

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CHRIS J. KROENUNG,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 2025-1363
	)	
DEPARTMENT OF DEFENSE,	)	
	)	
Respondent.	)	

RESPONDENT'S RESPONSE TO
PETITIONER'S MOTION FOR JUDICIAL NOTICE

Pursuant to Federal Appellate Rule 27(a)(3) and Federal Circuit Rule 27(b), respondent, the Department of Defense, respectfully submits this response to petitioner Chris Kroenung's motion for judicial notice, ECF No. 24-1.

Respondent takes no position on Mr. Kroenung's motion for judicial notice insofar as it requests that the Court take judicial notice of public records pertaining to issues properly before the Court in this appeal. *See Dimare Fresh, Inc. v. United States*, 808 F.3d 1301, 1306 (Fed. Cir. 2015).

However, much of Mr. Kroenung's motion, and his accompanying request that the Court permit a supplemental appendix consisting of extra-record material, goes well beyond the issues properly before the Court. *Wallace v. Dep't of the Air Force*, 879 F.2d 829, 832 (Fed. Cir. 1989) (an "issue must be raised with sufficient specificity and clarity that the tribunal is aware that it must decide the issue"); *Sanders v. U.S. Postal Serv.*, 801 F.2d 1328, 1329 n.* (Fed. Cir. 1986) (denying motion to supplement

appendix with materials not presented to the MSPB). Mr. Kroenung argues that he (1) raised constitutional issues below, or (2) may raise them now in the first instance. His citations to SAppx6000 and Appx31, his submissions before the agency and the MSPB, belie his first contention—neither mentions a constitutional issue. ECF No. 24-1 at 5; *see also, e.g.*, Appx232, Appx283 (ECF No. 24-53 at 232, 283). His second contention also fails: this Court need not consider a constitutional issue not raised below, *see Smith v. West*, 214 F.3d 1331, 1334 (Fed. Cir. 2000); *Harding v. U.S. Naval Acad.*, 567 F. App’x 920, 924 (Fed. Cir. 2014); and *Elgin v. Department of Treasury*, 567 U.S. 1, 18-19 (2012), expressly held that an appellant must pursue and develop his constitutional claims before the MSPB. Moreover, Mr. Kroenung principally asserts statutory, not constitutional, issues—such as his argument that the testing requirement did not comply with the Emergency Use Authorization (EUA) statute. ECF No. 24-1 at 19-23. He did not raise any EUA issue before the MSPB or even at the agency level. *See* Appx31, Appx72, Appx85, Appx232, Appx283 (ECF No. 24-53 at 31, 72, 85, 232, 283).

Our response brief will fully address the waiver issues presented in Mr. Kroenung’s opening brief. Thus, at a minimum, we respectfully request that the Court resolve this motion contemporaneously with its consideration of the parties’ merits briefing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 394 words. This response also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it was prepared using Word for Microsoft 365 in Garamond 14-point font, a proportionally spaced typeface.

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