No. 22-443

In the Supreme Court of the United States

MICHAEL S. ZUMMER, PETITIONER

v.

JEFFREY S. SALLET, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a federal employee entitled under the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, to appeal an adverse personnel action to the Merit Systems Protection Board may instead sue in district court to bring a constitutional challenge to an adverse personnel action resulting from the suspension and revocation of a security clearance.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-32) is reported at 37 F.4th 996. The opinion of the district court granting in part respondents' motion to dismiss (Pet. App. 52-80) is not published in the Federal Supplement but is available at 2019 WL 4213512. The opinion of the district court granting in part petitioner's motion for reconsideration (Pet. App. 36-51) is not published in the Federal Supplement but is available at 2019 WL 5294944.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2022. A petition for rehearing was denied on August 9, 2022 (Pet. App. 81-83). The petition for a writ of certiorari was filed on November 7, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, "established a comprehensive system for reviewing personnel action taken against federal employees." *United States* v. *Fausto*, 484 U.S. 439, 455 (1988). The CSRA "overhauled" the existing patchwork of statutes and rules governing the civil service system, *Lindahl* v. *Office of Pers. Mgmt.*, 470 U.S. 768, 773 (1985), and replaced it with "an integrated scheme" "designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration," *Fausto*, 484 U.S. at 445. To that end, the CSRA "prescribes in great detail the protections and remedies applicable to [personnel] action, including the availability of administrative and judicial review." *Id.* at 443.

As relevant here, the CSRA governs adverse personnel actions taken against certain government employees "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). A covered employee threatened with a major adverse action such as a removal or a suspension without pay lasting more than 14 days is entitled to notice, the opportunity to be represented by counsel, an opportunity to respond, and a written decision. 5 U.S.C. 7513(b); see 5 U.S.C. 7512; *Fausto*, 484 U.S. at 446-447. If the employing agency takes the proposed action, the employee can appeal to the Merit Systems Protection Board (MSPB). 5 U.S.C. 7513(d). The MSPB is authorized to order relief including reinstatement, backpay, and attorney's fees. 5 U.S.C. 1204(a)(2) and 7701(g). An employee aggrieved by a final decision of the MSPB may obtain judicial review, generally in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 7703; see 28 U.S.C. 1295(a)(9).

Only "competitive service" and "excepted service" employees who meet specified requirements regarding probationary periods and years of service are entitled to administrative and judicial review under the CSRA scheme. 5 U.S.C. 7511(a)(1) (Supp. III 2021). Many employees of the intelligence agencies, including the Federal Bureau of Investigation (FBI), are not covered. See 5 U.S.C. 7511(b)(7) and (8). But veterans and other preference-eligible employees in the FBI's excepted service are covered once they have completed a year of service in their position. 5 U.S.C. 7511(a)(1)(B).

2. Petitioner Michael Zummer is a former FBI special agent. Pet. App. 3. As a preference-eligible veteran who had served more than a year in his position, petitioner was covered under the CSRA. *Id.* at 10 n.11.

Petitioner was the lead agent in a high-profile public-corruption investigation of a Louisiana district attorney. Pet. App. 3. The district attorney was accused of pressuring numerous women into giving him sexual favors in exchange for lenient treatment for themselves or their family members. *Id.* at 3-4. The U.S. Attorney for the Eastern District of Louisiana entered into to a plea agreement under which the district attorney pleaded guilty to obstruction of justice, an offense carrying a three-year maximum sentence. *Id.* at 4, 53.

Believing the plea agreement to be too lenient, petitioner drafted a letter to the district judge presiding over the district attorney's case. Pet. App. 4. The letter described what petitioner viewed as misconduct and conflicts of interest in the U.S. Attorney's Office. *Ibid.* Petitioner asked his FBI superiors for permission to send the letter. *Ibid.* Based on the advice of the FBI's Office of the General Counsel, his superiors instructed petitioner not to send the letter, and instead to contact

the Department of Justice Office of the Inspector General and Office of Professional Responsibility—which were responsible for accepting whistleblower complaints—and ask them for permission first. *Id.* at 4-5, 53-54; see First Am. Compl. ¶ 27.

Petitioner submitted the draft letter to the Office of the Inspector General. Pet. App. 54. Petitioner had not received a response as the district attorney's sentencing drew near, so he decided to submit the draft letter to the FBI's prepublication-review office, which reviews memoirs and other materials that FBI employees seek to publish outside of their official duties. *Id.* at 5 & n.1. The prepublication-review office told petitioner that it would review his letter for release to the media, but not for transmission to the judge, because it viewed communications with the court to be a matter within petitioner's official duties. *Id.* at 5, 54.

Dissatisfied with that response—and notwithstanding his superiors' previous instruction not to send the letter without permission—petitioner updated his letter to include a description of the FBI's response to his efforts and sent it to the judge. Pet. App. 6; see C.A.E.R. 339, 362-363. The chief counsel of the FBI's New Orleans Division asked petitioner to retract the letter, but he refused. Pet. App. 54. Instead, petitioner sent the judge a second letter arguing that the contents of his first letter were not protected by any privilege. *Id.* at 6.

Two weeks after petitioner sent his first letter, he was removed from investigative activity. Pet. App. 54. A month later, the FBI suspended his security clearance. *Id.* at 55. Although the FBI did not accuse petitioner of divulging classified information, it explained that it could not trust him to learn new classified

information because of his "position," as reflected in his letters, "that information [he] personally gather[s] in the performance of [his] duties . . . may be disclosed [in his capacity] as a private citizen." Pet. App. 6 (brackets in original). Because FBI special agents must have a Top Secret/Sensitive Compartmented Information Clearance, the suspension of petitioner's clearance resulted in the indefinite suspension of his employment. *Id.* at 7.

The FBI's Security Division later determined that petitioner's clearance should be revoked permanently. Pet. App. 7, 55. In a letter informing petitioner of the decision, the Assistant Director of the Security Division stated that petitioner's "actions revealed evidence of heightened risk related to national security." First Am. Compl. ¶ 77. The letter further explained:

> Despite explicit instructions that you could not file your Misconduct Letter with the court without DOJ permission, you proceeded to do so nonetheless. Your deliberate failure to comply with the rules and regulations for protecting sensitive information raises doubt about your trustworthiness, judgment, reliability, or willingness and ability to safeguard such information.

Id. ¶ 79.

While these actions unfolded, petitioner continued his efforts to publish his letters. Pet. App. 7. The FBI later approved significantly redacted versions for release to the public. *Ibid.*

3. In 2017, petitioner filed suit in federal district court against the FBI and various FBI officials in their individual and official capacities, alleging violations of his First Amendment right to free speech. Pet. App.

56.[1] Count 1 of petitioner's amended complaint alleged that the suspension and termination of his security clearance and the suspension of his employment without pay were unlawful retaliation for protected speech; he sought reinstatement of his clearance, reinstatement of his position with backpay and benefits, and damages. *Id.* at 8, 56; see First Am. Compl. ¶¶ 82-84, 90, 93-94. Count 2 challenged the FBI's refusal to permit public release of petitioner's full unredacted letters. Pet. App. 8, 56; see First Am. Compl. ¶¶ 85-87, 91, 93-94.[2]

4. The district court granted the government's motion to dismiss in part, dismissing Count 1 against the official-capacity defendants and both counts against the individual-capacity defendants. Pet. App. 79. Citing this Court's decision in *Elgin* v. *Department of the Treasury*, 567 U.S. 1 (2012), the district court held that it lacked subject-matter jurisdiction over those claims because "[t]he CSRA is the exclusive means by which a [covered] federal employee can challenge an adverse employment action, even if the challenge to the action involves a constitutional claim." Pet. App. 63-64.

The district court also held, in the alternative, that review of petitioner's claims was precluded under this Court's decision in *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), because those claims "implicate[] the merits of the FBI's security clearance revocation." Pet. App. 66. The district court noted that, although *Egan* involved review of a security-clearance denial by

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[1] Pursuant to this Court's Rule 35.3, Douglas S. Beidler has been automatically substituted for Gerald Roberts, Jr. in his official capacity as the Assistant Director of the FBI's Security Division.

[2] At the time petitioner filed suit and amended his complaint, he remained suspended without pay. See Compl. ¶ 65; First Am. Compl. ¶ 81. His employment has since been terminated.

the MSPB, courts of appeals have held that *Egan*'s rationale likewise bars judicial review of such determinations. *Id.* at 66-67 (citing cases). And the court reasoned that for petitioner to succeed on his First Amendment retaliation claim, he would have to demonstrate that protected speech "was a substantial or motivating factor in the adverse employment action," which would require the court to "inquire as to the underlying merits of the FBI's security [clearance] revocation decision" and examine "the legitimacy of the FBI's proffered reasons." *Id.* at 69-70. Because *Egan* prohibits such an inquiry, the court held that petitioner's claims would fail even if they were not barred by the CSRA. *Id.* at 70.

Petitioner filed a motion for reconsideration, which the district court granted insofar as it reconsidered its rationale for dismissing Count 2 (the claim targeting the FBI's prohibition on publishing the unredacted letters) against the individual-capacity defendants. Pet. App. 50. Recognizing that this claim did not implicate *Elgin* or *Egan*, the court instead concluded that it should be dismissed for lack of a cause of action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). Pet. App. 43-50.

The parties then settled petitioner's sole remaining claim (Count 2 against the official-capacity defendants), Pet. App. 9, and the district court entered final judgment, *id.* at 33-35.

5. The court of appeals affirmed. Pet. App. 1-32.

a. On appeal, petitioner had argued that the CSRA did not foreclose his suit because the CSRA scheme could not provide him with meaningful relief, and that *Egan* was no obstacle to the district court's review of his First Amendment retaliation claim. In response, the government argued that the political-question doctrine

precluded *any* judicial consideration of petitioner's First Amendment retaliation claim, because adjudicating that claim would necessarily require an inquiry into the merits of the Executive Branch's judgment that petitioner could not be trusted with classified information. Gov't C.A. Br. 14-36. In the alternative, the government argued that the district court correctly held that the CSRA barred petitioner's suit because he was challenging a major adverse action and seeking reinstatement. Accordingly, to the extent petitioner's retaliation claim is justiciable at all, the government argued that he must seek review of that claim in the MSPB and the Federal Circuit in accordance with the CSRA. *Id.* at 36-52.

b. In a portion of the opinion joined by all three judges, the court of appeals determined that the CSRA deprived the district court of jurisdiction to adjudicate petitioner's First Amendment retaliation claim. Pet. App. 10-21. The court explained that in *Fausto*, this Court held that federal employees who lack CSRA appeal rights could not bring a statutory claim in a different forum. *Id.* at 14. The court of appeals further noted that in *Elgin*, this Court held that a district court lacked jurisdiction to adjudicate a group of federal employees' constitutional challenge to a statutory condition of their employment, because the employees sought reinstatement to their federal positions and therefore had to proceed through the CSRA scheme. *Id.* at 15-17.

The court of appeals observed that neither *Fausto* nor *Elgin* squarely controlled this case, because (in the court's view) petitioner's challenge to the adverse action stemming from the revocation of his security clearance was unreviewable in the CSRA scheme due to *Egan*. Pet. App. 13-14; see *id.* at 18, 19. The court nonetheless concluded that petitioner's claim was of the type that

Congress intended to be reviewed through the CSRA or not at all. *Id.* at 19-20. The court explained that petitioner sought reinstatement of his security clearance "merely as a 'vehicle' to 'reverse' the adverse employment decisions and 'return to federal employment.'" *Id.* at 19 (quoting *Elgin*, 567 U.S. at 22). Accordingly, petitioner's First Amendment challenge was "not 'wholly collateral to the CSRA scheme.'" *Ibid.* (quoting *Elgin*, 567 U.S. at 22). The court also reasoned that the MSPB's expertise would be relevant to adjudicating any threshold questions or alternative bases for reinstatement, which might eliminate the need to reach petitioner's challenge to the security-clearance determination. See *id.* at 19-20 & n.24 (noting petitioner's argument that his FBI position did not actually require a security clearance). The court thus determined, based on the "CSRA's text and structure," that Congress's intent to withdraw district-court jurisdiction over petitioner's claims was "'fairly discernible in the statutory scheme.'" Pet. App. 20 (quoting *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994)).

In a portion of the opinion joined by two judges, see Pet. App. 3, the court of appeals also rejected petitioner's reliance on this Court's decision in *Webster* v. *Doe*, 486 U.S. 592 (1988). Pet. App. 21-29. In *Webster*, the Court stated that a "'serious constitutional question'" would arise if "a federal statute were construed to deny any judicial forum for a colorable constitutional claim." 486 U.S. at 603 (citation omitted). The Court thus held that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Ibid.*

The court of appeals stated that this Court's subsequent decisions had undermined *Webster*. Pet. App. 24-

27. And the court emphasized that allowing a district court to consider petitioner's First Amendment claim would raise its own serious constitutional concerns. *Id.* at 28-29. The court highlighted *Egan*'s recognition that the Constitution "textually commits to the President the decision whether to grant someone a security clearance," and that the decision "'must be made by those with the necessary expertise in protecting classified information.'" *Id.* at 28 (quoting *Egan*, 484 U.S. at 527, 529). The court observed that this reasoning tracks factors that this Court identified in *Baker* v. *Carr*, 369 U.S. 186 (1962), for identifying "a nonjusticiable political question." Pet. App. 28. But the court did not definitively resolve the government's political-question argument, because it concluded that the mere presence of this significant constitutional issue was sufficient to overcome *Webster*'s constitutional-avoidance reasoning: "Faced with, at most, competing constitutional difficulties, we decline to apply [*Webster*'s] clear-statement rule." *Id.* at 29.[3]

6. Petitioner sought rehearing en banc, which was denied with no judge requesting a vote. Pet. App. 83.

ARGUMENT

Petitioner contends (Pet. 16-24) that the court of appeals erred in concluding that the district court lacked jurisdiction over his constitutional challenge to the adverse personnel action resulting from the FBI's suspension and revocation of his security clearance. But the court's core holding—that federal employees may not

[3] The court of appeals also affirmed the dismissal of petitioner's claim against the individual-capacity defendants, declining to recognize a new cause of action under *Bivens*. Pet. App. 29-31. Petitioner does not seek this Court's review of that holding. Pet. 13.

bypass the CSRA's exclusive scheme merely because *Egan* may foreclose or limit review of security-clearance determinations—is correct and does not conflict with any decision of this Court or another court of appeals. The United States does not agree with the court of appeals' view that the CSRA precludes district-court jurisdiction over colorable constitutional claims that cannot be adjudicated within the CSRA scheme but *can* be adjudicated in other forums. But that is not the situation presented here: The same principles underlying *Egan*'s holding that the MSPB cannot review the merits of security-clearance decisions also apply to judicial forums. Accordingly, a district court's authority to adjudicate such claims outside the CSRA scheme is no greater than the authority of the MSPB and the Federal Circuit to adjudicate such claims under the CSRA. As a result, channeling all such claims exclusively through the CSRA—and requiring petitioner to exhaust his available remedies in those forums—does not deny petitioner any meaningful review that he would otherwise obtain in district court. There is thus no basis for carving out an exception to the CSRA's exclusive scheme. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the CSRA precludes a covered employee from bypassing its mechanisms for administrative and judicial review and instead suing in district court to challenge an adverse personnel action stemming from a security-clearance revocation.

a. As the court of appeals explained (Pet. App. 10-18), this case implicates two lines of authority concerning the CSRA: (1) this Court's decisions in *United States* v. *Fausto*, 484 U.S. 439 (1988), and *Elgin* v. *Department of the Treasury*, 567 U.S. 1 (2012), which hold that

challenges to adverse personnel actions must be channeled through the CSRA's procedures, and (2) the Court's decision in *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988), which held that the MSPB may not review the substance of a security-clearance determination.

In *Fausto*, this Court determined that the CSRA's review procedures provide the exclusive means through which federal employees may challenge adverse employment actions on statutory grounds. 484 U.S. at 448-449, 455. Accordingly, the Court held that a non-CSRA-covered employee could not circumvent the CSRA's limits by bringing such a challenge in the Court of Federal Claims. *Id.* at 455. The Court reasoned that Congress intended to discard the "outdated patchwork of statutes and rules" governing review of federal personnel action and replace it with "an integrated scheme of administrative and judicial review" specifically "designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 444-445 (citation omitted). If claims that Congress deliberately excluded from CSRA review could simply be brought in another court instead, it would seriously undermine Congress's comprehensive statutory scheme. *Id.* at 449-451.

Later, in *Elgin*, this Court held that the CSRA also precludes district-court jurisdiction over *constitutional* challenges to adverse employment actions. In that case, employees who were discharged for failing to register for the Selective Service sued in district court to challenge the constitutionality of the Military Selective Service Act. *Elgin*, 567 U.S. at 6-7. The employees argued that the CSRA did not bar the court from adjudicating their claims because the MSPB has no authority to

declare a federal statute unconstitutional. The Court rejected that justification for bypassing the CSRA, reasoning that—just as in *Fausto*—"the CSRA's 'elaborate' framework" demonstrates Congress's intent to preclude extrastatutory avenues of review of employment action. *Id.* at 11 (citation omitted).

To confirm that Congress intended to channel the employees' constitutional claims through the CSRA scheme, the *Elgin* Court looked to three factors identified in *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200 (1994). See *Elgin*, 567 U.S. at 15-23. First, the Court found that the CSRA provided an opportunity for "meaningful review" of the employees' claims, because even if the MSPB could not resolve the constitutionality of the Military Selective Service Act, the Federal Circuit could. *Id.* at 16-18. Second, the employees' constitutional challenges were not "'wholly collateral' to the CSRA scheme," because those claims "[we]re the vehicle by which they s[ought] to reverse the removal decisions, to return to federal employment, and to receive the compensation they would have earned but for the adverse employment action." *Id.* at 21-22. Third, the MSPB's expertise could be brought to bear on "the many threshold questions that may accompany a constitutional claim" and that "may obviate the need to address the constitutional challenge." *Id.* at 22-23.

Finally, in *Egan*, this Court held that the MSPB has no authority to review a statutory challenge to the substance of a decision to deny a security clearance. 484 U.S. at 526-529. The Court grounded that rule in constitutional concerns, explaining that the duty to control access to classified information derives from the President's authority under Article II. *Id.* at 527-529. The Court stressed that security-clearance

determinations are an "inexact science" involving the exercise of "[p]redictive judgment" about security risks that "must be made by those with the necessary expertise in protecting classified information," and held that such judgments are "committed to the broad discretion of the agency responsible." *Id.* at 529 (citation omitted). "[I]t is not reasonably possible," the Court stated, "for an outside nonexpert body to review the substance of such a judgment and to decide whether the agency should have been able to make the necessary affirmative prediction with confidence," nor can that outside body "determine what constitutes an acceptable margin of error in assessing the potential risk." *Id.*

Although *Egan* specifically addressed the authority of the MSPB, the courts of appeals have recognized that this Court's reasoning likewise bars federal courts from adjudicating claims that would require a factfinder to second-guess the merits of an Executive Branch agency's denial or revocation of a security clearance.[4]

b. *Elgin* dictates that petitioner must raise his First Amendment claim through the CSRA scheme, and *Egan* does not lead to a different result. The court of appeals thus correctly held that petitioner's district-court suit could not proceed.

As a preference-eligible employee in the excepted service of the FBI, petitioner was covered by the CSRA,

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[4] See *El-Ganayni* v. *United States Dep't of Energy*, 591 F.3d 176, 182 (3d Cir. 2010); *Becerra* v. *Dalton*, 94 F.3d 145, 148-149 (4th Cir. 1996), cert. denied, 519 U.S. 1151 (1997); *Perez* v. *FBI*, 71 F.3d 513, 514-515 (5th Cir. 1995) (per curiam), cert. denied *sub nom. Mata* v. *FBI*, 517 U.S. 1234 (1996); *Dorfmont* v. *Brown*, 913 F.2d 1399, 1401 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991); *Hill* v. *Department of the Air Force*, 844 F.2d 1407, 1413 (10th Cir.), cert. denied, 488 U.S. 825 (1988); *Hill* v. *White*, 321 F.3d 1334, 1335-1336 (11th Cir. 2003) (per curiam); *Ryan* v. *Reno*, 168 F.3d 520, 524 (D.C. Cir. 1999).

including its procedures for reviewing adverse personnel action. See p. 3, *supra*; see also Pet. App. 10 n.11, 12. Any review of petitioner's First Amendment claim can therefore occur only in the MSPB and the Federal Circuit—the forums that Congress designated for this purpose. See *Fausto*, 484 U.S. at 449-451; see also *Elgin*, 567 U.S. at 11.

As in *Elgin*, application of the *Thunder Basin* factors confirms that petitioner was required to bring his claim through the CSRA procedures. The court of appeals held that the second and third factors—whether petitioner's suit is "wholly collateral" to the CSRA scheme, and whether his claim implicates the MSPB's expertise—weigh in favor of finding preclusion. Pet. App. 19-20. Petitioner does not contend otherwise, and for good reason: his First Amendment retaliation claim challenges a type of personnel action (suspension) that the MSPB and Federal Circuit regularly review, and the relief he seeks (reinstatement and backpay) are the kinds of remedies the MSPB and Federal Circuit regularly provide. See *Elgin*, 567 U.S. at 22. Similarly, the MSPB would have authority and the expertise to at least determine any threshold issues that might arise in evaluating those claims—for example, whether a security clearance was necessary for petitioner's job (contrary to petitioner's contention below, see Pet. App. 19 & n.24), and whether he was afforded all required process. See *Elgin*, 567 U.S. at 22-23.

The first *Thunder Basin* factor—whether the statutory review scheme will provide the litigant with "meaningful review" of his claim—does not compel a different outcome. To be sure, the government has maintained that, under *Egan*'s reasoning, petitioner cannot obtain judicial review of that decision. See pp. 7-8, *supra*. But

that is due to separation-of-powers principles applicable to *all* forms of judicial review, not any unique feature of the CSRA scheme. See Pet. App. 28. And because those limitations apply to *any* tribunal outside of the Executive Branch agency granting the security clearance, including the district court and the Fifth Circuit, requiring petitioner to proceed through the CSRA scheme would not deprive him of any review that he might obtain in another forum.

As the government argued below, a claim that would require a court to review the merits of a decision to revoke a security clearance raises a nonjusticiable political question. As *Egan* makes clear, there is "a textually demonstrable constitutional commitment of the issue" whether to grant or revoke a security clearance "to a coordinate political department," *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)—namely, the Executive Branch. See *Egan*, 484 U.S. at 527. And there are no "judicially discoverable and manageable standards" by which courts could assess an executive official's predictive judgment about an individual's suitability to handle classified information. *Baker*, 369 U.S. at 217; see *Egan*, 484 U.S. at 528-529. In short, "the requirement that a security clearance be afforded a government employee only where it is 'clearly consistent with the interests of national security' simply does not admit of judicial determination; it is a political question, not a judicially reviewable question." *Hegab* v. *Long*, 716 F.3d 790, 800 (4th Cir.) (Davis, J., concurring), cert. denied, 571 U.S. 1094 (2013).

While the court of appeals agreed that there is "a serious question about the constitutionality of a district court's deciding claims like [petitioner's]," the court declined to definitively resolve the government's political-

question argument. Pet. App. 29. But whatever the answer to that question, it is clear that the CSRA precludes petitioner from bringing suit in district court in the first instance. If the government is correct that the principles of *Egan* bar *any* tribunal from reviewing a First Amendment retaliation claim like petitioner's, then requiring such claims to be channeled through the CSRA scheme would not deny him any meaningful review that would otherwise be available. And if *Egan* principles do *not* bar review of petitioner's constitutional claim, then he could seek review before the MSPB and the Federal Circuit. At the very least, petitioner should be required to exhaust his remedies in the CSRA scheme before attempting to bring his constitutional claim in district court. See p. 15, *supra*.[5]

c. Petitioner principally argues (Pet. 16-21) that the court of appeals' decision is inconsistent with *Webster* v. *Doe*, 486 U.S. 592 (1988). In *Webster*, this Court held that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Id.* at 603. The Court explained that requiring such a heightened showing "avoid[s] the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Ibid.*

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[5] The Federal Circuit has not decided whether it may review a constitutional challenge to a security-clearance determination on appeal from the MSPB. See *Brockmann* v. *Department of the Air Force*, 27 F.3d 544, 546-547 (Fed. Cir. 1994) (reserving the question). In suggesting otherwise, petitioner (Pet. 23) and the court of appeals (Pet. App. 19) cite *Biggers* v. *Department of the Navy*, 745 F.3d 1360 (Fed. Cir. 2014). But that case did not involve a constitutional claim and thus did not resolve the question left open in *Brockmann*. See *id.* at 1361-1362.

In light of *Webster*, the United States has taken the position that the CSRA generally does not preclude a district court from adjudicating a colorable constitutional claim for which the CSRA itself provides no avenue for review. See, *e.g.*, Gov't Br. at 17-18, *Elgin*, *supra* (No. 11-45). The court of appeals (in a portion of the opinion joined by only two judges) reasoned differently. See Pet. App. 21-29. But that aspect of the court's opinion was not necessary to the court's core holding that the CSRA precludes petitioner's district-court suit. And that core holding is consistent with both *Webster* and the government's position.

As explained above, the government has maintained that *Egan* and the political-question doctrine preclude review of the merits of a security-clearance denial in any forum outside the agency granting the clearance. But if *Egan* does not bar judicial review of a constitutional challenge to an adverse action arising from a clearance decision, then review of that challenge could occur in the Federal Circuit. See pp. 16-17, *supra*. As this Court recognized in *Elgin*, "*Webster*'s standard does not apply where Congress simply channels judicial review of a constitutional claim to a particular court." 567 U.S. at 9. And if *Egan* does bar such review, then *Webster*'s requirement that a statute contain a heightened showing of congressional intent to foreclose review of constitutional claims still would not apply, because review would be foreclosed not by the CSRA, but instead by the separation-of-powers principles recognized in *Egan*. Because *Webster* is inapplicable here, this case would not be a suitable vehicle for considering petitioner's contention (Pet. 17) that the Fifth Circuit "erroneously held that *Webster* had been undermined." This Court "reviews judgments, not statements in

opinions," *Camreta* v. *Greene*, 563 U.S. 692, 704 (2011) (citation omitted), and the Fifth Circuit's judgment did not rest on the statement petitioner challenges.

For similar reasons, petitioner's argument that Congress may not "strip jurisdiction to prevent any judicial review of constitutional claims," Pet. 19, is misplaced here. If petitioner's constitutional claim is justiciable notwithstanding *Egan*, then Congress has not stripped courts of jurisdiction to review it; Congress has merely channeled review through the Federal Circuit. And if petitioner's claim is nonjusticiable, then Congress still has not stripped the courts of jurisdiction to adjudicate it; rather, the Constitution has done so, by committing security-clearance decisions to the Executive Branch.

2. Contrary to petitioner's assertion (Pet. 24-29), the courts of appeals are not divided on the question presented. Indeed, petitioner does not identify any other circuit-court decision even addressing the question presented here: Whether the CSRA precludes a covered employee from bringing a district-court suit raising a constitutional challenge to an adverse employment action based on a security-clearance determination.

a. Petitioner contends (Pet. 25, 27-28) that the Third, Fourth, and D.C. Circuits have held that the CSRA does not preclude district-court review of constitutional claims that cannot be reviewed within the CSRA scheme. But the decisions he cites did not address claims involving security-clearance determinations. And the constitutional claims they did address lacked the critical feature of petitioner's challenge to his security-clearance revocation, which is either reviewable within the CSRA scheme or else nonjusticiable in *any* court.

In *Semper* v. *Gomez*, 747 F.3d 229 (2014), the Third Circuit held that the CSRA precluded a judicial employee from bringing a constitutional claim in district court because the employee could obtain meaningful relief for that claim under the court's employment dispute resolution plan. *Id.* at 235. The Third Circuit also stated that a judicial employee who could not pursue meaningful relief through such a plan would have the right to seek equitable relief in district court. *Id.* at 242. But that statement was dicta.

In *Strickland* v. *United States*, 32 F.4th 311 (2022), the Fourth Circuit relied on that dicta to hold that the CSRA did not preclude district-court jurisdiction over a judicial employee's constitutional claims where the employee would not have had an alternative forum for meaningful review. *Id.* at 374-377. But that case did not involve a claim that would have called for judicial review of a security-clearance determination. The Fourth Circuit thus had no occasion to consider whether the CSRA would preclude judicial review of an unexhausted claim that was potentially unreviewable in any court.

The same was true in *National Federation of Federal Employees* v. *Weinberger*, 818 F.2d 935 (1987), where the D.C. Circuit held that the CSRA did not preclude district-court jurisdiction over a constitutional challenge to a drug-testing program brought by federal employees. *Id.* at 940-941. In addition, that decision predated *Thunder Basin* and *Elgin*, which have at minimum significantly undermined its holding. See *Payne* v. *Biden*, 602 F. Supp. 3d 147, 159 (D.D.C. 2022) (concluding that *Thunder Basin* and *Elgin* abrogated *Weinberger*), appeal pending, No. 22-5154 (D.C. Cir. filed May 31, 2022).

b. Petitioner also errs in relying (Pet. 25-26) on the D.C. Circuit's decision in *United States Information Agency* v. *Krc*, 905 F.2d 389 (1990), cert. denied, 510 U.S. 1109 (1994). In *Krc*, an employee's foreign service appointment was terminated after the U.S. Information Agency determined that his sexual orientation constituted a security risk. *Id.* at 392-393. The employee filed a complaint with the Foreign Service Grievance Board, which found the termination to be arbitrary and capricious and ordered the employee reinstated. *Id.* at 393. Pursuant to the judicial-review provisions of the Foreign Service Act, the agency challenged the Board's decision in district court. *Id.* at 392-393. On appeal, the D.C. Circuit applied *Egan* and held that the Board could not review the employee's termination. *Id.* at 395. The court of appeals nonetheless remanded the case to the district court to consider the employee's equal-protection claim in the first instance. *Id.* at 399-400. The *Krc* court did not address CSRA preclusion, however, because the case did not implicate that statute. Indeed, the court had no occasion to consider any form of preclusion, because the case arose on appeal from administrative proceedings prescribed under a statutory remedial scheme.

Petitioner invokes (Pet. 26) dicta in *Krc* noting the importance of "judicial authority to consider the constitutional claims resulting from agency personnel decisions." 905 F.2d at 400. But that general statement does not suggest that the D.C. Circuit has decided the specific CSRA-preclusion question presented here. To the contrary, the court has "reserved th[e] question" whether "a plaintiff can seek to undo the denial or revocation of a security clearance[] based on non-frivolous constitutional challenges." *Palmieri* v. *United States*,

896 F.3d 579, 590-591 (D.C. Cir. 2018) (Katsas, J., concurring) (citing *Gill* v. *United States Dep't of Justice*, 875 F.3d 677, 682 (D.C. Cir. 2017)).

For similar reasons, petitioner errs in relying (Pet. 27) on the Third Circuit's decision in *El-Ganayni* v. *United States Department of Energy*, 591 F.3d 176 (2010). He is correct that *El-Ganayni* held that courts have subject-matter jurisdiction to review security-clearance denials, *id.* at 183, but that case did not involve any CSRA-preclusion issue. In any event, as petitioner acknowledges (Pet. 27), his claim would not have been able to proceed in the Third Circuit because the court held that challenges to security-clearance determinations must be dismissed on the merits without inquiring into the substance of the Executive Branch's determination. See *El-Ganayni*, 591 F.3d at 183-186.

Petitioner also asserts (Pet. 29) that the Ninth Circuit "has held that constitutional claims regarding security clearances may be reviewed." That overstates Ninth Circuit law. Petitioner cites *Dubbs* v. *CIA*, 866 F.2d 1114 (9th Cir. 1989), but the constitutional claim in that case challenged an alleged "blanket policy of security clearance denials to all persons who engage in homosexual conduct," as well as an alleged policy of treating homosexuality as a negative factor in clearance adjudications. *Id.* at 1117, 1119 & n.8. As the government acknowledged below, challenges to such blanket policies might present different issues. Gov't C.A. Br. 36 n.6. And *Dubbs* did not consider whether *Egan* precludes judicial review of an individual clearance determination. Accordingly, the Ninth Circuit has not "purport[ed] to answer the difficult preliminary question whether courts may review the security clearance decisions of officials who derive their authority from the President."

Dorfmont v. *Brown*, 913 F.2d 1399, 1405 (9th Cir. 1990) (Kozinski, J., concurring); see *Palmieri*, 896 F.3d at 590 (Katsas, J., concurring) (agreeing that the Ninth Circuit has reserved that question).[6]

3. Petitioner additionally emphasizes two areas of legal and policy concern, but his case does not implicate either of them. First, petitioner asserts that his case "raises the 'serious constitutional question that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.'" Pet. 2 (citation omitted). As already explained, however, this case does not present that question. The federal statute at issue—the CSRA—merely channels petitioner's First Amendment challenge to the adverse personnel action flowing from the revocation of his security clearance to the MSPB and the Federal Circuit. See pp. 15-17, supra. Whether *Egan* bars those tribunals from considering such a challenge is an independent question that was not squarely decided below and not properly presented here.

[6] The district court cases that petitioner cites are not evidence of a circuit conflict on the question presented, either. *Lamb* v. *Holder*, 82 F. Supp. 3d 416, 422-423 (D.D.C. 2015), and *McCabe* v. *Barr*, 490 F. Supp. 3d 198, 211-212 (D.D.C. 2020), held that FBI employees not covered by the CSRA could bring constitutional claims in district court. *Buttino* v. *FBI*, 801 F. Supp. 298, 301-302 (N.D. Cal. 1992), held that a non-CSRA FBI employee's constitutional challenge to his security-clearance revocation was reviewable. Similarly, *Garcia* v. *Pompeo*, No. 18-cv-1822, 2020 WL 134865, at *7 (D.D.C. Jan. 13, 2020), addressed a constitutional challenge brought by a State Department applicant. None of those decisions addressed the question presented here: Whether a CSRA-covered employee may bypass the CSRA scheme and bring a constitutional challenge to his security-clearance revocation in district court.

Second, petitioner suggests (Pet. 14-16) that the court of appeals' decision will impair FBI employees' ability to report serious wrongdoing within the agency. But his case does not in any way diminish FBI whistleblower protections; petitioner simply chose to disclose the alleged wrongdoing outside of congressionally approved channels. See 5 U.S.C. 2303 (prohibiting reprisal against an FBI employee who has disclosed information to a supervisor, the FBI Inspector General or Inspection Division, the Department of Justice or FBI Office of Professional Responsibility, the Office of Special Counsel, or Congress). In any event, such policy arguments cannot provide a basis for circumventing the CSRA's carefully drawn scheme of administrative and judicial review. See *Elgin*, 567 U.S. at 12-15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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