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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September 2011

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**



**OTHER SOURCE**

## 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 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

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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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