 3 of the Military Selective Service Act (50 App. U.S.C. 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.

The Civil Service Reform Act, 92 Stat. 1111 *et seq.*, outlines administrative procedures available to certain federal employees for certain adverse employment actions. Relevant portions of the Civil Service Reform Act are reproduced in the Appendix at 108a.

STATEMENT OF THE CASE

Petitioners Michael B. Elgin, Aaron Lawson, Henry Tucker, and Christon Colby are former federal employees. Each was terminated or constructively terminated from his federal employment under 5 U.S.C. § 3328, which imposes a lifetime bar on federal executive agency employment on men who do not

register with the Selective Service between the ages of 18 and 26. First Am. Compl. ¶ 2.

Elgin appealed his termination to the Merit Systems Protection Board (MSPB), arguing that 5 U.S.C. § 3328 was a Bill of Attainder and that he was discriminated against on the basis of sex. The MSPB dismissed Elgin's appeal for lack of jurisdiction. Pet. App. 95a, 104a.[1]

Elgin, Lawson, Tucker, and Colby then brought this action in district court under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Administrative Procedure Act, 5 U.S.C. § 702, against their former employers, the United States, the U.S. Department of the Treasury, and the U.S. Department of the Interior. First Am. Compl. ¶ 5. Petitioners challenged 5 U.S.C. § 3328 as a Bill of Attainder and as violative of their constitutional rights to equal protection on the basis of sex, seeking injunctive and declaratory relief. *Id.* ¶ 4. The district court initially held that 5 U.S.C. § 3328 was a Bill of Attainder, but did not violate Petitioners' right to equal protection, and granted Petitioners' partial motion for summary judgment. Pet. App. 66a-67a. On reconsideration, the district court addressed for the first time whether it had jurisdiction over Petitioners' claims and held that it did. *Id.* at 51a. However, the district court reversed its holding on the merits, ruling that 5 U.S.C. § 3328 was not a Bill of Attainder. *Id.* at 63a-64a.

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[1]The unpublished decision of the MSPB is reproduced in the Appendix at 94a. It is also available at *Elgin v. Department of the Treasury*, No. PH-0752-08-0004-I-1, 2007 M.S.P.B. LEXIS 7502 (M.S.P.B. Nov. 16, 2007).

A divided panel of the Court of Appeals for the First Circuit vacated the district court's decision and remanded for entry of a new judgment denying Petitioners relief for lack of subject matter jurisdiction. *Id.* at 15a. Acknowledging a circuit split (*id.* at 12a n.4), the panel majority held that the district court lacked jurisdiction to review Petitioners' claims because the Civil Service Reform Act (CSRA), 92 Stat. 1111 *et seq.*, impliedly precludes federal district courts from granting equitable relief for constitutional injuries. *Id.* at 12a. Because the CSRA does not explicitly preclude such relief, the concurring judge would have found that the district court had jurisdiction. *Id.* at 18a.

A. Factual Background

The Military Selective Service Act requires all males to register with the Selective Service between the ages of 18 and 26 upon proclamation of the President. 50 U.S.C. app. § 453. Since 1980, a presidential proclamation has required registration, and all persons are, by statute, "deemed" to know about the registration requirement. Proclamation No. 4771, 45 Fed. Reg. 45,247 (July 2, 1980); 50 U.S.C. app. § 465(a). Failure to register is a crime, punishable by a fine of up to $10,000 and up to five years in prison. Men can be prosecuted until their 31st birthdays. *Id.* § 462(a). In addition, in 1986, Congress enacted 5 U.S.C. § 3328, which further penalizes men who knowingly and willfully fail to register by imposing a lifetime bar on federal executive agency employment. Regulations provide for the termination of employees who fail to register, and the Office of Personnel Management (OPM) is responsible for determining

whether the failure to register was knowing and willful. 5 C.F.R. § 300.707.

The Selective Service System has no record of registration for any of the Petitioners. Three of them—Elgin, Tucker, and Colby—did not become aware of the registration requirement until after their 26th birthdays, when it was too late to register. The fourth—Lawson—knew about the requirement and believes that he registered, but the Selective Service System does not have any record of his registration. Elgin, Lawson, and Colby sought determinations that their failure to register was not knowing and willful, but OPM denied their claims.

Petitioners are former employees of federal agencies. Elgin, Lawson, and Colby were terminated solely under 5 U.S.C. § 3328 because they failed to register. Tucker resigned from one agency when his failure to register became apparent, and his offer of employment from a second agency was withdrawn solely because he failed to register.

1. Michael B. Elgin was first hired by the Internal Revenue Service (IRS), an agency of the Treasury Department, in 1991 as a low-level data transcriber. Pet. App. 95a. Over the next sixteen years, Elgin consistently received glowing evaluations and was promoted to positions with increasing responsibility. First Am. Compl. ¶ 31. As part of a routine background investigation when he was offered a promotion in 2002, the IRS learned that Elgin had not registered with the Selective Service and passed that information on to OPM. *Id.* ¶¶ 32-34. Nevertheless, Elgin was promoted. *Id.* ¶ 33.

In 2003, OPM determined that Elgin was ineligible for federal employment under 5 U.S.C. § 3328 because he had failed to register with the Selective Service. Elgin sought a waiver that would permit his employment, arguing that his failure to register had not been knowing and willful because he had not been aware of the registration requirement; at age 18, he was struggling to complete high school and support his son while being virtually homeless. *Id.* ¶¶ 29-30. OPM denied his request for a waiver in 2006. Both Massachusetts Senators and the IRS asked OPM to reconsider, explaining that Elgin was a valued IRS employee whose termination would negatively affect the agency and that Elgin's failure to register was inadvertent. *Id.* ¶ 34. OPM denied the Senators' and IRS's request. *Id.* ¶ 35. Elgin was terminated on July 27, 2007. *Id.* ¶ 36.

2. Aaron Lawson has been a wildfire fighter since 1997, first with the California Department of Forestry and later with the U.S. Forest Service. *Id.* ¶ 40. He is a specialist in directing helicopter crews fighting forest fires. *Id.* ¶ 41. The Government has spent tens of thousands of dollars training him to do this dangerous work. *Id.* In 2003, the Bureau of Land Management, a division of the Interior Department, in conjunction with the U.S. Forest Service, hired him as a wildfire fighter helicopter captain. *Id.* ¶ 40. After he was hired, Lawson learned that the Selective Service has no record of his registration. *Id.* Lawson believes that he completed the registration forms at his local post office around the time of his 18th birthday. *Id.* ¶ 39. The Bureau of Land Management and U.S. Forest Service requested a waiver from OPM that would make

Lawson eligible for employment. *Id.* ¶ 42. OPM denied the waiver. Lawson was terminated. *Id.*

3. In 2007, Henry Tucker was a Financial Institution Specialist at the Federal Deposit Insurance Corporation, where he had been employed for 17 years. *Id.* ¶ 44. He had never been aware of the requirement to register with the Selective Service; Tucker's mother left him when he was 16, and he moved frequently as a teenager. *Id.* ¶ 43. In December 2007, the Federal Deposit Insurance Corporation learned that Tucker had not registered with the Selective Service and referred the matter to OPM. *Id.* ¶ 45.

Fearing that he would be fired, Tucker resigned and applied for a position with the National Institutes of Health, which offered Tucker a job as a Budget Analyst. *Id.* ¶ 46. It withdrew the offer, however, after learning that Tucker had not registered with the Selective Service. *Id.*

4. Christon Colby began working at the IRS in 2001 as a temporary employee and was hired permanently in 2002. *Id.* ¶¶ 49-52. Colby received consistently excellent performance reviews and was promoted to positions with increasing responsibility. *Id.* ¶ 53. In 2003, the IRS informed Colby that it had become aware of his failure to register with the Selective Service. *Id.* ¶ 54. Colby sought a waiver from OPM on the basis that his failure to register was not knowing and willful. Colby explained that he had moved out of his parents' home at age 18 and was unaware of the registration requirement until he was too old to register. *Id.* ¶¶ 47-48, 55.

In 2006, OPM declined to issue a waiver making him eligible for employment. *Id.* ¶ 57. Colby's supervisor at the IRS appealed the determination within OPM, explaining that Colby was "an extremely valuable and integral" employee and noting that the IRS had invested $25,000 in training Colby. *Id.* ¶ 58. OPM affirmed its decision not to issue Colby a waiver, and Colby was terminated on August 3, 2007. *Id.* ¶¶ 59-60.

B. Proceedings Before the Merit Systems Protection Board and the District Court

The Civil Service Reform Act (CSRA), 92 Stat. 1111 *et seq.*, provides that non-exempt federal employees (such as Petitioners had been) may challenge their terminations before the Merit Systems Protection Board (MSPB) under certain conditions. 5 U.S.C. §§ 7701(a), 7512(1), 7513(d). Shortly after being terminated under 5 U.S.C. § 3328, Petitioner Elgin appealed the decision to the MSPB, arguing that 5 U.S.C. § 3328 is a Bill of Attainder and that he was subject to unconstitutional sex-based discrimination because the Selective Service registration requirement only applies to men. On November 16, 2007, at the Treasury Department's urging, the MSPB dismissed Elgin's appeal for lack of jurisdiction. Pet. App. 100a-01a. The MSPB explained that it lacked jurisdiction over appeals where employees were terminated under absolute statutory prohibitions, such as 5 U.S.C. § 3328. *Id.* The MSPB also held that it lacked authority to rule on the constitutionality of a statute and noted that, to the extent it could review any constitutional or discrimination claims, it did not have jurisdiction over

those claims without an explicit grant of jurisdiction, which was absent here. *Id.* at 101a-02a.

After Elgin's MSPB appeal was dismissed, on December 28, 2007, Elgin, joined by Lawson, Tucker, and Colby, brought this action challenging the constitutionality of 5 U.S.C. § 3328 in the United States District Court for the District of Massachusetts against the United States of America, the U.S. Department of the Treasury, and the U.S. Department of the Interior (collectively, the Government). First Am. Compl. ¶ 1. Petitioners contended that 5 U.S.C. § 3328 is a Bill of Attainder prohibited by Article I, Section 9, Clause 3 of the Constitution because it legislatively imposes punishment—the lifetime bar on federal employment—on a specific group of men for their irreversible failure to register. Petitioners also contended that because the Selective Service registration requirement and employment bar applies to men and not women, it unlawfully discriminates under the equal protection component of the Fifth Amendment. *Id.* ¶¶ 1, 4. Petitioners sought declaratory and injunctive relief, including reinstatement. *Id.* ¶ 4. The claims were brought under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, and the Administrative Procedure Act, 5 U.S.C. § 702, and jurisdiction was premised on 28 U.S.C. §§ 1331, 1343, and 1346. First Am. Compl. ¶ 5. Petitioners amended the complaint in January 2008 to add a class action claim. *Id.* ¶ 1.

The Government moved to dismiss, arguing that Petitioners' claims failed on the merits. Pet. App. 66a. The Government did not, at that time, contest the district court's jurisdiction. Petitioners responded by

opposing the motion to dismiss as to the equal protection claim and seeking partial summary judgment as to liability on the Bill of Attainder claim. After a hearing, the district court granted Petitioners' motion for partial summary judgment, holding that 5 U.S.C. § 3328 was a Bill of Attainder, and granted the Government's motion to dismiss in part, holding that the Selective Service scheme did not violate Petitioners' rights to equal protection. *Id.* at 66a-67a.

Petitioners then filed a motion for class certification and sought a preliminary injunction reinstating Petitioners. The Government filed a motion for reconsideration of the district court's grant of summary judgment on the Bill of Attainder claim, contending both that the claim failed on the merits and arguing for the first time that the district court did not have subject matter jurisdiction over the claim because the CSRA precludes district court review of federal employment decisions. *Id.* at 41a-42a. The district court held that it did have jurisdiction, but granted the motion for reconsideration because it determined, on reexamination, that 5 U.S.C. § 3328 was not a Bill of Attainder. *Id.* at 51a, 63a-64a.

C. Proceedings Before the First Circuit

Petitioners appealed the district court's decisions dismissing the equal protection claim and granting the motion for reconsideration on the Bill of Attainder claim to the United States Court of Appeals for the First Circuit. The panel agreed that Petitioners' claims should be dismissed, but was divided on the question whether the district court had jurisdiction over Petitioners' constitutional claims for equitable relief. *Id.* at 15a.

The majority agreed with the Government that the CSRA provides the exclusive remedy for the termination or constructive termination of federal employees, even for facial constitutional challenges like this one. 92 Stat. 1111 *et seq.* (codified as amended in various sections of 5 U.S.C.). The CSRA permits non-exempt federal employees, such as Petitioners, to appeal their terminations to the MSPB if they were removed "for such cause as will promote the efficiency of the service." 5. U.S.C. § 7513(a); *see generally id.* §§ 7511-7514. Employees can then appeal the MSPB decision to the United States Court of Appeals for the Federal Circuit. *Id.* § 7703(b)(1). As the majority noted, this Court has held that though the CSRA does not explicitly state it is the exclusive remedy, its comprehensiveness generally precludes ordinary district court review of federal employee removals. Pet. App. 6a (citing *United States v. Fausto*, 484 U.S. 439, 443-55 (1988) and *Bush v. Lucas*, 462 U.S. 367, 368 (1983)).

The majority held that Petitioners' terminations, which were based solely on 5 U.S.C. § 3328, were nonetheless terminations made for "efficiency of the service" under 5 U.S.C. § 7513(a) and were therefore subject to the review procedures outlined by the CSRA. Pet. App. 7a-9a. Noting the circuit split on the question, the majority held that the CSRA is the exclusive remedy even when the employee brings only constitutional claims for equitable relief. *Id.* at 11a-12a & 12a n.4. Therefore, the district court lacked jurisdiction over Petitioners' claims.

The majority recognized, however, that its conclusion might be different if the CSRA provided no

remedy for Petitioners' constitutional claims. *Id.* at 13a. Though the majority did not dispute that the MSPB was powerless to strike down a statute as unconstitutional, the majority reasoned that the Federal Circuit had the authority to do so on appeal from the MSPB. *Id.* at 14a. Therefore, according to the majority, the merits of Petitioners' constitutional claims could be aired and decided at the Federal Circuit, if not the MSPB.

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

Judge Stahl disagreed that the district court lacked jurisdiction, but would have rejected Petitioners' claims on the merits. *Id.* at 15a. Judge Stahl sided with the

Third, Ninth, and D.C. Circuits and held that because the CSRA does not explicitly state that it prohibits employees from bringing constitutional challenges for equitable relief in district court, it does not preclude such actions. *Id.* at 23a-24a.

Judge Stahl disagreed with the majority that Petitioners' constitutional claims could have been addressed in the Federal Circuit. He explained that the Federal Circuit's jurisdiction has never exceeded the scope of the MSPB's jurisdiction on review of appeals from the MSPB, even when the appellant asserted constitutional claims beyond the MSPB's jurisdiction. *Id.* at 21a-22a (citing *Hubbard v. MSPB*, 319 Fed. App'x 192 (Fed. Cir. 2009) (unpublished)). Judge Stahl noted that in *Brockmann v. Department of the Air Force*, relied on by the majority, the Federal Circuit hypothesized about the possibility of reviewing constitutional claims but did not actually state that it would or could do so. *Id.* (discussing *Brockmann*, 27 F.3d at 546-47). Therefore, Judge Stahl reasoned, the better reading of the Federal Circuit's decisions was that it would not have had jurisdiction, and the CSRA process would not have provided any review of Petitioners' constitutional claims. *Id.* at 22a.

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve the Deep and Enduring Circuit Split on the Question Whether the Civil Service Reform Act Impliedly Precludes Federal District Courts From Granting Equitable Relief on the Constitutional Claims of Federal Employees.

As the First Circuit acknowledged, this case raises a question on which there is a deep and longstanding circuit split: whether the CSRA impliedly precludes federal district courts from exercising jurisdiction over the constitutional claims of federal employees seeking injunctive relief. *Id.* at 12a n.4, 24a-25a. The Third and D.C. Circuits have held that the CSRA does not preclude district court jurisdiction over equitable constitutional claims; the First, Second, and Tenth Circuits have held that it does; and four other circuits have recognized the split.[2]

A. The Circuit Split

1. Two circuits—the Third and D.C. Circuits—have held that the CSRA does not preclude federal

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[2] *See Am. Fed'n of Gov't Emps. Local 1 v. Stone*, 502 F.3d 1027, 1037-39 (9th Cir. 2007) (discussing circuit split); *Dotson v. Griesa*, 398 F.3d 156, 179 (2d Cir. 2005), *cert. denied*, 547 U.S. 1191 (2006) ("The circuits are divided as to whether equitable relief such as reinstatement is available to federal employees notwithstanding their general agreement that the CSRA precludes *Bivens* claims for damages."); *Hardison v. Cohen*, 375 F.3d 1262, 1266 (11th Cir. 2004) ("Several of our sister circuits have differed on whether equitable relief is precluded by the presence of a statutory remedial scheme."); *Paige v. Cisneros*, 91 F.3d 40, 44 (7th Cir. 1996) (discussing circuit split); *Mitchum v. Hurt*, 73 F.3d 30, 34 (3d Cir. 1995) (discussing circuit split); *Bryant v. Cheney*, 924 F.2d 525, 525 (4th Cir. 1991) (discussing "tension among the circuits").

employees from bringing claims for equitable relief for constitutional injuries in federal district court. A third—the Ninth Circuit—has expressly agreed with the Third and D.C. Circuits and has held that, at least in some circumstances, federal employees may bring constitutional claims for equitable relief in district court.

In *Hubbard v. EPA*, 809 F.2d 1 (D.C. Cir. 1986), a detective with the D.C. Police Department alleged that he had been denied a position with the Environmental Protection Agency because of statements he made to the press about an investigation into illegal drug use by members of Congress. Under the CSRA, Hubbard could appeal the decision—including his constitutional claims under the First Amendment—to OPM and file a petition with the Office of Special Counsel. Hubbard brought a *Bivens* action in district court for damages as well as a claim for injunctive relief. *Id.* at 1, 3, 8.

Relying on this Court's decision in *Bush v. Lucas*, the D.C. Circuit held that Hubbard's *Bivens* claim for damages was precluded by the CSRA's comprehensive remedial scheme. In *Bush*, this Court rejected a federal employee's *Bivens* claim for damages because the "comprehensive procedural and substantive provisions" of the CSRA are "special factors counselling hesitation in the absence of affirmative action by Congress." *Bush*, 462 U.S. at 377 (quoting *Carlson v. Green*, 446 U.S. 14, 18-19 (1980)). However, the D.C. Circuit ruled that the CSRA did not preclude Hubbard's claim for equitable relief because to eliminate courts' jurisdiction over equitable relief for constitutional violations, Congress must do so explicitly, and the CSRA did not contain any provision explicitly eliminating federal

court jurisdiction. The D.C. Circuit explained the difference:

> The courts' power to impose equitable remedies against agencies is broader than its power to impose legal remedies against individuals. *Bivens* actions are a recent judicial creation and, as *Carlson v. Green* made clear, comparatively easy for Congress to preempt. The courts' power to enjoin unconstitutional acts by the government, however, is inherent in the Constitution itself, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, L.Ed. 60 (1803). Although Congress may limit this power, *see Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 19 L.Ed. 264 (1869), CSRA did not explicitly limit our jurisdiction to enjoin unconstitutional personnel actions by federal agencies.

Hubbard, 809 F.2d at 11 n.15.

The *Bivens* portion of the *Hubbard* decision was reheard and affirmed en banc in *Spagnola v. Mathis*, 859 F.2d 223 (D.C. Cir. 1988). Although the en banc court did not rehear the question whether the CSRA also precludes constitutional claims for equitable relief, it made clear that its decision with regard to the *Bivens* claim left the equitable claim intact: "[T]ime and again this court has affirmed the right of civil servants to seek equitable relief against their supervisors, and the agency itself, in vindication of their constitutional rights." *Id.* at 229-30.

In *Mitchum v. Hurt*, 73 F.3d at 36, the Third Circuit joined the D.C. Circuit in holding that the CSRA did not preclude district court jurisdiction over

constitutional claims for equitable relief. There, the plaintiffs were three current or former employees of the Pittsburgh Veterans Administration Medical Center who alleged that they were retaliated against for criticizing the level of patient care at the facility. Those employees had varying access to administrative remedies under the CSRA, including appeals to the MSPB and Federal Circuit. The employees sued in district court for declaratory and injunctive relief, alleging that their First Amendment rights had been violated. *Id.* at 31-33.

The Third Circuit followed the rationale of the D.C. Circuit, explaining that "[t]he power of the federal courts to grant equitable relief for constitutional violations has long been established." *Id.* at 35 (citing *Osborn v. Bank of the United States*, 22 U.S. (9 Wheat.) 738, 838-39, 859 (1824) and *Ex Parte Young*, 209 U.S. 123, 156 (1908)). The court reasoned that when Congress legislated, it did so against the backdrop of the judicial power to grant such relief, and courts "should be very hesitant before concluding that Congress has impliedly imposed such a restriction on the authority to award injunctive relief to vindicate constitutional rights." *Id.* Because Congress did not explicitly restrict equitable constitutional relief in the CSRA, the CSRA did not preclude such relief. *Id.* at 36.

In *American Federation of Government Employees Local 1 v. Stone*, the Ninth Circuit addressed the question whether an airport security screener could bring a claim for equitable relief in federal district court based on the violation of his First Amendment rights to engage in union activities. 502 F.3d 1027. Because airport security screeners' employment is

governed solely by the Aviation and Transportation Security Act (ATSA), and screeners are not entitled to any remedies under the CSRA, *Stone* presented a slightly different question from those in *Hubbard* and *Mitchum*. *See id.* at 1030-31, 1035-36. Rather, as the Ninth Circuit explained, *Stone* was very similar to *Webster v. Doe*, 486 U.S. 592, in which this Court held that a discharged CIA employee could bring a constitutional claim for equitable relief in district court because the statute governing the CIA contained no explicit prohibition against bringing constitutional claims. As in *Stone*, the employee in *Webster* was not entitled to any CSRA remedies and served at the unfettered discretion of the agency. Unlike in *Webster*, however, in *Stone*, the Government argued in the district court that the CSRA, as the comprehensive and exclusive remedial scheme for federal employees, precluded the screener from bringing a constitutional claim for equitable relief in district court. The district court agreed, holding that the screener's claim was precluded by the CSRA. *Stone*, 502 F.3d at 1031.

On appeal, the Ninth Circuit stated that whether the CSRA precluded district court review of constitutional claims where the employee has no other remedy was an open question in the circuit. *Id.* at 1034 (quoting *Stanley v. Gonzales*, 476 F.3d 653, 657 (9th Cir. 2007)). In reversing the district court, the Ninth Circuit expressly agreed with the reasoning of *Hubbard* and *Mitchum* and held "that the statutory scheme governing [the screener's] employment does not

clearly state an intention on the part of Congress to preclude judicial review." *Id.* at 1039.[3]

2. In this case, the First Circuit majority joined the Second and Tenth Circuits in holding that the CSRA impliedly precludes district courts from exercising jurisdiction over federal employees' constitutional claims for equitable relief.

In *Lombardi v. Small Business Administration*, a Presidential Management Intern at the Small Business Administration sued in district court alleging that his constitutional rights were violated when he was terminated from his position. 889 F.2d 959, 960 (10th Cir. 1989). After finding that the district court lacked jurisdiction over Lombardi's *Bivens* claim for damages, the Tenth Circuit also rejected Lombardi's argument that the district court had jurisdiction over his claim for injunctive relief, reasoning that claims for damages and equitable relief were equally precluded by the CSRA's comprehensive remedial scheme. *Id.* at 960-62.

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[3] *Stanley* explicitly avoided resolving the question whether the CSRA precludes district court review of equitable constitutional claims when the employee has no other remedy, affirming the district court's dismissal because the plaintiff's constitutional claims were not colorable. 476 F.3d at 655. An earlier Ninth Circuit case, *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991), which denied a plaintiff leave to amend his complaint to add a claim for injunctive relief, is sometimes cited for the proposition that the rule in the Ninth Circuit is that the CSRA *does* preclude district court jurisdiction over constitutional claims. *See, e.g.*, *Mitchum*, 73 F.3d at 34. However, *Stone* both explicitly endorsed the reasoning in *Hubbard* and *Mitchum* and questioned the rationale in *Saul* because *Saul* failed to mention this Court's decision in *Webster*. *Stone*, 502 F.3d at 1037-38.

In *Dotson v. Griesa*, the Second Circuit acknowledged a circuit split on the question whether the CSRA precludes district court jurisdiction over federal employees' constitutional claims for equitable relief. 398 F.3d at 179-80. There, the plaintiff was terminated from his position as a probation officer for the Southern District of New York. He sought monetary and equitable relief on his claim that his constitutional rights to equal protection and due process had been violated. *Id.* at 159. The CSRA does not provide remedies for employees of the judicial branch, but the judiciary has its own administrative appeals process. *Id.* at 160. The Second Circuit held that, like other federal employees, judicial branch employees may not bring *Bivens* actions because of the comprehensive nature of the CSRA. *Id.* at 176. The Second Circuit also found that because Congress had "plainly expressed its intent" that the CSRA be the "comprehensive scheme addressing the employment rights of federal employees," Dotson's claims for equitable relief were also precluded by the CSRA. *Id.* at 182.[4]

3. In addition, the Fourth, Seventh, and Eleventh Circuits have recognized the circuit split, *see supra* note 2, but avoided deciding the question. The Fourth

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[4]The Eighth Circuit has also held that the district court lacks jurisdiction over constitutional claims by federal employees for both monetary and injunctive relief, at least when there are remedies for the constitutional claims available under the CSRA. *Carter v. Kurzejeski*, 706 F.2d 835 (8th Cir. 1983). However, the Eighth Circuit did not address the question of equitable relief separately from the question of damages, and *Carter* predated this Court's decisions in *Bush* and *Webster*. *Id.*

Circuit noted the "weight and difficulty of the issue," but disposed of the case by finding that the plaintiff lacked standing to seek the requested injunctive relief. *Bryant*, 924 F.2d at 528-29. The Seventh and Eleventh Circuits skipped the "difficult" jurisdictional question and determined that the plaintiffs' constitutional claims failed on the merits. *Paige*, 91 F.3d at 44-45; *Hardison*, 375 F.3d at 1268.

Thus, of the circuits to have considered the question whether the CSRA precludes district court jurisdiction of federal employees' constitutional claims for equitable relief, two have held that there is jurisdiction in the district court, three have held that there is not, and three have deliberately left the question open.

B. This Court's Intervention Is Needed to Resolve the Split.

Because of this conflict in the circuits, federal employees who file suit in the Third and D.C. Circuits can be awarded injunctive relief for constitutional violations, while those in the First, Second, and Tenth cannot. For example, if this suit had been brought in the District of Columbia, where Petitioner Tucker lives, rather than in Massachusetts, where Petitioner Elgin lives, Petitioners would, by accident of geography, be able to pursue their claims in district court. This inequitable treatment of federal employees is disruptive to employees and their managers, whose rights and remedies should not turn on the circuit in which they live.

Moreover, this issue will not be resolved without this Court's intervention. The circuits have been split for more than twenty years, and there is no movement

toward a consensus view. A number of circuits are at a loss as to how to resolve the issue and are deciding the merits of the plaintiffs' claims rather than the jurisdictional question—an approach at odds with this Court's holding in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998), that jurisdictional questions be determined first. *See Paige*, 91 F.3d at 44-45; *Hardison*, 375 F.3d at 1268. Even circuits that have come to a conclusion as to whether the CSRA precludes equitable claims in the district have acknowledged that there are colorable arguments on both sides of the issue. *See Dotson*, 398 F.3d at 180; *Mitchum*, 73 F.3d at 34; *see also* Pet. App. 15a (Stahl, J., concurring) (recognizing that the majority reached a "reasoned conclusion").

Several circuits have also discussed the difficulty in navigating this Court's decisions in *Bush* and *Webster* and have called on this Court to clarify those precedents. *See Mitchum*, 73 F.3d at 34 ("Without more specific guidance from the Supreme Court, we do not think that [precluding equitable relief for constitutional claims] is a jump that we should make."). Commenting on the "weight and difficulty of the issue," the Fourth Circuit noted that "[r]esolution of this issue is made more difficult by a distinction the Supreme Court seems to have drawn between *Bivens* actions for damages and equitable claims for injunctive or declaratory relief." *Bryant*, 924 F.2d at 528, 528 n.2.

The confusion caused by the split among the circuits is compounded by the Government's inconsistent position as to whether the federal courts have jurisdiction over constitutional claims for equitable relief. For example, as noted earlier, in this

case, the Government argued that the CSRA precluded federal court jurisdiction, but not until Petitioners succeeded on their Bill of Attainder claim. Pet. App. 41a-42a. In contrast, in *Whitman v. Department of Transportation*, 547 U.S. 512 (2006), the Government conceded that the CSRA's text was not clear enough to foreclose judicial review of an employee's federal constitutional claims. *Stone*, 502 F.3d at 1034 (discussing the Government's position in *Whitman*); *see* Brief for Respondents at 47, *Whitman v. Dep't of Transp.*, 547 U.S. 512 (2006) (No. 04-1131), 2005 WL 2738321 ("The language of the CSRA does not appear to meet the "heightened showing," *Webster*, 486 U.S. at 603, required to foreclose judicial review of constitutional claims."). In *Stone*, the Government argued in the district court that the CSRA precluded district court jurisdiction but reversed its position in the court of appeals. 502 F.3d at 1034.

In short, whether the CSRA precludes federal court jurisdiction of constitutional claims for equitable relief is a difficult question that has divided the circuits and should be answered by this Court.

II. The Federal District Court Has Jurisdiction Over Petitioners' Constitutional Claims for Equitable Relief.

Certiorari is also warranted because the First Circuit's decision was wrong on the merits in several ways. First, Courts should not construe statutes to preclude injunctive relief for constitutional claims absent a clear statement by Congress that it intended to do so. Second, the First Circuit was wrong to conclude that the CSRA's procedures provide an

avenue for judicial review of Petitioners' constitutional claims.

A. The CSRA Does Not Preclude Federal District Court Jurisdiction Over Constitutional Claims for Equitable Relief.

This Court has held that "where Congress intends to preclude judicial review of constitutional claims, its intent to do so must be clear." *Webster*, 486 U.S. at 603 (citing *Johnson v. Robison*, 415 U.S. 361, 373-74 (1974)). It is undisputed that the CSRA does not expressly preclude judicial review of constitutional claims. Therefore, it does not preclude original federal district court jurisdiction over federal employees' constitutional claims for equitable relief, and the First Circuit's holding that the CSRA impliedly precludes constitutional claims is contrary to *Webster*.

The First, Second, and Tenth Circuits, in holding that the CSRA precludes judicial review over equitable constitutional claims, have ignored *Webster* and instead relied on this Court's decisions in *Bush v. Lucas* and *United States v. Fausto*—both of which predate *Webster*—and *Schweiker v. Chilicky*, which was decided within days of *Webster*. *Bush, Fausto*, and *Chilicky*, however, are inapposite. To start, *Fausto* held only that the CSRA's comprehensive scheme precluded non-CSRA *statutory* remedies under the Back Pay Act. 484 U.S. at 455. Thus, *Fausto* has no bearing on whether the CSRA precludes claims for *constitutional* violations, and, as *Webster* holds, for a statute to foreclose constitutional claims, there must be a "heightened showing" that Congress intended to do so. 486 U.S. at 603.

Bush held that an employee's *Bivens* claim for money damages was precluded by the CSRA's comprehensive remedial scheme. 462 U.S. at 390. However, *Bush* does not support the conclusion that claims for equitable relief are also precluded. *See Mitchum*, 73 F.3d at 36. First, *Bivens* actions can be defeated either when Congress has foreclosed them or when there are "special factors counselling hesitation" in extending *Bivens* remedies into new contexts. *Bush*, 462 U.S. at 378. A comprehensive remedial scheme that forecloses particular remedies—such as the availability of money damages—is a special factor counseling hesitation. *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988); *see also Chappell v. Wallace*, 462 U.S. 296, 304 (1983). Thus, *Bush* did not hold that any provision in the CSRA precluded constitutional claims; indeed, *Bush* acknowledged that the CSRA does not expressly deny employees judicial remedies. 462 U.S. at 378. Rather, *Bush* held that the comprehensive scheme was a special factor counseling hesitation in extending the availability of damages claims, a factor that matters in the *Bivens* context, but not in the context of claims for equitable relief. *See id.* at 377-78, 388, 390. *Chilicky* reached the same conclusion with regard to *Bivens* actions in the context of Social Security disability claims, and, like *Bush*, does not control whether equitable remedies are available. *See Chilicky*, 487 U.S. at 414, 425.

Second, this Court has long recognized the distinction between legal relief and equitable relief for constitutional claims, and there is an established tradition of federal courts awarding equitable relief to redress constitutional injuries. *See, e.g.*, *Carlson*, 446

U.S. at 42 (Rehnquist, J., dissenting) ("The broad power of federal courts to grant equitable relief for constitutional violations has long been established."); *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring) (There is a "presumed availability of federal equitable relief against threatened invasions of constitutional interests."); *Bell v. Hood*, 327 U.S. 678, 684 (1946) ("[I]t is established practice for this Court to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution."); *Ex Parte Young*, 209 U.S. 123; *United States v. Lee*, 106 U.S. 196 (1882); *Osborn*, 22 U.S. (9 Wheat.) at 868; *see also Hubbard*, 809 F.2d at 11 n.15 ("The court's power to enjoin unconstitutional acts by the government, however, is inherent in the Constitution itself.") (citing *Marbury*, 5 U.S. (1 Cranch) 137).

Indeed, in *Whitman*, this Court highlighted that the federal courts presumptively have jurisdiction over constitutional claims under 28 U.S.C. § 1331. 547 U.S. at 513-14. *Whitman* explained that the question is not whether the CSRA provides for federal court jurisdiction over constitutional claims, but rather whether it precludes the jurisdiction that the courts already have. *Id.*

Because it is well established that equitable relief is available for constitutional claims in federal court and neither the CSRA nor the *Bush* line of cases precludes that remedy, the federal courts have jurisdiction over federal employees' constitutional claims for equitable relief. The First Circuit's error is another reason to grant review.

B. Petitioners Have No Remedies for Their Constitutional Claims Under the CSRA.

After holding that the CSRA precludes original federal court jurisdiction over Petitioners' constitutional claims for equitable relief, the First Circuit recognized that denying Petitioners *any* remedy for their constitutional injuries would be problematic. Pet. App. 13a. The First Circuit did not discuss this Court's decision in *Webster*, but reflected its sentiment: "a 'serious constitutional question' would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster*, 486 U.S. at 603 (quoting *Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)). Thus, to avoid that serious constitutional dilemma, the First Circuit found that Petitioners' injuries could be remedied under the procedures provided by the CSRA.

First, the First Circuit decided that the MSPB did have jurisdiction to review Petitioners' terminations even though the MSPB has consistently held, including in Elgin's case, that it lacks jurisdiction to review 5 U.S.C. § 3328 terminations of men who failed to register with the Selective Service. Pet. App. 9a; *see* cases cited *infra* note 5. The MSPB's jurisdiction is not plenary; its jurisdiction is limited to what is conferred by statute, rule, or regulation. *Maddox v. Merit Sys. Prot. Bd.*, 759 F.2d 9, 10 (Fed. Cir. 1985). The First Circuit reasoned that the CSRA provided for MSPB jurisdiction over Petitioners' appeals in 5 U.S.C. § 7513(a) and (d), which state that those adverse actions, such as terminations, taken to "promote the

efficiency of the service" may be appealed to the MSPB. Pet. App. 9a.

When Petitioner Elgin appealed his termination under § 3328 to the MSPB, the Government argued that the MSPB did *not* have jurisdiction to review his removal, and the MSPB agreed, dismissing Elgin's appeal. *Id.* at 100a-01a. The MSPB reasoned that once OPM makes its final, unreviewable determination that an individual is ineligible for federal employment under § 3328, § 3328 is an absolute statutory bar to employment, and the MSPB lacks jurisdiction to review terminations made under absolute statutory bars. *Id.*; *see* 5 C.F.R. § 300.706(c) (OPM's decision is administratively unreviewable). Because those employees were never eligible for employment in the first place, the MSPB maintained, they are not afforded the procedural protections of the CSRA, including appeal to the MSPB. Pet. App. 98a (citing *Travaglini v. Dep't of Ed.*, 18 M.S.P.R. 127, 137-38 (M.S.P.B. 1983), *aff'd as modified*, 23 M.S.P.R. 417, 419 (M.S.P.B. 1984)); *see also Daneshpayeh v. Dep't of the Air Force*, No. 93-3476, 1994 WL 18964 (Fed. Cir. Jan. 26, 1994) (unpublished) (affirming MSPB dismissal for lack of jurisdiction when there was an absolute statutory bar to employee's federal employment). Indeed, under this reasoning, and at the persistent urging of the Government, the MSPB has consistently and uniformly dismissed appeals from § 3328 removals for lack of jurisdiction.[5]

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[5] *E.g.*, *Charner v. OPM*, No. PH-3443-08-0601-I-2, 2009 M.S.P.B. LEXIS 1296, at *10-*11 (M.S.P.B. Mar. 6, 2009) (continued...)

After Elgin's appeal to the MSPB was dismissed, Elgin filed this suit in district court where, in its motion for reconsideration, the Government reversed its position, arguing that the MSPB *did* have jurisdiction to review Petitioners' terminations under its "efficiency of the service" theory. Pet. App. 41a-42a, 46a. The district court rejected the Government's argument, reasoning that nothing about Petitioners' terminations indicated they were for the "efficiency of the service," and, in addition, OPM's regulations state that after it has made its final determination that an employee's failure to register was knowing and willful, "[t]here is no further right to administrative review." 5 C.F.R. § 300.706(c); Pet App. 46a-47a. As noted above, however, the First Circuit reversed the district court and held that the MSPB does have jurisdiction to review appeals of men terminated for failing to register with the Selective Service.

As a practical matter, it is irrelevant to the MSPB what the First Circuit has said about its jurisdiction. The Federal Circuit, not the First Circuit, has appellate review over the MSPB. 28 U.S.C. § 1295(a)(9). Thus, the MSPB will continue to dismiss

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[5](...continued)
(unpublished); *Whitfield v. Dep't of the Interior*, No. DC-0752-09-0094-I-1, 2008 M.S.P.B. LEXIS 6910, at *1, *4, *7 (M.S.P.B. Dec. 23, 2008) (unpublished) (characterizing employee's claims of MSPB jurisdiction as frivolous); *Rivera v. Dep't of Veterans Affairs*, No. NY-0752-08-0137-I-1, 2008 M.S.P.B. LEXIS 2056, at *7 (M.S.P.B. Mar. 31, 2008) (unpublished); *Clarke v. OPM*, No. DA-3443-07-0538-I-1, 2007 M.S.P.B. LEXIS 7101, at *1 n.1, *7 (M.S.P.B. Dec. 17, 2007) (unpublished) (characterizing employee's claims of MSPB jurisdiction as frivolous).

appeals of § 3328 terminations, leaving former employees like Petitioners caught in a catch-22: The MSPB will dismiss their administrative appeals for lack of MSPB jurisdiction, and the district courts in the First Circuit (and in the Second and Tenth Circuits as well) will dismiss their judicial complaints for lack of district court jurisdiction, in part on the premise that their claims ought to have been brought before the MSPB. Petitioners do not believe that this Court would need to reach the issue whether the MSPB has jurisdiction to hear constitutional claims because the district courts have jurisdiction to hear those claims in any event. But the continuing controversy over the MSPB's jurisdiction and the Government's inconsistent position on the issue demonstrates that this Court's guidance is needed to ensure that federal employees' constitutional claims can be addressed in some forum.

Though the First Circuit held that the MSPB did have jurisdiction over Petitioners' constitutional claims, it acknowledged that the Petitioners' specific constitutional claims could not be considered by the MSPB because the MSPB lacks the power to declare acts of Congress, such as § 3328, unconstitutional. Pet. App. 13a, 101a; *see also Johnson*, 415 U.S. at 368; *Brooks v. Office of Pers. Mgmt.*, 59 M.S.P.R. 207, 215 (M.S.P.B. 1993). However, the First Circuit held that even if the MSPB could not consider Petitioners' requests for relief, the Federal Circuit could do so on appeal from the MSPB. Pet. App. 13a. The Federal Circuit, though, has consistently held that the scope of its jurisdiction on appeal from the MSPB is coextensive with the MSPB's, and has never addressed issues beyond the limit of what the MSPB could review. *See*

Perez v. Merit Sys. Prot. Bd., 931 F.2d 853, 855 (Fed. Cir. 1991) ("Since the MSPB had no jurisdiction, the merits of Perez's challenge . . . were not before the MSPB for decision; nor are they before us."); *Manning v. Merit Sys. Prot. Bd.*, 742 F.2d 1424, 1427 (Fed. Cir. 1984) ("If the MSPB does not have jurisdiction, neither do we . . . ."); *Rosano v. Dep't of the Navy*, 699 F.2d 1315, 1318 (Fed. Cir. 1983) ("[T]he scope of the subject matter jurisdiction of this court is identical to the scope of the jurisdiction of the board.").

The First Circuit predicted, nonetheless, that the Federal Circuit would review constitutional claims that are unreviewable by the MSPB because the Federal Circuit had stated that if otherwise unreviewable colorable constitutional claims were before it, it would have to review them under *Webster*. Pet. App. 14a. The First Circuit, however, overstated the Federal Circuit's position. In *Brockmann v. Department of the Air Force*, a divided panel of the Federal Circuit held that the employee's constitutional claims were not colorable, but did not actually hold whether it would be obligated to review the employee's constitutional claims under *Webster* were they colorable. 27 F.3d at 546-47. *Riggin v. Office of Senate Fair Employment Practices*, also cited by the First Circuit, did consider the constitutional claims of an employee that had not been heard in the administrative board below, but the Federal Circuit had first held that, under the statutory scheme at issue there, the board should have reviewed the claim. 61 F.2d at 1570. Thus, neither case squarely decided the issue.

Indeed, the First Circuit's assumption that the Federal Circuit would address an issue on appeal that

had not been heard—and could not have been heard—in the tribunal below is contrary to general principles of appellate jurisdiction. As the dissenting judge in *Brockmann* explained, reviewing an issue on appeal for the first time—including the issues of whether an employee's constitutional claims are colorable—is not only jurisdictionally precluded, but ill advised because the reviewing court lacks the benefit of a developed record. 27 F.3d at 550 (Newman, J., dissenting).

In short, the First Circuit concluded that even if the district court lacked jurisdiction over Petitioners' constitutional claims, those claims could be aired in the MSPB and the Federal Circuit, contrary to those bodies' own practices and rulings regarding their jurisdiction, in effect, leaving no forum for Petitioners' claims. The First Circuit's acrobatics highlight why this Court should resolve the circuit split and hold that district courts have jurisdiction over federal employees' constitutional claims for equitable relief.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 11-45

IN THE
Supreme Court of the United States

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

v.

UNITED STATES DEPARTMENT OF THE TREASURY, ET AL.,
Respondents.

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

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY

The government argues that the petition should be denied because the First Circuit's holding that federal district courts do not have jurisdiction over federal employees' equitable constitutional claims is correct and is compelled by this Court's precedent. The government further contends that the circuit split over this issue is shallow and unimportant and that Petitioners' claims are insubstantial. None of these assertions is accurate or undermines the need for review of the question presented in the petition.

I. There Is a Genuine Circuit Split, the First Circuit's Holding Was Incorrect, and Similar Cases Are Frequently Litigated.

A. The circuit courts are divided over whether the Civil Service Reform Act (CSRA) precludes the district courts' jurisdiction over federal employees' equitable constitutional claims. The D.C. and Third Circuits have held that the CSRA does not preclude district court jurisdiction over federal employees' constitutional claims for equitable relief regardless of whether the CSRA provides a remedy for the employees' constitutional claims. *Hubbard v. EPA*, 809 F.2d 1, 11 (D.C. Cir. 1986); *Mitchum v. Hurt*, 73 F.3d 30, 35 (3d Cir. 1995). On the other hand, the First Circuit here, and the Second and Tenth Circuits in *Dotson v. Griesa,* 398 F.3d 156, 179 (2d Cir. 2005), and *Lombardi v. Small Business Administration*, 889 F.2d 959, 962 (10th Cir. 1989), have held that the CSRA impliedly precludes district court jurisdiction over those same types of claims.

Seeking to minimize the circuit split, the government argues the D.C. Circuit "generally requires

exhaustion of administrative remedies as a prerequisite to bringing suit" for constitutional claims in equity for which relief is only "sometimes available." Opp. 14 (citing *Steadman v. Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (D.C. Cir. 1992)). This characterization of the D.C. Circuit's stance is incorrect. *Steadman* involved former government employees whose union had failed to timely invoke the arbitration process under their collective bargaining agreement and instead brought a due process claim challenging their termination in the district court. *Steadman*, 918 F.2d at 965. The D.C. Circuit held that "when a constitutional claim is intertwined with a statutory one, and congress has provided machinery for the resolution of the latter, a plaintiff must first pursue the administrative machinery," but when "the constitutional claim raises issues totally unrelated to the CSRA procedures," direct action in the district court is available. *Id.* at 967. This case falls into the second category; Petitioners' facial constitutional challenge to 5 U.S.C § 3328 is not based on statutory rights conferred by the CSRA, but on Petitioners' rights under the Constitution. And under the D.C. Circuit's decision in *Hubbard*, 809 F.3d at 11, which the government's opposition fails even to cite, district court jurisdiction is available for Petitioners' equitable constitutional claims. The First Circuit's holding below is thus directly at odds with *Hubbard*, which the First Circuit acknowledged. *See* Pet. App. 12a n.4.

The government also fails to explain away the conflict with the Third Circuit's decision in *Mitchum v. Hurt*. *See* Opp. 14. The government characterizes

Mitchum as holding that only "in some circumstances" does the CSRA "not prevent a covered federal employee from seeking equitable relief for a constitutional employment claim." *Id.* at 14. However, the Third Circuit in *Mitchum* unequivocally held that the CSRA does not preclude district court jurisdiction over equitable constitutional claims even where the CSRA provided the employees a remedy. *Mitchum*, 73 F.3d at 35-36. The Third Circuit acknowledged that other circuits had come to a different conclusion, but it held that "on balance . . . the District of Columbia has taken a better course" because "[t]he power of the federal courts to grant equitable relief for constitutional violations has long been established" and "we should be very hesitant before concluding that Congress has impliedly imposed such a restriction on the authority to award injunctive relief to vindicate constitutional rights." *Id.* at 35 (citing *Hubbard*, 809 F.2d at 11). Thus, *Mitchum* is also contrary to the First Circuit's decision in this case, which deepened a longstanding circuit split acknowledged by seven circuits. *See* Pet. 14 & 14 n.2.

B. The district court has jurisdiction over Petitioners' claims because it has jurisdiction over "all civil actions arising under the Constitution," 28 U.S.C. § 1331, and Congress did not expressly remove that jurisdiction in the CSRA. *See Whitman v. Dep't of Transp.*, 547 U.S. 512, 514 (2006) (per curiam). The First Circuit majority here acknowledged that the CSRA does not expressly preclude jurisdiction over Petitioners' constitutional claims, and the government does not argue otherwise. Pet. App. 6a.

There is a "presumed availability of federal equitable relief against threatened invasions of constitutional interests." *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 404 (1971) (Harlan, J., concurring). Thus, as *Whitman* held, the proper question "is not whether [the CSRA] confers jurisdiction, but whether [the CSRA] removes the jurisdiction given to the federal courts." 547 U.S. at 514. Congress can eliminate district court jurisdiction under 28 U.S.C. § 1331, but it chose not do so in the CSRA. Indeed, in other statutes, Congress has explicitly stated that litigants may not bring actions in district court. *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 23-24 (2000) ("No action against the United States, the [Secretary], or any officer or employee thereof shall be brought under [28 U.S.C. §] 1331."); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (jurisdiction of the Federal Mine Safety and Health Review Commission "shall be exclusive and its judgment and decree shall be final"). Thus, because the CSRA does not explicitly remove the district court's jurisdiction, the district court had jurisdiction here.

This Court has never addressed whether the CSRA precludes district court jurisdiction over equitable constitutional claims. As the government notes, this Court has held that the comprehensive nature of the CSRA is a factor counseling hesitation against extending *Bivens* damages remedies to federal employees seeking relief outside the CSRA. *Bush v. Lucas*, 462 U.S. 367, 380 (1983). However, the ability of federal courts to grant equitable relief to remedy constitutional violations is "inherent in the

Constitution itself" while monetary relief for constitutional injuries is a judicially created remedy. *Hubbard*, 809 F.2d at 11; *see Bivens*, 403 U.S. at 396; Pet. 25-26.

The government relies on *United States v. Fausto*, 484 U.S. 439 (1988), and *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527 (1989). To be sure, those cases held that the CSRA precluded statutory claims in the district courts. *Fausto*, 484 U.S. at 455 (CSRA precludes district court jurisdiction over statutory monetary claims under the Back Pay Act); *Karahalios*, 489 U.S. at 536 (no district court cause of action for enforcement of rights granted by the CSRA, in part in light of the CSRA's remedial scheme). Jurisdiction over statutory claims must be granted by Congress and "[t]he classic judicial task of reconciling many laws enacted over time . . . necessarily assumes that the implications of a statute may be altered by the implications of a later statute," which can therefore eliminate district court jurisdiction. *Fausto*, 484 U.S. at 453. However, jurisdiction over constitutional claims is "inherent in the constitution" and must be expressly eliminated by Congress (assuming that they can be eliminated at all). *Hubbard*, 809 F.2d at 11. *See also Fausto*, 484 U.S. at 455 (Blackmun, J., concurring) (citing *Davis v. Passman*, 442 U.S. 228 (1979); *Carlson v. Green*, 446 U.S. 14 (1980)).

The government suggests that the Court need not grant review because the question presented has already been resolved in cases such as *Bush*, *Fausto*, and *Karahalios*. Opp. 8-9. That is not so. As noted above, those cases did not concern whether and in what circumstances a federal statute may impliedly

divest the district courts of jurisdiction over constitutional claims seeking equitable relief. Indeed, the circuit split on the question whether the CSRA precludes district court jurisdiction over employees' equitable constitutional claims emerged *after* this Court decided both *Bush* and *Fausto*: *Hubbard* and *Mitchum* considered *Bush*, and *Mitchum* addressed *Fausto*. *Hubbard*, 809 F.2d at 1; *Mitchum*, 73 F.3d at 34. Neither decision considered this Court's prior rulings to have resolved whether the CSRA precludes equitable constitutional claims. Moreover, even the Second Circuit and the First Circuit below, which both decided the question favorably to the government, did not view the issue as preordained by this Court's decisions in *Bush* and *Fausto*. *Dotson*, 398 F.3d at 180; Pet. App. 11a-12a.

C. The government asserts that review should be denied because the question whether the CSRA precludes district court jurisdiction over equitable constitutional claims is "of limited practical importance" and "infrequently litigated." Opp. 15. The government states that it is aware of only one case since *Mitchum* in the Third Circuit "in which a federal employee has sought equitable relief in the district court . . . based on an allegedly unconstitutional employment-related action." *Id.* at 15 (citing *Rhodes v. Holt*, 2007 WL 1704653 (M.D. Pa. June 12, 2007)). However, in at least four other cases since *Mitchum*, a federal employee has brought an equitable constitutional claim against his or her employer in a district court in the Third Circuit.[1]

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[1] *Yu v. U.S. Dep't of Veterans Affairs*, 2011 U.S. Dist. LEXIS 71995 (W.D. Pa. July 5, 2011); *Reynolds v. Fed. Bureau of Prisons*,

In sum, the division among the circuit courts is deep and longstanding, and the question presented arises often. This Court's review is needed.

II. The CSRA Provides No Remedy for Petitioners' Constitutional Claims.

The government argues that the normal concerns over reading a federal statute to impliedly preclude district court jurisdiction over constitutional claims for equitable relief, *see Webster v. Doe*, 486 U.S. 592 (1988), are present only when the statutory scheme provides no constitutional remedy. Opp. 10. Because a remedy for Petitioners' claims exists under the CSRA, the government argues, there is no district court jurisdiction here. *Id.*

We disagree with the government's premise. As explained above, the district courts are open to constitutional claims unless Congress explicitly divests them of jurisdiction. But even taken on its own terms, the government's argument is incorrect because there is no remedy for Petitioners' constitutional claims under the CSRA.

The CSRA sends federal employees' claims to the Merit Systems Protection Board (MSPB), which lacks the power to strike down acts of Congress and lacks jurisdiction to review employees' terminations when there is an absolute statutory bar against the individual's employment, as there is here. *See Brooks v. Office of Pers. Mgmt.*, 59 M.S.P.R. 207, 215 n.7 (M.S.P.B. 1993); *Travaglini v. Dep't of Ed.*, 18

2010 U.S. Dist. LEXIS 19090 (E.D. Pa. Mar. 2, 2010); *Harold v. Barnhart*, 450 F. Supp. 2d. 544 (E.D. Pa. 2006); *Lei v. Brown*, 1997 U.S. Dist. LEXIS 15725 (E.D. Pa. Oct. 8, 1997).

M.S.P.R. 127, 137-38 (M.S.P.B. 1983), *aff'd as modified*, 23 M.S.P.R. 417, 419 (M.S.P.B. 1984)). Indeed, the government regularly asserts that the MSPB lacks jurisdiction over employees' claims when there is an absolute statutory bar to their employment and consistently obtains summary judgment in the MSPB on that basis. *See, e.g.*, *Charner v. OPM*, 2009 M.S.P.B. LEXIS 1296 (M.S.P.B. Mar. 6, 2009); *Rivera v. Dep't of Veterans Affairs*, 2008 M.S.P.B. LEXIS 2056 (M.S.P.B. Mar. 31, 2008). Here, the First Circuit acknowledged that the MSPB cannot strike down a statute, and the government does not argue otherwise. Pet. App. 13a.

Instead, the government argues that the Federal Circuit could have exercised appellate review over Petitioners' claims despite the lack of MSPB jurisdiction and the lack of a factual record. *Id.* at 10. However, the Federal Circuit has held that its jurisdiction on appeals from the MSPB extends no further than the jurisdiction of the MSPB itself. *See Perez v. Merit Sys. Prot. Bd.*, 931 F.2d 853, 855 (Fed. Cir. 1991) ("Since the MSPB had no jurisdiction, the merits . . . were not before the MSPB for decision; nor are they before us."); *Rosano v. Dep't of the Navy*, 699 F.2d 1315, 1318 (Fed. Cir. 1983). For example, in *Rosano*, the Federal Circuit refused to hear the merits of a constitutional free-exercise-of-religion claim because the MSPB lacked jurisdiction, holding that "the scope of the subject matter jurisdiction of [the Federal Circuit] is identical to the scope of the jurisdiction of the [MSPB]." *Id.*

The government notes that the Federal Circuit made an exception to this practice in *Briggs v. Merit*

Systems Protection Board, 331 F.3d 1307 (Fed. Cir. 2003). Opp. 13. *Briggs* held that "lack of a need to develop a factual record before adjudication" is a factor indicating that a legal issue may be justiciable for the first time on appeal. 331 F.3d at 1313. Petitioners' case on the merits here requires developing an extensive factual record on the changing role of women in the military to support its challenge to the continued viability of *Rostker v. Goldberg*, 453 U.S. 57 (1981) (holding that limiting the Selective Service's registration requirement to men did not violate the due process clause of the Fifth Amendment). Accordingly, even under *Briggs*'s rationale, the Federal Circuit would have lacked jurisdiction to review Petitioners' claims.

The government claims that this Court has held that a court of appeals can adjudicate a constitutional claim on appeal from an administrative agency, even if the agency could not have considered it. Opp. 11. However, in both cases on which the government relies, *Thunder Basin*, 510 U.S. at 215, and *Shalala*, 529 U.S. at 23-24, the statute giving jurisdiction to the administrative body and appellate court expressly precluded review in the district court. When Congress expressly precludes judicial review in the district courts, there must be judicial review on appeal from an administrative tribunal to avoid the "serious constitutional question" that would arise if Congress completely precluded judicial review of constitutional claims. *Webster*, 486 U.S. at 603. As discussed above, it is undisputed here that the CSRA does not explicitly preclude district court jurisdiction, rendering *Thunder Basin* and *Shalala* inapposite.

III. Petitioners' Constitutional Claims Are Substantial.

Contrary to the government's assertion, Petitioners' claims on the merits are substantial. As for their first claim, Petitioners argue, and the district court acknowledged in its initial summary judgment decision, *see* Pet. App. 86a, that 5 U.S.C. § 3328 meets the three-part test for determining whether an act of Congress is a Bill of Attainder. *See Selective Serv. Sys. v. Minn. Pub. Interest Research Group,* 468 U.S. 841 (1984). For a statute to be a Bill of Attainder, a specific individual or group must be singled out or identified by "immutable" conduct, the legislature must inflict punishment of a type historically imposed by Bills of Attainder, and the punishment must be imposed without a judicial trial. *Id.*

First, 5 U.S.C. § 3328 identifies a group by its conduct: men who did not register with the selective service. If the Office of Personnel Management first chooses to enforce the statute after their 26th birthday, men cannot change their conduct to avoid the punishments imposed by the statute. The statute at issue in *Selective Service System v. Minnesota PIRG* barred federal student loans for men who failed to register with the Selective Service. 468 U.S. at 844. That statute was held not to be a Bill of Attainder because it allowed a grace period for student loan applicants who had been notified that they had not registered with the Selective Service to then register and qualify for aid. *Id.* at 864. The statute at issue here, however, contains no such grace period, and the punishment is based on past, immutable conduct. 5 U.S.C. § 3328. Second, § 3328 inflicts punishment that

was historically imposed by Bills of Attainder: denial of employment. *See* 468 U.S. at 852. Finally, the punishment is imposed without a judicial trial. *See id.* at 847.

Petitioners' equal protection claim raises a substantial challenge to the continued viability of this Court's decision in *Rostker v. Goldberg*, 453 U.S. 57. That decision was premised on the then-"current thinking as to the place of women in the Armed Services" and the limits on the positions women could fill in the military. *Id.* at 71. Petitioners argue that *Rostker* should be revisited because the role of women in the military, society's perception of women in the military, and the nature of military needs have changed drastically in the thirty years since *Rostker*. The force of *stare decisis* is at its low point when the underlying facts are so changed that they can no longer justify the decision. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 855 (1992). Petitioners' equal protection claim presents such a case.

Since *Rostker*, nearly all positions in the military have become open to women. The statutory restrictions on women serving on combat ships and in combat aircraft cited by *Rostker* as justification for excluding women from Selective Service requirements have ended. 453 U.S. at 76 (citing 10 U.S.C. § 6015 (repealed 1993); 10 U.S.C. § 8549 (repealed 1991)). Unlike in 1981, women can now serve in 93 percent of all Army occupations. *See id.* at 81; Women in the U.S. Army: Today's Women Soldiers, http://www.army.mil/women/today.html (last visited Sept. 20, 2011). The percentage of the Army made up of women increased from 9.8 percent in 1983 to 15.5 percent in 2009. *Id.*

Having explained the substantiality of Petitioners' claims on the merits, it nevertheless bears emphasis that the merits are two steps removed from the issue now before the Court at the certiorari stage: whether to resolve a longstanding circuit split on an important jurisdictional question. If the Court grants review, it will decide that important jurisdictional question. And if the Court rules that the district court had jurisdiction over Petitioners' claims, it will remand to the First Circuit for a decision on those claims. For now, however, the government's diversionary foray into the merits puts the cart well before the horse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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