No. 02-1626

In the Supreme Court of the United States

JOHN M. COURTNEY, LARRY E. TROUTMAN AND MALCOLM A. WEBSTER, PETITIONERS

v.

DAVID R. SMITH, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, government employees, had standing to challenge a decision made pursuant to Office of Management and Budget Circular A-76 to contract out to the private sector responsibility for certain support functions at a military base.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 297 F.3d 455. The decision of the district court (Pet. App. 22a-30a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2002. The petition for a writ of certiorari was filed on October 21, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Office of Management and Budget (OMB) Circular A-76, a directive from OMB to the heads of executive agencies, sets forth "the general policy of the Government to rely on commercial sources to supply the products and services the Government needs." Circular, ¶ 4a.[1] The Circular directs that "the Government shall not start or carry on any activity to provide a commercial product or service if the product or service can be procured more economically from a commercial source." *Id.*, ¶ 5c. To determine whether an activity that could be performed by the private sector should be contracted out or retained in-house, an agency conducts a comprehensive cost comparison in accordance with the Circular and its Supplement. The activity must then be contracted out unless the cost comparison demonstrates that in-house performance by the government would be more economical than performance by the private sector. *Id.*, ¶¶ 5a, 8d.

A commercial activity being performed by the government may be contracted out without a formal cost comparison if the agency issues a waiver. Circular, Supp., Pt. I, Ch. 1, ¶ E. The waiver must include a written determination signed by the appropriate official that the in-house operation has no reasonable expectation of winning a competition conducted under the Circular's cost comparison provisions. See *ibid.* The Circular requires each executive agency to establish an internal appeals procedure pursuant to which bidders

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[1] Circular A-76 is publicly available on the internet at *www.whitehouse.gov/omb*. Recent amendments went into effect in May 2003. References in this brief are to the Circular's provisions that were in effect at the time of the underlying events. See Pet. App. 31a-41a.

and agency employees may obtain intra-agency administrative review of A-76 cost comparison and waiver determinations. See Circular, Supp., Pt. I, Ch. 3, ¶ K.

The Circular provides that "[c]ertain functions are inherently Governmental in nature, being so intimately related to the public interest as to mandate performance only by Federal employees." Circular, ¶ 5b. Accordingly, inherently governmental functions are exempt from the Circular's contracting-out directives. "[T]hese functions shall be performed by Government employees." *Ibid.*

The Circular states that its provisions are not intended to set forth any legally enforceable rights and obligations: "This Circular and its Supplement shall not * * * [e]stablish and shall not be construed to create any substantive or procedural basis for anyone to challenge any agency action or inaction on the basis that such action or inaction was not in accordance with this Circular." Circular, ¶ 7c(8).

2. a. Petitioners are three individuals who were federal employees performing vehicle maintenance work at the Youngstown-Warren Air Force Reserve Base in Vienna, Ohio. They alleged that, beginning in 1998, a cost comparison was undertaken pursuant to OMB Circular A-76 to determine whether certain "Base Operating Support" functions being performed in-house by government employees should be contracted out to the private sector. The functions at issue included the base's vehicle maintenance activities. Petitioners alleged that, in January 2000, properly designated base authorities announced that the functions in question would be outsourced to Griffin Services, Inc., a private company that had bid for the work. See Pet. App. 3a-4a.

After exhausting their administrative appeals, petitioners filed the instant lawsuit in federal court seeking judicial review of the outsourcing decision under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* Petitioners alleged that issuance of the contract violated OMB Circular A-76. Petitioners also alleged that the contracting-out determination infringed the statutes that created OMB and its Office of Federal Procurement Policy (OFPP), *i.e.*, 31 U.S.C. 101 *et seq.* and 41 U.S.C. 401 *et seq.* Petitioners further claimed that the contract award contravened a number of federal procurement statutes, 10 U.S.C. 2304, 2461, 2462, 2463, 2467, 2468, 2469, 2469(a), and the Federal Activities Inventory Reform Act of 1998, Pub. L. 105-270, 112 Stat. 2382. Those statutes provide, *inter alia*, that "the Secretary of Defense shall procure each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the Department * * * from a source in the private sector if such a source can provide such supply or service to the Department at a cost that is lower * * * than the cost at which the Department can provide the same supply or service." 10 U.S.C. 2462(a). As relief, petitioners sought an order declaring unlawful and enjoining the challenged agency action on the ground that continued in-house performance of the "Base Operating Support" services would be more cost-effective than performance by a private contractor. See Pet. App. 4a.

b. The district court granted the government's motion to dismiss on the ground that petitioners had established neither constitutional nor prudential standing to sue. Pet. App. 23a-30a. With respect to constitutional standing, the court reasoned that petitioners failed to satisfy the threshold prerequisites of Article

III. *Id.* at 25a-26a. The court explained that it was incorrect and speculative to assume that Air Force employees performing the pertinent "Base Operating Support" functions would be unable to obtain reassignment to other federal jobs at the same or higher grades. *Id.* at 25a, 30a n.2 (citing, *e.g.*, 5 C.F.R. Pt. 351 (reduction-in-force procedures)). The court also noted that, under the applicable regulations, those employees would have the right of first refusal concerning jobs with the contracting firm. *Id.* at 25a (citing 48 C.F.R. 7.305(c), 52.207-3).

As for prudential standing, the court explained that petitioners' interest in keeping their federal jobs did not fall within the "zone of interests" of the statutes alleged to have been violated. Pet. App. 26a-30a. The court explained that "[f]ederal courts considering claims similar to those advanced by the plaintiffs have consistently held that federal employees attempting to preserve their government jobs are not within the 'zone of interests' intended to be protected [by] the budget and procurement statutes under which OMB Circular A-76 was promulgated." *Id.* at 26a-27a. The court emphasized in particular (*id.* at 27a-29a) that the D.C. Circuit had denied standing in a case indistinguishable from the present one. *National Fed'n of Fed. Employees* v. *Cheney*, 883 F.2d 1038 (D.C. Cir.), reh'g denied, 892 F.2d 98 (D.C. Cir. 1989), cert. denied, 496 U.S. 936 (1990). The court also noted (Pet. App. 29a) that the Seventh Circuit, in *American Fed'n of Gov't Employees* v. *Cohen*, 171 F.3d 460 (1999), had followed the D.C. Circuit's decision.

The district court also denied petitioners' motion to file a second amended complaint containing class allegations. The court reasoned that there was no basis for allowing petitioners to re-plead the case as a class

action where the named plaintiffs had failed to demonstrate that they had standing to sue. See Pet. App. 19a.

3. The court of appeals affirmed. Pet. App. 1a-21a. With respect to constitutional standing, the court observed that the complaint did not allege that any of the three plaintiffs had been separated from government service or had suffered a diminution in salary or benefits. *Id.* at 6a-7a. The court noted that, according to an affidavit submitted in response to the government's motion to dismiss, one of the plaintiffs (Courtney) had accepted a federal position at a different location far from home, requiring a long commute to see his family. *Id.* at 6a. The court explained that, although that individual's inconvenience "might be a sufficient injury to satisfy" the injury-in-fact requirement of Article III, neither of the other two plaintiffs has "provided any evidence to support a conclusion that [he has] suffered an injury in fact." *Id.* at 7a. The court determined that, "[r]ather than deciding whether Courtney has established Article III standing when it appears unlikely that the other two plaintiffs have done so," it would "proceed to an examination of the prudential standing requirements." *Ibid.*

The court of appeals then held that petitioners lacked prudential standing because they were not within the "zone of interests" intended to be protected by a relevant statute. Pet. App. 7a-20a. The court explained that Circular A-76 "is not a statute, and, although promulgated pursuant to congressional authority, the Circular itself cannot grant standing." *Id.* at 10a (quoting *Cheney*, 883 F.2d at 1043). The court further explained that the ability of a government employee to pursue an administrative appeal under the Circular does not establish standing to seek judicial review in the courts. Instead, the court reasoned, plaintiffs must show that

they are within the "zone of interests" of a relevant statute. *Id.* at 11a-12a; see *id.* at 11a (observing that administrative appeal procedure was not intended to create judicially enforceable rights).

The court then examined the statutes invoked in the complaint and concluded that none provided a basis for establishing prudential standing. Pet. App. 12a-19a. Citing the D.C. Circuit's decision in *Cheney*, the Seventh Circuit's decision in *Cohen*, and the Federal Circuit's decision in *American Fed'n of Gov't Employees* v. *United States*, 258 F.3d 1294 (2001), cert. denied, 534 U.S. 1113 (2002)—each of which found that federal employees lacked standing to challenge cost comparisons underlying a government contracting-out determination—the court concluded that the interest in maintaining government employment does not fall within the zone of interests of any of the statutory provisions relied upon in the complaint. Pet. App. 12a-19a. Based on its finding that petitioners lacked standing to sue, the court also upheld the district court's denial of their motion for class certification. *Id.* at 19a-20a.

Judge Merritt dissented. In his view, because federal employees were directly affected parties entitled to invoke the administrative appeal mechanism under the A-76 Circular, they should also be considered to be persons "adversely affected or aggrieved by agency action" within the meaning of the APA's judicial review provisions, 5 U.S.C. 702. Pet. App. 20a. "For this reason, as well as the reasons generally stated in Judge Mikva's dissent in * * * *Cheney*," Judge Merritt would have granted standing. *Id.* at 21a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Although the court of appeals did not dispositively resolve the issue, the district court held that petitioners were without constitutional standing. Pet. App. 24a-26a. As the district court explained, while the complaint alleges that the government improperly decided to privatize the functions performed by petitioners, federal employees whose work is contracted out do not necessarily lose their federal employment or suffer any diminution in their pay and benefits. Under applicable procedures, such individuals may be reassigned to other federal positions, including positions at the same pay level, and may also obtain employment with the private contractor in question. See *id.* at 25a, 30a n.2. Thus, as the district court noted, the complaint here improperly assumes that federal employees whose functions are transferred to the private sector will necessarily suffer an "injury in fact" sufficient to satisfy the case or controversy requirement of Article III of the Constitution. See *id.* at 25a.

As the court of appeals observed, at least two of the three petitioners "have provided [no] evidence to support a conclusion that they have suffered an injury in fact." Pet. App. 7a. An affidavit submitted in response to the government's motion to dismiss indicated that the third petitioner (Courtney) had accepted a federal position far from home, but made no claim that the position involved any diminution in pay or benefits. *Id.* at 6a. While the court of appeals suggested that Courtney's inconvenience and separation from his family "might be a sufficient injury to satisfy the [injury in

fact] requirement of Article III standing," *id.* at 7a, it did not definitively pass on the issue, and the petition does not seek to refute the district court's analysis. In the absence of a sufficient allegation of injury-in-fact, petitioners have no constitutional standing to sue.

2. In any event, the court of appeals held that petitioners lack prudential standing under the APA because they did not fall within the zone of interests protected by the statutes invoked in the complaint. See 5 U.S.C. 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action *within the meaning of a relevant statute*, is entitled to judicial review thereof.") (emphasis added). That holding is correct and is consistent with all reported decisions.

The leading precedent on point is *Cheney*, 883 F.2d at 1038. In that case, Department of Defense employees sought to enjoin the government's decision to contract out certain activities, alleging that the decision was based on a cost comparison that was not in compliance with OMB Circular A-76. The D.C. Circuit affirmed the district court's order granting the government's motion to dismiss, holding that the plaintiffs lacked standing to seek relief under the APA for violations of 31 U.S.C. 101 *et seq.*, 41 U.S.C. 401 *et seq.*, and 10 U.S.C. 2462, each of which is relied on by petitioners in this case.

The D.C. Circuit reasoned that the interest of federal employees in preventing the loss of government jobs is not within the zone of interests sought to be protected by any of those statutes. See *Cheney*, 883 F.2d at 1043-1048 (discussing 31 U.S.C. 101 *et seq.*); *id.* at 1048-1050 (discussing 41 U.S.C. 401 *et seq.*); *id.* at 1050-1052 (discussing 10 U.S.C. 2462 (formerly codified at 10 U.S.C. 2304 note)). Indeed, the court determined that the interest of employees in protecting government jobs is,

if anything, inconsistent with these provisions. See *Cheney*, 883 F.2d at 1049-1050; see also *id.* at 1044. The D.C. Circuit's holding and reasoning in *Cheney*, which were followed by the Sixth Circuit in this case, are correct.

Petitioners do not claim, for example, that they have standing under any particular provision of 31 U.S.C. 101 *et seq.* In pertinent part, these provisions state that "[t]he Office of Management and Budget is an office in the Executive Office of the President," 31 U.S.C. 501, and that "[t]he Office of Federal Procurement Policy established under [41 U.S.C. 404(a)] is an office in the Office of Management and Budget," 31 U.S.C. 506. It is difficult to see how a federal employee's interest in keeping his government job could be anything more than marginally related to those highly generalized provisions. See *Cheney*, 883 F.3d at 1043-1048.

Petitioners likewise err in relying on 41 U.S.C. 401 *et seq.* As *Cheney* explains, the interests of federal employees in continued government employment are, if anything, inconsistent with the interests underlying 41 U.S.C. 401 *et seq.* Those provisions, for example, expressly impose upon designated officials of each executive agency the responsibility for "promoting the acquisition of commercial items, and challenging barriers to such acquisition." 41 U.S.C. 418(c). Insofar as the statute thus expressly calls for the use of commercial products and services, it cannot plausibly be argued that federal employees were meant to be within the zone of interests protected by it. See *Cheney*, 883 F.2d at 1049-1050. Petitioners in fact do not argue that they have standing under any particular provision of Title 41.

Petitioners also invoke 10 U.S.C. 2462, which provides in pertinent part that "the Secretary of Defense

shall procure each supply or service necessary for or beneficial to the accomplishment of the authorized functions of the Department of Defense * * * from a source in the private sector if such a source can provide such supply or service to the Department at a cost that is lower * * * than the cost at which the Department can provide the same supply or service." *Ibid.*[2] As the D.C. Circuit explained in *Cheney*, the legislative history of that provision makes clear that it was intended to combat a built-in bias against contractors. 883 F.2d at 1050 (citing S. Rep. No. 331, 99th Cong., 2d Sess. 278 (1986)). Section 2462 thus "was designed to protect the integrity of the contracting out process by [eliminating] 'handicaps' against government contractors." *Id.* at 1050. The interests of federal employees in retaining their government jobs are inconsistent with—indeed, "antithetical" to—the interests of private contractors in that regard. *Id.* at 1051.[3]

Petitioners do not claim that the D.C. Circuit's decision *Cheney* is distinguishable. Nor do they take issue with any portion of the analysis in *Cheney*. Instead, alluding to Judge Mikva's dissent (Pet. 12), petitioners

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[2] Additional statutory sections in Title 10 that are cited in the complaint concern for the most part related technical and administrative issues. Pet. App. 17a-19a; see 10 U.S.C. 2461 (reporting to Congress), 2463 (data collection and retention), 2467 (retirement costs), 2468 (authority of base commanders), 2469 (depot-level activities). See also Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382 (inventory requirement).

[3] Because the employees' interests are incompatible with the interests sought to be protected by the pertinent statutes, the D.C. Circuit in *Cheney* emphatically rejected the contention, repeated by petitioners here (Pet. 16), that such parties could qualify as "peculiarly suitable challenger[s]" to the government's action. See 883 F.2d at 1048 n.22, 1051.

assert that *Cheney* should not be followed because, in their view, it departs from this Court's precedent.

That contention is untenable in light of *Air Courier Conference* v. *American Postal Workers Union*, 498 U.S. 517 (1991). In *Air Courier*, unions representing postal employees brought suit to set aside a rule allowing private courier companies to engage in international remailing, *i.e.*, the direct deposit in foreign postal systems of letters addressed to foreign destinations. The unions argued that the rule violated the Private Express Statutes (PES), which generally grant the Postal Service a monopoly on the carriage of mail in and from the United States. This Court held that the unions lacked standing to sue under the APA.

The Court framed the standing question as "whether the adverse effect on the employment opportunities of postal workers resulting from the [government's decision] is within the zone of interests encompassed by the PES—the statutes which the Unions assert the Postal Service has violated in promulgating the international remailing rule." *Air Courier*, 498 U.S. at 524. The Court reasoned that, to answer that question, "[w]e must inquire * * * as to Congress' intent in enacting the PES in order to determine whether postal workers were meant to be within the zone of interests protected by those statutes." *Ibid.* The Court determined that the postal "monopoly was created by Congress as a revenue protection measure for the Postal Service to enable it to fulfill its mission," *id.* at 519, and was not intended "in any sense as a means of ensuring certain levels of public employment," *id.* at 527. The Court concluded that the unions lacked standing because their interest in protecting postal employment and furthering postal job opportunities was not within the zone of interest of the PES. See *id.* at 528.

Air Courier illustrates the correctness of the D.C. Circuit's analysis in *Cheney*. In both cases, federal employees sought to challenge a government determination that it would be more efficient and hence in the public interest for certain activities previously performed by government employees to be performed instead by the private sector. Each case holds that any interest government employees may have had in maximizing employment opportunities did not fall within the zone of interests sought to be protected under the relevant statutes. As the court of appeals correctly determined in this case, the same rationale applies here. See Pet. App. 12a-19a.

Petitioners suggest (Pet. 7) that *Air Courier* has been superseded by *National Credit Union Admin.* v. *First National Bank & Trust Co.*, 522 U.S. 479 (1998). That contention is without merit. In *National Credit Union Admin.*, this Court explicitly reiterated *Air Courier*'s holding and reasoning. 522 U.S. at 498-499. Indeed, petitioners disregard the Seventh Circuit's subsequent opinion in *Cohen*, 171 F.3d at 460, on which the court of appeals here relied in support of its conclusion that plaintiffs did not satisfy the requirements for prudential standing. See Pet. App. 17a. *Cohen* is another case in which federal employees sought to obtain APA review of an outsourcing determination on the ground that in-house performance by government workers would purportedly have been more economical. Expressly relying on *Air Courier* and *Cheney*, the Seventh Circuit held that plaintiffs lacked prudential standing under the general procurement statutes. See *Cohen*, 171 F.3d at 468-473.[4]

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[4] The Seventh Circuit held that plaintiffs had standing under the Arsenal Act, 10 U.S.C. 4532 (1994), a provision that is not ap-

As the Seventh Circuit explained, echoing *Cheney*, those statutes, in particular 10 U.S.C. 2462, "are aimed at facilitating and increasing the private provision of services and supplies." *Cohen*, 171 F.3d at 473. "[T]he interests protected by the[se] statute[s] are primarily those of private contractors," *id.* at 470, and "the interests of federal employment, and the goal of private procurement are inconsistent," *id.* at 471. The court thus concluded that the employees lacked APA standing to sue. *Id.* at 468-473.

Petitioners do not cite *Cohen*. Nor do they discuss earlier cases also denying standing in analogous circumstances. See *American Fed'n of Gov't Employees* v. *Dunn*, 561 F.2d 1310, 1315 (9th Cir. 1977) (federal employees lacked standing to contest contracting-out of Air Force food facility); *American Fed'n of Gov't Employees* v. *Stetson*, 640 F.2d 642, 645-646 (5th Cir. 1981) (same; custodial services); *American Fed'n of Gov't Employees* v. *Hoffman*, 427 F. Supp. 1048, 1082-1084 (N.D. Ala. 1976) (same; Army contract). Those decisions confirm that the federal courts uniformly hold that federal employees alleging an inadequate cost comparison have no APA standing to challenge agency contracting-out determinations. See also *American Fed'n of Gov't Employees* v. *United States*, 46 Fed. Cl. 586, 597-600 (2000) (similarly denying standing under the Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270, 112 Stat. 2382, and expressly following *Cheney* and *Cohen*), aff'd, 258 F.3d 1294 (Fed. Cir. 2001), cert. denied, 534 U.S. 1113 (2002).[5]

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plicable in this case and that petitioners here do not seek to invoke. See *Cohen*, 171 F.3d at 473-474.

[5] While an intra-circuit conflict would provide no basis for review by this Court in any event, see *Wisniewski* v. *United States*,

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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353 U.S. 901 (1957) (per curiam), petitioners err in suggesting (see Pet. 5, 6, 16) that the court of appeals' decision conflicts with the Sixth Circuit's previous decision in *Diebold* v. *United States*, 947 F.2d 787 (1991), reh'g denied, 961 F.2d 97 (1992). In *Diebold*,the panel majority indicated that OMB Circular A-76, considered in conjunction with related statutes and regulations, could give rise to judicially enforceable requirements, but it expressly declined to address any question of who might have standing to sue. See 947 F.2d at 789, 811 n.16; cf. *id.* at 811-815 (Wellford, J., dissenting).