No. 14-1189

IN THE
Supreme Court of the United States

TERRYL J. SCHWALIER, Brig. Gen., USAF, Ret.,
Petitioner,

v.

ASHTON CARTER, Secretary of Defense and
DEBORAH LEE JAMES, Secretary of the Air Force,
Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Federal Circuit

REPLY BRIEF OF PETITIONER

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The Government's brief in opposition amounts to an extended plea to allow the Federal Circuit to continue to treat core provisions of DOPMA as a nullity. The Government does not dispute that its interpretation makes § 624(d) of DOPMA meaningless. Instead, like the Federal Circuit, it justifies reading the provision out of existence to satisfy its dubious interpretation of the Appointments Clause.

This Court, not the Federal Circuit, should decide whether DOPMA means what it says, and whether its provisions are constitutional. Both of those questions should be answered affirmatively because nothing in DOPMA offends the Appointments Clause. The Government's rhetoric aside, DOPMA does not "automatically appoint" officers over the President's objection. Rather, the only officers appointed are those who are nominated by the President, confirmed by the Senate, and then promoted from the President's approved promotion list on the date determined by the President's delegee in the relevant military branch.

This case is worthy of the Court's review not just because it concerns the constitutionality of a federal statute, but because it is of substantial importance to the Nation's military officers. *See* Amicus Br. of Air Force Association and Former Air Force Secretaries at 1-2, 5-6. After nearly 30 years of service, and after having been wrongly blamed by the then-current administration, Petitioner was found to have been promoted to major general not once, but twice, by the

relevant Air Force review board. This Court should determine whether the Federal Circuit was correct to conclude that DOPMA and the Constitution require a different outcome.

I. The Government's "Promotion Date" Argument Is Forfeited And Meritless.

The Government's lead argument for denying certiorari is a purported factual dispute over Petitioner's promotion date. The Government maintains that Petitioner's promotion date was actually February 1, 1997 rather than January 1, 1997, and that Petitioner's removal from the promotion list therefore occurred within six months of his promotion date. It makes this argument despite the express holding of the Air Force Board for the Correction of Military Records ("AFBCMR") that Petitioner's promotion date was January 1, 1997. Pet. App. 28a, 51a-52a. The Government's argument fails.

As the Government acknowledges, the Federal Circuit did not rule on its factual argument. Opp. 11. Instead, it held that regardless of Petitioner's promotion date, "*Dysart* controls Mr. Schwalier's case." Pet. App. 9a-10a. Thus, the Government's factual argument is not a "vehicle problem" that would prevent the Court from reaching the question presented: the question of whether *Dysart* was correct is squarely presented for review.

The reason the Federal Circuit did not address the Government's factual argument is that the Government did not raise it. In the District Court, the Government

did not affirmatively argue that Petitioner's promotion date was February 1; instead it argued that there was insufficient evidence to establish whether the promotion date was January 1 or February 1, and that Petitioner's suit should be dismissed under the doctrine of laches. *Schwalier v. Panetta*, No. 1:11-cv-00126-RMC (D.D.C.), Motion to Dismiss at 36-38, Dkt. 9. The District Court declined to address this argument, instead dismissing Petitioner's complaint based on *Dysart*. *Schwalier v. Panetta*, 839 F. Supp. 2d 75, 77 n.1 (D.D.C. 2012).

Then, in the Federal Circuit, the Government abandoned this issue. The words "February 1" appear nowhere in its brief. Instead the Government accepted Petitioner's framing that there *was* a six-month delay, and relied exclusively on *Dysart*. *E.g.* CAF Gov't Br. 23 ("[T]he expiration of the six-month delay did not serve to cut off the President's authority and result in General Schwalier's automatic promotion"). Thus, the Government made the tactical decision to abandon its factual argument in the Federal Circuit, so that it could obtain a broader legal ruling that would apply regardless of the promotion date. Having successfully obtained that broader legal ruling, the Government seeks to avoid review of that ruling by relying on the very factual argument that it abandoned below.

The Court should not countenance such tactics. Instead the Court should grant certiorari, answer the question presented, and remand for the Federal Circuit to consider the Government's alternative argument (if it excuses the Government's forfeiture). This Court

routinely remands cases for lower courts to consider alternative arguments, *e.g.*, *Alabama Dep't of Revenue v. CSX Transp., Inc.*, 135 S. Ct. 1136, 1144 (2015), and it should do the same here.

Even if it were preserved, the Government's factual argument would fail on the merits. The critical point – inexplicably ignored by the Government – is that the AFBCMR found, and the Secretary, acting through his delegee, concurred, that Petitioner's promotion date was January 1, 1997. Pet. App. 16a-17a, 28a, 35a, 51a-52a. The AFBCMR is specifically charged to make such determinations, *see* 10 U.S.C. § 1552(a)(1); 32 C.F.R. §§ 865.0-865.8, and the Federal Circuit has repeatedly held at the Government's urging that the AFBCMR's decisions are subject to a deferential, substantial-evidence standard of review. *E.g.*, *Melendez Camilo v. United States*, 642 F.3d 1040, 1044 (Fed. Cir. 2011). The Government is thus now in the perhaps unprecedented position of arguing that the factual findings of its own agency are not supported by substantial evidence.

The Government's contention fails. The AFBCMR reasonably concluded that the record "establish[ed] clearly that the applicant's effective date of promotion to major general was 1 Jan 97." Pet. App. 45a, 51a. The Government's assertion that "undisputed record evidence establishes" that the promotion date was delayed until February 1, 1997, Opp. 11, was rejected by the AFBCMR, which reasonably concluded that any purported delay in the promotion date until February 1, 1997 was never approved by the Secretary of the Air

Force and was hence invalid. Pet. App. 46a-47a, 51a. At any rate, the Government's factual arguments are entirely irrelevant to both the Federal Circuit's disposition and the questions before this Court.[1]

II. *Dysart*'s Statutory Analysis Is Wrong.

The Petition argued that *Dysart*'s statutory analysis must be wrong because it renders 10 U.S.C. § 624(d) completely meaningless. Pet. 21-25. Remarkably, the Government does not dispute this point. It ascribes no function to § 624(d) whatsoever and apparently concedes that § 624(d) should effectively be invalidated.

The Government's sole effort to address § 624(d) is its citation of authority holding that "if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." Opp. 13 (quoting *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003)). To the extent the

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[1] In its "Statement" section (but not in its "Argument" section), the Government observes that Petitioner argued to the Federal Circuit that he was attempting to distinguish, rather than overrule, *Dysart*. Opp. 7. The Government does not contend that this presents a vehicle problem, and it clearly is not, given that Petitioner explicitly argued that he was entitled to his promotion under DOPMA, and the Federal Circuit explicitly applied *Dysart*. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995). In any event, given that *Dysart* is binding precedent in the Federal Circuit, it is hardly surprising that Petitioner would attempt to distinguish *Dysart*.

Government thinks that this authority can justify wiping § 624(d) out of the U.S. Code, it is wrong.

First, this case has nothing to do with "noncompliance with statutory timing provisions." Petitioner does not contend that any government official broke the law by failing to take action within six months; he alleges that he became a major general after six months. The remedy he seeks is not a "coercive sanction," but rather a recognition that his promotion occurred.

Second, in the *Barnhart* line of cases, the statutory timing provisions were *not* superfluous. To the contrary, they imposed mandatory legal deadlines on government officials. The sole question was whether the official's failure to comply with those mandatory deadlines deprived him of the subsequent power to act. *Barnhart v. United States*, 537 U.S. 149, 157 (2003) (statutory deadline was "of course" "'mandatory,' 'imperative,' [and] a 'deadline,'" and the sole question was "what the consequence of tardiness should be"). Those cases hold that the failure to meet a mandatory deadline should instead carry a different consequence: possible "disciplinary measures" when government officials "fail to discharge their statutory duties." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 64-65 (1993).

Here, by contrast, the Government argues that § 624(d) does *not* impose any statutory duties on anyone. It instead doubles down on *Dysart*'s holding that the President is not "bound" to make

appointments and must have "complete discretion in choosing whether or not to appoint an officer." Opp. 14, 16 (quotation marks omitted). If that is true, then the carefully delineated provisions of § 624(d) constraining that discretion are meaningless. Pet. 21.

Remarkably, the Government does not even attempt to respond to Petitioner's arguments that §§ 624(a) and (d) are written in mandatory terms. Pet. 24-25. Nor does the Government try to rehabilitate the Federal Circuit's effort to warp these provisions into discretionary suggestions. *Id.* The Government ignores these arguments entirely.

The Government contends that Petitioner's interpretation of § 624(d) "reads Section 624(c) out of the statute." Opp. 12. That is incorrect. As the Petition explained (and the Government ignores), § 624(c) serves "to identify the classes of officers who do and do not require Senate confirmation." Pet. 23. The Government argues that under Petitioner's reading, an officer could be appointed without Senate confirmation, Opp. 14-15 & n.3, but that is precisely the result that § 624(c) prevents. Thus, under Petitioner's reading, all portions of DOPMA are given effect.

The Government also apparently concedes that under its reading, § 629(a) is superfluous as well. According to the Government, § 629(a) simply "confirm[s]" that the President does not "actually" have to appoint officers post-Senate confirmation. Opp. 14. But is entirely unnecessary if § 624(c) itself requires a distinct, post-confirmation act of presidential

appointment. By contrast, § 629(a) makes perfect sense under Petitioner's interpretation. Pet. 22.

Under ordinary principles of statutory construction, *Dysart* makes no sense. The Government attempts to justify *Dysart* based on the constitutional avoidance canon, but "that canon of construction does not give [a court] the prerogative to ignore the legislative will in order to avoid constitutional adjudication." *Stern v. Marshall*, 131 S. Ct. 2594, 2605 (2011) (internal quotation marks omitted). A court may not "rewrite[e]" a statute under the constitutional avoidance doctrine, *id.* (quotation marks omitted; bracket in original). By effectively invalidating § 624(d), the Federal Circuit did exactly that. In any event, as explained below, the Federal Circuit's view that DOPMA is unconstitutional as written was incorrect.

III. *Dysart*'s Constitutional Holding is Wrong.

The Government's constitutional argument consists of the following conclusory assertion: "The Constitution does not give Congress the power to provide for automatic appointment." Opp. 17. That attacks a straw man. Of course the Appointments Clause requires the President to make an appointment. The question in this case is, *what* is required for an "appointment" to occur?

As explained in Petitioner's brief, DOPMA does *not* provide for "automatic appointments." It explicitly requires the President to approve the promotion list, requires the President's delegee to set the promotion

date, and does not interfere with the President's unilateral power to remove an officer from the promotion list at any point prior to the appointment. As the Petition explains, this structure is amply sufficient to satisfy the constitutional requirement of presidential appointment. Pet. 25-27. The Government ignores these arguments altogether; it simply asserts that the Constitution does not permit "automatic appointments."

Strikingly, the Government offers no theory whatsoever of *what* must occur to meet the constitutional appointment requirement. The Government is careful not to argue that a letter or certificate of appointment is constitutionally required; it makes only the tentative statement that appointment occurs through such a letter or certificate "*[i]n many circumstances*." Opp. 3 (emphasis added). The Government evidently recognizes that appointments can occur in other ways, but makes no effort to draw a constitutional line or explain why this case crosses it.[2] The Government's lone case in support of its position is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Opp. 16. But the Government simply repeats what *Dysart*

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[2] The Government makes the puzzling assertion that Petitioner relies on Congress's "constitutional authority over the appointment of inferior officers." Opp. 17. He does not. Under the Appointments Clause, *all* officer positions are "established by law." Every argument in the Petition pertains to *presidential* appointments. The Petition has nothing to do with the President's power to vest the appointment of inferior officers in "the courts of law" or "the heads of departments."

said about *Marbury*, *id.*, and chooses to ignore altogether the significant distinctions between *Marbury* and this case. Pet. 31-32. The Government also entirely ignores Petitioner's arguments establishing that DOPMA falls comfortably within Congress' constitutional authority to set forth the "means of appointment." Pet. 28-32. Indeed, the paucity of analysis in the Government's brief serves only to confirm the weakness of the Federal Circuit's constitutional reasoning.

IV. This Case Warrants Review.

Finally, review is warranted because Petitioner presents an important question that can be resolved by this Court alone. The Government has no answer to Petitioner's fundamental argument for granting review: the Federal Circuit has, in effect, invalidated an important federal statute. The Government claims that the Federal Circuit has supplied a "reasonable construction of a statute," Opp. 18 n.4, yet conspicuously refuses to ascribe any significance whatsoever to § 624(d) and DOPMA's unambiguously mandatory requirements. Pet. 20-25. If Congress's chosen scheme in DOPMA is to be nullified, it should be nullified by this Court.

Moreover, DOPMA is no ordinary statute – it governs appointments of the most important military officials in the United States, an issue of undeniable public importance. And this case presents no ordinary constitutional issues – the separation-of-powers issues are fundamental and this Court has not spoken to them

directly in over 200 years. In light of the practical and doctrinal significance of this case, certiorari is warranted.

The Government's arguments against review are insubstantial. The Government's contention that this issue could arise in other circuits is ironic. Petitioner filed this action in the District of Columbia[3] and appealed to the D.C. Circuit in an effort to avoid *Dysart*, only to be involuntarily transferred to the Federal Circuit at the Government's urging. *See Schwalier v. Hagel*, 734 F.3d 1218 (D.C. Cir. 2013). The Government's speculation that a circuit split might theoretically arise if an officer explicitly waives his entitlement to back pay, and its citation of a District Court case addressing a different statutory scheme, Opp. 18, are no basis to deny review.

The Government's assertion that "this Court has previously rejected petitions for writs of certiorari raising the same question presented," Opp. 18, is flat wrong. In *Barnes v. United States*, 552 U.S. 813 (2007) (No. 06-1466), the Federal Circuit held that as a factual matter, the officer's promotion delay complied with DOPMA – the very argument that the Government chose not to make in the Federal Circuit here. As the Government stated in its brief in opposition, the Federal Circuit's "decision that the Navy provided petitioner with timely notice of the delay in his promotion is correct and that fact-specific

[3] Petitioner waived any claim for damages exceeding $10,000, thus conferring jurisdiction on the District Court under the Little Tucker Act. 734 F.3d at 1219-20.

determination does not warrant this Court's review." *Barnes* Gov't Opp., at 9, 2007 WL 2261599. In *Lewis v. United States*, 552 U.S. 810 (2007) (No. 06-1289), the officer's argument was based on a different portion of DOPMA's promotion scheme that had subsequently been amended in relevant part. The Government's brief in opposition explained that the case "has limited prospective importance" in light of DOPMA's "[r]ecent amendments." *Lewis* Gov't Opp., at 7, 9-13, 2007 WL 1812492. Moreover, as the Government pointed out, the Federal Circuit separately held that Lewis was not qualified for promotion *in any event* because she lacked a medical license, a holding Lewis did not challenge. *Id.* at 7, 14.

The Government identifies no such vehicle problems here. The Federal Circuit relied solely on *Dysart*, there are no relevant statutory amendments, and the Air Force itself believes Dysart should have been promoted. Pet. 36. Unlike *Barnes* and *Lewis*, this case is a strong vehicle to consider the correctness of *Dysart*.

The Government asserts that the large number of military promotions each year "generates only a very small number of claims to automatic appointment." Opp. 19. Setting aside the incorrect assertion that this case involves "automatic appointment," the Government ignores that *Dysart*'s invalidation of § 624(d) is a strong deterrent for officers to pursue challenges based on § 624(d). It is doubtful that many officers have the resources and willingness to pursue promotion challenges through military boards, and then

district courts and the Federal Circuit, solely for the purpose of filing a petition for certiorari to challenge *Dysart*.

In any event, the identity of the officer corps of the United States military is a question of surpassing importance. Even if there were only four disputes in recent years about whether a person had ascended to a high military rank within the meaning of DOPMA and the Appointments Clause, Opp. 19, the question presented would still warrant review. As *Dysart* put it, this case presents "significant questions concerning the appointment process for military officers." Pet. App. 54a. Ensuring that military officers continue to be promoted in accordance with the statutory scheme established for this purpose is a matter of recurring importance.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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