No. 08-1415 MAY 14 2009

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In The
Supreme Court of the United States

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JOSEPH J. FILEBARK, *et al.*,

Petitioners,

v.

UNITED STATES DEPARTMENT
OF TRANSPORTATION and FEDERAL
AVIATION ADMINISTRATION,

Respondents.

◆

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

◆

PETITION FOR A WRIT OF CERTIORARI

◆

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QUESTION PRESENTED

The Civil Service Reform Act of 1978 regulates adverse personnel actions, i.e. official actions that unfavorably alter the employment, classification or salary of federal employees. The Act provides a comprehensive set of remedies for such adverse personnel actions, including in specified circumstances review by the Merit Systems Protection Board and judicial review of the action of the Board. In *United States v. Fausto*, 484 U.S. 439 (1988), this Court held that the Act precludes judicial review of such adverse personnel actions under the Back Pay Act.

The Question Presented is: Does the Civil Service Reform Act, as the District of Columbia Circuit held, preclude judicial review under statutes other than the Civil Service Reform Act itself of "federal employee claims" generally, including claims that are neither adverse personnel actions nor otherwise covered by the Act?*

* A certiorari petition raising the same question presented is pending in *Grosdidier v. Chairman, Broadcasting Board of Governors*, No. 08-___.

PARTIES

The petitioners are Joseph J. Filebark, II, Jerry Todd, Sr., John J. Havens, II, and Richard Boatman. The respondents are the United States Department of Transportation and the Federal Aviation Administration.

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Petitioners Joseph Filebark, *et al.*, respectfully pray that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered on February 13, 2009.

OPINIONS BELOW

The February 13, 2009 opinion of the Court of Appeals for the District of Columbia, which is reported at 558 F.3d 1009 (D.C.Cir. 2009), is set out at pp. 1a-13a of the Appendix. The March 31, 2008 opinion of the District Court for the District of Columbia, which is reported at 542 F.Supp.2d 1 (D.D.C. 2008), is set out at pp. 25a-43a of the Appendix. The February 27, 2006 opinion of the District Court for the District of Columbia, which is reported at 468 F.Supp.2d 3 (D.D.C. 2006), is set out at pp. 14a-24a of the Appendix. The October 5, 2004, opinion of the Court of Appeals for the Federal Circuit, which is reported at 386 F.3d 1091 (Fed. Cir. 2004), is set out at pp. 56a-64a of the Appendix. The May 5, 2003 opinion of the Court of Federal Claims, which is reported at 56 Fed.Cl. 449 (2003), is set out at pp. 44a-55a of the Appendix.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on February 13, 2009. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Administrative Procedure Act

Section 702 of Title 5 provides in pertinent part "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."

Section 704 of Title 5 provides in pertinent part "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to judicial review."

Section 706 of Title 5 provides in pertinent part: "The reviewing court shall ... hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or not in accordance with law...."

Civil Service Reform Act

Section 7512 of Title 5 provides in pertinent part:

This subchapter applies to –

(1) removal;
(2) a suspension for more than 14 days;
(3) a reduction in grade;
(4) a reduction in pay; and
(5) a furlough of 30 days or less ...

Section 7513 of Title 5 provides in pertinent part:

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

* * *

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

Section 7701(a) of Title 5 provides in pertinent part: "An employee, or applicant for employment, may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation."

Section 7703(a) of Title 5 provides in pertinent part: "Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision."

Section 7703(b)(1) of Title 5 provides in pertinent part that "[e]xcept as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit."

Federal Aviation Administration Personnel System

Section 40122(g)(1) of Title 49 provides in pertinent part:

> [N]otwithstanding the provisions of title 5 and other Federal personnel laws, the Administrator shall develop and implement, no later than January 1, 1996, a personnel management system for the Administration that addresses the unique demands of the agency's workforce. Such a new system shall, at a minimum, provide for greater flexibility in the hiring, training, compensation, and location of personnel.

Section 40122(g)(2) of Title 49 provides in pertinent part:

> **Application of title 5** – the provisions of title 5 shall not apply to the new personnel management system developed and implemented pursuant to paragraph (1), with the exception of –
>
> (A) section 2302(b), relating to whistleblower protection....;
>
> * * *
>
> (C) chapter 71, relation to labor-management relations;
>
> * * *
>
> (H) sections 1204, 1211-18, 1221, and 7701-7703 relating to the Merit Systems Protection Board.

Section 40122(g)(3) of Title 49 provides:

> **Appeals to Merit Systems Protection Board.** – Under the new personnel management system developed and implemented under paragraph (1), an employee of the Administration may submit an appeal to the Merit Systems Protection Board and may seek judicial review of any resulting final orders or decisions of the Board from any action that was appealable to the Board under any law, rule, or regulation as of March 31, 1996.

STATEMENT OF THE CASE

The Statutory Scheme

The Civil Service Reform Act of 1978 ("CSRA") codified and reorganized a number of important substantive and procedural rights of federal employees. Chapter 75 deals with adverse personnel actions taken against employees "for the efficiency of the service." Section 7513 establishes certain procedures which an agency must follow in taking a major adverse personnel action, such as a dismissal or reduction in pay. Section 7513(d) provides that any employee against whom such an action is taken may appeal to the Merit Systems Protection Board established under Chapter 12. Section 7703 authorizes judicial review of actions by the Board.

Chapter 23 of the CSRA establishes a number of prohibited personnel practices. Employees aggrieved by asserted violations of those prohibitions may seek redress from the Office of Special Counsel, established under Chapter 12. Section 1222 of Title 5 provides that "[e]xcept [with regard to certain whistleblower claims], nothing in this chapter or chapter 23 shall be construed to limit any right or remedy available under a provision of statute which is outside of both this chapter and chapter 23."

Chapter 71 of the CSRA regulates labor relations at federal agencies, and requires that any collective bargaining agreement shall provide procedures for the settlement of grievances arising under that agreement. Those grievance procedures of a collective bargaining agreement ordinarily are "the exclusive administrative procedures for resolving grievances which fall within its coverage." 5 U.S.C. § 7121(a).

The Federal Aviation Administration is expressly subject to the provisions of the CSRA regarding appeals to the MSPB and judicial review of Board actions. The labor relations provisions of Chapter 71 also apply to the FAA. On the other hand, most of the provisions of Chapter 23 regarding prohibited personnel practices do not apply to the FAA, and in dealing with major adverse personnel actions the FAA is free to frame its own internal procedures. 49 U.S.C. § 40122(g).

Proceedings Below

This case concerns the salary levels paid to employees at the FAA Albuquerque air traffic control facility. Salary levels for controllers and their supervisors are governed by the classification given to the particular facility at which they work. That classification is based to a substantial degree on the amount of air traffic which the facility must handle. Air traffic controllers at facilities that handle a higher volume of traffic are paid more. This salary and classification system is embodied both in a collective bargaining agreement between the FAA and the National Air Traffic Controller Association ("NATCA") and in a separate order issued by the FAA that governs the salaries of supervisors who are not covered by the collective bargaining agreement. (Pet. App. 16a-17a and note 2, 28a-30a). The Albuquerque Center is now classified at an air traffic control ("ATC") Level 10. The plaintiffs (both union and non-union controllers) seek to have the Center reclassified as an ATC Level 11, which would result in a significant increase in salary for unionized and non-union workers alike.

Plaintiffs made repeated but unsuccessful efforts to pursue administratively their contention that the Albuquerque Center was misclassified. Filebark and another plaintiff[1] who were union members initially filed a grievance under the collective bargaining agreement, asserting that the Center's classification

[1] Filebark and Havens.

violated that agreement, and filed an unfair labor practice charge based on that asserted violation. The union subsequently filed a grievance of its own, and then asked that the grievance and charge filed earlier by the two individual controllers be dismissed in light of that union grievance. Once the grievance and charge of the two controllers had been dismissed as requested, however, the union withdrew its own grievance and refused to ask that the matter be sent to arbitration. (Pet. App. 16a-17a).

The efforts of the controller supervisors were equally unavailing. Under the FAA administrative procedures, only the Albuquerque Center's Facility Manager was authorized to file an appeal of the FAA's classification decision. Petitioner Todd, one of the controller supervisors, sought without success to persuade the Facility Manager to file such an appeal. Undeterred, Todd also tried to lodge a complaint with the Merit Systems Protection Board, but the Board declined to accept his complaint. (Pet. App. 32a).

Following the action of the Board, a group of controllers including several of the plaintiffs filed suit in the Court of Federal Claims under the Tucker Act, seeking backpay based on the salaries they would have received if the Albuquerque Center had been reclassified. The Court of Federal Claims dismissed that action, and the Federal Circuit affirmed. (Pet. App. 44a-64a). The Federal Circuit reasoned that the plaintiffs, even if successful on the merits of their claims, would be entitled only to prospective injunctive relief; the Tucker Act, on the other hand,

authorizes only retrospective awards. (Pet. App. 61a-62a).

Finally, the plaintiffs filed the instant case in the District Court for the District of Columbia. The complaint asserted that the failure of the FAA to comply with its own facility classification standard was arbitrary and capricious, and sought relief under the Administrative Procedure Act. The complaint sought only prospective injunctive relief requiring the FAA to upgrade the classification of the Albuquerque Center.

In its 2006 decision, the District Court dismissed the claims of the union plaintiffs, holding that the CSRA precluded union members from filing suit with regard to any matter that could be the basis of a grievance under the collective bargaining agreement. (Pet. App. 18a-20a). The District Court acknowledged that its construction of the CSRA, particularly of the significance of section 7121(a), had been rejected by the Federal and Eleventh Circuits. (Pet. App. 19a-20a).

In 2008 the District Court dismissed the claims of the non-union controllers. The CSRA, the district judge held, precluded any civil action related to federal employment except those forms of judicial review expressly authorized by the CSRA itself. (Pet. App. 39a-43a).

The District of Columbia Circuit affirmed. The CSRA, it insisted, precluded the federal courts from considering any claim arising out of federal employment except in those specific instances in which the CSRA itself permitted such judicial review. That

general rule of preclusion, the court of appeals held, barred the claims of both the union and non-union plaintiffs. The circuit court therefore found it unnecessary to decide whether the claims of the union plaintiffs would also have been barred by section 7121(a). (Pet. App. 6a-7a).

REASONS FOR GRANTING THE WRIT

I. There Is A Well Established Inter-Circuit Conflict Regarding Whether The Civil Service Reform Act Precludes Federal Employees From Bringing Actions Under Other Statutes Regarding Claims Not Involving Adverse Personnel Actions

(1) The enactment in 1978 of the Civil Service Reform Act has spawned three decades of litigation about the effect of that statute on the judicial remedies that federal employees enjoyed prior to 1978. The recurring question has been

> whether [a particular provision] (or the CSRA as a whole) removes the jurisdiction given to the federal courts [to hear such claims] ... or otherwise precludes employees from pursuing remedies beyond those set out in the CSRA.

Whitman v. Department of Transportation, 547 U.S. 512, 514 (2006). The courts of appeals have long

disagreed about the preclusive effect of the CSRA.[2] This case presents the most important unresolved dispute about the impact of the CSRA: whether the Act precludes federal employees from pursuing non-CSRA judicial remedies for claims other than the type of adverse personnel actions covered by the Act.

"Congress' primary focus in the CSRA was on adverse actions." *Lindahl v. OPM*, 470 U.S. 768, 793 (1985). Chapter 75 of the CSRA establishes procedures for reviewing actions, such as dismissals, suspensions, or reduction in pay, taken against a federal employee because of misconduct or inadequate performance. In *United States v. Fausto*, 484 U.S. 439 (1988), this Court concluded that the CSRA precludes federal employees not authorized to obtain judicial review by Chapter 75 from bringing suit instead under the Back Pay Act to challenge such adverse personnel actions. "The CSRA established a comprehensive system for reviewing personnel action taken *against* federal employees." 484 U.S. at 455 (emphasis added). The terms of the CSRA, the Court concluded,

> combine to establish a congressional judgment that those employees should not be able to demand judicial review *for the type of personnel action covered by that chapter* [75].

484 U.S. at 446-48 (emphasis added).

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[2] *Compare Dugan v. Ramsay*, 727 F.2d 192, 194-95 (1st Cir. 1984) (opinion by Breyer, J.) *with Carducci v. Regan*, 714 F.2d 171, 173-75 (D.C.Cir. 1983) (opinion by Scalia, J.).

Fausto left unresolved whether the CSRA also barred judicial review regarding types of actions *not* "covered by that chapter." Since *Fausto* the lower courts have reached sharply conflicting conclusions about that question. Several circuits, most importantly the District of Columbia Circuit, hold that the CSRA bars judicial scrutiny under statutes other than the CSRA itself of all disputes related to federal employment, regardless of whether a particular claim is outside the scope of Chapter 75 or any other provision of the CSRA. The Federal Circuit and several others have repeatedly concluded – to the contrary – that the CSRA precludes judicial review under statutes other than the CSRA only of matters covered by the CSRA, e.g., of claims of adverse personnel actions.[3]

That recurring question was presented, but not resolved, in *Whitman v. Department of Transportation*. In *Whitman* the plaintiff had allegedly been subjected to repeated, non-random drug tests, in violation of 49 U.S.C. § 45102(b)(1). Such treatment was not an "adverse personnel action" under the CSRA because (unlike the sort of personnel actions covered by Chapter 75) the testing did not affect

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[3] In the instant case the District of Columbia Circuit thought it particularly clear that non-CSRA based actions are precluded against the Federal Aviation Administration. (Pet. App. 10a-11a). The Federal Circuit, on the other hand, has upheld just such a suit against the FAA. *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002).

Whitman's employment, grade, or pay[4] and because it was not based on any asserted misconduct or inadequate performance by Whitman. The government acknowledged that the drug testing did not constitute an adverse personnel action under the CSRA,[5] but urged the Court to extend the preclusion principle in *Fausto* to matters not covered by Chapter 75. The Solicitor General argued that the CSRA is the exclusive judicial remedy, not merely for adverse personnel actions, but for all "the employment claims of federal employees."[6]

This Court's decision in *Whitman*, however, did not resolve whether the preclusion rule in *Fausto*

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[4] As the government explained at the oral argument in *Whitman*,

> [I]n Bush v. Lucas, the Court specifically identified warrantless searches as an example of conduct in which an employer might engage towards its employees that would not constitute a personnel action. And we think that's good authority for the proposition that an allegedly unconstitutional drug test is not a personnel action. Now, if the employee had refused to take the test and had been dismissed or disciplined, that would be a personnel action.

2005 WL 3387693 at *55.

[5] As the government explained at the oral argument in *Fausto*, although a reduction in the pay of a particular employee would be a personnel action, it would fall outside the scope of Chapters 43 and 75 if imposed for reasons unrelated to misconduct or job performance, e.g., by mistake, or simply as a device to save money. 1987 U.S.Trans. LEXIS 194 at *9.

[6] Brief for Respondent, *Whitman v. Department of Transportation*, No. 04-1131, (October 20, 2005), at 14.

should be extended to all such employment matters affecting federal officials. The court of appeals in *Whitman* had held only that the CSRA did not itself confer jurisdiction over the claim in that case. 547 U.S. at 513-14. This Court noted that jurisdiction over "all civil actions arising under the ... laws ... of the United States" was already created by 28 U.S.C. § 1331. The dispositive issue in *Whitman* was whether the CSRA had removed the jurisdictional grant in section 1331 or otherwise precluded employees from pursuing remedies that existed prior to the enactment of the CSRA. Because the court of appeals in *Whitman* had not addressed those issues, this Court remanded the case to permit the lower courts to do so in the first instance. 547 U.S. at 514-15.

(2) The decision of the District of Columbia Circuit in the instant case resolved the precise question that the Ninth Circuit had failed to determine in *Whitman*. The court below reasoned that

> the case for [the] controllers begins and ends with the question identified as central by the Supreme Court in *Whitman* ... namely, "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, *Whitman*, 547 U.S. at 514.

(Pet. App. 7a-8a) (emphasis omitted). The court of appeals concluded that "this APA claim [is] precluded by the structure of Congress's employment statutes

and 'the CSRA as a whole,' *Whitman*, 547 U.S. at 514." (Pet. App. 12a).

The circumstances of this case pose the issue left unresolved by *Whitman* and *Fausto* – whether the CSRA precludes judicial remedies for claims that do not arise out of adverse personnel actions, the subject matter of Chapter 75. The agency in this case did not alter in some adverse manner the circumstances of the plaintiffs' employment, such as by reducing their hours or classification; rather, the plaintiffs complain that the agency improperly refused to take favorable action that would have resulted in a substantial increase in their salaries. That decision, unlike the personnel decisions dealt with in Chapter 75, was not based on any misconduct or other personal failing of the plaintiffs themselves. Thus this action is not governed by the holding of *Fausto* that the CSRA bars remedies not contained in the CSRA for the "type of personnel action" covered by Chapter 75.

The District of Columbia Circuit held that CSRA preclusion extends to types of claims that are not covered by Chapter 75 and that do not in any other respect "concern '"a type of personnel action covered by the CSRA."'" (Pet. App. 10a) (quoting *Graham v. Ashcroft*, 358 F.3d 931, 934 (D.C.Cir. 2004)). Rather, the court of appeals held, the CSRA "preclude[s] litigation of an employment matter" – any employment matter – except where the CSRA itself authorizes judicial action. (Pet. App. 10a). "[W]e treat the CSRA and Congress's related employment statutes as covering the field of federal employee claims, and so

our cases expressly teach that those left out of this scheme are left out on purpose." (Pet. App. 10a-11a). Although there is a wide range of employment issues with which the CSRA does not deal at all, the court below reasoned that the CSRA's silence manifested "intentionally not providing ... particular forums and procedures" for all such omitted subjects. (Pet. App. 2a). The court of appeals thus concluded that the CSRA precludes judicial review or resolution of "federal employment disputes" except under the CSRA. (Pet. App. 2a).

This broad view of the preclusive effect of the CSRA dates from the District of Columbia Circuit's decision in *Carducci v. Regan*, 714 F.2d 171 (D.C.Cir. 1983). (See Pet. App. 1a) ("we have long held that federal employees may not use the Administrative Procedure Act to challenge agency employment action.") That interpretation of the CSRA was also recently applied by that Circuit in *Grosdidier v. Chairman, Broadcasting Board of Governors*, 560 F.3d 495, 496 (D.C.Cir. 2009) (stressing "the exclusivity of the CSRA for suits targeting personnel decisions" and "agency employment actions").[7]

The Sixth Circuit has given the CSRA a similarly broad preclusive effect. In *Harper v. Frank*, 985 F.2d 285 (6th Cir. 1993), the Sixth Circuit held that the

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[7] A certiorari petition is pending in *Grosdidier* raising the same question presented as the instant case.

CSRA precludes a claim asserting that the plaintiff was unlawfully denied a promotion.

> The direct holding of the Court in *Fausto* does not apply to [plaintiff's] complaint because the Postal Service's failure to promote her was not an adverse action under Chapter 75.... Although *Fausto's* holding relates only to attempts to obtain judicial review of adverse actions, its logic applies compellingly to claims for review of nonadverse actions.

985 F.2d at 290-91; see *Ryon v. O'Neill*, 894 F.2d 199, 204 (6th Cir. 1990) ("the structure of the CSRA indicate[s] that its [judicial] review provisions for personnel actions were intended to be exclusive").

The Eleventh Circuit also construes the CSRA to preclude all federal employment actions under statutes other than the CSRA and perhaps Title VII. *Broughton v. Courtney*, 861 F.2d 639, 643 (11th Cir. 1988) ("Congress intended the CSRA to provide an exclusive procedure for challenging federal personnel decisions"); see *Hendrix v. Snow*, 170 Fed.Appx. 68, 80 (11th Cir. 2006) ("outside of Title VII claims, both the Supreme Court and this Court have concluded generally that the CSRA provides the exclusive procedure for challenging federal personnel decisions").

(3) Four courts of appeals have rejected this broad preclusionary rule.

The Federal Circuit has repeatedly construed the CSRA, and applied the decision in *Fausto*, only to preclude judicial review under other statutes of those

personnel matters that *are* covered by the CSRA itself. In *Bosco v. United States*, 931 F.2d 879 (Fed. Cir. 1991), that Circuit held that the CSRA did not bar a claim by workers who objected to agency action altering the basis on which the wage for their positions were to be calculated. The government argued that the CSRA barred such suits because the Act was "the exclusive means of appealing an unwanted personnel action." 931 F.2d at 882. The court of appeals rejected that argument, holding that the CSRA provided the exclusive remedy only for the specific types of action addressed by the CSRA.

> The Supreme Court did not rule that the CSRA provided the only means of judicial review of *any* actions affecting federal employees, but rather that it was the only means of review as to the types of adverse personnel action specifically *covered* by the CSRA: Silence as to certain employees "displays a clear congressional intent to deny the excluded employees the protections of Chapter 75 – including judicial review – *for personnel action covered by that chapter*." 484 U.S. at 447 (emphasis added). *Fausto* involved an adverse personnel action of the general *type* covered by the CSRA, but against a particular *employee* who was *not* covered. In contrast, the instant case involves a type of personnel action not covered by the CSRA.... [T]he CSRA does *not* address the transfer of positions from one pay system to another. Since the CSRA thus does not cover the action taken in the instant case, it

> and the holding of *Fausto* have no application here.

931 F.2d at 883 (emphasis in original). Chapter 75, the Federal Circuit noted, concerned – and thus was the exclusive remedy only for – adverse actions based on misconduct and unacceptable performance. *Id.*[8]

In *Romero v. United States*, 38 F.3d 1204 (Fed. Cir. 1994), the Federal Circuit gave a similarly narrow reading of CSRA preclusion in upholding the authority of the federal courts to entertain a claim challenging the assertedly improper withholding of funds from the paychecks of federal workers. *Romero* was an appeal from a United States district court.[9] Relying on *Fausto*, "[t]he government argue[d] that ... district courts universally have no power to determine whether a 'personnel action' by a federal

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[8] The court reiterated that distinction in response to the government's petition for rehearing and suggestion for rehearing en banc.

> The Supreme Court in *Fausto* focussed on "precisely drawn provisions" with respect to Board and judicial review of adverse actions of any type within chapter 75 of the CSRA to infer a congressional judgment to preclude Board and judicial review.... 484 U.S. at 448-49.... [T]he Supreme Court grounded its holding in the peculiar context of adverse personnel actions. Such actions necessarily focus on the agency's appraisal of the misconduct of a particular employee. By contrast, reclassifications have nothing to do with appraisals of the actions of individual employees.

Bosco v. United States, 976 F.2d 710, 713-14 (Fed. Cir. 1992).

[9] See pp. 30-31, *infra*.

employer is justified." 38 F.3d at 1211. The Federal Circuit again rejected that argument, explaining that "when the passage [from *Fausto*] cited by the government is read in the context of the *Fausto* case, the government's argument loses any of its facial appeal." *Id.*

> *Fausto* does not hold that the CSRA makes impermissible "judicial review of *any* action affecting federal employees." *Bosco v. United States*, 931 F.2d 879, 883 (Fed. Cir. 1991). Rather, *Fausto* holds that the CSRA provides "the only means of review as to the types of adverse personnel action specifically *covered* by the CSRA." *Id.* The present case involves a type of personnel action – withholding of pay for income tax purposes – that "is not *covered* at all by the CSRA, for any employees." *Id.* There is no reason to suppose that the CSRA was intended to preclude this sort of action under the Back Pay Act and therefore *Fausto* is inapplicable.

Id.

In *Worthington v. United States*, 168 F.3d 24 (Fed. Cir. 1999), the Federal Circuit upheld on the same ground the authority of the federal courts to determine if a federal employee was entitled to backpay because he had been required to work a compressed schedule.

> This court has noted that *Fausto* deprives the Court of Federal Claims of jurisdiction over personnel actions covered by the CSRA....

> The CSRA, by its terms, however, does not encompass every adverse personnel action against a federal employee.... To determine the coverage of the CSRA, this court assessed the jurisdiction of the [Merit Systems Protection] Board.... [T]his court finds no law, rule, or regulation that gives the Board jurisdiction over Worthington's claim.... [B]ecause Worthington's claim is not within the coverage of the CSRA ... the Court of Federal Claims has jurisdiction to adjudicate this dispute.

168 F.3d at 26-27.[10]

The narrower preclusion rule in the Federal Circuit is of particular practical importance because it governs actions in the Court of Federal Claims, which has original jurisdiction under the Tucker Act over claims by federal employees throughout the nation.[11] Applying the Federal Circuit precedents in

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[10] Since *Worthington* the Federal Circuit rule has been sufficiently well established that that court of appeals has upheld federal jurisdiction over employment claims outside the scope of the CSRA without reiterating that circuit's longstanding rejection of the government's interpretation of *Fausto*. *Crowley v. United States*, 398 F.3d 1329 (Fed. Cir. 2005) (action for higher wages by federal employee claiming entitlement to supplemental pay under the Federal Law Enforcement Pay Reform Act); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002) (action for backpay by federal employee asserting entitlement to pay differential for work in Alaska).

[11] That court has exclusive jurisdiction over Tucker Act claims exceeding $10,000. 28 U.S.C. § 1346(a)(2).

Bosco, *Romero*, and *Worthington*, the Court of Federal Claims has entertained and resolved a wide variety of federal employment actions that were not authorized by the CSRA itself. The Court of Federal Claims, for example, has repeatedly adjudicated claims that federal workers were being paid at a lower rate than the rate to which they were entitled. Those lawsuits included claims for severance pay,[12] overtime pay,[13] availability pay,[14] premium pay,[15] remote duty

[12] *Sloan v. United States*, 36 Fed.Cl. 163, 165 (1996) (severance pay claim not barred by *Fausto* so long as court does not undertake to correct an adverse action); *Bell v. United States*, 23 Ct.Cl. 73, 77 (1991) (claim for severance pay does not require determination that dismissal was an "unjustified or unwarranted personnel action"; such claims are "analogous to ones for unpaid salary for time actually worked"); *Hedman v. United States*, 15 Ct.Cl. 304, 317-22 (1988) (distinguishing *Fausto*).

[13] *Adams v. United States*, 48 Fed.Cl. 602, 606 n.2 (2001) (action permissible because "[t]he denial of FLSA overtime pay falls outside the CSRA's coverage"; citing *Worthington*); *Abramson v. United States*, 42 Fed.Cl. 326, 332 (1998) ("[p]laintiffs claim overtime pay for overtime work.... The CSRA does not explicitly cover this claim"; citing *Romero*, *Worthington* and *Bosco*).

[14] *Vanderpool v. United States*, 84 Fed.Cl. 66, 78-79 (2008) ("[b]ecause none of the plaintiffs in this case initially received availability pay, there could be no reduction in pay, and ... the MSPB does not possess jurisdiction"; citing *Worthington*); *Bradley v. United States*, 42 Fed.Cl. 333, 336 (1998) (although the MSPB would have jurisdiction over a reduction in pay, "[p]laintiffs did not suffer a reduction in pay.... [P]laintiffs' claims are appropriately classified as ones for withholding pay as a result of a miscalculation on the part of the government"; distinguishing *Fausto*).

[15] *Contreras v. United States*, 64 Fed.Cl. 587 (2005) (disputes about premium pay are outside the jurisdiction of the

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allowances,[16] living quarter allowances,[17] travel expenses,[18] and pay retention benefits,[19] as well as claims that federal agencies failed to increase salaries as required by law.[20] Actions by individuals claiming they were unlawfully denied appointment to federal positions have been upheld where the basis of the claim was not covered by the CSRA.[21] None of these

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MSPB because "[t]o be deprived of [premium pay] is not to have one's pay reduced; it is to lose a bonus"; citing *Worthington*); *Hannon v. United States*, 48 Fed.Cl. 15, 25 (2000) ("[t]he plaintiffs do not allege entitlement as a result of a mistaken adverse personnel action, but seek ... premium pay ... for work they completed. As the CSRA does not cover such claims, the MSPB does not have jurisdiction over those claims"; citing *Worthington* and *Bosco*).

[16] *Agee v. United States*, 77 Fed.Cl. 84, 88 (2007) (although MSPB has exclusive jurisdiction over disputes regarding retirement benefits, pay claims can be adjudicated by courts even though they may affect those benefits).

[17] *Zervas v. United States*, 26 Ct.Cl. 1425 (1992) (relying on *Bosco*).

[18] *Bailey v. United States*, 52 Fed.Cl. 105 (2002) (relying on *Worthington*, *Romero*, and *Bosco*).

[19] *Zervas v. United States*, *supra*.

[20] *Berry v. United States*, 86 Fed.Cl. 24, 30 (2009) (claim for pay increase barred only if within the jurisdiction of the MSPB; citing *Worthington*); *King v. United States*, 81 Fed.Cl. 766, 771 (2008) ("[l]ike *Worthington*, and unlike *Fausto*, this case does not involve a personnel action governed by the CSRA because plaintiffs' claim for back pay is not based on personnel actions for unacceptable job performance, prohibited personnel practices, or adverse personnel actions").

[21] *Ainslie v. United States,* 55 Fed.Cl. 103, 108 n.2 (2003) (federal law mandating hiring of certain former military reservists; claim not barred because it was not "covered by the ...

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actions were authorized by the CSRA, and under the District of Columbia Circuit preclusion rule all of them were barred by the CSRA.

In those cases in which the Federal Circuit has concluded that a claim is precluded by the CSRA, its decision has been based on a finding that the specific claim at issue was indeed covered by the CSRA. *Read v. United States*, 254 F.3d 1064, 1067 (Fed. Cir. 2001) (a specific provision of the CSRA "covers the 'removal' of an employee," the action disputed by the plaintiff); *Gallo v. United States*, 529 F.3d 135, 1352 (Fed. Cir. 2008) (claim under Federal Employees' Compensation Act covered by the CSRA because the issue was "within the [MSPB]'s appellate jurisdiction under the CSRA").

Like the Federal Circuit, the Ninth Circuit applies a preclusion rule more limited than that in the District of Columbia Circuit. Except in cases involving adverse personnel actions similar to *Fausto*, in the Ninth Circuit the CSRA precludes an employment related claim of a federal worker only if the action complained of constituted a "prohibited personnel practice" forbidden by Chapter 23 of the CSRA.[22]

CSRA"); *Scholl v. United States*, 61 Fed.Cl. 322, 325 (2004) (mandatory reappointment of bankruptcy judges; claim not precluded by CSRA because it was not a "claim of the sort the [MSRB] has subject matter jurisdiction over"; relying on *Worthington*).

[22] *Mangano v. United States*, 529 F.3d 1243, 1246 (9th Cir. 2008) ("[t]he CSRA preempts Dr. Mangano's [Federal Tort Claims

(Continued on following page)

Thus in the Ninth Circuit such a federal employment claim is permitted if the action complained of was neither an adverse personnel action within the scope of the CSRA, nor a prohibited personnel practice forbidden by Chapter 23.

> [Plaintiff's allegations] fit no category of personnel actions listed in § 2302(a)(2). Her FTCA claims are therefore not preempted by the CSRA. The Government attempts to avoid this result by citing many of our previous holdings pertaining to the broad purpose and preemptive effect of the CSRA.... [The cases cited by the government] are distinguishable because the conduct in those cases, unlike the conduct alleged [by the plaintiff here], was within the scope of personnel actions prohibited by the CSRA. The CSRA is the exclusive remedy for all prohibited personnel actions.

Brock v. United States, 64 F.3d 1421, 1424-25 (9th Cir. 1995). That Ninth Circuit standard is reflected in the briefs filed by the government in that circuit.

Act] claims in this case if the conduct underlying his complaint can be challenged as 'prohibited personnel practices' within the meaning of the CSRA"); *Mahtesian v. Lee*, 406 F.3d 1131, 1134 (9th Cir. 2005); *Orsay v. United States Department of Justice*, 289 F.3d 1125, 1128 (9th Cir. 2002) ("[i]f the conduct that Appellants challenge in this action falls within the scope of the CSRA's 'prohibited personnel practices,' then the CSRA's administrative procedures are Appellant's only remedy, and the federal courts cannot resolve Appellant's claims under the Privacy Act and the FTCA").

"The 'controlling factor' in determining whether the CSRA preempts a claim is whether the action can be challenged as a 'prohibited personnel practice' under the CSRA. *Saul* [*v. United States*, 928 F.2d 829,] 841 [(9th Cir. 1991)]."[23]

The Tenth Circuit applies the same preclusion standard as the Ninth. "Federal and state court actions 'complain[ing] of activities prohibited by the CSRA ... are preempted by the CSRA.'" *Steele v. United States*, 19 F.3d 531, 533 (10th Cir. 1994) (quoting *Petrini v. Howard*, 918 F.2d 1482, 1485 (10th Cir. 1990)). The Second Circuit also appears to apply this standard. "[F]or claims falling within its purview, the CSRA provides the exclusive remedy. *Tiltti v. Weise*, [55 F.3d 596, 600 (2d Cir. 1998)]." *Sawyer v. Musumeci*, 1998 WL 743734 at *1 (2d Cir. 1998).[24]

(4) The District of Columbia Circuit recently expressed "doubts about [the Federal Circuit decision in] *Worthington*, which appears to be in significant

[23] Brief of Defendant-Appellee, *Mangano v. United States*, No. 05-17334 (9th Cir.), 2006 WL 2427080 at *9.

[24] Although *Sawyer* is not officially reported, the government reads the reported decision in *Tiltti* in a similar manner. Brief for Defendants-Appellees, *Johnson v. United States*, 81 Fed.Appx. 388 (2d Cir. 2003), 2003 WL 24057791 at *15 ("The CSRA provides the exclusive remedy by which federal employees may challenge adverse personnel actions, more particularly denominated as 'prohibited personnel practices'; unless the CSRA either explicitly or by necessary implication sanctions judicial challenges *to such actions*, judicial challenge is foreclosed. *Tiltti v. Weise*.") (emphasis added).

tension with this court's precedents in *Filebark* ... and *Carducci*." *Grosdidier v. Chairman, Broadcasting Board of Governors,* 560 F.3d at 496. But there is far more than "significant tension" between the District of Columbia Circuit precedents in *Carducci*, *Grosdidier*, and the instant case on the one hand, and the Federal Circuit precedents in *Bosco*, *Romero* and *Worthington* on the other. Those deeply embedded sets of precedents are entirely inconsistent with one another; the Federal Circuit precedents have repeatedly rejected the sweeping preclusion rule that the government has advanced and that the District of Columbia Circuit has repeatedly embraced.

Referring to another leading Federal Circuit case, the court below commented that "it may ... be true that *Mudge* [*v. United States,* 308 F.3d 1220 (Fed. Cir. 2002)] correctly allowed the employees in that case to proceed." (Pet. App. 6a). But if, as the court below held, the CSRA provides the exclusive basis on which the federal courts can hear employment-related claims of federal workers, it is impossible to understand how the Federal Circuit in *Mudge* could properly have permitted that action to continue. In *Mudge* the Federal Circuit upheld the jurisdiction of the federal courts to entertain an action for backpay against the FAA – the very agency at issue in the instant case – brought by a federal employee who claimed he was entitled to premium pay for work in Alaska. The government argued in *Mudge* – just as it did in the instant case – that the federal courts could only entertain employment-related claims of federal

employees in those specific circumstances enumerated in the CSRA.[25] If the court of appeals below was correct in upholding that sweeping contention, the Federal Circuit decision in *Mudge* was necessarily incorrect.

II. This Inter-Circuit Conflict Involves An Important and Recurring Issue

Although this conflict involves a total of seven circuits, it is particularly important to resolve the conflict on this issue between the District of Columbia Circuit and the Federal Circuit. Approximately 280,000 federal employees work in the District of Columbia, a substantial portion of the federal civilian workforce. When a federal employment dispute arises in the District of Columbia, whether the governing preclusion standard is that of the District of Columbia Circuit or the Federal Circuit is controlled by whether the claim falls within the Federal Circuit's Tucker Act jurisdiction. If the claim of a federal worker can properly be cast as a claim within the scope of the Tucker Act, his or her lawsuit may well proceed in the Court of Federal Claims under the narrower Federal Circuit preclusion rule. If, however, as here, that claim does not fall within the Tucker Act, and thus must be brought in the District Court for the District of Columbia, that action will almost certainly be dismissed under the sweeping District of

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[25] Brief of Defendant-Appellee, 2002 WL 34235708 at *7-*8.

Columbia Circuit preclusion rule. A federal employee working in the District of Columbia who has an ongoing dispute about his or her rate of pay could not obtain an injunction, because that remedy would have to be sought in the District Court and would be governed by District of Columbia Circuit precedent; that same employee could, however, achieve the same result by bringing a series of backpay claims in the Court of Federal Claims, where Federal Circuit precedent applies. It is incongruous that federal appellate courts located only three Metro stops apart on the Red Line are applying to the claims of federal employees in the nation's capitol avowedly inconsistent and outcome determinative preclusion standards.[26]

The differing treatment of federal employees seeking the same type of remedy is equally incongruous. Many claims asserting that a federal employee is receiving insufficient compensation are within the Tucker Act jurisdiction of the Court of Federal Claims (and thus governed by the Federal Circuit preclusion rule), but not all. The Court of Federal Claims has upheld such compensation claims under the Bankruptcy Reform Act,[27] the Law Enforcement

[26] Similarly, for federal employees in the Sixth and Eleventh Circuits, which CSRA preclusion rule applies turns not on the regional court of appeals within which the claim arises, but on the happenstance of whether the claim happens to fall within the subject matter jurisdiction of the Federal Circuit and is thus outside the authority of those regional appellate courts.

[27] *Scholl v. United States*, 61 Fed.Cl. 322 (2004).

Availability Pay Act,[28] the Federal Law Enforcement Pay Reform Act,[29] the Severance Pay Act,[30] the Fair Labor Standards Act,[31] the Kiess Act,[32] and a variety of other federal statutes.[33] In the instant case, however, the Federal Circuit concluded that only prospective compensatory relief was available, thus barring reliance on the Tucker Act. (Pet. App. 61a-62a). Petitioners' claim for increased compensation was thus adjudicated in the District of Columbia Circuit where, unlike compensation claims addressed in the Federal Circuit, it was rejected as precluded by the CSRA. That difference in outcome occurred solely because of the conflicting preclusion rules applied by the various circuits; no lower court to our knowledge has suggested that the CSRA itself should be read to distinguish in this way among federal employees asserting entitlement to a higher rate of pay.

Resolution of this conflict is of particular importance because of the unique appellate role of the

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[28] *Vanderpool v. United States*, 84 Fed.Cl. 66 (2008); *Bradley v. United States*, 42 Fed.Cl. 333 (1998).

[29] *Contreras v. United States*, 64 Fed.Cl. 583 (2005); *Hannon v. United States*, 48 Fed.Cl. 15 (2000).

[30] *Sloan v. United States*, 36 Fed.Cl. 163 (1996); *Hedman v. United States*, 15 Ct.Cl. 304 (1988).

[31] *Agee v. United States*, 77 Fed.Cl. 84 (2007); *Adams v. United States*, 48 Fed.Cl. 602 (2001).

[32] *Abramson v. United States*, 42 Fed.Cl. 326 (1998).

[33] *Ainslie v. United States*, 55 Fed.Cl. 103 (5 U.S.C. § 3329(b)); *King v. United States*, 81 Fed.Cl. 766 (2008) (28 U.S.C. § 540C).

Federal Circuit. In cases filed in a district court anywhere in the United States, if that district court's jurisdiction was "based, in whole or in part, on section 1346" of Title 28, the Little Tucker Act, any appeal is to the Court of Appeals for the Federal Circuit, rather than to the regional court of appeals for the circuit in which the district court is located. 29 U.S.C. § 1295(a)(2); see *United States v. Hohri*, 482 U.S. 64 (1987). The Federal Circuit decision in *Romero*, for example, overturned the decision of a district court in the First Circuit that had held the claim in that case was barred by the CSRA;[34] a number of other Federal Circuit decisions applying that Circuit's view of the limited preclusive effect of the CSRA involved appeals from the regional district courts.[35] In any case under the Administrative Procedure Act, or any other federal statute, in which the plaintiff could include a colorable section 1346 claim, the appeal would lie to the Federal Circuit, which limits CSRA preclusion to adverse personnel action cases. That would include, as in *Hohri* itself, an action filed in the District Court for the District of Columbia.

The United States has repeatedly recognized the considerable practical importance of whether the

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[34] *Romero v. Brady*, 764 F.Supp. 227, 237-38 (D.P.R. 1991).

[35] E.g., *Muniz v. United States*, 972 F.2d 1304 (Fed. Cir. 1992) (appeal from the District Court for the Northern District of California); *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990) (en banc) (appeal from the District Court for the Central District of California).

CSRA precludes actions by individuals for whom the CSRA itself provides no judicial remedy. In *United States v. Fausto*, in seeking review by this Court of the Federal Circuit decision permitting certain federal employees to obtain review of adverse personnel actions, the government correctly emphasized that the issue was one of "considerable practical importance to the federal government."[36] In *Cooper v. Kotarski*, 487 U.S. 1212 (1988), the government asked this Court to decide whether a federal employee can bring a constitutional challenge to removal from a probationary position. See *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). The United States explained that the question was "of great and recurring practical importance to the federal government," and highlighted the "significant disparity in the treatment of federal employees, depending solely upon where they reside."[37] In its response in *Whitman*, agreeing in part that certiorari should be granted, the United States noted the "considerable practical importance [of the issue] to the Nation's largest employer and its employees," pointed out that there was an "untenable lack of uniformity in federal employment law."[38] On six occasions in which a circuit court has held that a federal

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[36] Petition for Writ of Certiorari, *United States v. Fausto*, No. 86-595, at 16.

[37] Petition for Writ of Certiorari, *Cooper v. Kotarski*, No. 86-1813, at 10, 15.

[38] *Whitman v. Department of Transportation*, Brief of Respondent, at 20 (June 6, 2005).

employee could bring an action under a statute other than the CSRA, the United States has sought rehearing en banc in that court of appeals, arguing that the issue was one of sufficient importance to warrant that exceptional treatment.[39] See Fed. Rule App. Pro. 35(b)(1)(B).

In *Weber v. Department of Veterans Affairs*, 129 S.Ct. 754 (2009), the petitioner asserted that the court of appeals decision in that case was inconsistent with the Federal Circuit decisions in *Romero* and *Bosco*.[40] The government argued in its response that *Weber* was not an appropriate vehicle for raising that issue because the petitioner's claims in that case *were* covered by the CSRA. Weber was challenging his dismissal, an adverse personnel action under the CSRA; like the plaintiff in *Fausto*, Weber could not invoke the remedies in Chapter 75 because he was outside the definition of "employees" protected by that provision. The government correctly explained why the dismissal of Weber's claim was thus not inconsistent with *Romero* and *Bosco*.

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[39] See *Crowley v. United States*, 398 F.3d 1329 (Fed. Cir. 2005) (petition for rehearing denied); *Mudge v. United States*, 308 F.3d 1220 (Fed. Cir. 2002) (petition for rehearing en banc denied); *Burroughs v. OPM*, 784 F.2d 933 (9th Cir. 1986) (denying rehearing en banc); *Fausto v. United States*, 791 F.2d 1554 (Fed. Cir. 1986) (denying rehearing en banc); *Carter v. Gibbs*, 909 F.2d 1452 (Fed. Cir. 1990) (en banc); *Bosco v. United States*, 976 F.2d 710 (Fed. Cir. 1992) (denying rehearing en banc).

[40] Petition for Writ of Certiorari, *Weber v. Department of Veterans Affairs*, No. 08-281 at 11.

> In *Romero*, the Federal Circuit interpreted this Court's holding in *Fausto* as being inapplicable to "the type of personnel action – withholding of pay for income tax purposes – that 'is not covered at all by the CSRA, for any employees.'" *Romero*, 38 F.3d at 1211 ... ; accord *Bosco*, 931 F.2d at 833 (viewing *Fausto* as holding that the CSRA is "the only means of review as to the *types* of adverse personnel action specifically *covered* by the CSRA" (first emphasis added)). But the "type of personnel action" at issue in this case – separation from the service – is *expressly* addressed by the CSRA.

Brief for the Respondents in Opposition, *Weber v. Department of Veterans Affairs*, No. 08-281 at 11 (Nov. 3, 2008).

Here, unlike *Weber*, the petitioners' claims clearly are not "addressed by the CSRA." The underlying claim – that the employing agency was required to reclassify the facility at which the petitioners work – an action which would inexorably raise their salaries – bears not the slightest resemblance to the matters covered by the CSRA. This case presents an appropriate vehicle for resolving the question presented. The court below squarely resolved the issue framed by *Whitman*, holding that the CSRA precludes an action that otherwise (and prior to the enactment of the CSRA) would have been actionable under the Administrative Procedure Act. The district court earlier held that the plaintiffs had done all they could to exhaust their claim (Pet. App. 22a-23a), and the government

did not seek to reopen that issue in the court of appeals. The linchpin of the District of Columbia's broad preclusion rule – the specific and limited grant of judicial review in Chapter 75 of the CSRA – is expressly applicable to FAA employees. 49 U.S.C. § 40122(g)(3).

Earlier this year in an appeal in the District of Columbia Circuit the government pointed out that

> the Federal Circuit's *Worthington* decision is not binding on this Court. "The federal courts spread across the country owe respect to each other's efforts ... , but each has an obligation to engage independently in reasoned analysis. Binding precedent for all is set only by the Supreme Court...."[41]

Certiorari should be granted to establish the binding precedent that this Court alone can provide.

[41] Brief for Appellee, *Grosdidier v. Chairman, Broadcasting Board of Governors,* No. 08-5181 (D.C.Cir.), at 22 n.5 (*quoting In Re Korean Airlines Disaster of September 1, 1983*, 829 F.2d 1171, 1176 (D.C.Cir. 1987)).

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the District of Columbia Circuit.

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