ORAL ARGUMENT NOT SCHEDULED
No. 22-5154

In the United States Court of Appeals for the District of Columbia Circuit

JASON PAYNE,
Plaintiff-Appellant,
v.
JOSEPH R. BIDEN, JR., PRESIDENT; OFFICE OF PERSONNEL MANAGEMENT; KIRAN AHUJA, DIRECTOR, UNITED STATES OFFICE OF PERSONNEL MANAGEMENT; GENERAL SERVICES ADMINISTRATION; ROBIN CARNAHAN, ADMINISTRATOR, GENERAL SERVICES ADMINISTRATION; OFFICE OF MANAGEMENT AND BUDGET; SHALANDA YOUNG, ACTING DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET; SAFER FEDERAL WORKFORCE TASK FORCE; JEFFREY ZIENTS, CO-CHAIR, SAFER FEDERAL WORKFORCE TASK FORCE; UNITED STATES DEPARTMENT OF DEFENSE; LLOYD J. AUSTIN, III, SECRETARY, UNITED STATES DEPARTMENT OF DEFENSE; UNITED STATES DEPARTMENT OF THE NAVY; CARLOS DEL TORO, SECRETARY, UNITED STATES DEPARTMENT OF THE NAVY,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia, Case No. 21-cv-3077
The Hon. James E. Boasberg, U.S. District Judge

APPELLANT JASON PAYNE'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Asterisks mark the authorities upon which we chiefly rely.

GLOSSARY OF ABBREVIATIONS

"CSRA" means the Civil Service Reform Act of 1978.

"MSPB" means the Merit System Protection Board.

STATUTES AND REGULATIONS

Except for 28 U.S.C. § 1331, which is set forth in the body of this brief, all applicable statutes and regulations are contained in the Addendum to Mr. Payne's principal Brief.

SUMMARY OF ARGUMENT

The question here is whether the CSRA impliedly *removes* district court jurisdiction assigned under 28 U.S.C. § 1331 over Mr. Payne's separation of powers and other constitutional claims, not whether it *permits* it.

The government position—that the CSRA implied precludes district court jurisdiction—lacks textual foundation, misapplies precedent, ignores the strong presumption favoring prompt pre-enforcement judicial review of well-grounded constitutional claims, and causelessly abrogates longstanding Circuit authorities. In fact, the CSRA's text and structure provide no persuasive reason to believe that Congress silently intended to displace the strong presumption of pre-enforcement district court review of Executive policies that violate the separation of powers.

The government's principal authority, *Elgin v. Department of Treasury,* 567 U.S. 1 (2012), did not consider whether the CSRA impliedly precludes pre-enforcement review, much less hold that it does. So, the government invites this Court to take a radical course and hold, without either clear and plain supporting text or controlling Supreme Court authorities, that the CSRA impliedly precludes district court ju-

risdiction over Mr. Payne's case and, by extension, all other pre-enforcement constitutional challenges by federal workers. This invitation should be declined. Instead, Mr. Payne's case should be remanded for a determination on the merits.

INTRODUCTION

Mr. Payne has challenged—pre-enforcement—the federal vaccine mandate on separation of powers and other constitutional grounds. JA 13–16, 25–28 (¶¶ 22–58, 61–71).[1] He is not challenging or contesting a CSRA proceeding or determination. *Cf. Elgin v. Dep't of Treasury,* 567 U.S. 1, 11–12 (2012). Rather, he raises only a major constitutional question: Does the President possess the authority to unilaterally impose a vaccine mandate on all federal employees? *See Nat'l Fed'n of Indep. Bus.* v. *OSHA*, 142 S. Ct. 661, 665–66 (2022) (per curiam), 668 (Gorsuch, J., concurring); *see also W. Virginia v. Env't Prot. Agency*, 142 S.

[1] Mr. Payne suffered and recovered from COVID–19 and does not need, want, or intend to take the mandated vaccine. JA 9 at ¶ 3, JA 22–23 at ¶¶ 52–55. Notably, current CDC guidance "brings the recommendations for unvaccinated people in line with people who are fully vaccinated." Will Stone, Pien Huang, *With new guidance, CDC ends test-to-stay for schools and relaxes COVID rules*, NPR.org (Aug. 11, 2022), https://n.pr/3e6auxF.

Ct. 2587, 2609 (2022); *Andrade v. Lauer*, 729 F.2d 1475, 1491 (D.C. Cir. 1984).

The CSRA does not explicitly channel or preclude Mr. Payne's case. Nevertheless, the government insists that because the CSRA provides specific procedures for certain enumerated employee actions, Congress necessarily meant to preclude district court jurisdiction in *this* case as well. As justification, it cites *Elgin* and declares the case closed. Appellees' Br. at 11. But *Elgin* does not hold that the CSRA impliedly precludes district court jurisdiction over Mr. Payne's case, and—as Congress enacted the CSRA against a backdrop and presumption of pre-enforcement judicial review for constitutional claims—there is no persuasive reason to believe the Court intended to do so. *Cf. Elgin,* 567 U.S. at 11–12; *See Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 43–46 (2000) (Thomas, J., dissenting); *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 425 (1995); *see also Whitman v. Dep't of Transp.*, 547 U.S. 512, 514 (2006); *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 141 (1967).[2]

[2] The implied preclusion question presented here is also under review by the Fifth Circuit *en banc*. Relevant and potentially instructive argu-

ARGUMENT

I. THE GOVERNMENT STRETCHES *ELGIN* BEYOND REASON

The question here is whether the CSRA *removes* district court jurisdiction over pre-enforcement constitutional claims assigned under 28 U.S.C. § 1331, not whether it *permits* it. *See Whitman,* 547 U.S. at 514. The government contends that *Elgin* requires channeling Mr. Payne into the bureaucracy and forcing him to suffer constitutional injury for years until, at some indeterminate future point, he reaches the Federal Circuit. Appellee's Br. at 11. It further contends that *Elgin* requires "abrogating" longstanding Circuit precedent affirming district court jurisdiction over federal workers' pre-enforcement attacks on unconstitutional government-wide policies. Appellees' Br. at 25. These contentions are incorrect.

A. District Court Jurisdiction Over Pre-Enforcement Constitutional Claims is Strongly Presumed

The judicial branch has a strong institutional interest in maintaining the constitutional plan, including the separation of powers. *Clinton v. City of New York*, 524 U.S. 417, 449–50 (1998) (Kennedy, J.,

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ment by petitioners and amici may be found at *Feds. for Med. Freedom v. Biden,* 37 F.4th 1093 (5th Cir. 2022) (No. 22-40043) (*en banc*).

concurring); *Glidden Co. v. Zdanok,* 370 U.S. 530, 536 (1962); *Lauer,* 729 F. 2d at 1491. Accordingly, the rule is that courts have a duty to hear and resolve well-pled separation of powers and similar structural constitutional claims, particularly in a pre-enforcement setting. *Carr v. Saul,* 141 S. Ct. 1352, 1361 (2021); *Shalala*, 529 U.S. at 45 (Thomas J., dissenting).

From this rule follows the strong and long-standing presumption that district courts have jurisdiction over pre-enforcement constitutional challenges unless there is persuasive reason to believe Congress intended otherwise. *Lamagno*, 515 U.S. at 425. "[W]hen constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is manifested by 'clear and convincing' evidence." *Califano v. Sanders,* 430 U.S. 99, 109 (1977) (internal citations omitted). The "presumption favors not merely judicial review 'at some point,' but *pre-enforcement* judicial review." *Shalala*, 529 U.S. at 45 (Thomas, J., dissenting) (emphasis in original); *accord Jarkesy v. S.E.C.,* 803 F.3d 9, 23 (D.C. Cir. 2015).

The rationale is straightforward: pre-enforcement judicial review checks Executive Branch action that disregards legislative mandates or constitutional rights. The presumption may not be quite as strong when the question is now-or-later instead of now-or-never, *see Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207, n. 8, 215, n. 20, (1994), but the Supreme Court's authorities clearly establish that it applies in the former context as well. *Abbott Lab'ys*, 387 U.S. 139–40; *see also Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021); *Whitman,* 547 U.S. at 514.

B. There is No Persuasive Reason to Believe That the Presumption of District Court Jurisdiction Over Pre-Enforcement Constitutional Challenges is Disturbed by the CSRA

28 U.S.C. § 1331 provides, in full, that "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Elgin* does not suggest, much less hold, that the CSRA nullifies this clear statutory assignment or disturb the default presumption of district court jurisdiction over pre-enforcement constitutional claims. The issue presented there was "simply whether an employee who has already been subject to an adverse action, and who could immediately raise a constitutional challenge to that action through the CSRA's review scheme, can sidestep

that scheme by filing suit in district court instead." *Elgin v. Dep't of the Treasury,* Brief for Respondents at 25 (Case No. 11-45, Jan. 17, 2012); 567 U.S. at 11–12.

It may be that "so far as review of determinations under the CSRA is concerned, what you get under the CSRA is what you get." *Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005). However, Mr. Payne is not challenging any ongoing CSRA proceeding or determination, not under Title 5 Chapter 23, governing "personnel actions" or Chapter 75, governing "adverse actions." *Cf. Elgin,* 567 U.S. at 11–12 (petitioners "are employees who suffered adverse actions" covered by the CSRA).[3] This is not a minor procedural detail.

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[3] *See also Am. Fed'n of Gov't Emps., v. Trump,* 929 F.3d 748, 760–61 (D.C. Cir. 2019) (many of the claims "require interpreting the…the very law that the [agency] is charged with administering and interpreting."); *Jarkesy*, 803 F.3d at 23; *Grosdidier v. Chairman, Broad. Bd. of Governors,* 560 F. 3d 495, 497 (D.C. Cir. 2009) (precluding Administrative Procedure Act suit challenging hiring and promotion decisions); *Fileback v. U.S. Dep't of Transp.,* 555 F. 3d 1009, 1010 (D.C. Cir. 2009) (precluding Administrative Procedure Act suit by employees for salary increases); *Fornaro,* 416 F.3d at 65–66 (precluding suit regarding the impact of disability rather than death on enhanced annuity entitlement); *Steadman v. Governor, U.S. Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (D.C. Cir. 1990) (precluding suit by fired employee alleging due process violations and Fair Management Labor Act failure to provide fair representation claims, because "when a constitutional claim is intertwined with a statutory one, and Congress has provided machinery for

As Justice Thomas pointed out:

> Subchapter II of Chapter 75, the portion of the CSRA relevant to petitioners, specifically enumerates the major adverse actions and employee classifications to which the CSRA's procedural protections and review provisions apply. The subchapter then sets out the procedures due an employee prior to final agency action. And, Chapter 77 of the CSRA exhaustively details the system of review before the MSPB and the Federal Circuit. Given the painstaking detail with which the CSRA sets out the method for covered employees *to obtain review of adverse employment actions*, it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court.

Elgin, 567 U.S. at 11–12 (internal citations omitted) (emphasis added). Accordingly, *Elgin* does not hold that pre-enforcement constitutional challenges are impliedly precluded by the CSRA, and the government offers no persuasive text-based reason to believe that they should be. *Id.*; *accord Shalala*, 529 U.S. at 45 (Thomas, J., dissenting).

Nevertheless, the government relies on *Elgin* as justification for inviting this Court to impliedly nullify 28 U.S.C. § 1331, silently "abrogate" long settled and well-reasoned Circuit precedent,[4] and, ironically,

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the resolution of the latter, a plaintiff must first pursue the administrative machinery").

[4] By the government's telling, the Circuit authorities abrogated by *Elgin* include, *inter alia*, *Weaver v. U.S. Info. Agency,* 87 F.3d 1429, 1434 (D.C. Cir. 1996); *Sanjour v. EPA,* 56 F.3d 85 (D.C.Cir.1995) (en banc); *Spagnola v. Mathis*, 859 F.2d 223, 229 (D.C. Cir. 1988) (per curiam); *NTEU v. Horner*, 854 F.2d 490, 497 (D.C. Cir. 1988); *NFFE v. Wein-*

overrun Justice Thomas's strong presumption of pre-enforcement review. *Shalala,* 529 U.S. at 45. The government's invitation to massively expand the doctrine should be declined.

In *Jarkesy,* the plaintiff sued after the Securities and Exchange Commission had initiated its enforcement proceeding against him, and he challenged multiple aspects of that ongoing proceeding. According to Judge Srinivasan, "The result might be different if a constitutional challenge were filed in court before the initiation of any administrative proceeding (and the plaintiff could establish standing to bring the judicial action)." 803 F.3d at 23 (citation omitted). The government's view is that this statement should be abrogated as mere "dicta" and "inapposite even if it were precedential" because Jarkesy was objecting to the Securities and Exchange Commission proceeding on constitutional grounds. If "vindicated" then he "should not have been subjected to the adminis-

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berger, 818 F.2d 935, 940 (D.C. Cir. 1987); *NTEU v. Devine*, 733 F.2d 114, 117 n.8 (D.C. Cir. 1984); *Lauer*, 729 F.2d at 1491 ("The Appointments Clause embodies important principles concerning the relative influence of the Legislative and Executive Branches over the carrying out of this country's laws. The decisionmakers involved in the statutory/contractual grievance procedure have neither the qualifications nor the expertise to articulate and develop these principles."); and *Carducci v. Regan*, 714 F.2d 171, 175–76 (D.C. Cir. 1983) (Scalia, J.).

trative proceeding at all." Appellees' Br. at 28–29. But this is exactly Mr. Payne's situation: If his pre-enforcement constitutional challenge is vindicated, then he cannot be subjected to CSRA discipline for refusing injection.

Mr. Payne has filed a pre-enforcement constitutional challenge to the government's vaccine mandate. 28 U.S.C. § 1331 expressly authorizes district court jurisdiction over this claim. There is no persuasive reason to conclude that the CSRA's text and structure remove the district court jurisdiction over his suit, and *Elgin* does not hold otherwise. Accordingly, the government's argument that *Elgin* mandates implied CSRA preclusion of Mr. Payne's pre-enforcement constitutional challenge should fail.

II. THE GOVERNMENT'S BACKSTOP ARGUMENTS SHOULD ALSO FAIL

A. Mr. Payne Need Not "Bet the Farm"

The government contends Mr. Payne must suffer an adverse personnel action before he may challenge the illegal mandate. Appellees' Br. at 19–20. But without explicit CSRA language to this effect, and there is none, this contention is meritless. *See e.g., MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007); *Abbott Lab'ys,* 387 U.S. at

149. Indeed, the Supreme Court has already rejected this argument. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 490–91 (2010) ("We normally do not require plaintiffs to bet the farm…by taking the violative action before testing the validity of the law.").

The government offers the creative, novel, and utterly fallacious argument that district court jurisdiction over Mr. Payne's case is impliedly precluded because someone, somewhere, might be able to challenge the illegal mandate's constitutional infirmity in a CSRA proceeding:

> Here, even if some federal employees might hesitate to challenge [the mandate] through the CSRA framework for fear of discipline if the challenge fails, there is no reason to believe *all* employees will share that fear; some undoubtedly, would not want to continue working for the federal government if told that the only way to do so was to become vaccinated. Because this is not a situation where "the only" parties "able to invoke" the CSRA scheme "are highly unlikely to do so," there is no reason to regard the CSRA framework as ineffective.

Appellees' Br. at 21–22 (emphasis in original) (citation omitted).

It simply does not follow that because some employee *could* challenge the mandate in a CSRA disciplinary proceeding that Mr. Payne *must* do so and is therefore impliedly precluded from launching a pre-

enforcement constitutional challenge.[5] Congress has plainly assigned the district court jurisdiction over Mr. Payne's pre-enforcement constitutional claims. There is no persuasive textual or other reason to conclude the CSRA impliedly precludes this jurisdiction.

B. The CSRA Should Not Be Remodeled to Reflect the Government's Radical Claims

Courts normally interpret a statute in accord with the ordinary public meaning of its terms at the time of its enactment. "If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the peo-

[5] The government relies on a Medicare Act reimbursement case where an LLC sued for judicial review, arguing it could not directly challenge an agency decision because it was not a Medicare-enrolled provider. Holding that the LLC's client hospitals were adequate proxies to channel the general claim for reimbursement, the court affirmed dismissal for lack of jurisdiction. *RICU LLC v. United States Dep't of Health & Hum. Servs.*, 22 F.4th 1031, 1039 (D.C. Cir. 2022). In that case, there was an "action" arising under the Medicare Act that had to be channeled through the agency. *Shalala,* 529 U.S. at 23. Leaving aside the Supreme Court's admonition that "Constitutional questions obviously are unsuited to resolution in administrative hearing procedures," *Sanders,* 430 U.S. at 109; *see also Lauer,* 729 at 1491, the fact is that there is no CSRA "action" against Mr. Payne and therefore nothing to channel. *Accord Jarkesy,* 803 F.3d at 23.

ple's representatives." *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731, 1738 (2020).

The government urges this Court to radically "remodel" the CSRA by holding that federal workers may *never* bring a pre-enforcement challenge to unconstitutional Executive Branch action, no matter the constitutional harm or coercion. The basis for this surprising claim is assuredly not that the CSRA expressly precludes such challenges (which it does not do), but that the CSRA does not expressly *authorize* them. Appellees' Br. at 10 ("Nothing in *Elgin* suggests that a federal employee…[can] bring a pre-enforcement challenge…in district court"). This cannot be right. And in fact, the government has inverted the controlling authorities.

To be clear, Mr. Payne is not obliged to demonstrate that the CSRA permits him to sue in district court. Rather, the government bears the heavy burden of demonstrating that the CSRA's text and structure provide persuasive reason to believe Congress intended to *foreclose* district court jurisdiction over his case. *Whitman,* 547 U.S. at 514; *Shalala,* 529 U.S. at 46 (Thomas, J., dissenting); *Lamagno,* 515 U.S. at 424; *Abbott Lab'ys,* 387 U.S. at 139–40.

Of course, the government cannot point to anything in the CSRA's text and structure that persuasively shows this was Congress's purpose. Congress enacted the CSRA against the backdrop of a longstanding historical tradition of courts issuing injunctive relief against ongoing constitutional violations and "violations of federal law by federal officials." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). The negative injunction is a standard equitable remedy that "federal courts have authority to entertain under their traditional equitable jurisdiction" dating back to the Judiciary Act of 1789 and earlier English traditions. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 540 (2021) (Thomas, J., concurring in part). Therefore "where threatened action by government is concerned," as it is here, courts "do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." *MedImmune,* 549 U.S. at 128–29.

But coercing Mr. Payne and other federal workers seems to be the government's whole point. Appellees' Br. at 20–23. As Justice Marshall said, "the value of a sword of Damocles is that it hangs—not that it drops. For every employee who risks his job by testing the limits of the

[government's action], many more will choose the cautious path." *Arnett v. Kennedy*, 416 U.S. 134, 231 (1974) (Marshall, J., dissenting).

Critically, the CSRA does not provide for a pre-enforcement process to maintain the status quo while the constitutionality of challenged Executive Branch action is tested through an administrative process that takes years to complete. The best the government can do is suggest that immediate judicial review of unlawful mandates perhaps could be had by a writ of mandamus from the Federal Circuit under 28 U.S.C. § 1651 in the case of "obviously unlawful directives." Appellees Br. at 33–35. This is hard to square with the government's insistence on complete CSRA exclusivity, and it ignores that the All Writs Act does not expand a court's jurisdiction or apply until a party has at least taken the first preliminary step leading to appellate jurisdiction. *Mylan Lab'ys Ltd. v. Janssen Pharm., N.V.*, 989 F.3d 1375, 1380 (Fed. Cir. 2021). The CSRA does not apply, much less bestow jurisdiction by mandamus or otherwise, until after the government has taken a defined employment action.

In truth, implied preclusion of Mr. Payne's case means that this Court believes Congress *silently* intended to give the government a free

pass to unconstitutionally coerce its workers through unlawful government-wide policies, free from the constraints of pre-enforcement judicial review. "This imputation cannot be cast on the legislature of the United States." *United States v. Nourse*, 34 U.S. 8, 29 (1835); *see also Thunder Basin*, 510 U.S. at 206; *Lamagno*, 515 U.S. at 425–27.

C. The Government Recognizes No Limiting Principle

The government recognizes no limiting principle and offers no logical stopping point that might cabin its newfound authority to mandate vaccinations. A vaccine mandate is strikingly unlike the workplace regulations that the government has typically imposed on federal employees. A vaccination, after all, is designed to change a person's immune system and physiology—it "cannot be undone at the end of the workday." *Nat'l Fed'n*, 142 S. Ct. at 665; *see also Kentucky v. Biden,* 23 F.4th 585, 608 (6th Cir. 2022). By comparison, the government's cited smoking and ethics mandates are "work-anchored" measures with built in limits.

Precisely because it has no limiting principle to offer, the government simply dismisses the possibility that a future President might order federal workers to undergo weight-reduction measures and sur-

geries as an "outlandish requirement"[6] and declares "there is no reason to believe any President would impose" this. Appellees' Br. at 33. But the government apparently believes a President may, simply by decree and memorandum, mandate that as a condition for federal employment, employees must engage in or abstain from an unlimited range of activities. The possibilities are limited only by the imagination of whomever inhabits the White House

III. IMPLIED PRECLUSION COULD CREATE MAJOR QUESTIONS DOCTRINE CONCERNS

As discussed *supra* and in Mr. Payne's principal brief, the CSRA does not impliedly preclude district court jurisdiction absent either a Title 5 Chapter 23 "personnel action" or a Title 5 Chapter 75 "adverse action." Payne Br. at 12–22. Tellingly, the government does not engage with or analyze the relevant statutory text—it merely invokes doctrine as talisman. *See generally* Appellees' Br. at 16–30. But absent CSRA text providing persuasive reason to believe Congress intended to impliedly preclude district court jurisdiction over pre-enforcement consti-

[6] The science shows obesity and its related maladies are a far more deadly public health and economic threat than COVID–19 was or is.

tutional challenges, implied preclusion in a case raising the major questions doctrine, as this case does,[7] could be problematic.

The Supreme Court has left no doubt that extraordinary executive authority can be rarely predicated on "modest words," "vague terms," or "subtle device[s]." Rather, there must be clear congressional authorization for significant agency power. *W. Virginia*, 142 S. Ct. at 2609 (citations omitted).

The authority to displace the district court jurisdiction assigned in § 1331 and decide claims relating to the relative balance between the Executive and the Legislative Branches administratively seemingly qualifies as the sort of power for which clear congressional authorization should be necessary. *See Bowen v. Michigan Acad. of Fam. Physicians,* 476 U.S. 667, 670–73 (1986) (citations omitted); *Bowsher v. Synar*, 478 U.S. 714, 721–22 (1986); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); The Federalist No. 47 (Rossiter Ed. 1961) (James Madison) ("there can be no liberty

[7] *See Nat'l Fed'n,* 142 S. Ct. at 666, 668; *see also W. Virginia*, 142 S. Ct. at 2609; *Alabama Assn. of Realtors* v. *Dep't of Health and Hum. Servs.,* 141 S. Ct. 2485, 2489 (2021); *Util. Air Reg'l Grp. v. EPA*, 573 U.S. 302, 324 (2014). The government agrees the major questions doctrine will be highly relevant at the merits stage. Appellees' Br. at 32–33. Arguably, it is also salient now.

where the legislative and executive powers are united in the same person, or body of magistrates."). Historically, courts, not bureaucrats, sort out the relative authority of the Legislative and Executive Branches. *Lamagno*, 515 U.S. at 424; *see also Lauer*, 729 F. 2d at 1491. Consequently, the rule is that federal judges traditionally proceed from the "strong presumption that Congress intends judicial review." *Bowen*, 476 U.S. at 670. As Chief Justice Marshall wrote long ago:

> It would excite some surprise if, in a government of laws and of principle, furnished with a department whose appropriate duty it is to decide questions of right, not only between individuals, but between the government and individuals; a ministerial officer might, at his discretion, issue this powerful process…leaving to [the claimant] no remedy, no appeal to the laws of his country, if he should believe the claim to be unjust. But this anomaly does not exist; this imputation cannot be cast on the legislature of the United States.

Lamagno, 515 U.S. at 424 (quoting *Nourse*, 34 U.S. at 8–9).

Congress expressly assigned district courts original jurisdiction over constitutional claims in 28 U.S.C. § 1331. The CSRA does not expressly disturb that assignment for pre-enforcement separation of power claims. Impliedly precluding pre-enforcement review of unconstitutional Executive overreach, and channeling separation of powers and other similar constitutional claims into an inexpert administrative or-

gan such as the MSPB, is therefore no small or insignificant thing. *See Lauer,* 729 F. 2d at 1491.

Given the fundamental constitutional interests at stake in this case, the government should be required to show far more than it does to justify impliedly precluding district court jurisdiction. Attributing to Congress the silent intention to take the remarkable step of channeling Mr. Payne's pre-enforcement separation of powers challenge into the administrative process seems a bridge too far. Consequently, there is more than ample reason to hesitate before concluding that the CSRA precludes district court jurisdiction of his case, impliedly or otherwise. *W. Virginia*, 142 S. Ct. at 2609.

CONCLUSION

The order below should be reversed and this case remanded for a merits determination.

Dated: September 9, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned counsel certifies compliance with the requirements of Fed. R. App. P. 32. The brief is 4,099 words in length and follows the required font and formatting regulations.

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