No. 04-1131

IN THE

Supreme Court of the United States

TERRY L. WHITMAN,
Petitioner,
v.

DEPARTMENT OF TRANSPORTATION ET AL.,
Respondents.

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

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

This brief responds to the Court's order of May 2, 2006, directing the parties to file supplemental briefs addressing the applicability of *Darby* v. *Cisneros*, 509 U.S. 137 (1993), to this case. Put simply, *Darby* confirms petitioner's position that the federal district court had jurisdiction to hear his complaint and that he was not required first to exhaust an administrative process either within the FAA or before some other federal agency.

The question presented in *Darby* was "whether federal courts have the authority to require that a plaintiff exhaust available administrative remedies before seeking judicial review under the Administrative Procedure Act (APA)." *Id.* at 138. This Court gave a unanimous negative answer:

> [W]here the APA applies, an appeal to "superior agency authority" is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review. Courts are not free to impose an exhaustion requirement as a rule of judicial administration where the agency action has already become "final" under § 10(c) [codified as 5 U.S.C. 704].

Id. at 154 (emphasis in original). The Court recognized that, with respect to APA actions, Congress "effectively codified" the doctrine of exhaustion. *Id.* at 153. Only "in cases not governed by the APA" does exhaustion "apply as a matter of judicial discretion." *Id.* at 153-54 (citing *McCarthy* v. *Madigan*, 503 U.S. 140 (1992)).

In this case, petitioner seeks injunctive relief to end the Federal Aviation Administration's (FAA) violation of his rights under the Constitution and 49 U.S.C. 45104(8) through its administration of suspicionless non-random drug testing. Like the petitioner in *Darby*, petitioner did raise his concerns

with the agency before bringing suit.[1] And like the petitioner in *Darby*, petitioner did not pursue other available, but not "expressly required," administrative processes.

But unlike in *Darby*, the government in this case did *not* move to dismiss petitioner's complaint for failure to exhaust. Rather, respondents argued from the beginning that the issue of exhaustion was irrelevant because federal law "precludes district court review of employment-related complaints such as Whitman's," "even if [he] had no administrative remedy for his complaint," C.A. Br. at 26-27 (internal capitalization omitted).[2] Thus, the existence or scope of any potential

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[1] Petitioner filed a charge detailing his concerns with the Federal Labor Relations Authority (FLRA) that was served on the FAA and Robert W. Rigg, the FAA Flight Surgeon for the Alaskan Region responsible for overseeing the drug testing program. C.A. Supp. Excerpts of Record at 1. Petitioner also engaged in a detailed email exchange with Rigg detailing his concern that the tests were not random and that the latest test was in fact retaliatory. See Exh. A to Unopposed Motion to Amend Complaint and Unopposed Motion to Supplement Complaint (docket document # 11-1). Petitioner had also raised his concerns with the Internal Substance Abuse Program Manager at the Anchorage Facility. See Unopposed Motion to Amend Complaint and Unopposed Motion to Supplement Complaint at 5 (docket document # 11-1).

[2] See also, *e.g.*, Defendant's Motion to Dismiss the Complaint and the Amended Complaint at 11 (Jan. 10, 2003) (docket document # 13-1) ("There is no federal waiver of sovereign immunity which provides Whitman with a private right of action to sue his employer in federal court. He may not use the Administrative Procedures Act, and he may not assert a Constitutional claim against a federal agency."); BIO i (issue presented by this case is "whether the CSRA precludes a federal employee from seeking equitable relief from a federal district court for an alleged constitutional violation by his or her employer").

To be sure the government's answer *did* mention a failure to exhaust administrative remedies "for any claim of discrimination because he did not contact an EEO [equal employment opportunity] counselor within 45 days." See C.A. Supp. Excerpts of Record 8.

exhaustion requirement was neither briefed nor decided by either court below.

The government has wisely abandoned its insistence on the categorical preclusion of all judicial review. But only at the eleventh hour, in their merits brief before this Court, did respondents even begin to identify the administrative procedure that they claim petitioner should have exhausted. There, they suggested that petitioner must raise his claim in the negotiated grievance procedure contained in his collective bargaining agreement; and then persuade his union to seek arbitration of his grievance and appeal an unfavorable arbitral award to the Federal Labor Relations Authority (FLRA), see U.S. Br. 22-23.[3] Once he and his union complete that administrative process, the government suggested, petitioner might be entitled to seek judicial review of the FLRA's decision before a federal court of appeals. See *id*. at 48. To its credit, however, the government acknowledged a serious problem with its proposal: the statute providing for judicial review of FLRA final decisions expressly excludes judicial review of FLRA orders "involving an award by an arbitrator," unless that award concerns an allegation of unfair labor practices. 5 U.S.C. 7123(a)(1). So the government suggested "reading in[to]" section 7123(a)(1) an "exception" overriding the clear statutory language. U.S. Br. 48.

At oral argument, the government took yet a different tack, this time suggesting that petitioner was required only to go through the two stages of the negotiated grievance procedure within his control, and then, if his union declined to

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But respondents now recognize that this boilerplate has no application to this case, as petitioner does not bring a claim of discrimination falling within the jurisdiction of the EEO process. Thus, they have not argued in this Court that petitioner was required to exhaust the EEO process.

[3] They recognized that petitioner himself could neither request arbitration nor appeal an unfavorable arbitral decision. See U.S. Br. 22-23; see also 5 U.S.C. 7121(b)(1)(C)(iii); J.A. 27.

seek arbitration, he could file suit in federal district court under the APA. See Tr. of Oral Arg. at 33, 39.

Given the government's failure to raise in its answer the affirmative defense of failure to exhaust administrative remedies, see Fed. R. Civ. P. 8(c), and its repeated changes of position on what exhaustion was required, this Court should hold that respondents have waived any exhaustion-related defense in this case. See *Zipes* v. *TWA*, 455 U.S. 385, 393 (1982); *Heckler* v. *Day*, 467 U.S. 104, 110 n.14 (1984). The Court can, and should, leave the question whether to impose some exhaustion requirement in this context for another day.

But if this Court were to reach the question whether petitioner should have exhausted some administrative process before bringing suit, *Darby* shows that the answer is "no." *Darby* contemplates a four-stage inquiry for answering that question:

1.Does the APA apply to the plaintiff's claim?

2.If the APA applies, is the plaintiff challenging "final agency action"?

3.Does any statute "expressly require[e]" exhaustion after the agency action has become "final"?

4.Does an agency rule require exhaustion and "provid[e] that the action meanwhile is inoperative"?

In this case, the answer to all four questions is clear. First, as the government acknowledged at oral argument, the APA applies to plaintiff's claims. Second, this case involves a challenge to final agency action. Third, no statute expressly requires exhaustion. Finally, no agency rule requires exhaustion (and even if one did, the FAA's process does not satisfy the APA's requirement that the agency action be rendered "inoperative" while the claimant pursues administrative relief).

I. The APA Applies To Petitioner's Claims.

Section 702 of the APA provides that "[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," and waives the United States' sovereign immunity for actions seeking only equitable relief. In this case, petitioner alleges that he is "suffering legal wrong" (*i.e.*, violations of his constitutional and statutory rights) because of "agency action" (*i.e.*, the FAA's administration of its drug and alcohol testing program). Thus, his claims fall squarely within the APA. See Petr. Br. at 13, 15, 18, 33, 45; *Nat'l Federation of Fed'l Employees* v. *Weinberger*, 818 F.2d 935, 941 n.11 (CADC 1987) (stating that an agency's drug testing program "is clearly an 'agency action' within the meaning of the APA's judicial review provisions"). [4] Indeed, the government has never argued otherwise and explicitly conceded at oral argument that petitioner's claims fall within the scope of the APA. See Tr. of Oral Arg. 48-49.

II. Petitioner Has Challenged "Final Agency Action."

In *Bennett* v. *Spear*, 520 U.S. 154 (1997), this Court explained that, as a "general matter," the APA requires that "two conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,'

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[4] The APA defines "agency action" to include, among other things, "the whole or a part of an agency rule, order * * * [or] sanction." 5 U.S.C. 551(13). The FAA's drug testing regime reflects an agency "rule" within the meaning of 5 U.S.C. 551(4), because it "implement[s]" Congress's command that the agency develop a program for "random" drug testing, see 49 U.S.C. 45102(b)(1). Petitioner's injuries arise from the implementation of that rule through agency "orders" requiring him to submit to suspicionless, non-random testing. 5 U.S.C. 551(6). Those orders were enforced through the threat of a "sanction," as failure to comply with the order could lead to termination. See *id.* § 551(10)(A).

or from which 'legal consequences must flow." *Id.* at 177-78 (internal citations omitted).

Both those conditions are satisfied here. With respect to the FAA's drug testing program, the DOT has promulgated and published detailed regulations that determine the rights and obligations of employees. See Pet. App. 2a. Orders requiring individuals to submit to drug or alcohol tests are clearly final agency action as well: they are not "preliminary, procedural, or intermediate agency action," 5 U.S.C. 704, but require the employee to report to the testing site within fifteen to thirty minutes, Petr. Br. 8, and provide a sample before leaving upon threat of termination.[5] See *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 151, 152-53 (1967) (agency action final when "compliance was expected" and non-compliance subject to sanction).

III. No Statute "Expressly Require[s]" Exhaustion Before Petitioner Seeks Judicial Review.

The government has not, and cannot, argue that anything in the CSRA "expressly required" petitioner to exhaust any agency process as a "prerequisite to judicial review." *Darby*, 509 U.S. at 154. To the contrary, it has been the government's principal position throughout this litigation that the CSRA's administrative processes are *preclusive of* – not a "prerequisite to" – judicial review. And even that preclusive effect, the government has always argued, is not "expressly

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[5] As Justice Breyer pointed out at oral argument, a plaintiff faced with irreparable injury from an impending agency action – such as the threatened denial of his First and Fourth Amendment rights – can obtain review of the agency's conduct by seeking a stay of the action under section 705 of the APA. See Tr. of Oral Arg. at 40-41; see also *id.* at 48-49 (acknowledgement by respondents that, under the particular circumstances of this case, the combination of the unquestionably final agency action in subjecting petitioner to allegedly unconstitutional drug tests in the past with the threat of subjecting him to further unconstitutional tests in the future permits suit under the APA).

required by statute," *ibid*., but rather, arises from inferences it would have the Court draw from "[t]he structure of the CSRA, which *generally* channels all workplace claims through specified administrative bodies." U.S. Br. 13 (emphasis added). But as this Court held in *Darby*, for cases brought under the APA, an exhaustion requirement must be express; it cannot be based on inference. Accordingly, exhaustion was not required in this case.

While no statute expressly requires exhaustion of a specified administrative process for claims like petitioner's,[6] respondents have suggested that sections 7121-23 of the CSRA should nonetheless be construed to impose an exhaustion requirement. But far from "expressly requir[ing]" exhaustion as a prerequisite to judicial review, *Darby*, 509 U.S. at 154; 5 U.S.C. 704, the language of those sections demonstrates that Congress clearly did not intend the negotiated grievance process to constitute an exhaustion requirement.

The collective bargaining agreement in this case provides employees with a two-stage negotiated grievance procedure. "Step 1" requires an employee to discuss his grievance "informally" with his immediate supervisor within 15 days of its occurrence. If the matter is not settled within an additional

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[6] As explained in the prior briefing and at oral argument, petitioner's claim is not governed by the exhaustion requirements for a "personnel action" under the CSRA. See *Bush* v. *Lucas*, 462 U.S. 367, 385 n.28 (1983) (concluding that "warrantless searches" of federal employees "would not be defined as 'personnel actions' within" the meaning of section 2302(a)(2)(A) of the CSRA). Nor, given the allegations petitioner has made, does this case involve either a claim of an "unfair labor practice" within the meaning of 5 U.S.C. 7116, see Pet. App. 3a (noting that the FLRA disclaimed jurisdiction over petitioner's charge because he had not alleged an unfair labor practice) or a claim that the FAA has violated one of the general federal fair employment statutes, such as Title VII.

15 days, "the grievance may be moved to the next step." J.A. 24. "Step 2" requires the employee to reduce his grievance to writing and submit it to his facility manager (or the manager's designee) within 15 days of the step 1 decision. The manager then has 15 days to issue a written decision. *Id.* That decision "complete[s] the negotiated grievance procedure." J.A. 26.

The further proceedings laid out in sections 7121-23 for what occurs *after* the employee completes his part of the process simply do not provide a route by which individual employees can seek judicial review of constitutional or statutory claims. Section 7121(b)(1)(C)(iii) expressly contemplates that only the union or the employer, and not individual employees, can demand arbitration. See also J.A. 26, 27-28. Only the union or the employer (as parties to that arbitration), and not the employee, can seek review of the arbitrator's decision before the Federal Labor Relations Authority. 5 U.S.C. 7122(a). And with respect to seeking judicial review of the FLRA final order before a court of appeals, such review is expressly limited to cases involving "unfair labor practices." *Id.* § 7123(a)(1); see also Petr. Reply Br. 11 n.5 (noting that it is unclear whether an employee, as opposed to his union, is entitled to seek review of an FLRA order reviewing an arbitration). Thus, even if an employee in petitioner's position could have persuaded his union to demand arbitration and appeal an unfavorable arbitral award to the FLRA, unless and until this Court takes the *further* step of accepting the government's belated invitation to "read in" to section 7123(a)(1) an "exception for constitutional claims," U.S. Br. 48, no judicial review is possible from "exhausting" the procedures set out in sections 7121-23.

Darby recognized that "Congress clearly was concerned with making the exhaustion requirement unambiguous so that aggrieved parties would know precisely what administrative steps were required before judicial review would be available." 509 U.S. at 146. In this case, the federal government did not state what those steps were until midway

through oral argument before this Court. Before the district court and the court of appeals, the government suggested there were *no* steps petitioner could take to obtain judicial review.[7] Before this Court, the government has proposed two materially different exhaustion requirements. See *supra* at 3-4. Far more so than in *Darby* itself – where the administrative process allowing for further agency review was at least laid out clearly in the Code of Federal Regulations, see *Darby*, 509 U.S. at 141 – dismissing petitioner's complaint for failure to exhaust a process that was nowhere laid out and that requires this Court to significantly rewrite a federal statute would turn the negotiated grievance process into "into a trap for unwary litigants." *Id*. at 147.

IV. The Negotiated Grievance Procedure Does Not Constitute An "Agency Rule" Within The Meaning Of Section 704.

In *Darby*, this Court also recognized that section 704 requires exhaustion in APA cases "when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." 509 U.S. at 154. The government has pointed to no such agency rule in this case. But even if the negotiated grievance procedure could somehow be construed to constitute an agency rule requiring exhaustion, that "rule" would not satisfy the second precondition for requiring exhaustion. When it comes to random drug tests, it is crystal clear that the FAA does not treat its order to an employee to produce a specimen as "inoperative" while the employee pursues whatever additional administrative relief it now suggests might also be available. To the contrary: it treats "[r]efusal to submit to random drug

[7] While the government apparently continues to maintain its claim that section 7121(a) strips federal courts of jurisdiction over petitioner's statutory claim, that argument is meritless for reasons petitioner has already explored in his opening and reply briefs. See Petr. Br. 44-46; Petr. Reply Br. 15-20.

or alcohol testing or failure to cooperate with the collection process" as "grounds for removal from the Federal service." Petr. Br. 36 (quoting an FAA memorandum)

V. The Application Of *Darby* To This Case Will Affect Only A Narrow Class Of Federal Employees' Claims, Since It Leaves Untouched The Many Existing Exhaustion Requirements.

This Court need not fear that applying the clear rule of *Darby* to this case will undermine the purposes of the CSRA, provide a means of evading its requirements, or open the floodgates to employment litigation under the APA in the federal courts. Petitioner does not contest that where Congress has established an administrative process leading to judicial review under the CSRA, exhaustion of that process is required. Thus, exhaustion is required (either by the CSRA or by other federal statutes) for complaints regarding adverse "personnel actions," "unfair labor practices," or violations of federal fair employment statutes, and many other federal statutory rights. Accordingly, even under *Darby*, the vast majority of federal employment complaints are subject to exhaustion, including almost all grievances that are sufficiently serious to make the trouble and expense of litigation worthwhile.

The question in this case is whether exhaustion may also be judicially required for the small subset of cases in which an employment practice gives rise to an injury important enough to receive constitutional or statutory protection, and for which the APA provides a right of judicial review, yet the CSRA does not provide an administrative avenue leading to judicial review. *Darby* directly answers that question, concluding that in enacting the APA Congress intended to fill the gap that may exist in other statutory regimes by allowing judicial review, not by precluding it.[8]

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[8] There is already a well-developed line of cases relying on Darby to hold that exhaustion of administrative procedures is not

Of course, neither section 704 nor the Court's analysis in *Darby* precludes either Congress or particular federal agencies from making administrative exhaustion a prerequisite to federal jurisdiction, even over claims like petitioner's. All section 704 and *Darby* demand is that any prerequisite be made explicit by Congress (through statutes) or agencies (through properly promulgated rules), rather than by judges.

VI. Given The History Of This Case, This Court Should Refuse To Impose An Exhaustion Requirement Even If *Darby* Does Not Squarely Foreclose Doing So.

1. Under no circumstances should the Court use this case as a vehicle to re-examine or modify *Darby* or to otherwise hold that a judicially crafted exhaustion requirement should have been imposed in petitioner's case, let alone in other cases not now before the Court. As petitioner has already explained, *supra* at 3, the government never squarely raised the exhaustion argument until the case reached this Court. See also Tr. of Oral Arg. 39. The questions presented cannot fairly be read to include the question whether this Court should announce a new requirement that federal employees exhaust their negotiated grievance procedures before filing suit in federal district court.[9] Rather, the question on which

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required for certain APA-based employment-related claims by servicemembers. See, *e.g.*, *Dowds* v. *Clinton*, 1994 U.S. App. LEXIS 4510, at *1 (CADC 1994) (unpublished opinion); *O'Grady* v. *Nyvold*, 2001 U.S. Dist. LEXIS 25668 (W.D. Wis. 2001); *Crane* v. *Secretary of the Army*, 92 F. Supp. 2d 155, 161 (W.D.N.Y. 2000); *Watson* v. *Perry*, 918 F. Supp. 1403, 1411 (W.D. Wash. 1996), aff'd, 124 F.3d 1126 (CA9 1997); *Perez* v. *United States*, 850 F. Supp. 1354, 1359-61 (N.D. Ill. 1994).

[9] The D.C. Circuit, the only circuit to have imposed a judicially crafted exhaustion requirement on federal employees did not require exhaustion of negotiated grievance procedures, but rather required exhaustion of other statutorily defined procedures. See Petr. Br. 40-41.

this Court granted certiorari was whether section 7121(a) or the CSRA as a whole "precludes" judicial review altogether. See Pet. Cert. i; BIO i. The answer to that question is a simple "no." Even if at some future date this Court were to consider whether to impose an exhaustion requirement, such a requirement would only affect the timing of and conditions precedent to judicial review; review would not be "preclude[ed]."

The federal government is party to well over a thousand collective bargaining agreements,[10] each having its own negotiated grievance procedure. Nothing in the record before this Court provides any information about the potentially wide differences among these procedures including the scope of covered grievances, the number of steps involved, or the applicable deadlines. It would thus be exceptionally unwise for this Court to declare that *all* federal employees must exhaust negotiated grievance procedures about whose contours it knows next to nothing on the basis of a general sentiment that exhaustion makes sense.[11] The fact that Congress created so many distinct, detailed administrative

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[10] According to the Office of Personnel Management, as of January 1, 1997, the various agencies of the federal government had recognized 1,763 collective bargaining units represented by 91 different unions, and had entered into 1,235 collective bargaining agreements. Brief for the Petitioners at 6, *NASA* v. *FLRA*, 527 U.S. 229 (1999) (citing Union Recognition in the Federal Government I-5 to I-9 (June 1997)).

[11] The negotiated grievance process is also ill-suited for exhaustion because it does not cover all federal employees, but only those subject to a collective bargaining agreement (excluding many managerial and other employees). At the same time, the CSRA explicitly contemplates that collective bargaining agreements may define categories of complaints that are not subject to the negotiated grievance process. 5 U.S.C. 7121(a)(2). Whether a particular claim would be subject to exhaustion, therefore, would vary from employee to employee, claim to claim.

regimes for federal employment practices but "stopped short," *McCarthy*, 502 U.S. at 150, of creating a single exhaustion requirement cuts strongly against this Court doing so.

2. Moreover, it would be entirely inconsistent with *Darby* for this Court to retroactively impose an exhaustion requirement on petitioner. As petitioner has already explained, *supra* at 9, any exhaustion requirement this Court announces in the course of deciding this case would flout Congress's concern that exhaustion requirements be "unambiguous" so that individuals "know precisely what administrative steps" they must complete before seeking judicial review. *Darby*, 509 U.S. at 146; see also 5 U.S.C. 552(a)(1)(B) (requiring that federal agencies either publish in the Federal Register or otherwise provide actual and timely notice of "the nature and requirements of all formal and informal procedures available"). In 2002, there was literally no place petitioner could have looked that would have articulated the exhaustion regime the government now claims he should have followed.

3. Even if this Court were to consider modifying *Darby*, or to somehow conclude that the APA does not govern petitioner's case, the two-step negotiated grievance procedure adopted pursuant to section 7121(a)(1) is hardly the kind of administrative process that this Court has previously transformed into an exhaustion requirement.

In *McCarthy* v. *Madigan*, which *Darby* cited with approval, this Court declined to require that a federal prisoner exhaust "internal grievance procedure promulgated by the Federal Bureau of Prisons" (BOP) before instituting a *Bivens* action for inadequate medical care. 502 U.S. at 141.[12] The reasons for the Court's decision apply with equal force to this case.

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[12] Congress subsequently amended the relevant statute to expressly require exhaustion. See 42 U.S.C. 1997e(a).

First, exhaustion should not be required when "[n]o formal factfindings are made" in the course of an agency's process. 502 U.S. at 155. Here, neither stage of the negotiated grievance procedure requires any formal factfinding. Nor does the employee have any right to a formal hearing, to call witnesses, or to present documentary evidence. Only the stages of the administrative process that an individual employee like petitioner has no right to invoke – namely, arbitration and appeal to the FLRA – provide for the kind of administrative adjudication and factfinding that *McCarthy* contemplated.

Second, courts should not require exhaustion of an administrative process when there is "doubt as to whether the agency [is] empowered to grant effective relief." *Id.* at 147 (internal quotation marks omitted). Such doubt is clearly present here; indeed, respondents' answer to the complaint asserted that the "the drug testing program and the selection of employees to be tested is not administered by [the] local FAA office." See C.A. Supp. Excerpts of Record 21. Nor has the government ever explained how an arbitrator or the FLRA would have had any power to enjoin the drug tests at issue here.

Third, most negotiated grievance processes, like the administrative process this Court found inadequate in *McCarthy*, "impose short, successive filing deadlines that create a high risk of forfeiture" of meritorious claims. 503 U.S at 152 (BOP imposed deadlines of 15 and 20 and 30 days). Here, the negotiated grievance procedure imposes even more stringent deadlines: it requires the employee to file his grievance within 15 days of the episode giving rise to his claim, J.A. 23, to reduce his grievance to writing and file the written grievance within 15 days of receiving a decision from his immediate supervisor, *id.* at 24; and contact his union, and perhaps actually persuade it to file a request for arbitration, within 10 days of receiving a decision from the facility manager, *id.* at 26. Such deadlines are perfectly appropriate for a system designed principally to resolve minor complaints

without prejudice to judicial review of substantial statutory and constitutional claims. But they are entirely ill-suited for the purpose to which respondents would now have this Court adapt them.

Finally, *McCarthy* cautioned against judicial imposition of an exhaustion requirement when pursuing an agency's internal grievance procedure would mean that "a particular plaintiff may suffer irreparable harm if unable to secure immediate judicial consideration of his claim." 502 U.S. at 147. Here, even if petitioner were otherwise required to exhaust the negotiated grievance procedure, he would be permitted to seek immediate judicial review of these claims because he has alleged an irreparable injury from being subjected to unconstitutional or illegal drug tests that violate his constitutional and statutory rights.

In light of the facts and history of this case, imposing on petitioner either of the new exhaustion requirements belatedly proposed by the government before this Court not only runs afoul of this Court's decisions in *Darby* and *McCarthy*, but serves no purpose whatsoever except to further defer judicial review of petitioner's claims.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioner's opening and reply briefs and at oral argument, the judgment should be reversed.

Respectfully submitted,

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