**No. 04-1131**

IN THE

# Supreme Court of the United States

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Terry L. Whitman,

*Petitioner*,

v.

U.S. Department of Transportation, *et al*.

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

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## BRIEF OF THE PETITIONER

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## QUESTIONS PRESENTED

1. In light of 5 U.S.C. 7121 – the provision of the Civil Service Reform Act that describes the administrative grievance procedures negotiated pursuant to collective bargaining agreements – are federal district courts categorically barred from hearing suits by federal employees seeking equitable relief from allegedly unconstitutional employment practices?

2. Does the Civil Service Reform Act preclude federal courts from granting equitable relief for constitutional and statutory claims brought by federal employees in cases where the courts would otherwise have an independent basis for exercising jurisdiction?

## PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were the petitioner, Terry L. Whitman, and the respondents, the United States Department of Transportation and Norman Y. Mineta, the Secretary of Transportation.

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## BRIEF OF THE PETITIONER

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The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. 1a-11a) is published at 382 F.3d 938. The district court's order granting the government's motion to dismiss the complaint and the amended and supplemental complaint for lack of subject matter jurisdiction (Pet. App. 12a-15a), dated February 25, 2003, is unpublished.

## JURISDICTION

The judgment of the court of appeals was entered on August 30, 2004. The court of appeals denied rehearing and rehearing en banc on November 24, 2004. See Pet. App. 16a. The petition for a writ of certiorari was filed on February 22, 2005, and was granted on June 27, 2005. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

## RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appendix to this Brief reproduces the relevant portions of the First and Fourth Amendments to the Constitution of the United States, as well as the relevant provisions in Titles 5 and 49 of the United States Code.

## STATEMENT

This Court has long affirmed its "established practice * * * to sustain the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). This Court exercised precisely that jurisdiction in *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989), where it considered the constitutionality of the Customs Service's warrantless, suspicionless drug testing program. Despite the fact that petitioner, like the plaintiffs in *Von Raab*, is a federal employee seeking injunctive relief

against an allegedly unconstitutional drug testing program, the Ninth Circuit held that federal courts lack subject-matter jurisdiction to consider his claim in light of the Civil Service Reform Act (CSRA), 5 U.S.C. 7101 *et seq*. The court of appeals relied in particular on 5 U.S.C. 7121(a), which requires that a collective bargaining agreement "provide procedures for the settlement of grievances," and describes those negotiated procedures (with exceptions not relevant here) as "the exclusive administrative procedures for resolving grievances." That conclusion thus presents this Court with the question whether section 7121 or the CSRA more generally strips the federal courts of their pre-existing authority to adjudicate claims for equitable relief from violations of federal employees' constitutional and statutory rights.

## I. Statutory Framework

Petitioner Terry L. Whitman is an Air Traffic Assistant for the Federal Aviation Administration (FAA). The FAA is an agency within the United States Department of Transportation (DOT). Like all federal agencies, the FAA faces certain constitutional and statutory constraints on its prerogatives as an employer. Unlike most federal agencies, however, the FAA is not directly governed by the CSRA. Congress has directed the FAA to develop its own personnel management system, 49 U.S.C. 40122(g)(1), and has provided that "[t]he provisions of title 5," which is where the CSRA is codified, "shall not apply to the new personnel management system," with certain exceptions. *Id.* § 40122(g)(2).[1]

[1] The list of CSRA provisions that directly govern the FAA's Personnel Management System is codified in 49 U.S.C. 40122(g)(2).

In promulgating the FAA System, the Administrator noted his discretion to adopt the substance of any provision of title 5 that he deems appropriate. See FAA Personnel Management System –

Pursuant to this legislation, the FAA developed a personnel system (FAA System). See FAA Personnel Management System (Mar. 28, 1996), http://www.faa.gov/ahr/policy/PMS/personel.htm (visited Aug. 28, 2005). That system incorporates the provisions of the CSRA required under the enabling legislation, as well as additional CSRA provisions the FAA Administrator deemed appropriate for the FAA. *Id*. at II.

Under the FAA System, as under the CSRA, several administrative remedies are potentially available to a tenured competitive service employee who wishes to contest a management action taken against him. These include the following:

1. The Merit Systems Protection Board (MSPB) has jurisdiction over appeals from FAA decisions that involve "major adverse personnel actions." See 49 U.S.C. 40122(g)(3), (h).[2] The MSPB's procedures provide for an initial hearing before an administrative law judge, whose decision becomes a final order of the Board unless the Board grants a petition for Board review and issues a superseding order. See generally 5 C.F.R. Pt. 1201. "Any employee * * * adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision" in the Court of Appeals for the Federal Circuit. 5 U.S.C. 7703(a)(1), (b)(1).

2. The Guaranteed Fair Treatment Program (GFT), like the MSPB process, is available to challenge "major adverse

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Introduction, http://www.faa.gov/ahr/policy/PMS/pmsintro.htm (visited Aug. 28, 2005).

[2] 49 U.S.C. 40122(j) provides that "the term 'major adverse personnel action' means a suspension of more than 14 days, a reduction in pay or grade, a removal for conduct or performance, a nondisciplinary removal, a furlough of 30 days or less (but not including placement in a nonpay status as the result of a lapse of appropriations or an enactment by Congress), or a reduction in force action."

personnel actions" and operates as an alternative to MSPB review. See 49 U.S.C. 40122(h); *Battle* v. *FAA*, 393 F.3d 1330, 1332-33 (CADC 2005). GFT is an FAA-specific arbitration process for employees who, unlike petitioner, are not covered by collective bargaining agreements. See FAA Personnel Reform Implementation Bulletin 017 § 101 (Apr. 1, 1996), http://www.faa.gov/ahr/policy/prib/PRIBS/national/PRIB017.cfm (visited Aug. 28, 2005). Decisions of the arbitration panel are "issued as final orders of the Administrator" and an employee "may seek judicial review of an order by filing a timely petition for review in the United States Court of Appeals for the District of Columbia Circuit or in the court of appeals for the circuit in which the employee resides." See FAA Personnel Management System at 5(m).

3. The Office of Special Counsel (OSC), see 5 U.S.C. 1211, has jurisdiction over the claim of an FAA employee that he has been subjected to any "personnel action"[3] – a broader category than the "major" adverse personnel actions to which the MSPB and GFT processes apply – but only if the employee's claim relates to "whistleblowing."[4] OSC's

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[3] The FAA System does not contain a definition of the phrase "personnel action." The definition in 5 U.S.C. 2302(a)(2)(A) includes, among other things, appointment, promotion, disciplinary action (including removal or suspension), or "a decision to order psychiatric testing or examination," *id.* § 2302(a)(2)(A)(x).

[4] For most federal employees, the OSC can assert jurisdiction over complaints about any of the twelve prohibited personnel practices described in 5 U.S.C. 2302(b). Section 2302(b) contains the CSRA's general definition of forbidden employment practices. Its twelve subsections prohibit actions such as violations of various federal fair employment and labor statutes, *id.* § 2302(b)(1); nepotism, *id.* § 2302(b)(7); and any other personnel action that "violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in section 2301 of this title," *id.* § 2302(b)(12). In turn, the merit

decisions not to prosecute complaints are not subject to any further review; an FAA employee who does not receive relief from the OSC process for his whistleblowing claim can, however, seek relief from the MSPB, see 5 U.S.C. 1214(a)(3), and ultimately from the Court of Appeals for the Federal Circuit, see 5 U.S.C. 7703.

4. The Federal Labor Relations Authority (FLRA) has original jurisdiction over a relatively limited class of complaints: charges that the FAA, or the employee's union, has committed an "unfair labor practice" within the meaning of 5 U.S.C. 7116(a), which deals with employees' rights concerning collective bargaining, labor organizing, union representation, and related issues. See *id.* § 7105(a)(2)(G). An employee begins the FLRA administrative process by filing a charge with an FLRA regional office. If, after investigation, the director of the regional office issues a complaint (or the general counsel of the FLRA orders that a complaint be issued, on appeal from the director's refusal to issue one), the complaint will proceed before an administrative law judge and culminate in a final FLRA order. See 5 C.F.R. 2423.41. "Any person aggrieved" by that final order can seek judicial review in either the D.C. Circuit or the court of appeals for the circuit where he resides. 5 U.S.C. 7123(a).[5]

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system principles articulated in section 2301 include ensuring that all employees "receive fair and equitable treatment in all aspects of personnel management * * * with proper regard for their privacy and constitutional rights." *Id.* § 2301(b)(2).

With respect to FAA employees, however, the OSC's jurisdiction is limited to whistleblowing claims. See United States Office of Special Counsel: Prohibited Personnel Practices, http://www.osc.gov/ppp.htm#q2 (visited Aug. 28, 2005).

[5] A decision by the FLRA not to issue a complaint is not judicially reviewable. See, *e.g.*, *Rizzitelli* v. *FLRA*, 212 F.3d 710, 712 (CA2 2000); *Turgeon* v. *FLRA*, 677 F.2d 937, 938 (CADC 1982) (per curiam).

5. Finally, FAA employees who are members of bargaining units also have access to negotiated grievance procedures.[6] The category of potential "grievances" is larger than the class of personnel actions: "grievance" means any complaint "by any employee concerning any matter relating to the employment of the employee." 5 U.S.C. 7103(a)(9)(A). However, collective bargaining agreements can exclude designated matters from the negotiated grievance procedures. 5 U.S.C. 7121(a)(2). With certain exceptions not relevant to this case, the negotiated grievance procedures are "the exclusive administrative procedures for resolving grievances" that fall within their scope. *Id.* § 7121(a)(1).[7]

The negotiated grievance procedure relevant to this case was the product of a collective bargaining agreement between the FAA and the National Association of Government Employees, SEIU/AFL-CIO (NAGE). See J.A. 20. That agreement covers FAA Air Traffic Assistants such as petitioner. The FAA-NAGE agreement permits individual employees to initiate the grievance procedure. At the first stage, the employee discusses the grievance with his immediate supervisor; if no satisfactory settlement is reached, the employee must send a written grievance to the Facility Manager (or his designee), describing the issues involved and the corrective or remedial action sought. Within a relatively

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[6] See 49 U.S.C. 40122(g)(2)(C) (requiring the FAA System to incorporate chapter 71 of title 5); 5 U.S.C. 7121(a)(1) (providing that "any collective bargaining agreement shall provide procedures for the settlement of grievances").

[7] An employee can elect alternative administrative procedures – such as pursuing his claim before the MSPB – in cases involving alleged violations of specified federal fair employment statutes, discrimination on the basis of marital status or political affiliation, or the imposition of certain severe consequences such as removal, suspension, or reduction in grade. See 5 U.S.C. 7121(a)(1), (d), (e), and (g).

short time period, the manager or his designee will meet with the employee to attempt a resolution. See J.A. 23-24.

If the grievance is not resolved through this informal process, the CSRA entitles an employee to seek further review only by persuading his union to request arbitration. See J.A. 26. If he cannot, the CSRA provides no further administrative review – and no judicial review – of the Facility Manager's determination. If the union does request arbitration, the FAA or the union may file exceptions to the arbiter's decision with the FLRA. See 5 U.S.C. 7122(a). But unless the grievance involves an unfair labor practice within the meaning of 5 U.S.C. 7118 or a major adverse personnel action, neither the union (in the former case) nor the employee (in the latter) may seek judicial review of the arbitration. See 5 U.S.C. 7121(f), 7123(a)(1).

**II. The FAA's Drug Testing Program.**

Congress has directed the FAA to establish programs for "reasonable suspicion, random, and post-accident testing" for the use of controlled substances or alcohol by "employees of the Administration whose duties include responsibility for safety-sensitive functions," 49 U.S.C. 45102(b)(1), a category that includes petitioner. The operation of that program is subject to constitutional and statutory constraints. In *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989), this Court held that the federal government's power to impose mandatory drug testing on federal employees is limited by the reasonableness requirement of the Fourth Amendment. Consistent with this constitutional requirement, Congress required the FAA to "ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances." 49 U.S.C. 45104(8).

The DOT has promulgated detailed regulations regarding random drug testing that apply to the FAA, among other agencies. Pet. App. 2a. Under DOT Order 3910.1, "random

testing" is listed as one of five categories of drug tests given to employees. The procedures for selecting employees for random testing are outlined in the DOT's testing guide, Department of Transportation Drug and Alcohol Testing Guide, http://dothr.ost.dot.gov/HR_Programs/Drug_and_Alcohol/revisedguide.pdf (visited Aug. 28, 2005). Five days before each test administration, the DOT's Departmental Drug Office is supposed to produce a computer-generated list, see, *id*., app. B, at 7-9, 13-14, divided by geographic region, *id*. at II-1, of FAA employees to be tested. The list is given to the Drug Program Coordinator, the contractor, and on test day, the Site Coordinator. *Id*. at II-1.

Each Site Coordinator is charged with the responsibility of "work[ing] the list" – that is, proceeding through the list sequentially, summoning test subjects in the same order that the names appear. *Id*., app. B at 11. If the first employee listed is scheduled to work during the designated collection time, the Site Coordinator will notify the employee's supervisor, who will notify the employee. *Id*. Typically, the employee will have fifteen to thirty minutes to report for testing. If the employee is unavailable for testing, the Site Coordinator notes this on the test list, *id*. at II-3, and proceeds to the next name on the list, *id*., app. B at 11. This process continues until the predetermined number of tests for that day is finished or the day's list is exhausted. *Id*., app. B at 3, 7, 9, 14, 16. The Test Guide does not contemplate rescheduling of random tests unless an employee is at work but fails to report to the test site, *id*. at VII-1, or proceeds to the site but is unable or unwilling to produce an adequate testing sample, *id*. at VII-2. The only other delineated rescheduling of test dates involves "follow-up" tests for employees who have previously tested positive for prohibited substances and are required to undergo additional testing. *Id.* at VII-3.

**III. Proceedings Below**

1. Petitioner Terry Whitman has worked as an Air Traffic Assistant at the FAA's Anchorage Air Route Traffic

Control Center for the past twenty years. As alleged in his complaint, between 1996 and 2002, petitioner was subjected to a pattern of non-random, suspicionless drug testing in violation of his constitutional and statutory rights. Petitioner alleged that during those six years, he was summoned from his work and subjected to breathalyzer or urinalysis examinations fourteen separate times, far more than similarly-situated co-workers. J.A. 7. According to petitioner's complaint, systematic deviations from FAA drug testing policies caused him to be selected "from an 'alternate list' to replace employees already selected for testing," *ibid*.; subjected "to a 'makeup test' for a previously conducted round of random drug testing," *id*. at 13; and repeatedly tested without allowing access to his bargaining unit representative, *id*. at 10. This pattern persisted even though petitioner tested negative for prohibited substances on every occasion.

In June 2001, convinced that he was being subjected to unconstitutional, illegal, non-random drug testing, petitioner filed a charge with the FLRA. See *supra* at 5 (describing the FLRA process). He alleged that the testing system failed to "guarantee individual rights" and was not random. C.A. S.E.R. 1; Pet. App. 3a. The San Francisco Regional Director of the FLRA refused to issue a complaint in the matter. He determined that petitioner's charge fell outside "the jurisdiction of the FLRA" because it did not involve an "unfair labor practice." C.A. S.E.R. 3 (citing 5 U.S.C. 7116(a)). The Director advised petitioner to raise his claim under the negotiated grievance procedure. *Ibid.* He did not identify any administrative process that explicitly provided a possibility of judicial review of the administrative decision. Petitioner filed a motion for reconsideration with the FLRA General Counsel, who denied the motion. *Id*. at 5.

2. Following the denial of his request for reconsideration, petitioner filed this suit against the Department of Transportation and Norman Y. Mineta, the Secretary of Transportation, in the U.S. District Court for the District of Alaska. In his *pro se* complaint and his amended

and supplemental complaint, petitioner alleged that the FAA had violated his "First Amendment right to privacy," J.A. 19, and the statutory requirement that its testing program "ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances." *Id.* at 7.[8] Petitioner sought only equitable relief. He requested that the court order an employee survey to determine whether the Anchorage Center's testing procedures complied with legal requirements and a temporary injunction against the FAA's testing of him if the survey indicated that test subjects were not chosen randomly.

The district court granted the government's motion to dismiss the complaint for lack of subject matter jurisdiction. Pet. App. 12a. The centerpiece of the district court's ruling was its conclusion that petitioner's ability to seek judicial redress depended on whether the CSRA provided him that right. See Pet. App. 14a (stating that federal courts have "no power to review federal personnel decisions and procedures unless such review is expressly authorized by Congress in the CSRA or elsewhere") (quoting *Veit* v. *Heckler*, 746 F.2d 508, 511 (CA9 1984)). In particular, with respect to petitioner's constitutional claims, the district court held that the CSRA pre-empted all pre-existing causes of action "for constitutional violations arising from governmental personnel actions." Pet. App. 14a n.19 (quoting *Russell* v. *United States Dep't of the Army*, 191 F.3d 1016, 1020 (CA9 1999)). The district court found that since the CSRA contemplated negotiated grievance procedures, the "[c]ourt cannot provide him with a judicial remedy." Pet. App. 14a.

3. On appeal, the Ninth Circuit affirmed the district court's dismissal of the complaint "because 5 U.S.C. § 7121(a)(1), as amended in 1994, does not expressly confer

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[8] Petitioner inadvertently cited 49 U.S.C. 5331(d)(8) when the correct citation is 49 U.S.C. 45104(8). But the language of the two provisions is the same.

federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal employees' collective bargaining agreements." Pet. App. 2a.[9]

The court of appeals began its analysis by observing that petitioner could have resorted to the negotiated grievance process, since his claim undoubtedly constituted a "grievance" within the meaning of the CSRA. Pet. App. 5a.[10] As to the question whether petitioner could "also pursue his employment-related claims in federal court," *id.* 6a, the court of appeals looked to 5 U.S.C. 7121(a)(1), which provides that with certain inapplicable exceptions, the negotiated grievance process "shall be the exclusive administrative procedures for resolving grievances which fall within its coverage." The court held that "'under the law of this circuit, 5 U.S.C. § 7121(a)(1) preempts employment related claims which fall within collective bargaining agreements' because the statute does not expressly provide for federal court jurisdiction over such claims." *Id.* at 7a (quoting *Golt* v. *United States*, 186 F.3d 1158, 1159 (CA9 1999).

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[9] The court of appeals recognized that the district court had erroneously analyzed petitioner's claim directly under the CSRA rather than the FAA Personnel Management System, but found that the same legal analysis would apply. See Pet. App. 4a-5a.

[10] In addressing petitioner's claim that the FAA's actions also constituted a prohibited personnel practice, the court of appeals suggested that petitioner was "required under the CSRA to pursue corrective action through the Office of Special Counsel." Pet. App. 10a. It rejected petitioner's claim that he "was unable to pursue such relief because the FAA is immune from OSC investigation," finding that "his argument is belied by 49 U.S.C. § 40122(g)(2)(H), which extends the CSRA's provisions for OSC investigation of prohibited personnel practices to the FAA System." Pet. App. 10a. But see *supra* at 4 & n. 4 (explaining that, as the OSC confirms, its jurisdiction over FAA employees extends only to whistleblower complaints).

The court of appeals recognized that the Federal Circuit and the Eleventh Circuit had held to the contrary. Those circuits had each relied on a 1994 amendment to section 7121(a) that substituted the phrase "exclusive administrative remedy" for the antecedent phrase "exclusive remedy" to conclude that "[t]he plain language of amended § 7121(a)(1) * * * does not limit a federal employee's right to avail him or herself of alternative, non-administrative avenues of redress." *Mudge* v. *United States*, 308 F.3d 1220 (CAFC 2002). See *Asociacion de Empleados del Area Canalera (ASEDAC)* v. *Panama Canal Comm'n*, 329 F.3d 1235, 1240 (CA11 2003). According to the Ninth Circuit, however, "the addition of the word 'administrative' to the statute does not constitute an express grant of federal court jurisdiction," and thus the amended section 7121(a)(1) "establishe[d] no more than an exclusive administrative remedy," but no judicial remedy. Pet. App. 8a.

Petitioner's motions for rehearing and rehearing en banc were denied. Petitioner filed a petition for a writ of certiorari on February 22, 2005. This Court granted the petition on June 27, 2005.

## SUMMARY OF ARGUMENT

The fundamental error at the heart of the Ninth Circuit's decision was its assumption that because the CSRA generally and 5 U.S.C. 7121 do not themselves "expressly provide for federal court jurisdiction," Pet. App. 7a, Congress stripped the district courts of jurisdiction to hear petitioner's constitutional and statutory challenges to the FAA's drug testing policy. But it does not follow from the fact that section 7121 did not *create* jurisdiction that Congress somehow *stripped* the district court of the jurisdiction it would otherwise undoubtedly have enjoyed. Especially given this Court's consistent presumption against construing statutes to strip federal courts of their jurisdiction to hear constitutional claims for injunctive relief, such as petitioner's, nothing in the

text, structure and policy, or history of section 7121 can support so radical a conclusion.

The source of the district court's power to hear petitioner's claim lay entirely outside section 7121 and the CSRA. Petitioner's causes of action against the FAA and Secretary Mineta were conferred directly by the Constitution itself and by statutory provisions requiring the FAA to use nondiscriminatory and impartial drug-testing procedures and providing for judicial review of agency action. 49 U.S.C. 45104(8); 5 U.S.C. 702. The district court had subject-matter jurisdiction over those claims under 28 U.S.C. 1331; the Administrative Procedure Act waived any jurisdictional defense of sovereign immunity with respect to petitioner's claims against the agency. Finally, with respect to the redressability of petitioner's complaint, this Court has consistently recognized the power of federal courts to grant injunctive relief against unconstitutional conduct by the federal government.

Neither section 7121 nor the CSRA more generally stripped the district court of this preexisting jurisdiction. First, the plain language of section 7121(a) recognizes the existence, and continued vitality, of *non*-administrative procedures; thus, it should be read only to preclude federal employees from seeking redress through administrative paths other than the negotiated grievance procedures, and not to impliedly repeal otherwise available judicial remedies.

Second, the 1994 amendment to section 7121(a) that added the word "administrative" to the phrase "exclusive procedures" reinforces the plain-language meaning. The amendment was enacted against a backdrop of decisions that had construed the phrase "exclusive procedures" to include judicial procedures as well as administrative ones. Congress' decision to amend the statute to refer instead only to "exclusive administrative procedures" removed the bar to judicial redress. Had Congress agreed with the construction of section 7121(a) adopted by the Ninth Circuit, there would

have been no need to amend the section at all – let alone to amend it by using language that is most naturally read to leave judicial remedies available and that had indeed been proposed specifically as a means of restoring federal employees' right to seek judicial review.

Third, the overall structure of the CSRA undercuts the Ninth Circuit's interpretation. The CSRA as a whole clearly does not preclude judicial review of constitutional or statutory challenges to federal drug-testing regimes. The sole result of the Ninth Circuit's position is to leave employees like petitioner – sober and compliant – unable to bring their constitutional challenges, while substance-impaired or insubordinate co-workers retain their right to judicial review. It is implausible that Congress intended this paradoxical and unfair result, particularly in light of this Court's holding in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), that individuals can challenge an agency's rules without first disobeying them and then raising their challenges as a defense in an enforcement proceeding. Not only does the CSRA not preclude judicial review, it does not require employees to pursue, or to exhaust, negotiated grievance procedures when they seek solely prospective injunctive relief.

## ARGUMENT

### I. Federal District Courts Presumptively Have Jurisdiction Over Suits, Such as Petitioner's, That Seek Equitable Relief for Constitutional Claims.

The court of appeals' decision in this case rests on a fundamental legal error: the assumption that petitioner's invocation of federal jurisdiction must rest on 5 U.S.C. 7121(a). The court of appeals' conclusion that section 7121(a) does not *itself* confer jurisdiction on federal district courts to hear constitutional or statutory claims by federal employees is beside the point, because section 7121(a) is not a jurisdictional provision at all. Instead, it simply sets out a

requirement that federal collective bargaining agreements must contain negotiated grievance procedures and describes the relationship between those grievance procedures and the other administrative remedies available to federal employees.

The source of the federal district court's power to hear petitioner's complaint is entirely extrinsic to section 7121(a). It lies in the Constitution itself, in 28 U.S.C. 1331, and in section 702 of the Administrative Procedure Act, 5 U.S.C. 702. As this Court explained in *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979), the question whether a plaintiff can bring suit claiming unconstitutional conduct by the government involves three subsidiary issues: cause of action; jurisdiction; and relief. Under this Court's precedents, petitioner plainly has a cause of action; the federal district court manifestly had jurisdiction; and injunctive relief clearly was available.

1. *Cause of action*. In *Davis*, this Court highlighted the sharp distinction between cases involving "[s]tatutory rights and obligations" on the one hand and constitutional commands on the other. *Davis*, 442 U.S. at 241. With respect to the former, the question whether an individual has a cause of action is wholly a question of congressional intent. Congress both creates the right or obligation and decides whether to permit its vindication through private lawsuits. See *Cort* v. *Ash*, 422 U.S. 66 (1975); see also, *e.g.*, *Alexander* v. *Sandoval*, 532 U.S. 275, 286-89 (2001). *United States* v. *Fausto*, 484 U.S. 439 (1988), for example, involved the very narrow question whether untenured federal employees not protected by a veterans' preference should be permitted to bring claims alleging violations of agency regulations in the context of an adverse personnel action. See *id*. at 440. The question whether Fausto had a cause of action was purely one of congressional intent. This Court concluded from the CSRA's structure and purpose that Congress did not intend to permit employees in Fausto's position to have a cause of action under the Back Pay Act when the CSRA itself denied

that category of employees "the right to administrative or judicial review of suspension for misconduct." *Id*. at 443.

By contrast, in suits presenting constitutional claims, the question whether a particular individual has a cause of action does not depend on congressional intent.[11] "At least in the absence of 'a textually demonstrable constitutional commitment of [an] issue to a coordinate political department,' * * * * litigants who allege that their own constitutional rights have been violated" have a cause of action. *Davis*, 442 U.S. at 242 (quoting *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)). In explaining this principle, the Court pointed to *Bolling* v. *Sharpe*, 347 U.S. 497 (1954), where the court "settled that a cause of action may be implied directly under the equal protection component of the Due Process Clause of the Fifth Amendment in favor of those who seek to enforce this constitutional right." *Davis*, 442 U.S. at 242. On that basis, this Court has repeatedly recognized a cause of action for individuals, like petitioner, asserting Fourth Amendment violations by federal officials. See, *e.g.*, *Bell* v. *Hood*, 327 U.S. 678, 681-82 (1946) (holding that plaintiffs who allege a violation of their Fourth and Fifth Amendment rights by federal agents have stated a cause of action).

In this case, petitioner has a constitutional cause of action. Among other things, petitioner's pleadings alleged that the FAA's drug-testing policy, as administered at the Anchorage Air Route Traffic Control Center, was "not random," J.A. 11, that he had been "selectively target[ed]" for testing as a result of his initial complaint, J.A. 18, and that the testing had violated his "right to privacy under the Constitution," J.A. 19.

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[11] By contrast, questions of jurisdiction and remedy do at least implicate congressional intent. See *infra* at 18-21.

Read fairly,[12] these allegations raise constitutional claims under the Fourth, Fifth, and First Amendments to the Constitution. Indeed, in *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656 (1989), this Court adjudicated nearly identical claims against the Customs Service's drug testing regime without any suggestion that the Court's authority to do so was in doubt. The Court's decision in that case established that a government drug testing program must not be "subject 'to the discretion of the official in the field,'" *id*. at 667 (quoting *Camara* v. *Municipal Court*, 387 U.S. 523, 532 (1967)), and must avoid "the grave potential for 'arbitrary and oppressive interference with the privacy and personal security of individuals' that the Fourth Amendment was designed to prevent," *id.* at 672 n.2 (quoting *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554 (1976)). Petitioner's complaint alleges that the FAA's testing at the Anchorage Facility violated these principles. Because the testing was allegedly arbitrary rather than random – *i.e.*, because it depended on individual discretion – the complaint also states a claim for a violation of the equal protection component of the Fifth Amendment's Due Process Clause. Cf. *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996) (noting that decisions to prosecute cannot be based on "arbitrary" classifications). And to the extent that petitioner alleged in his supplemental complaint that he had been tested in part because he had complained of irregularities in the testing

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[12] This Court has repeatedly held that pleadings filed by *pro se* litigants like petitioner are to be held "to less stringent standards than formal pleadings drafted by lawyers." *Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (per curiam); see also, *e.g.*, *Castro* v. *United States*, 540 U.S. 375, 381 (2003) (noting that federal courts "sometimes will ignore the legal label[s]" used by *pro se* litigants in order to avoid unfairness); *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976) (a *pro se* complaint should be dismissed for failure to state a claim only "if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief'") (quoting *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957)).

program, his complaint is fairly construed to raise a First Amendment retaliation claim as well. While the district court may ultimately determine that these claims are unfounded, there can be no question that petitioner has a cause of action to seek that judicial determination.[13]

2. *Jurisdiction*. Nor is there any question that the district court had subject-matter jurisdiction to hear petitioner's constitutional claims. Under 28 U.S.C. 1331, federal district courts "shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Davis* held that when a plaintiff has a cause of action arising under the Constitution, section 1331 gives federal district courts subject-matter jurisdiction over a suit for injunctive relief against a government official (here, Secretary Mineta). 442 U.S. at 236-37.

Section 702 of the Administrative Procedure Act, in turn, removes any obstacle to the district court exercising jurisdiction against the Department of Transportation. That provision expressly waives the federal government's sovereign immunity for "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. 702. In light of section 702, this Court has consistently held that section 1331 "confer[s] jurisdiction on federal courts to review agency action." *Califano* v. *Sanders*, 430 U.S. 99, 105 (1977).

Thus, for example, the employees in *Von Raab* relied on 28 U.S.C. 1331, the Declaratory Judgment Act, and the

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[13] Petitioner postpones to Section III, *infra*, the question whether he also has a cause of action under 49 U.S.C. 45104(8), which requires that the Administrator of the FAA "ensure that employees are selected for [drug and alcohol] tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances."

Administrative Procedure Act as the source of the federal courts' jurisdiction to hear their request for injunctive relief against the Customs Service's drug-testing regime. See Joint Appendix at 4, *National Treasury Employees Union* v. *Von Raab*, No 86-1879. This Court never questioned its jurisdiction to consider the employees' claims, although the issue of subject-matter jurisdiction had been litigated before the district court. See *National Treasury Employees Union* v. *Von Raab*, 649 F.Supp. 380, 384-85 (E.D. La. 1986) (squarely rejecting the government's argument that the CSRA barred district court review).[14]

3. *Relief*. As this Court explained in *Davis*, "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." 442 U.S. at 239. "[R]elief is a question of the various remedies a federal court may make available." *Id*. at 239 n.18 (emphasis omitted).

Throughout our history, this Court has "sustain[ed] the jurisdiction of federal courts to issue injunctions to protect rights safeguarded by the Constitution." *Bell* v. *Hood*, 327 U.S. at 684; *Davis*, 442 U.S. at 242. The *United States Reports* are filled with cases involving suits for equitable relief against federal officials – in the last two Terms alone, see, *e.g*., *Gonzales* v. *Raich*, 125 S.Ct. 2195 (2005); *Johanns* v. *Livestock Mktg. Ass'n*, 125 S.Ct. 2055 (2005); *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004); *Ashcroft* v. *ACLU*, 542 U.S. 656 (2004). Petitioner's

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[14] That the Court never expressed concern about the jurisdictional question is particularly telling in light of its repeated recognition of a "special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review,' even though the parties are prepared to concede it." *Bender* v. *Williamsport Area School Dist*., 475 U.S. 534, 541 (1986) (quoting *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934)); see also, *e.g., Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 73 (1997).

complaint sought only the equitable relief that it has been this Court's "established practice" to find available under the inherent powers of the federal courts. *Davis*, 442 U.S. at 242 (quoting *Bell*, 327 U.S. at 684).

Importantly, this case does *not* involve a claim for damages, which raises distinct and more difficult remedial questions. Since its decision in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388, 395 (1971), this Court has repeatedly faced the question whether to recognize an implied right of action for damages caused by constitutional violations to supplement the established right to injunctive relief. See, *e.g.*, *Corr. Serv. Corp.* v. *Malesko*, 534 U.S. 61 (2001); *FDIC* v. *Meyer*, 510 U.S. 471 (1994); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988); *Bush* v. *Lucas*, 462 U.S. 367 (1983); *Carlson* v. *Green*, 446 U.S. 14 (1980); *Davis* v. *Passman*, 442 U.S. 228 (1979). For the most part – and particularly with regard to employment-related claims by federal employees – this Court has refused to find the right to a damages action. See *Malesko*, 534 U.S. at 68-70.

But as this Court explained in *Malesko*, the refusal to permit a *Bivens* action in no way undercuts the continued availability of the injunctive relief sought by petitioner here: "[U]nlike the *Bivens* remedy, which we have never considered a proper vehicle for altering an entity's policy, injunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally." *Id.* at 74. See also *Bush* v. *Lucas*, 462 U.S. at 385 (explaining that federal employees are protected by "procedures – administrative *and judicial* – by which improper action may be redressed" and it is thus unnecessary to create a damages action as well) (emphasis added).

In sum, contrary to the court of appeals' belief in this case, it is entirely irrelevant that section 7121(a) "does not expressly confer federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal employees' collective bargaining agreements," Pet. App. 2a, since 28 U.S.C. 1331 clearly does. Moreover, there

is no doubt that petitioner has a cause of action to pursue his constitutional claims for injunctive relief and that the district court had jurisdiction to award that remedy. Rather, the question is whether section 7121(a), *sub silentio*, removes from federal district courts the jurisdiction they would otherwise undeniably possess. As petitioner explains in the next sections, it does not.

## II. Nothing About Section 7121 Strips the Federal Courts of Their Jurisdiction to Hear Petitioner's Constitutional Claims.

By its plain terms, section 7121(a) has nothing to do with the question whether federal employees can seek judicial redress for constitutional violations. Rather, it simply requires that collective bargaining agreements contain grievance procedures and describes the role that those negotiated procedures should play vis-à-vis other potential administrative procedures. Given the plain language of section 7121(a), the strong presumption against reading *any* statute to preclude judicial review of constitutional claims, and the history surrounding the 1994 amendment that introduced the word "administrative" into the phrase "exclusive administrative procedures," this Court should hold that federal district courts retain their power to review claims like petitioner's.

### A. This Case Is Governed By the Strong Presumption – Which This Court Has *Never* Found Overcome – That Federal Statutes Do Not Preclude All Judicial Review of Constitutional Claims.

Nothing in section 7121(a) even mentions the jurisdiction of the federal courts, let alone purports to limit it in any way. That is significant in light of the Administrative Procedure Act's declaration that agency actions are judicially reviewable except where "statutes preclude judicial review." See 5 U.S.C. 701(a)(1). As we now explain, this presumption in

favor of judicial review, particularly as applied to constitutional claims, has not been overcome here.

This Court has frequently expressed a "strong presumption" in favor of the availability of judicial review of executive-branch action. *Bowen* v. *Michigan Acad. of Family Physicians*, 476 U.S. 667, 681 (1986) (quoting *Dunlop* v. *Bachowski*, 421 U.S. 560, 567 (1975)). That presumption is especially strong in cases raising constitutional claims because denying individuals judicial review of such claims would raise a "serious constitutional question" given the judiciary's central role in protecting constitutional rights. See *Michigan Acad.*, 476 U.S. at 681 n.12 ("Congress cannot bar all remedies for enforcing federal constitutional rights") (quoting Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 Stan. L. Rev. 895, 921, n.113 (1984)). That stripping federal courts of the power to hear a constitutional question would, at the very least, raise serious constitutional questions has been widely and consistently recognized in the academic literature. See, *e.g.*, Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1398-99 (1953) (identifying potential constitutional problems with Congress' enactment of statutes implicitly limiting federal courts' power to hear a given class of constitutional cases); Lawrence Gene Sager, *Constitutional Limits on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 69-72 (1981) (discussing constitutional difficulties that would arise if Congress attempted to strip federal courts of their power to hear particular constitutional claims); Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 Tex. L. Rev. 1549, 1553-54 (2000) (explaining the history of the controversy surrounding jurisdiction-stripping); Martin H. Redish, *Same-Sex Marriage, the Constitution, and Congressional Power to Control Federal Jurisdiction: Be Careful What You Wish For*,

9 Lewis & Clark L. Rev. 363, 369-70 (2005) (providing an up-to-date summary of the literature). This Court has sought to avoid this constitutional difficulty by repeatedly requiring that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Demore* v. *Kim*, 538 U.S. 510, 517 (2003) (quoting *Webster* v. *Doe*, 486 U.S. 592, 603 (1988)); see also *Johnson* v. *Robison*, 415 U.S. 361, 367 (1974).

In light of the strong presumption against jurisdiction stripping, this Court requires that as long as "an alternative interpretation of the statute" that preserves the jurisdiction of federal courts over constitutional claims "is 'fairly possible,'" courts are "obligated" to adopt that interpretation. *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 300 (2001) (quoting *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932)). This obligation obtains even where the constitutionally problematic interpretation might be "otherwise acceptable," *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), and "plausible," *Public Citizen* v. *Dep't of Justice*, 491 U.S. 440, 467 (1989). See also *St. Cyr*, 533 U.S. at 299-300. The jurisdiction-preserving construction will be adopted unless it is "plainly contrary" to congressional intent. *Edward J. DeBartolo Corp.*, 485 U.S. at 575. Thus, this Court has required a "heightened showing," *Webster*, 486 U.S. at 603, through "specific language or specific legislative history that is a reliable indicator of congressional intent," or specific congressional intent "fairly discernible in the detail of the legislative scheme." *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984) (internal quotations omitted).

The importance of this presumption, and its strength, are demonstrated by the fact that, as far as petitioner is aware, this Court has *never* construed any statute to surmount the presumption and bar all judicial review of a constitutional claim. The court of appeals' decision in this case, which completely foreclosed judicial review of petitioner's

constitutional claims in *any* court [15] is thus completely unprecedented.

In light of these principles, nothing about section 7121(a) justifies construing it as a jurisdiction-stripping statute.

1. The text of section 7121(a) contains no specific language precluding judicial review. As far as petitioner is aware, no bill precluding judicial review of an individual's constitutional claims has been enacted since the end of the Civil War. But bills have frequently (albeit unsuccessfully) been introduced to achieve that result, and their language stands in sharp contrast to the text of section 7121(a). See, *e.g.*, Pledge Protection Act of 2005, H.R. 2389, 109th Cong., 1st Sess. § 2 (2005) (providing that " no court created by Act of Congress shall have any jurisdiction, and the Supreme Court shall have no appellate jurisdiction, to hear or decide any question pertaining to the interpretation of, or the validity under the Constitution of, the Pledge of Allegiance * * * or its recitation"); Sanctity of Life Act of 2005, H.R. 776, 109th Cong., 1st Sess. §§ 3, 4 (2005) (providing, *inter alia*, that the Supreme Court and federal district courts "shall not have jurisdiction" over any case "arising out of any statute, ordinance, rule, regulation, practice, or any part thereof, or arising out of any act interpreting, applying, enforcing, or effecting any statute, ordinance, rule, regulation, or practice" that "prohibits, limits, or regulates * * * the performance of abortions").

Moreover, even with respect to *statutory* claims, Congress has demonstrated that when it wants to foreclose judicial review of administrative decisions, it expresses this intent explicitly. See, *e.g.*, 22 U.S.C. 6723(b)(3)(B) (providing that the President's decision to object to an individual's serving as an inspector under the Chemical

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[15] There is no contention that federal employees could pursue their employment claims in state court with possible review by this Court on certiorari.

Weapons Convention "shall not be reviewable in any court"); 42 U.S.C. 1973b(b) (providing that the determination that a particular jurisdiction is covered by the special provisions of the Voting Rights Act "shall not be reviewable in any court"). Another example is the statute at issue in *Johnson* v. *Robison*, 415 U.S. 361 (1974), which provided that "no other official or any court of the United States shall have power or jurisdiction to review any * * * decision" by the Administrator of the Veterans' Administration regarding any law providing benefits. 38 U.S.C. 211(a) (currently codified in 38 U.S.C. 511). Notably, even in *Robison*, this Court declined to find that the statute stripped federal courts of jurisdiction over *constitutional* (as opposed to statutory or regulation-based) claims.[16] Nothing in the language of section 7121(a) thus comes even close to "purport[ing]" to strip courts of their preexisting jurisdiction. *Verizon Maryland, Inc.* v. *Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 643 (2002).

2. Nor does anything in the text of the CSRA or the statute's overall structure overcome the presumption that the federal courts have jurisdiction over constitutional claims. There is no indication in the statute that Congress believed judicial review of employee claims to be generally incompatible with the civil service system it was establishing. To the contrary, the CSRA explicitly provides for judicial review of a vast array of employment-related claims – any claim, in fact, involving a major adverse personnel action or various forms of discrimination that are also actionable under federal fair-employment statutes. See *supra* at 3-4. Thus, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), this Court found it unnecessary to create an implied damages cause of action for constitutional claims precisely because the CSRA provides "procedures – administrative *and judicial* – by which

[16] Petitioner addresses the reviewability of his statutory claim *infra* at 44-46.

improper action may be redressed." *Id.* at 385 (emphasis added).[17]

Nor is there any reason to believe that because Congress expressly provided for administrative proceedings culminating in judicial review of *some* employee claims, it intended to foreclose judicial review of all others, including particularly the constitutional claims that have uniformly been the province of the federal courts. For example, as petitioner explains below, *infra* at 36-37, the CSRA explicitly provides for judicial review of constitutional claims regarding drug testing by employees who are subjected to serious disciplinary action because they refuse to take, or they fail, drug or alcohol tests. Thus, it permits judicial review of claims by those who test positive. But this Court has repeatedly explained that an express provision of judicial review for some types of claims does not carry with it a negative pregnant "suffic[ient] to support an implication of exclusion as to others [from judicial review]." *Michigan Acad.*, 476 U.S. at 674 (quoting *Abbott Labs* v. *Gardner*, 387 U.S. 136, 141 (1967)). Rather, "silence on the subject leaves the jurisdictional grant of § 1331 untouched." *Verizon*, 535 U.S. at 644.

Nothing in this Court's decision in *United States* v. *Fausto*, 484 U.S. 439 (1988), undercuts this conclusion. In *Fausto*, this Court held that an untenured federal employee could not seek judicial review of his wholly statutory claim for reinstatement and backpay when such employees were specifically excluded from the provisions of the CSRA that provide judicial review for claims of other classes of employees. Nothing in *Fausto* purported to establish that all

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[17] Although much of the CSRA can be read as a jurisdiction-*channeling* statute, in the sense that some provisions require exhaustion of administrative remedies, see *infra* at 43, and others confer jurisdiction on particular federal courts in circumstances not present here, see *supra* at 3-5, that is a far cry from any conclusion that the CSRA was intended to foreclose judicial review altogether.

federal employee claims are pervasively precluded from judicial review unless the CSRA explicitly provides otherwise. Instead, the Court found review precluded in *Fausto* principally because Congress had carefully considered and precisely delineated the rights of workers who were neither part of the competitive, tenured civil service nor entitled to a veterans' preference, with respect to the specific type of action involved – a suspension based on misconduct. *Id.* at 448-50. Their statutorily unprotected status, as well as the text, structure, and legislative history of the CSRA, showed that Congress had deliberately excluded them from the judicial review contemplated by the CSRA. *Ibid.* By contrast, because Fausto raised no constitutional claim, the Court did not suggest that the CSRA manifested any intent to strip the federal courts of their jurisdiction to protect constitutional rights.

3. The Ninth Circuit's reading of section 7121(a) undoubtedly creates a serious constitutional question because it completely forecloses judicial review of petitioner's First, Fourth, and Fifth Amendment claims – thus "remov[ing] from the courts an essential judicial function under our implied constitutional mandate of separation of powers, and depriv[ing] an individual of an independent forum for the adjudication of a claim of constitutional right." *Bartlett* v. *Bowen*, 816 F.2d 695, 703 (CADC 1987). By contrast, the construction adopted by the Federal Circuit in *Mudge* v. *United States*, 308 F.3d 1220 (2002), and by the Eleventh Circuit in *Asociacion de Empleados del Area Canalera (ASEDAC)* v. *Panama Canal Commission*, 329 F.3d 1235 (2003), wisely avoided that constitutional difficulty. As petitioner explains below, the text, structure and legislative history of section 7121(a) all show that it is not just "fairly possible," but is in fact a great deal more plausible, to construe section 7121(a) to preserve judicial review of petitioner's constitutional claims.

### B. The Plain Language of Section 7121 Makes Clear Congress' Intent Only To Channel Administrative Complaints and Not To Foreclose Judicial Remedies.

Section 7121 expressly provides that, with a few exceptions, the negotiated grievance procedures established by a collective bargaining agreement "shall be the exclusive administrative procedures for resolving grievances" which fall within the agreement's coverage. Because the most natural construction of the phrase "exclusive administrative procedures" is one that recognizes the existence, and continued vitality, of *non*-administrative procedures, section 7121 should be read to mean what it says, precluding federal employees from seeking redress through *administrative* paths other than the negotiated grievance procedures (such as the other grievance procedures an agency maintains or the grievance procedures provided by the Office of Personnel Management, see *Mudge*, 308 F.3d at 1231; *ASEDAC*, 329 F.3d at 1240), while leaving otherwise available *judicial* remedies unaffected.

It is a "settled rule that [the Court] must, if possible, construe a statute to give every word some operative effect." *Cooper Indus., Inc.* v. *Aviall Services, Inc.*, 125 S.Ct. 577, 584 (2004). Adherence to this rule requires that section 7121 be construed to give meaning to the word "administrative." The Ninth Circuit's approach, however, rendered the word entirely superfluous by treating the negotiated grievance procedures as if they were the sole avenue – administrative or not – for seeking redress. The court below thus flouted this Court's consistent directive that statutes must be interpreted so that "no clause, sentence, or word shall be superfluous," *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (citing *Washington Mkt. Co.* v. *Hoffman*, 101 U.S. 112, 115 (1879); see also, *e.g.*, *Babbitt* v. *Sweet Home Chapter*, 515 U.S. 687, 698 (1995); *United States* v. *Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Inhabitants of Montclair Tp.* v. *Ramsdell*, 107 U.S. 147, 152 (1883)).

1. In construing section 7121, this Court should give the word "administrative" its ordinary or natural meaning. *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994). That meaning – as dictionary usage, the decisions of this Court, and the United States Code all reflect – squarely distinguishes "administrative functions or acts * * * from such as are judicial." Black's Law Dictionary 45 (6th ed. 1990). Indeed, Black's expressly defines an "administrative remedy" as "a *nonjudicial* remedy provided by an administrative agency." *Id*. at 1320 (emphasis added ). [18] Thus, when section 7121 addresses "administrative procedures for resolving grievances," it refers to the processes conducted by an administrative agency, and not to any *judicial* procedures.

This Court has regularly acknowledged the distinction between "administrative" and "judicial" proceedings. See, *e.g.*, *Ranchos Palos Verdes* v. *Abrams*, 125 S.Ct. 1453, 1459 (2005) (explaining that 42 U.S.C. 1983 provides a cause of action for violation of a federal statute by persons acting under color of state law, when the substantive statute "[does] not provide a private judicial remedy (or, in most of the cases, even a private administrative remedy) for the rights violated"); *Blessing* v. *Freestone*, 520 U.S. 329, 348 (1997) (noting that the title of the Social Security Act at issue "contains no private remedy – *either judicial or administrative*") (emphasis added); *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 521 (1990) (noting that the Medicaid Act provided no provision "for private *judicial or administrative* enforcement") (emphasis added). See also *Jenkins* v. *Morton*, 148 F.3d 257, 259 (CA3 1998) (holding

[18] Black's consistently treats "administrative" and "judicial" as distinct categories. See, *e.g.*, BLACK'S LAW DICTIONARY 738 (8th ed. 2004) (defining a "fair hearing" as a "judicial *or* administrative hearing conducted in accordance with due process") (emphasis added); *id.* at 379 (defining "county court" as a body that "may govern administrative *or* judicial matters, depending on state law") (emphasis added).

that the provision of the Prison Litigation Reform Act that requires prisoners to exhaust their "administrative remedies" before bringing suit in federal court does not also require them to seek judicial relief from the state since there is a "well-established distinction between administrative and judicial remedies").

2. If Congress had intended section 7121(a) to address both administrative and judicial proceedings, it would not have included the "administrative" limitation or it would have mentioned both classes of procedures, as it plainly has in other provisions of the CSRA. See, *e.g.*, 5 U.S.C. 1214(b)(2)(E) (providing that a determination by the Special Counsel "shall not be cited or referred to in any proceeding under this paragraph or any other *administrative or judicial* proceeding for any purpose") (emphasis added); *id.* § 1214(a)(2)(B) (providing that certain written statements "may not be admissible as evidence in any *judicial or administrative proceeding*") (emphasis added).

The CSRA reflects Congress' consistent practice in drafting statutes. The United States Code is honeycombed with statutory provisions that expressly include the phrase "administrative or judicial" when Congress intends to restrict access to both administrative and judicial fora. See, *e.g.*, 2 U.S.C. 1361(d)(1) (limiting the right of legislative branch employees to "commence an administrative or judicial proceeding to seek a remedy" for violation of certain employment rights); 3 U.S.C. 435(d)(1) (similarly limiting the ability of certain employees in the office of the president to "commence an administrative or judicial proceeding to seek a remedy" for violation of certain federal employment laws); 7 U.S.C. 2021(g)(2)(C) (providing that certain food stamp-related disqualification decisions made by the Secretary of Agriculture "shall not be subject to judicial or administrative review"); 8 U.S.C. 1160(e)(1) (restricting "administrative or judicial review" of determinations of special agricultural workers' status); 31 U.S.C. 3552(b)(2) (providing that certain government procurement-related decisions are "not subject to

administrative or judicial review"); 40 U.S.C. 3312(a)(2) (providing that certain General Services Administration decisions to waive compliance with building codes are "not subject to administrative or judicial review"); 42 U.S.C. 1395m(l)(5) (providing that "[t]here shall be no administrative or judicial review" of the amounts set in the fee schedule for Medicare-covered ambulance services).

There is, therefore, no basis for reading the word "administrative" out of Section 7121(a) or redrafting the statute to include the word "judicial" where Congress left it out. See *United States* v. *Standard Brewery, Inc.*, 251 U.S. 210, 218 (1920) ("It is elementary that all of the words used in a legislative act are to be given force and meaning, and of course the qualifying words * * * cannot be rejected. It is not to be assumed that Congress had no purpose in inserting them or that it did so without intending that they should be given due force and effect.").

3. The syntax of the sentence in which the phrase "exclusive administrative procedures" appears also reinforces the conclusion that section 7121(a)'s plain language operates only to restrict sources of "administrative" redress. The sentence begins with the clause "[e]xcept as provided in subsections (d), (e), and (g) of this section." Each of those subsections provides employees with alternative administrative routes – before the Merit Systems Protection Board, the Equal Opportunity Employment Commission, or the Office of Special Counsel – for pursuing employment-related grievances.[19] In light of this exceptions clause, the

[19] Subsection 7121(d) offers employees alleging a violation of 5 U.S.C. 2302(b)(1) – which forbids various forms of discrimination – the ability to "raise the matter under a statutory procedure or the negotiated procedure." Subsection 7121(e) permits employees who have been subjected to certain severe consequences – such as removal or reduction in grade pursuant to 5 U.S.C. 4303 or removal, lengthy suspension or furlough, or reduction in grade or pay pursuant to 5 U.S.C. 7512 – the

most natural reading of section 7121(a) is that it cuts off access to those alternative administrative remedies except in the circumstances specified. The plain language of section 7121 thus bears on the availability or unavailability of administrative procedures, not on judicial review.

### C. The History of Section 7121 Reinforces the Conclusion That Congress Did Not Strip the Courts of the Power To Resolve Constitutional Claims.

As originally enacted, section 7121(a) used the phrase "exclusive procedures" without the qualifying adjective "administrative." Civil Service Reform Act of 1978, Pub. L. 95-454 Title VII, § 7121, 92 Stat. 1111 (1978). But in 1994, section 7121(a) was amended so that it now refers to "exclusive administrative procedures." Pub. L. 103-424, § 9(c), 108 Stat. 4361 (1994). The events leading up to that amendment are particularly persuasive in reinforcing the conclusion that section 7121(a) is not a jurisdiction-stripping provision.

The court of appeals accorded Congress' surgical insertion of "administrative" no significance whatsoever, adhering to its pre-amendment interpretation in *Veit* v. *Heckler*, 746 F.2d 508 (CA9 1984), and proceeding on the assumption that "administrative" was added to clarify that section 7121(a) did not "constitute an express grant of federal court jurisdiction" over employee grievances. Pet. App. 10a. As petitioner has already explained, however, section 7121(a)

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"discretion" to raise their claims "either under the appellate procedures" of the Merit Systems Protection Board "or under the negotiated grievance procedure." 5 U.S.C. 7121(e)(1). And subsection 7121(g) sets out in further detail the consequences of an employee's decision to "elect" among three "remedies": appeal to the Merit Systems Protection Board; pursuit of a negotiated grievance procedure; or resort to the Office of Special Counsel. 5 U.S.C. 7121(g)(3).

was *never* the source for federal court jurisdiction over employees' claims; that jurisdiction always rested on the general grant of federal question jurisdiction contained in 28 U.S.C. 1331 and the waiver of immunity contained in section 702 of the Administrative Procedure Act. See *supra* at 18-20. It was thus entirely unnecessary to confirm that it did not *confer* federal court jurisdiction.

To the contrary, the only reason why Congress would have wanted to amend section 7121(a) was to override the views of several federal courts that the provision as previously worded *rescinded* federal court jurisdiction conferred elsewhere. Prior to the amendment, the leading decision construing section 7121(a), *Carter* v. *Gibbs*, 909 F.2d 1452 (CAFC) (en banc), *cert. denied*, 498 U.S. 811 (1990), had interpreted section 7121(a)'s then-reference to the "exclusive procedures" of the negotiated grievance process to preclude judicial review of grievable claims. The *Carter* approach was widely adopted by other federal courts. See, *e.g.*, *Albright* v. *United States*, 26 Cl. Ct. 1119, 1122 (1992); *Saul* v. *United States*, 928 F.2d 829, 843 n.23 (CA9 1991); *O'Connell* v. *Hove*, 22 F.3d 463, 466-67 (CA2 1994); see also *Matter of Cecil E. Riggs, et al.*, 71 Comp. Gen. 374, 375 (1992).

The year before section 7121(a) was amended – and, crucially, against the backdrop of *Carter* – a bill was introduced at the urging of employee representatives proposing that section 7121(a) be amended in *precisely* the manner ultimately accomplished in 1994: that is, by inserting the word "administrative" between the words "exclusive" and "procedures." The accompanying House Committee Report explained that section 7121 was never "intended to limit *judicial* remedies otherwise provided by law." Federal Employee Fairness Act of 1994, H.R. Rep. No. 103-599, pt. 2, at 75 (1994) (emphasis added). Adding "administrative" to section 7121(a), the Report explained, would "clarif[y] Congress' original intent that the grievance procedure would be an exclusive administrative procedure for matters that it

covers* * * * This clarification is necessary to correct an erroneous decision [in *Carter*.]" *Id*. pt. 1, at 56. The original bill to correct *Carter* was not enacted, but the next year, identical language was proposed in new legislation. At the subcommittee hearings on that bill, officials from the National Treasury Employees Union asked Congress to overrule *Carter* by amending section 7121(a) to make clear that the statute would not prevent the federal courts from adjudicating claims brought by federal employees covered by a collective bargaining agreement.[20] This time, the bill passed, and Section 7121(a) was amended to its present form.

This Court has consistently construed statutes in light of "the common-sense presumption that statutes are usually enacted to change existing law." *Wallace* v. *Jaffree*, 472 U.S. 38, 59 n.48 (1985). Had Congress agreed with *Carter*'s construction of section 7121(a), there would have been no need to amend section 7121(a) at all – let alone to amend it by using language that is most naturally read to accomplish precisely the opposite result. Congress also would have understood that using the same phraseology that had previously been proposed to overrule *Carter* would convey an intent to reject *Carter*'s jurisdiction-stripping construction. It is thus highly implausible that, without explanation, Congress added the word "administrative" to section 7121(a) to accomplish a completely unexpressed purpose when the natural consequence of the language it chose was to restore jurisdiction to the federal courts.[21]

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[20] See H.R. 2970, To Reauthorize the Office of Special Counsel and To Make Amendments to the Whistleblower Protection Act: Hearing Before the Subcomm. on the Civil Serv. of the Comm. on Post Office and Civil Serv., 103d Cong. 20-23 (1993) (statements of Timothy Hannapel, Assistant Counsel, National Treasury Employees Union, and Robert M. Tobias, President, National Treasury Employees Union).

[21] That the alteration of section 7121 was denominated a "Technical and Conforming" amendment does not undermine this

Given the plain meaning of section 7121's reference to "exclusive administrative" procedures, only an "extraordinary showing" of a contrary legislative history could justify construing section 7121 to restrict access to judicial remedies. *Mudge*, 308 F. 3d at 1230, citing *Garcia* v. *United States*, 469 U.S. 70, 75 (1984). In this case, however, every piece of available history reinforces section 7121's plain meaning and supports the continued availability of judicial review.

### D. The Court of Appeals' Construction of Section 7121 Would Produce Absurd and Unjust Results That Congress Could Not Have Intended.

One "common mandate of statutory construction" is "to avoid absurd results." *Rowland* v. *California Men's Colony*, 506 U.S. 194, 200 (1993). See also, *e.g.*, *Clinton* v. *City of New York*, 524 U.S. 417, 429 (1998); *Griffin* v. *Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982). But the court of appeals' construction of section 7121(a) as a jurisdiction-stripping statute would produce strikingly unjust and absurd results. First, it would deprive petitioner – who complied with every demand that he submit to drug or alcohol testing and passed each test – of the right to seek judicial review, while leaving such review available for individuals who were the subjects of adverse agency action because they refused to take tests at all or who failed the tests they took. Second, it would permit third parties, in this case the FAA and

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common-sense conclusion. As this Court noted in *United States* v. *R.L.C.*, 503 U.S. 291, 305 n.5 (1992), "a statute is a statute, whatever its label": even if the "critical congressional enactment" is contained within a "Technical Amendments Act," courts should "appl[y] the usual tools of statutory construction" to give the statute its "most natural[] read[ing]." See also *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 589 (1980) (rejecting the argument that a phrase lacked meaning simply because it was added in a "Technical and Conforming Amendment" and directing that the phrase "must be construed to mean exactly what it says").

petitioner's union, to prospectively waive his right to judicial redress.

If the FAA demands that an employee take a drug or alcohol test, there are three possible outcomes. First, the employee can refuse to take the test. Second, the employee can submit to the test and test positive for a prohibited substance. Third, the employee can submit to the test and test negative for a prohibited substance. In any of these scenarios, the employee may wish, as petitioner did, to challenge the test on constitutional or statutory grounds. But because the Ninth Circuit's construction of section 7121 would allow such a challenge only under first or second scenarios, it rests on the perverse and implausible conclusion that Congress intended to place someone in the third category – the obedient but innocent employee – in a disfavored position.

For FAA employees, "[r]efusal to submit to random drug or alcohol testing or failure to cooperate with the collection process * * * is grounds for removal from the Federal service." Memorandum from the Department of Transportation, Federal Aviation Administration, Notice to Applicant or Employee Subject to Drug and/or Alcohol Testing 3 (Sept. 27, 2000), http://www.faa.gov/region/aso/hrmd/EOD/Drug%20Test%20NOTICE%20MEMO.DOC (visited August 29, 2005). Similarly, failing a test will result in removal from safety-sensitive positions, see 49 CFR 40.23(a), (c); reassignment to a non-safety, non-security position, if one is available; and ultimately termination unless the employee completes agency-approved rehabilitation. Memorandum from the Department of Transportation, Federal Aviation Administration, Notice to Applicant or Employee Subject to Drug and/or Alcohol Testing.

If an FAA employee were terminated (or subject to a suspension of more than 14 days or reduced in grade or pay) for refusing to submit to a test or for failing a test, he would be entitled to appeal this "major adverse personnel action," see 49 U.S.C. 40122(j), to the Merit Systems Protection

Board. And if the Board rejected his constitutional and statutory challenges to the testing regime, he would be entitled to judicial review pursuant to 5 U.S.C. 7703(a)(1).

In contrast, under the Ninth Circuit's reading of section 7121(a), an FAA employee like petitioner, who falls into the third category – that is, an employee who complies with the demand for testing and passes the test – is wholly precluded from ever challenging the testing regime in federal court. He cannot allege that the test itself is a major adverse action. See *supra* note 2. Nor can he file a complaint with the Office of Special Counsel alleging a prohibited personnel practice. See *supra* note 5. Thus, the Ninth Circuit's reading of section 7121(a) leaves an FAA employee like petitioner – sober and compliant – unable to challenge the constitutionality of a substance testing regime,[22] while his insubordinate or impaired co-workers retain their right to judicial review. It is implausible to believe that Congress intended this paradoxical and unfair result, which is yet a further basis for rejecting the Ninth Circuit's reading in favor of the plain-language interpretation adopted by the other courts of appeals to have addressed the issue.

That the Ninth Circuit's decision turns the remedial structure of the CSRA "upside down," *Fausto*, 484 U.S. at 449, is illustrated by the numerous substantial constitutional and statutory claims of FAA employees that would have no possibility – ever – of receiving judicial review. An FAA employee, for example, who was repeatedly subjected to strip searches, would have no judicial recourse; in and of themselves, the searches, however frequent or invasive, would almost certainly not constitute a major adverse personnel action under 49 U.S.C. 40122(j), an unfair labor practice under 5 U.S.C. 7116(a), a whistleblower claim under

[22] At most, the sober and compliant employee could file a grievance, which his union might or might not pursue to arbitration and which would be subject to final review by the FLRA, a specialized agency with no expertise in Fourth Amendment law.

5 U.S.C. 2302(b)(8), see 49 U.S.C. 40122(g)(2)(A), nor any other category of claim for which the CSRA itself provides judicial review. The same would be true for an employee who was subject to repeated week-long suspensions or harassment because of his political beliefs.

The disfavored position into which the Ninth Circuit's reading thrusts employees like petitioner is not only intuitively perverse, but inconsistent with the principles this Court articulated in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967). In *Abbott Laboratories*, the court of appeals had held that the plaintiff drug manufacturers could not seek pre-enforcement judicial review of the Food and Drug Administration's promulgation of new regulations. Thus, the plaintiffs faced the prospect of either complying with regulations that they believed exceeded the FDA's power or risking criminal and civil penalties for unlawfully distributing "misbranded" pharmaceuticals. Under the court of appeals' view, only by risking serious penalties and raising the invalidity of the regulations as a defense to an enforcement action would they be able to present their claims to a federal court. This Court, however, held that the plaintiffs were entitled to seek judicial review without facing such a Hobson's choice:

> To require [the manufacturers] to challenge these regulations only as a defense to an action brought by the Government might harm them severely and unnecessarily. Where * * * a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts under the Administrative Procedure Act and the Declaratory Judgment Act must be permitted, absent a statutory bar or some other unusual circumstance, neither of which appears here.

*Abbott Labs*, 387 U.S. at 153.

The Ninth Circuit's ruling places petitioner squarely into the *Abbott Laboratories* dilemma. His hands are effectively tied; he must either submit to tests he believes are unconstitutional and unauthorized by law or risk his job by declining to take the test in order to raise his constitutional and statutory claims as a defense in a termination proceeding. Particularly given the availability of a reasonable, plain-language interpretation of section 7121(a) that preserves petitioner's right to judicial review of his constitutional claims, there is no warrant for finding an implied "statutory bar" in this case. Foreclosing the possibility of judicial challenges to drug testing for employees who submit to testing and receive clean results creates an anomalous consequence antithetical to the logic, plain language, and history of section 7121.

The Ninth Circuit's reading of section 7121(a) produces yet another absurd result: it allows the union to waive petitioner's right to judicial review of his constitutional claims against his wishes.[23] Thus, under the Ninth Circuit's view, an employee is forced by a collective bargaining agreement into pursuing his claim through the agreement's negotiated process, but that process effectively assigns the employee's right to seek judicial review of his constitutional claims to his union.

That outcome conflicts with this Court's decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that collective bargaining agreements, while they can waive causes of action based on contractual terms and causes of action related to collective activity, *cannot* waive employees' rights to seek judicial redress for statutory claims.

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[23] Only the union or the employer, and not the employee, can decide to invoke the final stage of the grievance process – arbitration. J.A. 26. Only the union or the employer, and not the employee, can seek judicial review in the limited circumstances in which such review is available – namely, when the grievance involves an unfair labor practice.

*Gardner-Denver* concerned an employee's race discrimination claim under Title VII; the defendant argued that an employee who pursued arbitration under a collective bargaining agreement could not then bring suit in federal court. This Court disagreed:

> It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. * * * * Of necessity, the rights conferred can form no part of the collective-bargaining process * * * . In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.

Id. at 51-52. *Gardner-Denver*'s analysis has, if anything, even more force in cases involving constitutional claims. Neither the FAA nor petitioner's union has any power to waive prospectively his right to seek judicial review.

### E. This Court Should Not Require Plaintiffs Like Petitioner to Exhaust Negotiated Grievance Procedures Before Seeking Judicial Review.

Petitioner recognizes that one court of appeals has read exhaustion requirements into certain provisions of the CSRA. See *Weaver* v. *United States Info. Agency*, 87 F.3d 1429 (CADC 1996) (requiring an employee to exhaust his remedies with the OSC regarding an oral admonishment before filing suit), *cert. denied*, 520 U.S. 1251 (1997); *Steadman* v. *Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963 (CADC 1990) (requiring employees alleging a

breach of the duty of fair representation to exhaust their remedies with the FLRA before filing suit on their related constitutional claims).[24] Whether petitioner was required to exhaust his claims is not a question before this Court: the Ninth Circuit did not dismiss petitioner's claims for failure to exhaust and, in any event, the Government has waived any exhaustion defense by not raising it in the lower courts. Cf. *Johnson* v. *California*, 125 S.Ct. 1141,1159 (2005) (Thomas, J., dissenting) (noting that a majority of the Court seemed in the context of a constitutional challenge to prison policy to assume that even "statutorily mandated exhaustion is not jurisdictional" and that a defendant has "waived the issue by failing to raise it").

Were this Court to consider the question, however, it should hold that exhaustion is not required for claims, like petitioner's, for which the only administrative remedy is an informal grievance process. Nothing in the text of section 7121(a) explicitly requires employees to pursue the informal negotiated grievance process before filing suit. And nothing in the overall structure of the CSRA imposes a requirement that employees exhaust negotiated grievance procedures.

As this Court has recognized, "policy considerations alone cannot justify judicially imposed exhaustion unless exhaustion is consistent with congressional intent." *Patsy* v. *Board of Regents*, 457 U.S. 496, 513 (1982). Exhaustion requirements are thus "largely creatures of statute," *Sims* v. *Apfel*, 530 U.S. 103, 107 (2000). Broadly speaking, when

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[24] In imposing an exhaustion requirement, however, the D.C. Circuit explicitly acknowledged the continued availability of judicial review. *Steadman*, 918 F.2d at 968 (declaring, after requiring that the employees first exhaust their administrative remedies, that this was "not to say that a federal employee may not bring an equitable claim based on the Constitution in federal district court after having exhausted his CSRA remedy" because "if a constitutional claim survives an unsuccessful journey through the administrative process, the federal courts are open").

Congress wishes to impose an exhaustion requirement, it takes one of two tacks. First, Congress often expressly requires exhaustion. See, *e.g.*, 15 U.S.C. 6765(b) (requiring that persons aggrieved by certain insurance regulatory actions "shall be required to exhaust all available administrative remedies" before they may "seek judicial review"); 31 U.S.C. 6716(a) (requiring that, "[b]efore bringing an action," any person who claims to be injured by a local government's failure to comply with conditions of various federal block grant programs must "exhaust administrative remedies"); 42 U.S.C. 1769f(f) (requiring that "[p]rior to seeking judicial review," any contractor barred from participating in federally funded child nutrition programs must "exhaust all administrative procedures"); 42 U.S.C. 1997e(a) (providing that "[n]o action shall be brought with respect to prison conditions under section 1983 * * * or any other Federal law * * * until such administrative remedies as are available are exhausted"). Section 7121(a) notably contains no exhaustion requirement. When Congress amended section 7121(a) in 1994 to reinstate district court jurisdiction to hear employees' constitutional claims, it could easily have also added an explicit exhaustion requirement; that it did not do so undercuts any assumption that it meant to impose one. Under these circumstances, it would affirmatively frustrate congressional intent to require exhaustion: Congress specified the role that it wanted the grievance procedure to play in relation to other possible remedies and made clear that existence of the procedure would have no effect on judicial causes of action.

Second, Congress sometimes implicitly requires exhaustion by setting up a detailed remedial scheme that provides for a particular form of judicial review preceded by administrative proceedings. When Congress constructs this type of specific system, this Court has sometimes inferred that Congress did not mean for plaintiffs to circumvent its particular provisions by relying on a more general statutory provision that allows for immediate resort to federal district

court. Cf. *Smith* v. *Robinson*, 468 U.S. 992 (1984) (holding that when Congress has created a detailed remedial scheme, plaintiffs cannot bring suit under 42 U.S.C. 1983 instead); *Middlesex County Sewerage Auth.* v. *Nat'l Sea Clammers' Ass'n*, 453 U.S. 1 (1981) (same).

*Some* constitutional claims by federal employees might fall into this category. If, for example, an employee could have challenged a major adverse personnel action before the MSPB with review by the Federal Circuit, see 5 U.S.C. 7703, a court might conclude that Congress intended for that employee to pursue that administrative remedy rather than going straight to court. That is because Congress' design would be directly thwarted if an employee were permitted such direct judicial access. But for claims like petitioner's, where no sequential path is set out for administrative and then judicial review, the structure of the CSRA creates no implied exhaustion requirement.

In fact, the nature of the negotiated grievance process – in which the *union*, rather than the grievant, controls whether arbitration is even available, see J.A. 26 – shows why section 7121 cannot be sensibly read to impose an exhaustion requirement. An individual employee simply has no power of his own to fully exhaust the entire negotiated grievance procedure; control over the stages of the grievance procedure that *might* – albeit only in extraordinarily narrow circumstances not applicable to this case, see *supra* at 7 – result in the ability to seek judicial review lies in the union alone. Requiring an employee to exhaust a process he cannot pursue makes no sense.

Of course, most employees, especially those advised by counsel, will likely choose to pursue negotiated grievance procedures before they head to federal court: those processes are sure to be less expensive and quicker, and when they work, preferable along nearly every dimension. But nothing in the statute explicitly or implicitly requires them to do so.

Even if this Court were to adopt a judicially created exhaustion requirement, it should nevertheless reverse the judgment of the Ninth Circuit. First, even the D.C. Circuit has not imposed an exhaustion requirement on cases like petitioner's; it requires exhaustion only in cases seeking retrospective relief. See *Weaver*, 87 F.3d at 1434 (distinguishing between "the ordinary case of a failure to exhaust CSRA remedies, in which the employee would have no claim that she could file directly in federal court if isolated from her claims for relief from a personnel action" and claims where an employee wishes simply to challenge the prospective application of a policy, and permitting the latter type of claim without exhaustion). Thus, under the D.C. Circuit's rule, petitioner could have proceeded directly to federal district court, since he sought no form of retrospective relief. Second, the government did not argue before the district court that petitioner's complaint should be dismissed for failure to exhaust, thereby waiving that argument. Finally, the district court dismissed petitioner's complaint for lack of subject-matter jurisdiction – a dismissal with prejudice; if petitioner was required to exhaust and had failed to do so, any dismissal should have been without prejudice.

## III. The District Court Also Retained Its Jurisdiction to Hear Petitioner's Statutory Claim.

In addition to raising a constitutional challenge to the way the FAA's drug-testing program had been administered, petitioner also argued that the agency had violated 49 U.S.C. 45104(8), which required the Administrator to "ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no employee is harassed by being treated differently from other employees in similar circumstances." Just as the district court retained its jurisdiction under 28 U.S.C. 1331 and the Administrative Procedure Act to hear petitioner's constitutional claims, so too, it retained its jurisdiction to hear petitioner's statutory

claim, unless a statute precluded judicial review. 5 U.S.C. 701(a)(1).

To be sure, Congress often imposes duties on governmental actors without creating concomitant, judicially enforceable rights for every individual who is affected by the government's conduct. Cf. *Gonzaga Univ.* v. *Doe*, 536 U.S. 273, 284 (2002) (requiring that statutes contain "rights-creating" language before the Court will find that Congress intended to allow private enforcement). But here, section 45104(8)'s explicit focus on the privacy and fairness interests of individual employees surely creates a right. And section 702 of the APA explicitly gives individuals whose rights were denied by agency action an "entitle[ment] to judicial review."

As with petitioner's constitutional claim, the Ninth Circuit erred by assuming that section 7121 had to create a cause of action in order for petitioner to bring suit. To the contrary, petitioner's cause of action is provided by the combination of section 45104(8) and section 702 of the Administrative Procedure Act. And 28 U.S.C. 1331 gives the federal district court jurisdiction to hear petitioner's statutory cause of action because his claim arises under the laws of the United States. Nothing in the text, structure, purposes, or legislative history of section 45104(8) suggests that Congress meant to accord the Administrator unreviewable discretion in establishing or administering the substance-testing program. Certainly, if Congress had wanted to make the Administrator's decisions unreviewable, it had numerous examples of far clearer language in which to express itself. See, *e.g.*, 7 U.S.C. 136w-8(g)(2)(B) (providing, with the exception of one specific issue that was amenable to judicial review, that "[n]o other action authorized or required under this section shall be judicially reviewable by a Federal or State court"); 12 U.S.C. 1831k(d) (providing with respect to any federal banking agency's decision to pay a reward for assistance in proving civil or criminal violations of various federal statutes that "[a]ny agency decision under this section is final and not reviewable by any court"); 19 U.S.C. 1339

(providing, with respect to the Trade Remedy Assistance Office that "[a]n agency decision regarding whether a business concern is an eligible small business for purposes of this section is not reviewable by any other agency or by any court"); 31 U.S.C. 5111(c)(3) (providing, with respect to certain determinations by the Secretary of the Treasury regarding procurements related to coinage that "[a]ny determination * * * shall not be reviewable in any administrative proceeding or court of the United States").

The very fact that employees who fail a test – and thus face suspension, termination, and other adverse consequences – undeniably retain the right to seek judicial review of their punishment belies any contention that the operation of the drug-testing program was intended to be unreviewable. As petitioner explained *supra* at 38-39, this Court's decision in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), stands squarely for the proposition that plaintiffs are entitled to seek judicial review of agency action without having first to violate the agency's regulations. Having already been subjected to several substance tests that allegedly violated section 45104(8) and the FAA's own regulations, petitioner's claim was surely ripe within the meaning of *Abbott Laboratories*. Thus, he should have the same ability to seek judicial review of the FAA's actions that employees who refused to take, or who failed, the drug and alcohol tests would have enjoyed.

## CONCLUSION

For the foregoing reasons, the judgment should be reversed.

Respectfully submitted,

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# APPENDIX

## Constitutional Provisions

The First Amendment to the Constitution of the United States provides, in relevant part that "Congress shall make no law * * * abridging the freedom of speech * * * ."

The Fourth Amendment to the Constitution of the United States provides, in relevant part that "[t]he right of the people to be secure in their persons * * * against unreasonable searches and seizures, shall not be violated * * * ."

## Statutory Provisions

5 U.S.C. 7121(a) provides:

(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d), (e), and (g) of this section, the procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage.

(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

49 U.S.C. 40122(g) provides, in relevant part:

(1) In general. In consultation with the employees of the [Federal Aviation] Administration and such non-governmental experts in personnel management systems as he may employ, and notwithstanding the provisions of title 5 and other Federal personnel laws, the Administrator shall develop and implement * * * a personnel management system for the Administration that addresses the unique demands on the

agency's workforce. Such a new system shall, at a minimum, provide for greater flexibility in the hiring, training, compensation, and location of personnel.

(2) Applicability of title 5. The provisions of title 5 shall not apply to the new personnel management system developed and implemented pursuant to paragraph (1), with the exception of –

(A) section 2302(b), relating to whistleblower protection, including the provisions for investigation and enforcement as provided in chapter 12 of title 5;

* * *

(C) chapter 71, relating to labor-management relations;

* * *

(H) sections 1204, 1211-1218, 1221, and 7701-7703, relating to the Merit Systems Protection Board.

49 U.S.C. 45102(b)(1) provides, in relevant part:

The Administrator shall establish a program of preemployment, reasonable suspicion, random, and post-accident testing for the use of a controlled substance in violation of law or a United States Government regulation for employees of the Administration whose duties include responsibility for safety-sensitive functions and shall establish a program of reasonable suspicion, random, and post-accident testing for the use of alcohol in violation of law or a United States Government regulation for such employees.

49 U.S.C. 45104 provides, in relevant part:

In carrying out section 45102 of this title, the Administrator of the Federal Aviation Administration shall develop requirements that —

* * *

(8) ensure that employees are selected for tests by nondiscriminatory and impartial methods, so that no

employee is harassed by being treated differently from other employees in similar circumstances.