No. 98-554

In the Supreme Court of the United States

OCTOBER TERM, 1998

KENNETH W. LEE, PETITIONER

v.

ROBERT C. HUGHES, JR., AND DANIEL C. LANFORD, JR.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a preference-eligible employee in the excepted service of the Judicial Branch may bring an action under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), to recover monetary damages from his supervisors for termination of his employment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 145 F.3d 1272. The opinions of the district court (Pet. App. 14a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 1998. The petition for writ of certiorari was filed on October 1, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, a former United States Probation Officer for the Middle District of Georgia, brought a federal suit against his supervisors for damages on account of the termination of his employment, relying in part on this Court's decision in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The district court dismissed petitioner's suit, holding that Congress's decision to provide limited remedies for federal employees under the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (codified at various sections of Title 5 of the United States Code), precludes the judiciary from creating a *Bivens* remedy. See Pet. App. 14a-30a. The court of appeals affirmed the district court's decision. *Id.* at 1a-13a.

1. Congress has authorized the United States District Courts to appoint and remove probation officers. See 18 U.S.C. 3602(a). In 1983, the United States District Court for the Middle District of Georgia appointed petitioner as a probation officer. Pet. App. 2a. Respondent Daniel Lanford, who was Chief U.S. Probation Officer, and respondent Robert Hughes, who was Deputy Chief U.S. Probation Officer, supervised petitioner. *Id.* at 2a, 16a. After petitioner received poor performance evaluations, the district court demoted petitioner and ultimately terminated his employment. *Id.* at 16a.

Petitioner protested his termination on the ground that the decision was improperly motivated by race, and he sought redress through the Equal Employment Opportunity (EEO) Plan for the Middle District of Georgia. Pet. App. 2a. The EEO Plan adopted by the Middle District of Georgia is identical to the EEO plan that had been considered and approved by the Judicial

Conference of the United States. *Id.* at 2a n.1. A complainant may initiate an action under the EEO Plan by filing a timely discrimination complaint with the EEO Coordinator. The EEO Coordinator or a court appointed investigator makes an investigation, consults with the parties, and prepares a report "identifying the issues, describing his or her findings and recommendations, explaining what resolution, if any, was achieved, and defining what corrective actions, if any, will be undertaken." *Id.* at 2a-3a. If the complainant objects to the report, the complainant may request the chief judge of the district court to review the matter. *Id.* at 3a. The chief judge may conduct any additional investigation deemed necessary, interview the parties or other persons, and determine whether to hold a formal hearing on the matter. *Ibid.*

The chief judge appointed a magistrate judge to investigate petitioner's discrimination claim. Pet. App. 16a. After completing his investigation, the magistrate judge submitted a report recommending that the chief judge reject petitioner's discrimination claim. *Ibid.* Petitioner's counsel, who was provided with a copy of the report, submitted written objections.[1] After considering the magistrate's report and recommendations and

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[1] Under the EEO Plan, an aggrieved employee may seek review of the report and the chief judge may hold a formal hearing, including the cross-examination of witnesses. See C.A. Supp. App. Doc. 2 (EEO Plan, § 7.04(D)(3)(c)). In this case, the chief judge met with petitioner's counsel and said he was "open to whatever appeal, whatever tact [*sic*] you wished to take." C.A. Supp. App. Docs. 5, 6. Petitioner's counsel did not request a formal hearing at that meeting and instead submitted a three-page letter to the chief judge objecting to the magistrate judge's report. C.A. Supp. App. Doc. 7.

petitioner's objections, the chief judge approved petitioner's termination. *Ibid.*

2. Petitioner filed suit in district court for compensatory and punitive damages against respondents in their individual capacities. Petitioner asserted a *Bivens* claim and a claim under 42 U.S.C. 1981, alleging that he was terminated on the basis of race. The district court granted respondents' motion to dismiss and entered judgment in their favor. The district court held, among other things, that the CSRA sets out the appropriate procedures and remedies for resolving federal employment disputes and that the CSRA precludes the courts from creating additional *Bivens* remedies for damages from the employee's supervisors. Pet. App. 17a-22a.[2]

Petitioner moved the district court to alter or amend its judgment, but the court entered an order denying that motion. Pet. App. 26a-30a. The court acknowledged that its prior opinion had incorrectly stated that petitioner was a "nonpreference member of the excepted service" and that petitioner had a right under the CSRA to challenge the adverse employment action by filing a petition with the Office of Special Counsel of the Merit Systems Protection Board. *Id.* at 26a-27a. Instead, petitioner was "a preference eligible member of the excepted service in the judicial branch and did not have the right to file a petition with the [Office of Special Counsel]." *Id.* at 27a. The court nevertheless rejected petitioner's contention that its misperception

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[2] The district court also concluded that petitioner's Section 1981 claimed was without merit because the statute does not apply to actions taken under color of federal law. Pet. App. 22a-25a. The court of appeals affirmed this ruling on appeal (*id.* at 11a-13a), and petitioner does not challenge that holding in his petition to this Court.

of petitioner's employment classification justified setting aside the court's ruling. *Id.* at 27a-29a.

The district court stated that "[t]he operative fact for purposes of the Court's analysis was that the CSRA does not provide [petitioner] the right to administrative or judicial review of the merits of any adverse personnel decision." Pet. App. 27a. The district court concluded that Congress's decision to provide federal employees with certain CSRA remedies, but to limit those statutory remedies in other respects, "constitutes a special factor counseling against creating a *Bivens* cause of action in the federal employment context." *Id.* at 28a. The district court additionally noted that:

> Congress amended the Back Pay Act, 5 U.S.C. § 5596, in 1990 specifically to provide employees of the judicial branch with a back pay remedy for "unjustified or unwarranted" personnel actions in appropriate circumstances. 5 U.S.C. § 5596(b)(1). Such a remedy is not precluded by the CSRA. *United States v. Fausto*, 484 U.S. 439, 453 (1988). This remedy provided by Congress also defeats [petitioner's] *Bivens* claim.

Id. at 29a.

3. The court of appeals affirmed the district court's judgment. Pet. App. 1a-13a. That court rejected petitioner's argument that he is entitled to a *Bivens* remedy. *Id.* at 4a-11a. The court reasoned that Congress had enacted the CSRA to provide a comprehensive remedial scheme for federal employees' employment-related claims and that the CSRA does not provide an administrative or judicial remedy to preference eligible employees of the excepted service who work in the Judicial Branch. *Id.* at 4a-5a. The court of appeals reasoned that Congress had made that decision deliber-

ately and that it would be inappropriate for the courts to create a *Bivens* remedy in the face of Congress's action. *Id.* at 4a-11a. "In light of Congress's deliberate exclusion of certain employees from the protections of the CSRA and this country's long-respected separation of powers doctrine, courts should be hesitant to provide an aggrieved plaintiff with a remedy where Congress intentionally has withheld one." *Id.* at 9a.

ARGUMENT

The petition for a writ of certiorari should be denied. The court of appeals' conclusion that the CSRA precludes the creation of a *Bivens* remedy here is correct and consistent with this Court's decisions. There is no conflict among the courts of appeals on that issue warranting the Court's review.

1. This Court decided in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), that a plaintiff who alleged injury from violation of his Fourth Amendment rights could seek money damages against the responsible federal officers for the constitutional violation. The Court later extended that remedy to other types of constitutional injuries. See *Davis* v. *Passman*, 442 U.S. 228 (1979) (denial of due process); *Carlson* v. *Green*, 446 U.S. 14 (1980) (cruel and unusual punishment). The Court recognized that the judicial creation of a monetary remedy for constitutional violations was appropriate in those situations because Congress had not created a remedial mechanism to address the alleged constitutional violations and there were "no special factors counselling hesitation in the absence of affirmative action by Congress." *Bivens*, 403 U.S. at 396-397. See *Davis*, 442 U.S. at 245-247; *Carlson*, 446 U.S. at 18-20.

This Court's "more recent decisions have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988). See *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994). In those situations in which Congress has established a comprehensive statutory scheme to resolve disputes with the federal government, the Court has concluded that a *Bivens* remedy is inappropriate, even if the remedial scheme does not provide complete relief for the alleged constitutional injury. See *Schweiker*, 487 U.S. at 422-423; *Bush* v. *Lucas*, 462 U.S. 367, 388-390 (1983). The Court has explained that the "the concept of 'special factors counselling hesitation in the absence of affirmative action by Congress' has proved to include an appropriate judicial deference to indications that congressional inaction has not been inadvertent." *Schweiker*, 487 U.S. at 423. See *Chappell* v. *Wallace*, 462 U.S. 296, 298 (1983). "When the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," this Court has held that it is inappropriate for a court to afford "additional *Bivens* remedies." *Schweiker*, 487 U.S. at 423.

As this Court has recognized, the CSRA "comprehensively overhauled the civil service system," *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985), and created an elaborate "new framework for evaluating adverse personnel actions against [federal employees]," *id.* at 774. The CSRA classifies federal employees according to their responsibilities and qualifications. See *United States* v. *Fausto*, 484 U.S. 439, 441 n.1 (1988); 5 U.S.C. 2101-2105 (1994 & Supp. II 1996), 2108, 3132 (1994 & Supp. II 1996). It then specifies, for employees in each classification, the employment protections, remedies, and ave-

nues for administrative and judicial review of adverse personnel actions. See, *e.g.*, 5 U.S.C. 7501-7703 (1994 & Supp. II 1996).

In this case, petitioner, who is a preference-eligible member of the excepted service in the Judicial Branch, enjoys a number of employment benefits under the CSRA and related statutes, but he does not have the statutory rights provided to most other federal employees to challenge an adverse personnel action. The fact that Congress has not extended the same CSRA rights to petitioner and other judicial branch employees does not mean, however, that petitioner may assert a *Bivens* claim. Congress deliberately excluded court personnel from those provisions of the CSRA based on a policy judgment that took into account both the Judicial Branch's need for independence in personnel management and the court personnel's employment rights. Congress's judgment on that matter is a "special factor[] counselling hesitation" that weighs against creating a *Bivens* remedy. See *Schweiker*, 487 U.S. at 423, 426-429; *Bush*, 462 U.S. at 372-373 & n.9.

Congress has struck a carefully considered balance that is sensitive to the interests of the Judicial Branch. In the case of probation officers, Congress granted the district courts the authority to appoint and remove those employees, 18 U.S.C. 3602(a), and it established that a paid probation officer may be removed by the district court only "for cause." *Ibid.* The Judicial Conference has, in turn, directed that each district court adopt an EEO Plan that, among other things, provides a mechanism by which probation officers, as well as other court personnel, may seek redress of discrimination complaints. Pet. App. 2a-3a. Under the Back Pay Act of 1966, a court employee who successfully invokes that administrative remedy may be entitled to back pay

plus interest. See 5 U.S.C. 5595-5596 (1994 & Supp. II 1996).[3]

Congress's decision to limit the rights of court employees to challenge adverse personnel actions in this way was not "inadvertent." *Schweiker*, 487 U.S. at 423. Congress elected to provide probation officers and other court appointed personnel many benefits that are available to other federal employees, including severance pay, 5 U.S.C. 5595 (1994 & Supp. II 1996), retirement benefits, 5 U.S.C. 8331(1)(A), life insurance, 5 U.S.C. 8701(a)(1), health insurance, 5 U.S.C. 8901(1)(A), and coverage under the Annual and Sick Leave Act of 1951, 5 U.S.C. 6301(2), and the Family and Medical Leave Act of 1993, 5 U.S.C. 6381(1). Congress's decision, nevertheless, to provide more circumscribed rights to challenge adverse personnel actions reflects conscious sensitivity to the personnel management interests of the Judicial Branch, which in turn is a "special factor[] counselling hesitation." *Schweiker*, 487 U.S. at 423; *Bush*, 462 U.S. at 380, 388-390.

Congress's sensitivity to the Judicial Branch's employment interests is especially clear in light of its enactment of the Administrative Office of the United States Courts Personnel Act of 1990 (AO Act), Pub. L. No. 101-474, 104 Stat. 1097. The AO Act placed employees of the Administrative Office of the United States Courts outside of the coverage of the CSRA for purposes of adverse personnel actions and directed the Administrative Office to design its own administrative

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[3] The Back Pay Act of 1966 defines an "employee" as "an individual employed in or under an agency," and it defines an "agency" to include the federal courts. See 5 U.S.C. 5595(a)(1) and (2)(A), 5596(a); 28 U.S.C. 610; see also 5 U.S.C. 2104(a), 2105 (1994 & Supp. II 1996).

remedies. § 3(a), 104 Stat. 1097-1098. In doing so, Congress recognized that it was necessary for the Judicial Branch to have its own "independent, self-contained personnel management system." H.R. Rep. No. 770, 101st Cong., 2d Sess. Pt. 1, at 5 (1990). Petitioner is not an employee of the Administrative Office and therefore is not entitled to invoke the specific administrative remedies that the Administrative Office created through that Act. Nevertheless, Congress recognized that the federal courts were already "mostly free" of Executive Branch supervision over employment matters, and the administrative remedies that petitioner and other Judicial Branch employees are entitled to invoke through the court-adopted EEO Plans are analogous to the procedures envisioned under the AO Act. *Ibid.*

Congress described the AO Act as establishing a "comprehensive personnel system" for Administrative Office employees, H.R. Rep. No. 770, *supra*, at 1, and it stated that this personnel system is similar to that available to "the rest of the judicial branch," *id.* at 5. The mandated procedures, like the EEO Plans, provide a mechanism for resolving employment disputes involving claims of discrimination. See § 3(a)(5) and (9), 104 Stat. 1097-1098; H.R. Rep. No. 770, *supra*, at 5, 7-8. In both situations, Congress has enabled the employee to seek a back pay remedy, under the Back Pay Act of 1966, in conjunction with the administrative review scheme. H.R. Rep. No. 770, *supra*, at 12. Thus, Congress was aware of the type of remedies being afforded to judicial employees for employment discrimination through the EEO plan system, expressed its approval

of those remedies, and augmented them through revisions to the Back Pay Act of 1966.[4]

The CSRA, coupled with other congressional actions, including enactment of the AO Act and amendment of the Back Pay Act of 1966, accordingly manifests Congress's policy determination that Judicial Branch personnel, such as petitioner, who seek to challenge adverse personnel action are to do so through the Judicial Branch's administrative remedies. Compare *Bush*, 462 U.S. at 388-390. Although petitioner had no statutory review rights under the CSRA, he has meaningful remedies. The court of appeals correctly concluded that, "[i]n light of the comprehensive nature of the CSRA," petitioner "is precluded from asserting a *Bivens* claim in an attempt to recover damages for the constitutional violations alleged here." Pet. App. 11a.[5]

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[4] Congress demonstrated further deference to the Judicial Branch in the Congressional Accountability Act of 1995, in which Congress applied 11 federal employment and workplace laws to the Legislative Branch of the federal government. 2 U.S.C. 1301 *et seq.* (Supp. II 1996). Congress did not extend those laws to the Judicial Branch, but rather required the Judicial Conference to prepare a report for Congress, including "any recommendations the Judicial Conference may have for legislation to provide to employees of the judicial branch the rights, protections, and procedures under the listed laws." 2 U.S.C. 1434 (Supp. II 1996).

[5] The court of appeals correctly concluded that petitioner's reliance upon *Davis* v. *Passman*, 442 U.S. 228 (1979), is misplaced. In *Davis*, the Court permitted a former congressional staff member to bring a *Bivens* action against a congressman alleging unconstitutional discrimination on the basis of sex. The Court did not address the preclusive effect of the CSRA, which Congress had enacted only a few months before *Davis* was decided. Pet. App. 8a. Since that time, the Court has stated that its decision in *Davis* rested on the absence of *any* equitable or monetary remedy for the terminated staff member. See *Bush*, 462 U.S. at 376-377 & n.13. In this case, there is an elaborate administrative review scheme

2. Petitioner is also mistaken in contending that the courts of appeals' decision in this case gives rise to a conflict among the court of appeals warranting this Court's review. The court of appeals' decision is consistent with other circuit court decisions holding that the CSRA is a comprehensive statute that precludes *Bivens* claims even in those situations in which it does not provide review for a particular category of employee or claim. See *Saul* v. *United States*, 928 F.2d 829, 840 (9th Cir. 1991) (CSRA "precludes even those *Bivens* claims for which the act prescribes no alternative remedy"); *Lombardi* v. *Small Bus. Admin.*, 889 F.2d 959, 961 (10th Cir. 1989) (decisions in *Fausto* and *Schweiker* weigh against creating "a *Bivens* remedy in a Federal employment action even if no remedy at all has been provided by the CSRA"); *Feit* v. *Ward*, 886 F.2d 848, 855-856 (7th Cir. 1989) (withdrawing as contrary to *Schweiker* a plurality opinion allowing a discharged employee who had no remedy under the CSRA to bring a *Bivens* action).

Petitioner contends that the court of appeals' decision conflicts with *Duffy* v. *Wolle*, 123 F.3d 1026 (8th Cir. 1997), cert. denied, 118 S. Ct. 1839 (1998). In that case,

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and the opportunity to obtain both equitable and monetary relief (back pay with interest). That important difference makes the reasoning of *Davis* inapplicable here. Indeed, Justice Marshall's concurring opinion in *Bush* explicitly endorsed the Back Pay Act of 1966 remedy as an adequate form of relief that forecloses a constitutional *Bivens* money damage action. See 462 U.S. at 390-391 (Marshall, J., concurring) ("Although petitioner may be correct that the administrative procedure created by Congress, unlike a *Bivens* action, does not permit recovery for loss due to emotional distress and mental anguish, Congress plainly intended to provide what it regarded as full compensatory relief when it enacted the Back Pay Act of 1966.") (footnote omitted).

the Eighth Circuit held that a court-adopted EEO Plan, standing alone, did not preclude a probation officer from asserting a *Bivens* sex discrimination claim against the judges who elected not to promote him to the position of Chief Probation Officer, *id.* at 1033, but ultimately affirmed the district court's grant of summary judgment in favor of the defendants, *id.* at 1040-1041. As the court of appeals in this case observed, it appears that "the defendants in *Duffy* never suggested that the CSRA preempted plaintiff's claim, but rather argued only that plaintiff's *Bivens* claim should have been dismissed because the local EEO Plan provided plaintiff with a remedy." Pet. App. 10a n.4. Because the Eighth Circuit did not address the CSRA's effect, *Duffy* does not conflict with the court of appeals' decision in this case. *Ibid.*

In addition, the Eighth Circuit appeared to rely on the defendants' failure to "present[] * * * support" for the conclusion that the remedial scheme available to judicial employees did not result from congressional inadvertence. *Duffy*, 123 F.3d at 1034-1035. As we explain above, there is ample indication that Congress deliberately limited the remedies available to judicial personnel for adverse personnel actions. The Eighth Circuit also appeared to believe that there were no statutory remedies available to Judicial Branch employees. *Ibid.* As discussed above, judicial employees may seek a remedy under the Back Pay Act of 1966 in conjunction with the Judicial Branch's administrative process for addressing discrimination complaints.

In any event, review of the issue presented here would be premature. At this juncture, only the Eighth and Eleventh Circuits have specifically addressed whether probation officers are entitled to a *Bivens* remedy for adverse personnel actions, and the Eighth

Circuit's consideration of the matter was based on incomplete arguments and incorrect assumptions. The Court would plainly benefit from further consideration of the issue in the courts of appeals. Currently, the issue is pending in at least one other court of appeals. See *DeMello* v. *Ney*, No. 97-15205 (9th Cir. (filed Nov. 5, 1998)); *Blankenship* v. *McDonald*, No. 97-35898 (9th Cir. (argued Dec. 10, 1998)). The question presented here does not warrant this Court's review at this juncture.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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