Nos. 08-1415 and 08-1418

In The
Supreme Court of the United States

JOSEPH J. FILEBARK, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION and FEDERAL AVIATION ADMINISTRATION,

Respondents.

CAMILLE GROSDIDIER, *et al.*,

Petitioners,

v.

CHAIRMAN, BROADCASTING BOARD OF GOVERNORS,

Respondent.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITIONERS' REPLY BRIEF

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The petitions in No. 08-1415, *Filebark v. Department of Transportation*, and No. 08-1418, *Grosdidier v. Chairman, Broadcasting Board of Governors*, pose the same question presented. For the reasons set out below, the Court should grant certiorari in both cases and consolidate them for briefing and argument.

I. THESE CASES PRESENT AN IMPORTANT AND WELL-ESTABLISHED INTER-CIRCUIT CONFLICT

The United States correctly describes the decisions of the court of appeals in both *Filebark* and *Grosdidier* as holding that the "CSRA precludes judicial review of all employment-related actions (unless judicial review is specifically permitted in the CSRA itself)." (Grosdidier R. Br. at 7; see Filebark R. Br. at 12). That holding, the government observes, is in conflict with decisions in the Federal and First Circuits. (Grosdidier R. Br. at 7 and n.8; Filebark R. Br. at 12, 13 n.5). The government's recognition of the existence of this inter-circuit conflict reflects not only a sound reading of the decisions involved, but also the extensive practical experience of the Department of Justice in litigating scores of federal employee claims under the divergent standards applied by the various courts of appeals.

The Federal Circuit holds that the CSRA precludes judicial review only of claims that concern a type of employment practice specifically addressed by the CSRA itself, such as disciplinary action. The

Federal Circuit's limited preclusion rule would not apply to the claim in *Filebark* (which concerns the proper classification of an entire facility) or *Grosdidier* (which concerns a statute that entitles suitably qualified citizens to be promoted ahead of more qualified aliens). The NTEU[1] disputes the government's characterization of the breadth of the D.C. Circuit preclusion standard, but does not assert that the Federal Circuit would hold that claims in *Filebark* and *Grosdidier* are barred by the CSRA.

The NTEU suggests that the D.C. Circuit holds only that the CSRA bars judicial review of non-CSRA employment-related claims where "Congress' intent to proscribe review is 'fairly discernable' in the CSRA's scheme." (NTEU Br. at 9). But that circuit's caselaw gives a sweeping preclusive effect to the CSRA because the D.C. Circuit insists that an intent to proscribe review is discernable with regard to *all* federal employment-related claims.[2] Similarly, the

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[1] For simplicity we refer to the union amici in this case as the NTEU, and cite the Brief for the National Treasury Employees Union and American Federation of Government Employees, AFL-CIO, as "NTEU Br."

[2] *Fornaro v. James*, 416 F.3d 63, 67 (D.C. Cir. 2005):

> We ... concluded in *Carducci v. Regan*, 714 F.2d 171, 174-75 (D.C. Cir. 1983), that no remedy was available under the APA for an employment claim as to which the CSRA provided no relief. As we explained, that "failure to include" any relief "within the remedial scheme of so comprehensive a piece of legislation reflects a congressional intent that no judicial relief be available."

(*quoting Carducci v. Regan*, 714 F.2d 171, 174 (D.C. Cir. 1983)).

union urges that all circuits agree on "the unremarkable proposition that the CSRA precludes review of claims that fall within its scope." (NTEU Br. at 15-16). But the courts of appeals disagree about what claims do fall within the scope of the CSRA. The D.C. Circuit insists that all employment-related claims (or at least all claims involving agency personnel actions) fall within the scope of the CSRA; the Federal Circuit, on the other hand, holds that only claims regarding the particular practices expressly addressed in the CSRA fall within the scope of the CSRA.

The NTEU asserts that

> the court below [in *Filebark*] explicitly recognized in its decision that federal employees could pursue claims in court that are grounded on a "source of law" that is "independent" of the CSRA.

(NTEU Br. at 8, *quoting* Filebark Pet. App. 7a). The court of appeals did not so hold. The court of appeals stated that the existence of a "source of law" "independent" of the CSRA is necessary, but not that it is sufficient. The APA *is* just such a source of law, independent of the CSRA, authorizing judicial review of government actions. The court of appeals nonetheless rejected the plaintiffs' claims, holding that employment-related claims under the APA (claims which presumably would have been viable prior to the adoption of the CSRA) are precluded by the CSRA.

> [T]he employees ... must point to an independent source of law in order to maintain this action.... [T]he only basis for a cause of action... is the APA.... [T]he case ... begins and ends with the question ... "whether ... *the CSRA as a whole* ... removes the jurisdiction given to the federal courts or otherwise precludes employees from pursuing" a claim under the APA....

(Filebark Pet. App. 7a) (emphasis in original).

The NTEU suggests that the District of Columbia Circuit construes the CSRA to preclude, not all claims in any way related to federal employment, but only claims about agency personnel actions. (NTEU Br. at 9, 11, 15). Even if that were the case, the D.C. Circuit standard would still conflict with the decisions in the Federal Circuit. The Federal Circuit has repeatedly rejected arguments by the United States that the CSRA precludes review under any other statute of claims regarding agency personnel actions. *Worthington v. United States*, 168 F.3d 24, 26-27 (Fed. Cir. 1999); *Romero v. United States*, 38 F.3d 1204, 1211 (Fed. Cir. 1994).

The D.C. Circuit preclusion standard, moreover, cannot be as limited as the NTEU suggests. The claim in *Filebark* itself – which the D.C. Circuit held precluded by the CSRA – did not involve an agency "personnel action," as that phrase would normally be understood. The agency in *Filebark* had not taken action directed at the employment status or benefits of a particular federal worker; rather, the disputed practice was the failure of the agency to alter the

classification of an air traffic control facility. The NTEU itself describes the broad preclusion standard in the Ninth, Tenth and Eleventh Circuits as barring not only claims regarding agency personnel actions, but more broadly "state tort claims *related to* employment." (NTEU Br. at 15 n.14; see *id.* at 15) (emphasis added). The union acknowledges that the D.C. Circuit itself characterizes its own standard as precluding "federal employee claims." (NTEU Br. at 11). The decisions below articulated the D.C. Circuit standard in just such all-inclusive terms. (Filebark Pet. App. 11a; Grosdidier Pet. App. 5a, 7a).

II. REVIEW SHOULD BE GRANTED IN BOTH *FILEBARK* AND *GROSDIDIER*

A. We agree with the United States that the court of appeals decision in *Filebark* is an appropriate vehicle for resolving the question presented.

The court of appeals decision in *Filebark* rests on that circuit's view of the general preclusive effect of the CSRA. The United States correctly describes the circuit court's opinion as holding that

> petitioners could not pursue their claims under the APA ... because the CSRA precludes federal employees from seeking redress for employment-related claims through a judicial remedy unless such

remedy is specifically permitted in the CSRA.[3]

The NTEU does not deny that the court of appeals decision was based on the D.C. Circuit's well-established CSRA preclusion standard.

The NTEU nonetheless argues that *Filebark* is not an appropriate vehicle for resolving the dispute about the preclusive effect of the CSRA, even though CSRA preclusion was the actual basis of the court of appeals decision, because the *district court* concluded that there was a separate basis for refusing to consider the claims of the plaintiffs in *Filebark*. (NTEU Br. at 6-8). The district court held that, regardless of whether the CSRA precluded consideration of the plaintiffs' claims, judicial review of those claims was barred by the terms of the Department of Transportation Act. (Filebark Pet. App. at 43a). The union does not contend that the court of appeals itself ever addressed that alternative basis for rejecting the complaint.

Filebark thus presents the common situation in which a court of appeals has ruled for the respondent on one ground, without addressing other alternative arguments advanced by that party. This Court routinely grants certiorari in such cases; if the petitioner prevails on the question presented, the case is then routinely remanded to the lower courts for further consideration of any remaining claims or defenses of

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[3] Filebark R. Br. at 10.

the respondent. The NTEU offers no reason why that well-established practice should not be followed in the instant case.

The NTEU asserts that "the relevant ... question presented by this case is whether petitioners' claims are precluded by the DOT Act." (NTEU Br. at 7). But that is precisely the alternative ground which the court of appeals did *not* address. A certiorari petition could not properly have presented a question about the preclusive effect of the DOT Act, because that issue was never decided by the court of appeals below. If this Court, addressing the CSRA issue that was decided by the court of appeals, holds that the CSRA does not by itself preclude petitioners' claims, the court of appeals on remand will be free to resolve, as it did not in its earlier opinion, whether the DOT Act may have such a preclusive effect.

The NTEU similarly errs when it asserts that "[t]here is ... no need for this Court to address the question of whether the CSRA precludes petitioners' claims." (*Id.* at 7). To the contrary, that is the only question which the Court needs to, or even should address, because that is the question which was decided by the court below. Resolution of that question regarding the preclusive scope of the CSRA would be unnecessary only if the court of appeals, in addition to rejecting petitioners' claims on the basis of CSRA preclusion, had also rejected those claims on the alternative ground – relied on by the district court – that those claims are barred by the DOT Act. But the NTEU does not suggest that the court of appeals ever decided the latter issue.

The judicial review provisions of the CSRA are expressly applicable to employees at the FAA. 49 U.S.C. § 40122(g)(3). The D.C. Circuit thus understandably concluded that it was appropriate "to apply our [CSRA] preclusion cases to employees of [the FAA]." (Filebark Pet. App. at 10a). There are, of course, differences between some internal practices (such as salary scales) at the FAA and at other agencies. But as this Court made clear in *United States v. Fausto*, 484 U.S. 439, 448-49 (1988), any argument that the CSRA precludes judicial review under some other statute necessarily turns on the scope of, and exclusions from, the judicial review provisions of the CSRA itself. Thus *Filebark* is an appropriate vehicle for determining the preclusive effect of the judicial review provisions of the CSRA, which apply to the FAA just as they do to other federal agencies.

B. The court of appeals decision in *Grosdidier* is also an appropriate vehicle for resolving the question presented.

The court of appeals held that the claims of the *Grosdidier* plaintiffs were barred by the broad preclusive effect of the CSRA. The district court had rejected those claims on a different basis. The district court instead accepted the government's contention that the plaintiffs were actually claiming that they had been denied promotions in favor of less qualified applicants, a practice that could violate Chapter 23 of the CSRA. That characterization of plaintiffs' claims, if correct, could bar review of those claims under the APA; violations of the CSRA are only subject to

judicial review under the CSRA itself. On appeal the plaintiffs challenged that holding.[4] Rather than address that issue, however, the court of appeals held that the *Grosdidier* claims – regardless of whether (as the plaintiffs contended) those claims fell outside the prohibitions of the CSRA – were precluded by the CSRA.

The government acknowledges that the court of appeals "did not rely on the district court's conclusion" that the plaintiffs' claims would constitute a violation of the CSRA. (Grosdidier R. Br. at 8). It nonetheless urges that the existence of this unresolved dispute regarding the correctness of the district court's reasoning makes this case an unsuitable vehicle for resolving the distinct question of law, regarding the CSRA, which was in fact the sole basis of the court of appeals decision.

The United States suggests that *Grosdidier* is not an appropriate vehicle to review the court of appeals decision regarding the preclusive effect of the CSRA because the "petitioner does not challenge ... before this Court" the district court's holding that the claims of the Grosdidier petitioners were barred because they asserted a violation of the CSRA. (Grosdidier R. Br. 9). But it would have been entirely premature and inappropriate for petitioners to challenge in this Court a holding of the district court which has never been passed on by the court of appeals. At this point

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[4] Appellants' Brief, Grosdidier v. Glassman, No. 08-5181 (D.C. Cir.) at 17-21.

in the litigation this Court would not consider a challenge to an as yet unreviewed holding of the district court. The government does not suggest that the Grosdidier petitioners in the court of appeals failed to challenge – and thus waived any objection to – that holding of the district court on this issue. To the contrary, in the court of appeals the Grosdidier petitioners emphatically sought reversal of that district court decision.

The government suggests that "a ruling by the Court in petitioners' favor on the broad issue they present [regarding the preclusive effect of the CSRA] *would not appear* to permit the judicial review they seek." (Grosdidier R. Br. at 9) (emphasis added). But the Solicitor General is not suggesting that the court of appeals has already addressed and resolved (in the government's favor) the alternative defense argument relied on by the district court. Nor is the Solicitor General indicating that the government will ask this Court to consider that record-bound contention – which the court of appeals itself never passed on – as an alternative basis for affirmance. Rather, this passage is simply a prediction that it "appear[s]" that on remand the government will ultimately prevail on this alternative ground. The United States offers no explanation as to why it "would ... appear" that the government will prevail on that issue on remand, and circumspectly neither defends nor even describes the rationale of the district court opinion.

There is substantial reason to doubt that this holding of the district court would be upheld by the court of appeals on remand. But the disposition of the

petition in *Grosdidier* does not require this Court to foresee the outcome of such a hypothetical remand. In determining whether to grant review of a question of law decided by a court of appeals, this Court does not undertake to determine the merits of other questions which that lower court did not resolve, or to predict which party would prevail on those issues were they to be addressed by the lower courts at some subsequent point in the litigation.

C. The Court should grant certiorari in both *Filebark* and *Grosdidier*, and consolidate those cases for briefing and argument pursuant to Rule 27.3 of this Court.

A grant of review in both cases will assure that the Court can resolve the underlying question regarding the general preclusive effect of the CSRA. The parties in these cases each advance interpretations of the CSRA which – if adopted by this Court – would be equally dispositive of the preclusion issue in both *Filebark* and *Grosdidier*. Petitioners contend that the CSRA never precludes claims regarding employment matters not specifically addressed in the CSRA; the government argues that the CSRA always has such a preclusive effect. If the permissible interpretations of the CSRA were limited to these two per se rules, the question presented would necessarily be resolved by a decision in either case. But it is possible that an amicus will propose, or that the Court itself will suggest, a view of the law under which one of these cases could be resolved on a narrower ground, without reaching the broader issue regarding the general preclusive effect of the CSRA. Should the

Court grant review in only one of the cases, and then decide it on such a narrower ground, the underlying inter-circuit conflict would remain unresolved. It would then be necessary to grant review in the second, or some other, case. The risk of the ensuing delay, and the resulting inefficient use of this Court's scarce resources, would be significantly reduced if certiorari were granted in both cases.

This Court's assessment of the question presented would be facilitated by considering that question in the context of the different types of claims presented by *Filebark* and *Grosdidier*. The substantive claim in *Grosdidier* is based on a federal statute, whereas the claims in *Filebark* rest on a collective bargaining agreement and an administrative directive. The plaintiffs in *Grosdidier* seek promotions based on asserted violations of rights in particular individual cases; the plaintiffs in *Filebark* challenge a facility classification decision that affects the salaries of a substantial group of federal workers at that facility. A grant of review in both cases would permit a fuller understanding of the practical implications of the question presented, and would allow the Court to consider whether the preclusive effect of the CSRA should turn on the types of differences presented by the two cases.

Consolidation of these cases will not entail any additional burden on the parties, because the counsel of record in *Filebark* and *Grosdidier* are the same.

CONCLUSION

For the above reasons, certiorari should be granted in No. 08-1415 and No. 08-1418, and the cases should be consolidated for briefing and argument.

Respectfully submitted,

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