No. 04-1276

In the Supreme Court of the United States

ALLEN DOTSON, PETITIONER

v.

THOMAS P. GRIESA, JUDGE,
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
WILLIAM KANTER
MARK W. PENNAK
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioner is entitled to bring an action for equitable relief to challenge, on constitutional grounds, the termination of his employment with the Judicial Branch, notwithstanding the comprehensive remedial scheme for resolving employment disputes of Judicial Branch employees and petitioner's failure to invoke the procedures under that scheme.

2. Whether a private cause of action for damages should be implied under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), against federal District Court Judges and other Judicial Branch officials with respect to employment disputes in the Judicial Branch, in light of the comprehensive remedial scheme for employees of that Branch comparable to the procedures created by the Civil Service Reform Act.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

In the Supreme Court of the United States

No. 04-1276

ALLEN DOTSON, PETITIONER

v.

THOMAS P. GRIESA, JUDGE,
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 398 F.3d 156. The opinion and order of the district court granting the government's motion to dismiss for failure to state a claim upon which relief can be granted (Pet. App. 51a-58a) is unreported. The opinion and order of the district court denying petitioner's motion for reconsideration (Pet. App. 59a-61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered February 2, 2005. The petition for a writ of certiorari was filed March 22, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, to replace a "patchwork system" of federal personnel law "with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *United States* v. *Fausto*, 484 U.S. 439, 445 (1988). The personnel system created by the CSRA provides a "comprehensive" scheme of protections and remedies for federal employment disputes, *id.* at 448, and "prescribes in great detail the protections and remedies applicable * * * , including the availability of * * * judicial review." *Id.* at 443. Because of its comprehensive nature, courts have routinely held that "Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the [CSRA]." *Lehman* v. *Morrissey*, 779 F.2d 526, 527-528 (9th Cir. 1985).

Judicial Branch employees are expressly covered by some of the provisions of Title 5 of the United States Code, including "certain employment benefits and remedies, such as back pay, severance pay, family and medical leave, and health and retirement benefits." Pet. App. 23a-24a (quoting *Blankenship* v. *McDonald*, 176 F.3d 1192, 1195 (9th Cir. 1999), cert. denied, 528 U.S. 1153 (2000)). However, Congress intentionally omitted Judicial Branch employees from the specific procedures and remedies afforded by the CSRA by expressly classifying such employees as "excepted service" personnel under various provisions of the CSRA. *Id.* at 11a. See generally 5 U.S.C. 2302; 5 U.S.C. 4301; 5 U.S.C. 7511.

Judicial Branch employees instead have long been covered by a distinct and comprehensive set of procedures for review of employment decisions, including decisions implicating equal employment opportunity. See Pet. App. 27a-37a. Soon after Congress's enactment of the CSRA, the Judicial Conference developed a Model Equal Employment Opportunity Plan in 1980 and revised it in 1986 (Model Plan), and plans implementing the Model Plan have been adopted by every federal court. Under those procedures, all court employees may seek redress for discrimination complaints, including complaints for retaliation, coercion, or interference. *Id.* at 28a. Judicial employees have the right to counsel of their choice, "the right to have 'reasonable notice of any hearing conducted on a complaint,'" and "the right to 'use a reasonable amount of official time to prepare their case.'" *Id.* at 29a (quoting Judicial Conference of the United States, *Judiciary Equal Employment Opportunity Program—Model Equal Employment Opportunity Plan* App. 1, § III(C) and (D) (1980, rev. 1986) <http://www.uscourts.gov/forms/AO342.pdf>). Under the Model Plan, the complainant has the right to file a written complaint with a designated EEO Coordinator, who is required to investigate the complaint, consult with the parties, and file a report on the coordinator's findings and recommendations, including any resolution and corrective actions. Pet. App. 28a (citing Model Plan App. 1, § IV(A), (B) and (D)(1)). The complainant may then file a written request with the Chief Judge of the court or designee seeking further review of the Coordinator's report. *Ibid.* (citing App. 1, § IV(C)(1)). The Chief Judge (or his designee) may then conduct further investigation and issue a final decision or elect to hold an evidentiary hearing in which the complainant has the right to counsel and the right to present evidence and cross-

examine witnesses. *Ibid*. (citing Model Plan App. 1, § IV(C)(2) and (3)).

Congress has long been aware of the Judicial Conference Model Plan and elected specifically not to subject Judicial Branch employees to the CSRA. Pet. App. 30a-31a. Thus, when Congress enacted the Congressional Accountability Act of 1995 (CAA), Pub. L. No. 104-1, 109 Stat. 3, Congress extended to its own employees a host of labor statutes and remedial schemes but specifically elected to exclude Judicial Branch employees from that legislation. Pet. App. 30a-31a. Rather, in enacting the CAA, Congress required the Judicial Conference to submit a report to Congress on the application to the Judicial Branch of the federal labor laws extended to Congress by the CAA and any need for legislation to afford Judicial Branch employees rights, protections, and procedures, "including administrative and judicial relief," that are comparable to those available to Legislative Branch employees. 2 U.S.C. 1434; Pet. App. 31a. That report was prepared and submitted in 1996 and represented to Congress that "[t]he judiciary currently provides its employees with protections similar to those enumerated in the laws referenced in the CAA." Pet. App. 32a (quoting Judicial Conference of the United States, *Study of Judicial Branch Coverage Pursuant to the Congressional Accountability Act of 1995*, at 2 (Dec. 1996)).

The Judicial Conference thereafter adopted a new Model Employment Dispute Resolution Plan (Model EDR Plan).[1] The new Model EDR Plan established enhanced review procedures similar to the structure Congress created in the CAA. Pet. App. 35a. The Plan requires

[1] See Judicial Conference of the United States, *Model EDR Plan* (Mar. 1997) <http://www.ce9.uscourts.gov/web/ocelibra.nsf/0/f75b8f4776df874e8825650e0065ef2c?opendocument>.

mandatory counseling and mediation and, upon expiration of the mediation period, affords an employee the right to file a formal written complaint. *Ibid.* The Chief Judge then determines if the complaint states a claim upon which relief can be granted, and if so, the Chief Judge or other designated judicial officer "must hold a hearing on the merits within sixty days of the filing of the complaint." *Ibid.* The judicial officer may allow discovery and investigation; the employee has the right to present evidence and to cross-examine witnesses; and the judicial officer may award broad equitable relief, including back pay, if the statutory requirements of the Back Pay Act are satisfied. *Id.* at 36a. If an employee is still dissatisfied, the employee may appeal under the procedures established by the judicial council of the circuit. *Ibid.* In the Second Circuit, that appeal is made to the Circuit Executive and is reviewed by one or more members of the Circuit Judicial Council, whose members are designated by the Chief Judge of the Circuit. *Ibid.*

2. a. Petitioner is an African-American man who was employed as a probation officer in the Probation Office of the United States District Court for the Southern District of New York (Southern District). Pet. App. 52a. In December 1997, petitioner's supervisors served a memorandum on petitioner, advising him that he had been terminated on the ground that he had misrepresented his whereabouts and activities to his superiors. *Ibid.* The memorandum was signed by United States District Judge Kevin T. Duffy, who was then the Chairman of the Probation and Criminal Law Committee for the Southern District. *Ibid.*

Petitioner protested the termination and sought reinstatement. Pursuant to an administrative plan then in effect in the Southern District for addressing employment

disputes involving probation officers, Chief Judge Thomas P. Griesa referred petitioner's protest to Clifford P. Kirsh, the District Executive for the Southern District. Kirsh conducted a hearing on petitioner's termination in February 1998, at which petitioner was represented by counsel. Kirsh later sustained petitioner's termination in a written report. Petitioner appealed that decision to Chief Judge Griesa. On April 21, 1998, Chief Judge Griesa approved Kirsh's report and sustained the termination. Pet. App. 6a-8a, 52a-53a. On October 13, 1998, Chief Judge Griesa denied petitioner's request for an additional hearing, which petitioner had requested in order to present evidence of "discrimination, disparate treatment and racial epithets" at the Probation Office. *Id.* at 53a (citation omitted). Petitioner did not, however, invoke the special procedures under the Southern District's EEO plan for resolving discrimination complaints. *Id.* at 6a n.2.

b. Petitioner then brought this action in the District Court for the Southern District of New York, seeking compensatory and punitive damages, as well as injunctive relief, against Chief Judge Griesa, Judge Duffy, the Probation Office, Chief Probation Officer Chris T. Stantion, and Kirsh. He alleged racial discrimination and relied on *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), and on 42 U.S.C. 1981 as a basis for his cause of action. Pet. App. 51a. The district court granted respondents' motion to dismiss for failure to state a claim upon which relief could be granted. The district court first dismissed petitioner's *Bivens* claim on the ground that such a claim was the type covered by the CSRA and thus barred by *Bush* v. *Lucas*, 462 U.S. 367, 388 (1983), *Schweiker* v. *Chilicky*, 487 U.S. 412, 423 (1988), and subsequent court of appeals decisions. Pet. App. 55a-57a. The district court also dismissed petitioner's claim for

equitable relief on the ground that it also was barred by the CSRA. Finally, the court dismissed petitioner's Section 1981 claim on the ground that Section 1981 applies only to actions by private persons or persons acting under color of state law rather than, as here, alleged conduct taken under color of federal law. *Id.* at 58a.

c. The court of appeals affirmed in a detailed and thorough opinion, see Pet. App. 1a-50a, concluding that the CSRA barred both petitioner's *Bivens* damages claim and his claim for equitable relief.[2]

The court of appeals first concluded (Pet. App. 9a-37a) that "the remedial scheme established by the CSRA precludes federal civil service employees from challenging adverse employment decisions through *Bivens* actions for money damages." *Id.* at 21a. Although noting that the remedial scheme created by the CSRA did not itself afford remedies to Judicial Branch employees (who are "excepted service" personnel under the Act, see *id.* at 11a), the court found that the CSRA's elaborate remedial scheme nevertheless is a "special factor" counseling hesitation in recognizing a *Bivens* remedy for Judicial Branch employment disputes. See *Bush*, 462 U.S. at 378. The court reasoned that the structure of the CSRA, its amendment history, and Congress's awareness of the judiciary's own extensive review procedures (Pet. 21a-37a) all supported the conclusion that "Congress's decision to exclude judicial branch employees from the administrative and judicial review procedures of the CSRA * * * was not inadvertent, but a conscious and rational choice." That choice reflected both Congress's "proper regard for judicial independence and recognition of the Judiciary's own comprehensive

[2] The court of appeals also affirmed the district court's dismissal of petitioner's claim under 42 U.S.C. 1981. Pet. App. 8a-9a. Petitioner does not seek review of that holding.

review procedures for adverse employment actions," which afforded "review by judicial officers." *Id.* at 37a. Noting that petitioner never attempted to avail himself of that remedial scheme for discrimination complaints (*id.* at 6a n.2, 29a n.9), the court of appeals concluded that "judicial branch employees such as [petitioner], no less than other federal employees covered by the CSRA, are precluded from pursuing *Bivens* damages actions for adverse employment decisions." *Id.* at 37a. The court noted that its conclusion accorded with decisions of the Ninth and Eleventh Circuits. See *id.* at 21a-22a (citing *Blankenship* v. *McDonald*, *supra*; *Lee* v. *Hughes*, 145 F.3d 1272 (11th Cir. 1998), cert. denied, 525 U.S. 1138 (1999)).

Based on the same principles, the court of appeals also concluded (Pet. App. 44a-49a) that the CSRA precluded petitioner's claims for equitable relief. After noting that "the circuits are divided" about whether the CSRA bars federal employees generally from seeking "equitable relief such as reinstatement" for an alleged constitutional violation, *id.* at 44a, the court of appeals concluded that "the majority view is more convincing" and aligned itself with the majority of circuits that had found that "federal employees may seek court review for employment actions 'as provided in the CSRA *or not at all*.'" *Id.* at 45a (quoting *Veit* v. *Heckler*, 746 F.2d 508, 511 (9th Cir. 1984)). Relying on *Bush* and *Chilicky*, the court of appeals reasoned that the CSRA's comprehensive scheme would be disrupted by suits in equity no less than by actions for damages. *Id.* at 46a-47a. With particular reference to such suits by Judicial Branch employees, the court noted that Congress "was well aware that its decision [to except judiciary employees from the remedial provisions of the CSRA] did not leave judicial branch employees without any relief for employment grievances," *id.* at 47a, because "the judiciary has long

afforded its employees" a comprehensive remedial scheme for employment complaints that was modeled on procedures "available to members of the executive and legislative branches." *Ibid.* The court pointed out in this regard that the Judiciary's remedial procedures provide equitable remedies, including "the precise equitable relief here at issue: reinstatement." *Ibid.*

The court further explained that "allowing judicial branch employees to pursue equitable challenges to employment actions would * * * provide them with more protection than other civil servants, potentially threatening the remedial balance established by Congress in the CSRA," Pet. App. 48a, and would "depriv[e] courts of the opportunity to resolve personnel problems through administrative channels," *id.* at 49a. Because the judiciary's own review process itself "affords an employee one or more levels of judicial review," the court concluded it would be "particularly incongruous" to hold that an employee such as petitioner who had failed to file an EEO complaint and thus invoke this remedial scheme (*id.* at 48a & n.19) "could then invoke equity to have his claim reviewed by a different set of judicial officers." *Id.* at 48a.

ARGUMENT

Petitioner contends (Pet. 9-23) that the court of appeals erred by concluding that the CSRA precludes a judicial employee from seeking equitable relief and declining to create a cause of action against judicial officers under *Bivens* for employment-related claims. Petitioner asserts that the circuits are divided both on the availability of equitable relief (Pet. 9-12) and on the availability of a *Bivens* remedy (Pet. 20-21). The court of appeals' decision is correct, and further review is not warranted.

1. Petitioner first contends (Pet. 14-16) that the CSRA should not be construed to preclude injunctive relief for constitutional violations. In that way, petitioner continues, courts could avoid the "serious constitutional question" that he says would be presented if the CSRA is read "to deny an individual *any* remedy for a constitutional violation." Pet. 16. Petitioner's argument in favor of suits against the Judicial Branch and its officers for injunctive relief lacks merit, especially in the posture of this case.

a. The CSRA "comprehensively overhauled the civil service system," *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985), "prescrib[ing] in great detail the protections and remedies" available to federal employees, "including the availability of administrative and judicial review," *United States* v. *Fausto*, 484 U.S. 439, 443 (1988). On a number of occasions, this Court has considered whether federal employees may seek judicial review of work-related disputes where such review is not specifically provided by the CSRA. In each case, the Court has held that federal employees are limited to the remedies explicitly provided by statute. Thus, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court declined to recognize a cause of action for damages for alleged constitutional violations in the federal employment context under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), because the comprehensive framework of the CSRA, with its specification of particular remedies where Congress found them appropriate, was a special factor counseling hesitation. The Court concluded that it would be "inappropriate" to supplement the "comprehensive procedural and substantive provisions" regulating federal employment with a new judicial remedy. 462 U.S. at 368.

Similarly, in *Fausto*, the Court held that the CSRA's "integrated scheme of administrative and judicial review"

precluded federal employees from bringing a suit against the government for back pay, where the CSRA did not explicitly provide for that remedy. 484 U.S. at 445. Considering both the language and the structure of the CSRA, the Court held "that the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather a manifestation of a considered congressional judgment that they should not have statutory entitlement to review." *Id.* at 448-449. In *Karahalios* v. *National Federation of Federal Employees*, 489 U.S. 527 (1989), the Court held that suits in court to enforce a union's duty of fair representation are barred, because the CSRA empowers only the Federal Labor Relations Authority to enforce a union's statutory duty of fair representation and because "[t]here is no express suggestion in [the CSRA] that Congress intended to furnish a parallel remedy in a federal district court to enforce the duty." *Id.* at 532.

b. The court of appeals correctly concluded that, in light of the two comprehensive remedial schemes at issue here, petitioner's claims for equitable relief against District Judges and various other officials and entities in the Judicial Branch are barred. Congress created a detailed and comprehensive system of remedies in the CSRA, and deliberately excluded Judicial Branch employees (and other excepted personnel) from the procedural and remedial provisions it afforded. *Fausto* and *Bush* establish that courts should not permit federal employees to bypass Congress' decision to exclude certain classes of employees from statutory remedies under the CSRA by filing suits directly in court, without any specific statutory authorization for such suits. The court of appeals concluded that the same logic should apply to claims for equitable relief as well. See Pet. App. 46a-47a (discussing *Bush* and *Chilicky*).

This Court explicitly has held that Congress's failure to provide a remedy is an appropriate basis for declining to imply a remedy when "congressional inaction has not been inadvertent." *Chilicky*, 487 U.S. at 423. As the court of appeals persuasively demonstrated, Congress was fully aware of the Judicial Branch's comprehensive remedial scheme when it amended the CSRA, and it relied on that remedial scheme in deciding to continue to exclude judicial employees from the CSRA's remedies. Pet. App. 36a-37a. As the court explained,

> Congress's decision to exclude judicial branch employees from the administrative and judicial review procedures of the CSRA, and from subsequent legislation such as the CAA, was not inadvertent, but a conscious and rational choice made and maintained over the years in light of both a proper regard for judicial independence and recognition of the judiciary's own comprehensive review procedures for adverse employment actions, including review by judicial officers.

Id. at 37a. The case for holding that petitioner's suit for equitable relief is precluded is particularly strong in light of the fact that the Judicial Branch's remedial scheme was designed to address precisely the sort of discrimination claims filed by petitioner in this case, claims that are fully subject to review by judicial officers who are empowered to award equitable remedies.[3]

---

[3] Petitioner errs by suggesting that the conclusion that the CSRA precludes equitable relief for Judicial Branch employees is "particularly unwarranted" because the CSRA does not itself provide administrative or judicial remedies for those excepted personnel. Pet. 14. As the court of appeals noted, *Chilicky* "made clear that it is the overall comprehensiveness of the statutory scheme at issue," and not whether it affords a particular plaintiff the particular relief he desires, that counsels

Petitioner contends that reading a statute to "deny an individual *any remedy* for a constitutional violation" (Pet. 16 (emphasis added)), or to "deny any *judicial* forum for a colorable constitutional claim" (Pet. 14 (quoting *Webster* v. *Doe*, 486 U.S. 592, 603 (1988)) (emphasis added), would raise serious constitutional questions. Those concerns are not implicated here, however. Far from denying Judicial Branch employees "any remedy," the comprehensive remedial scheme created by the Judicial Conference and implemented by each federal court provides a range of remedies for employment grievances, including "the precise equitable relief" petitioner seeks: "reinstatement." Pet. App. 47a (citing *Model EDR Plan* Ch. VIII, § 9B(3)). And far from denying Judicial Branch employees any judicial forum for their constitutional claims, the plan affords such employees "one or more levels of judicial review." *Id.* at 48a; see also *id.* at 49a. By suing in federal court, petitioner seeks only to have "his claim reviewed by a different set of judicial officers" (*id.* at 48a) than those afforded him by the courts' long-established administrative scheme.[4]

---

against implying a remedy not provided by that statute. Pet. App. 17a; see *Chilicky*, 487 U.S. at 421-422.

[4] Petitioner asserts that the courts' Model EDR Plan "was not properly followed in his case." Pet. 15. That is incorrect. Petitioner never invoked the court's employment dispute resolution plan, but rather only sought to appeal the decision to terminate him through disciplinary review procedures. As the court of appeals noted, those procedures are "separate and apart from" the employment dispute resolution procedures. Pet. App. 36a. Petitioner claims that his "right to a hearing" under the Model EDR Plan would be a "hollow remedy" because he would receive "a hearing before an employee of the very Probation Office that fired him." Pet. 14. That is incorrect, and again conflates the disciplinary review procedures that he invoked with the employment dispute procedures that he did not. Under the Model EDR Plan, petitioner had a right to a hearing before the Chief Judge

c. Petitioner contends that "there is a deep and longstanding circuit split" on the availability of equitable relief to federal employees outside the framework of the CSRA. Pet. 9. Petitioner is correct that the courts of appeals have reached different conclusions on the question of whether the CSRA bars Executive Branch employees from seeking equitable relief for employment-related constitutional claims.[5] That division of authority is not, however, implicated by this case. This case involves the distinct situation of employees of the Judicial Branch, which has created a comprehensive remedial scheme that provides for review by a federal judicial officer who is fully

---

of the district or another designated judicial officer. Pet. App. 35a (quoting *Model EDR Plan* Ch. VIII, §§ 7B(2), 7C(1) and (2)(a)).

[5] The majority of the circuits that have addressed the question have held that the comprehensive nature of the CSRA precludes covered employees from seeking equitable remedies for employment-related injuries, just as it excludes other forms of judicial relief not expressly provided by the statute. See *Saul* v. *United States*, 928 F.2d 829, 843 (9th Cir. 1991); *Lombardi* v. *SBA*, 889 F.2d 959, 961-962 (10th Cir. 1989); *Berrios* v. *Department of the Army*, 884 F.2d 28, 31 (1st Cir. 1989); *Hallock* v. *Moses*, 731 F.2d 754, 757 (11th Cir. 1984); see also *Pinar* v. *Dole*, 747 F.2d 899, 909-912 (4th Cir. 1984) (holding that CSRA precludes equitable relief, at least where constitutional injury is not major), cert. denied, 471 U.S. 1016 (1985). The Third Circuit, by contrast, has held that the CSRA does not prevent a federal employee from seeking equitable relief for a constitutional employment claim. *Mitchum* v. *Hurt*, 73 F.3d 30, 35-36 (1995). The District of Columbia Circuit has held that equitable relief is available for covered federal employees asserting constitutional claims, but it generally requires exhaustion of administrative remedies as a prerequisite to bringing suit. See *Steadman* v. *Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (1990) ("Only in the unusual case in which the constitutional claim raises issues totally unrelated to the CSRA procedures can a party come directly to district court.").

empowered to pass on constitutional questions and award equitable relief.

That distinction is significant. Those courts that have construed the CSRA not to bar federal employees from seeking injunctive relief have involved employees or applicants for employment in Executive Branch agencies, and the courts' reasoning in reaching that conclusion has often turned on the fact that the defendant is a federal agency or agency official. As petitioner notes (Pet. 10), *Hubbard* v. *EPA*, 809 F.2d 1 (D.C. Cir. 1986), involved an applicant for a position at a federal executive agency, and the court's reasoning critically relied on that fact, invoking what the court regarded as its "broad[]" "power to impose equitable remedies *against agencies*," *id.* at 11 n.15 (emphasis added), and stating that "[t]he court's power to enjoin unconstitutional acts by the government, however, is inherent in the Constitution itself," *ibid.* (citing *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)); accord *Spagnola* v. *Mathis*, 859 F.2d 223, 229-230 (D.C. Cir. 1988) (en banc) (employee of Office of Management and Budget; court noted that "time and again this court has affirmed the right of civil servants to seek equitable relief against * * * the *agency itself*, in vindication of their constitutional rights") (emphasis added) (quoted at Pet. 10); see *Mitchum* v. *Hurt*, 73 F.3d 30, 35 (3d Cir. 1995) (quoting *Hubbard* at length).

There is no comparable basis for a claimed broad and inherent power in the courts to enter injunctive relief against officers and entities of the Judicial Branch. Moreover, in this case, there is no "restriction on the authority to award injunctive relief to vindicate constitutional rights." *Mitchum* v. *Hurt*, 73 F.3d at 35. The Judicial Branch's comprehensive remedial scheme does not restrict the authority to award equitable relief, and indeed, "among the remedies available through the Judiciary's administrative

process is the precise equitable relief" petitioner sought. Pet. App. 47a. Petitioner points to no division of authority on the question presented by this petition, *i.e.*, whether the CSRA precludes suits by *judicial employees* for equitable relief.[6]

d. Further review of this issue is not warranted for the additional reason that petitioner failed to make use of the comprehensive remedial scheme afforded to him by the courts. The rule is well established that where "a constitutional claim is intertwined with a statutory one," and "machinery" exists "for the resolution of the latter, a plaintiff must first pursue the administrative machinery." *Steadman* v. *Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (D.C. Cir. 1990).[7] That principle applies even where (unlike here) an administrative process could not resolve the constitutional claim, as long as the claim could be considered later upon judicial review. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 215 (1994). The process of "[p]roceeding through the agency in this way provides the agency the opportunity to reconsider its policies, interpretations, and regulations in light of those challenges." *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 24 (2000). It also affords responsible decision-makers an opportunity to address the matter in the first instance and grant relief on non-constitutional

---

[6] The petition in *Whitman* v. *U.S. Department of Transportation*, No. 04-1131, discussed by petitioner (Pet. 16-19), does, by contrast, present the question whether equitable relief is available to an employee of the Executive Branch.

[7] Accord *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 23-24 (2000); *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 215 (1994); *Sturm, Ruger & Co.* v. *Chao*, 300 F.3d 867, 874 (D.C. Cir. 2002); *Association of Civilian Technicians, Tony Kempenich Mem'l Chapter 21* v. *FLRA*, 269 F.3d 1119, 1122 (D.C. Cir. 2001).

grounds, perhaps informed by principles of constitutional avoidance, thereby obviating any occasion for addressing a constitutional claim in court. See Pet. App. 49a (noting that excusing exhaustion would deprive "courts of the opportunity to resolve personnel problems through administrative channels").

As noted above, if petitioner had chosen to pursue the available procedures for resolving EEO complaints, he could have obtained an adjudication of the merits of his discrimination claim and any constitutional issues, and he could have been awarded all the equitable relief he sought in this case if his claim was found meritorious. Channeling such claims into the Judicial Branch's own process thus would not result in any denial of judicial review of any claim; it would simply provide for that review through a process separate from the traditional suit filed in federal district court.

If at the conclusion of that process petitioner was dissatisfied with the result, and if he believed a constitutional issue remained, he could have brought a suit at *that* time arguing that the court should give a further level of Judicial Branch scrutiny to his constitutional claims. At that point, the court would have the benefit of a formal decision rendered after a hearing by the responsible official in the Judicial Branch, the asserted constitutional claim would be brought more sharply into focus, and arguments concerning judicial review could address not only whether equitable relief is available at all, but also what the conditions for any such relief might be, and the nature and scope of judicial review if it might be available in certain circumstances. This case, by contrast, comes to the Court presenting the issue of the availability of judicial review in the abstract. Even if the issue otherwise might warrant certiorari at some point, the Court should await a case in

which the applicable Judicial Branch procedures have been invoked and there is a final decision under those procedures.

2. a. Petitioner also contends (Pet. 22-23) that the court of appeals erred by declining to infer a cause of action for damages under *Bivens* for his employment dispute. That claim lacks merit. In *Bush*, this Court held that in light of the carefully calibrated remedial scheme contemplated by the CSRA, a cause of action should not be inferred under *Bivens* to allow a federal employee to sue a federal official for damages for alleged constitutional violations arising out of the employment relationship. The Court held that it would be "inappropriate" to supplement the "comprehensive procedural and substantive provisions" regulating federal employment with a new judicial remedy.[8] 462 U.S. at 368.

Petitioner seeks to distinguish *Bush* on the ground that in that case, "Congress had acted to create *some* remedy for constitutional violations" and, here, "judicial employees are entirely excluded from any administrative or judicial procedure provided by statute." Pet. 23. But as the court of appeals noted, "the judiciary has long afforded its employees administrative review of adverse employment decisions," Pet. App. 47a, and its "administrative procedures * * * largely mirror those of the CSRA." *Id*. at 49a. Because there is every indication that Congress "has withheld [statutory] relief mindful of the alternative review and relief afforded judicial branch employees by the

---

[8] Although *Bush* was decided after the enactment of the CSRA, it concerned the federal personnel system the CSRA replaced. This Court has cited *Bush* for the principle that a comprehensive personnel system precludes judicial remedies not provided for by the system. See *Karahalios* v. *National Fed'n of Fed. Employees*, 489 U.S. 527, 536 (1989).

judiciary itself," *ibid.*, the reasoning of *Bush* applies in this case as well. See *Blankenship* v. *McDonald*, 176 F.3d 1192, 1195 (9th Cir. 1999) (declining to fashion *Bivens* cause of action for employees of the Judicial Branch), cert. denied, 528 U.S. 1153 (2000); *Lee* v. *Hughes*, 145 F.3d 1272 (11th Cir. 1998) (same), cert. denied, 525 U.S. 1138 (1999).

b. Petitioner contends (Pet. 20-21) that the courts of appeals disagree about whether the CSRA precludes judicial employees from bringing *Bivens* claims, citing *Duffy* v. *Wolle*, 123 F.3d 1026 (8th Cir. 1997), cert. denied, 523 U.S. 1137 (1998). Pet. 20-21. That purported conflict does not warrant this Court's consideration. The Eighth Circuit in *Duffy* was not presented with the considerations central to the reasoning in this case; and, when presented with those considerations in a future case, the Eighth Circuit might well reach the same result as the court did here. Indeed, this Court has already twice denied review of this purported circuit conflict, see *Blankenship* v. *McDonald*, 528 U.S. 1153 (2000) (No. 99-672); *Lee* v. *Hughes*, 525 U.S. 1138 (1999) (No. 98-554), and there is no reason for a different result in this case, especially since petitioner did not invoke the remedies that have been made available by the courts for resolution of discrimination complaints. See pp. 16-18, *supra*.

In *Duffy*, the Eighth Circuit held that a judiciary employee could bring an action under *Bivens*, holding that the court-adopted EEO plan, standing alone, did not preclude a probation officer from asserting a *Bivens*-based sex discrimination claim against the judges who decided not to promote him. In the Eighth Circuit's view, "*[o]nly Congress* has the power to decide that a statutory or administrative scheme will foreclose a *Bivens* action." 123 F.3d at 1034 (quoting *Krueger* v. *Lyng*, 927 F.2d 1050, 1055 (8th Cir. 1991)). The Eighth Circuit declined to hold that the

Judicial Conference's EEO remedial plan was sufficient to bar *Bivens* suits "without some real indication that Congress intended the administratively-created scheme to have that result." *Ibid.* (quoting *Krueger* v. *Lyng*, 927 F.2d at 1055).

As the Eleventh Circuit noted in *Lee* v. *Hughes*, 145 F.3d 1272 (1998), cert. denied, 525 U.S. 1138 (1999), "the defendants in *Duffy* never suggested that the CSRA preempted plaintiff's claim, but rather argued only that plaintiff's *Bivens* claim should have been dismissed because the local EEO Plan provided plaintiff with a remedy." *Id.* at 1276 n.4. The *Duffy* court's failure to consider the CSRA is key, because the intentional exclusion of Judicial Branch employees from the remedies provided under the CSRA is precisely the sort of congressional action that the court in *Duffy* sought. Similarly, the Eighth Circuit in *Duffy* did not consider the extensive evidence, cited by the Second Circuit in this case, that Congress's decision to maintain the exception for Judicial Branch employees was a deliberate decision to rely on the comprehensive scheme developed by the Judicial Conference and implemented by each federal court to address employee complaints, including discrimination complaints. Finally, there is no indication that the *Duffy* court considered the "extensive dialogue [between Congress and] the federal courts" in the wake of the CAA, Pet. App. 37a, which occurred after the facts relevant in *Duffy*. Thus, there is no reason to believe that the Eighth Circuit would continue to follow *Duffy* if presented with these additional factors.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General
PETER D. KEISLER
Assistant Attorney General
WILLIAM KANTER
MARK W. PENNAK
Attorneys

JUNE 2005