No. 14-1184

In the Supreme Court of the United States

DON FIRENZE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
RICHARD A. BOCK
Deputy Associate General Counsel
BARRY F. SMITH
Senior Special Counsel
National Labor Relations Board
Washington, D.C. 20570-0001

QUESTIONS PRESENTED

1. Whether the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101 *et seq.*, precludes a suit by petitioner in federal district court against his employing agency, the National Labor Relations Board (NLRB), for breach of a collective bargaining agreement, where petitioner alleges that his union breached its duty of fair representation when it settled his grievances with the NLRB instead of taking them to arbitration.

2. Whether petitioner's First Amendment claim for injunctive relief was rendered moot by his retirement from federal employment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution and statutes:

Statutes—Continued: Page

Statutes—Continued: Page

In the Supreme Court of the United States

No. 14-1184

DON FIRENZE, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is unreported. The order of the district court adopting the magistrate judge's report and recommendation and granting summary judgment to the National Labor Relations Board on Count 2 of the complaint (Pet. App. 4a-34a) is reported at 993 F. Supp. 2d 40. The order of the district court dismissing Counts 1 and 3 of the complaint (Pet. App. 35a-36a) is not published in the *Federal Supplement* but is available at 2013 WL 639148. The magistrate judge's report and recommendation to dismiss Counts 1 and 3 (Pet. App. 37a-61a) is also unpublished but is available at 2013 WL 639151.

JURISDICTION

The judgment of the court of appeals was entered on December 30, 2014. The petition for a writ of certiorari was filed on March 23, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Civil Service Reform Act of 1978 (CSRA or Act), 5 U.S.C. 1101 *et seq.*, "comprehensively overhauled the civil service system" and created an "elaborate new framework for evaluating adverse personnel actions against federal employees." *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (citations, internal quotation marks, and brackets omitted). The CSRA describes the "protections and remedies applicable to such [an] action, including the availability of administrative and judicial review." *Ibid.* The CSRA's "integrated scheme of administrative and judicial review" is "designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 445.

Under the CSRA, a "prohibited personnel practice" occurs when an agency takes or influences a "personnel action" on an impermissible basis specified in the Act. 5 U.S.C. 2302(a)(1) and (b). The CSRA defines "personnel action" to include, *inter alia*, "an appointment," "a promotion," "a detail, transfer, or reassignment," and "any other significant change in duties, responsibilities, or working conditions." 5 U.S.C. 2302(a)(2)(A).

For certain major adverse actions such as suspensions for more than 14 days or removal, specified employees may appeal directly to the Merit Systems Protection Board (MSPB). 5 U.S.C. 7511-7513, 7701. If the employee is dissatisfied with the MSPB deci-

sion, he may seek judicial review of a final order or decision of the MSPB in the Federal Circuit. 5 U.S.C. 7703. Employees who are not covered by those provisions and employees who were not subjected to the specified major adverse actions must instead file an allegation of a "prohibited personnel practice" with the Office of Special Counsel (OSC). 5 U.S.C. 1214; see 5 U.S.C. 1212. If OSC concludes that there are reasonable grounds to believe a prohibited personnel action has occurred, it reports that finding to the MSPB, the Office of Personnel Management (OPM), and the agency involved. 5 U.S.C. 1214(b)(2)(B). If the agency does not take corrective action, OSC may petition the MSPB to order corrective or disciplinary action, see 5 U.S.C. 1214(b)(2)(D), 1215(a), and the employee may seek review of the MSPB decision in the Federal Circuit, 5 U.S.C. 1214(c), 7703. The CSRA does not provide for judicial review of an OSC decision not to seek corrective action.

The CSRA required agencies to adopt new systems of performance management, with guidance and approval from OPM. 5 U.S.C. 4302. The CSRA provides for the demotion and removal of employees performing at an unsatisfactory level, along with rights of appeal to the MSPB and the Federal Circuit. 5 U.S.C. 4303(a) and (e), 7701, 7703. In cases involving claims of discrimination in actions that are appealable to the MSPB, the CSRA provides for a *de novo* trial in federal district court. See 5 U.S.C. 7702, 7703(b)(2). Whistleblowers also have specific rights of appeal to the MSPB, regardless of whether they were subjected to a personnel action that is otherwise appealable. See 5 U.S.C. 1221, 2302(b)(8) and (9)(A)(i); see also

Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465-1466.

b. Title VII of the CSRA is the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. 7101 *et seq.*, which governs federal-sector collective bargaining and is administered by the Federal Labor Relations Authority (FLRA). See 5 U.S.C. 7104-7105. The FSLMRS requires parties to collective bargaining agreements (CBAs) to establish grievance procedures, culminating in arbitration by a private arbitrator. See 5 U.S.C. 7121(a).

Except for matters excluded by the parties, see 5 U.S.C. 7121(a)(2), or matters covered by Subsections 7121(d), (e), and (g), the procedures set forth in the CBA are the "exclusive administrative procedures" for resolving grievances. 5 U.S.C. 7121(a)(1). Subsections 7121(d), (e), and (g) provide that for certain matters—*i.e.*, discriminatory personnel practices covered by 5 U.S.C. 2302(b)(1); major adverse actions such as demotion, removal, or suspension for more than 14 days, 5 U.S.C. 4303, 7512; and other prohibited personnel practices such as whistleblower retaliation, 5 U.S.C. 2302(b)(8) and (9)(A)(i)—the employee may choose between the negotiated grievance procedures or the separate statutory review procedures provided for those specific types of complaints. 5 U.S.C. 7121(d), (e), and (g).

A federal employee has no specific right under the FSLMRS to invoke arbitration under the negotiated grievance procedures. Arbitration is invoked at the discretion of the union or the agency employer. 5 U.S.C. 7121(b)(1)(C)(iii). An employee who is dissatisfied with the union's handling of a grievance may file an unfair labor practice charge with the FLRA,

alleging breach of the duty of fair representation. 5 U.S.C. 7114(a)(1), 7116(b)(8), 7118. With some exceptions, a person aggrieved by a final order of the FLRA may seek judicial review in the appropriate federal court of appeals. 5 U.S.C. 7123(a). For most arbitration awards, review is limited to the aggrieved party's filing exceptions to the award with the FLRA, with no right of judicial review, even when the FLRA's decision turns on an interpretation of law. 5 U.S.C. 7122. Judicial review of the FLRA's decisions on exceptions to arbitration awards is limited to those awards involving statutory unfair labor practices. 5 U.S.C. 7123(a)(1).[1]

2. Before his retirement in 2014, petitioner was a field attorney in the National Labor Relations Board's (NLRB) Boston regional office and a member of the NLRB Union (Union). Between March 2009 and November 2010, the Union filed a series of six grievances on petitioner's behalf pursuant to the grievance procedures of the CBA between the Union and the NLRB. The grievances involved petitioner's complaints about (1) a written reprimand regarding his alleged dilatory attention to important pleadings; (2) a written warning to cease providing legal advice to an attorney in litigation against the NLRB; (3) his rating on an annual performance appraisal; and (4) three disciplinary suspensions without pay for periods of

[1] The D.C. Circuit has recognized two exceptions to Section 7123(a)(1)'s jurisdictional bar to judicial review of FLRA decisions on arbitration awards. See *United States Dep't of Treasury* v. *FLRA*, 43 F.3d 682, 684, 689 n.9, 690-691 (1994) (recognizing exception for cases where "the FLRA * * * exceeded its jurisdiction"); *Griffith* v. *FLRA*, 842 F.2d 487, 490-491 (1988) (recognizing exception for "constitutional challenges" to FLRA decisions).

three, seven, and ten days. The three-day suspension was for aiding a charged party's attorney and disclosing confidential information; the seven-day suspension was for disrespectful conduct toward supervisors and failure to follow confidentiality rules regarding an investigative affidavit; and the ten-day suspension was for disrespectful conduct toward the regional director, Rosemary Pye. Gov't C.A. Br. 2-3; see Pet. App. 39a-41a.

On April 30, 2010, petitioner wrote an email to Pye requesting that the office "itinerary," a list of staff members' whereabouts, list him as being on suspension. C.A. Supp. App. 50. Pye responded that she would not include that information in a document that could become public, because doing so could undermine petitioner and the NLRB. *Id.* at 49. Petitioner responded, "[d]oes this mean I cannot tell people who deal with us that I have been suspended?" *Ibid.* Pye replied that it "would help us answer your question if you tell us why you need to tell people you have been suspended." *Id.* at 48. Petitioner said his "general reason [wa]s that [he] prefer[s] to be able to speak the truth." *Ibid.*

Pye replied with an email stating, "[w]e are concerned that communications regarding your suspensions or other disciplinary action with parties to our cases or to members of the public contacting the NLRB about NLRB matters would undermine the integrity of the Agency and its ability to fairly effectuate the Act." C.A. Supp. App. 45. The email stated that petitioner "may not communicate in any way about any discipline by the Agency with parties, lawyers, other representatives, and witnesses to [his] cases or other members of the public who contact the

NLRB about NLRB matters." *Ibid.* When petitioner responded with a series of hypotheticals to clarify the restrictions Pye had outlined, Pye invited petitioner to contact her if a specific situation arose in which he needed further clarification. Pet. App. 11a-12a.

Petitioner later wrote to the NLRB expressing his desire to publicize the fact that the Union had filed for arbitration with respect to petitioner's grievances. Pet. App. 41. The NLRB reiterated to petitioner that he was not permitted to "communicate *in any way* about any discipline by the Agency with parties, lawyers, other representatives, and witnesses to [his] cases or other members of the public who contact the NLRB about NLRB matters." *Ibid.* (citation omitted).

The NLRB and the Union selected an arbitrator under the CBA's grievance procedures. All six of the grievances were settled before the arbitration hearing. Gov't C.A. Br. 5. Petitioner alleged that the Union settled the grievances without consulting him. Compl. ¶¶ 40, 43.

3. Petitioner filed a complaint against the NLRB and the Union. Count 1 alleged that the NLRB violated the CBA when it issued two warnings to petitioner, gave him a low performance appraisal, and subjected him to three disciplinary suspensions. Compl. ¶ 41. Count 2 alleged that the NLRB imposed a prior restraint on petitioner's speech, in violation of the First Amendment, by forbidding him from publicizing his labor dispute with the NLRB. *Id.* ¶ 42. Count 3 alleged that the Union had violated its duty of fair representation by settling petitioner's grievances instead of taking them to arbitration. *Id.* ¶ 43.

4. a. A magistrate judge recommended that Counts 1 and 3 be dismissed for lack of subject matter jurisdiction. Pet. App. 37a-61a.

i. The magistrate judge explained that, under the FSLMRS, 5 U.S.C. 7121, the negotiated grievance procedures are the "exclusive administrative procedures for resolving grievances," including claims that an employer breached the CBA. Pet. App. 47a (emphasis omitted) (quoting 5 U.S.C. 7121(a)(1)); see *id.* at 46a-50a. The magistrate judge therefore concluded that the district court lacked jurisdiction over petitioner's breach-of-contract claim against the NLRB. *Id.* at 49a-50a.

The magistrate judge further concluded that the district court lacked jurisdiction over petitioner's claim against the Union for breach of the duty of fair representation. Pet. App. 55a-60a. The magistrate judge explained that the FLRA has exclusive jurisdiction over duty-of-fair-representation claims, and that such claims cannot be enforced through a private cause of action against a union in federal court. *Id.* at 55-56 (citing *Karahalios* v. *National Fed'n of Fed. Emps., Local 1263*, 489 U.S. 527 (1989)).

The magistrate judge acknowledged that in *Vaca* v. *Sipes*, 386 U.S. 171 (1967), the Court permitted an employee to bring a duty-of-fair-representation claim in federal court. Pet. App. 57a. But the magistrate judge explained that such claims have only been allowed as part of a so-called "hybrid action," along with a breach-of-contract claim brought against a private employer under Section 301 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. 185. Pet. App. 57a. The LMRA covers collective bargaining in the private sector, and Section 301 specifi-

cally provides that "[s]uits for violation of contracts between an employer and a labor organization * * * may be brought in any district court of the United States having jurisdiction [over] the parties." 29 U.S.C. 185(a). The magistrate judge explained that the FSLMRS has no provision similar to Section 301 of the LMRA that would permit breach-of-contract suits against public employers in federal district court, and duty-of-fair-representation claims therefore could not be brought in federal district court as part of a "hybrid action." Pet. App. 57a (citing *Karahalios*, 489 U.S. at 536).

ii. The district court adopted the magistrate judge's report and recommendation in relevant part. Pet. App. 35a-36a.

b. i. The magistrate judge later recommended that summary judgment be granted to the NLRB on petitioner's First Amendment claim. Pet. App. 5a-34a. The magistrate judge explained that most of petitioner's grievances stemmed from an ongoing personal and professional dispute between petitioner and Pye that did not involve matters of public concern. *Id.* at 17a-20a.

The magistrate judge stated that petitioner's fourth grievance—a suspension that was based on petitioner's decision to email an attorney involved in litigation against the NLRB and suggest that review of hearing officer decisions by a two-member Board was a violation of due process—"require[d] a closer inquiry." Pet. App. 20a. The magistrate judge concluded, however, that petitioner's potential speech about his suspension for that conduct did not address a matter of public concern. *Id.* at 21a-22a.

The magistrate judge further concluded that, even if petitioner had been speaking as a private citizen on a matter of public concern, the NLRB's interests in promoting the efficiency of the public services it performs by restricting petitioner's speech outweighed petitioner's free-speech interests, regardless of whether the district court applied the balancing test set forth in *Pickering* v. *Board of Education of Township High School District 205*, 391 U.S. 563 (1968), or the balancing test for prior restraints set forth in *United States* v. *National Treasury Employees Union*, 513 U.S. 454 (1995). Pet. App. 27a-33a.

ii. The district court adopted the magistrate judge's report and recommendation and granted summary judgment to the NLRB on Count 2. Pet. App. 4a.

5. The court of appeals affirmed in part, and vacated and remanded in part. Pet. App. 1a-3a.

a. The court of appeals affirmed the district court's dismissal of petitioner's breach-of-contract claim against the NLRB and his duty-of-fair-representation claim against the Union. Pet. App. 3a. The court explained that the claims were "precluded by controlling precedent." *Ibid.* The court cited, *inter alia*, *Karahalios*, which held that the FSLMRS does not provide a private right of action to enforce a union's duty of fair representation. *Ibid.* The court declined petitioner's request to distinguish *Karahalios* or treat it as overruled by *Whitman* v. *Department of Transportation*, 547 U.S. 512 (2006) (per curiam). Pet. App. 3a.

b. The court of appeals vacated the district court's grant of summary judgment to the NLRB on petitioner's First Amendment claim and remanded to the

district court with instructions to dismiss the count as moot because petitioner had retired from federal employment while his appeal was pending. Pet. App. 2a.

ARGUMENT

Petitioner contends (Pet. 5-27) that the FSLMRS provides an implied private right of action for his breach-of-contract claim against the NLRB, when coupled with his claim that the Union breached its duty of fair representation when it settled his grievances instead of taking them to arbitration.[2] Petitioner further contends (Pet. 27-34) that the court of appeals erred in concluding that his First Amendment claim was moot because, according to petitioner, he has standing to bring the claim under the overbreadth doctrine. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. a. The CSRA "comprehensively overhauled the civil service system," *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985), "prescrib[ing] in great detail the protections and remedies" available to federal employees, "including the availability of administrative and judicial review," *United States* v. *Fausto*, 484 U.S. 439, 443 (1988). On a number of occasions, this Court has

---

[2] Petitioner's duty-of-fair-representation claim (Count 3) was brought against the Union, not the NLRB, and the Union has waived its right to respond to the petition for a writ of certiorari. Because petitioner contends that he may bring his breach-of-contract claim in federal court (Count 1) in part because the Union breached its duty of fair representation in pursuing those claims on his behalf through the negotiated grievance procedures, this brief addresses Count 3 as it relates to petitioner's breach-of-contract claim against the NLRB.

considered whether federal employees may seek judicial review of work-related disputes where such review is not specifically provided by the CSRA. In each case, the Court has held that federal employees are limited to the remedies explicitly provided by the statute. Thus, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court declined to recognize a cause of action for damages for alleged constitutional violations in the federal employment context under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). See *Bush*, 462 U.S. at 374-378. The Court concluded that "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States," it would be "inappropriate" to supplement the "comprehensive procedural and substantive provisions" regulating federal employment with a new judicial remedy. *Id.* at 368.[3]

Similarly, in *Fausto*, the Court held that the CSRA's "integrated scheme of administrative and judicial review" precluded federal employees from bringing a suit against the government for back pay, where the CSRA did not explicitly provide for that remedy. 484 U.S. at 445; see *id.* at 455. Considering both the language and the structure of the CSRA, the

---

[3] Although the agency actions at issue in *Bush* took place before the CSRA was enacted, see 462 U.S. at 369-370, the decision discussed the CSRA, see, *e.g.*, *id.* at 385 n.25, and its reasoning applies equally to the CSRA. See, *e.g.*, *Hardison* v. *Cohen*, 375 F.3d 1262, 1264-1265 (11th Cir. 2004); *Spagnola* v. *Mathis*, 859 F.2d 223, 226-228 (D.C. Cir. 1988) (en banc) (per curiam); see also *Karahalios* v. *National Fed'n of Fed. Emps., Local 1263*, 489 U.S. 527, 536 (1989).

Court held that "the absence of provision for these employees to obtain judicial review is not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment that they should not have statutory entitlement to review." *Id.* at 448-449.

In *Elgin* v. *Department of Treasury*, 132 S. Ct. 2126 (2012), the Court held that federal employees who were discharged for failure to comply with the Military Selective Service Act, 50 U.S.C. App. 451 *et seq.*, could not file a suit in federal district court to raise a constitutional challenge to 5 U.S.C. 3328, which bars anyone who has knowingly and willingly failed to register for the selective service from employment by an executive agency. 132 S. Ct. at 2131-2132. The Court explained that, "[g]iven the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions, it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court." *Id.* at 2134.

And in *Karahalios* v. *National Federation of Federal Employees, Local 1263*, 489 U.S. 527 (1989), the Court held that the FSLMRS does not confer on federal employees a private right of action against a union to enforce the duty of fair representation. *Id.* at 529. The Court explained that breach of the duty of fair representation is an unfair labor practice under the FLSMRS, see *id.* at 531-532 (citing 5 U.S.C. 7114(a)(1), 7116(b)(8)), and Congress vested "exclusive enforcement authority" over unfair labor practices in the FLRA, *id.* at 529; see *id.* at 532 (citing 5 U.S.C. 7118).

The Court explained that "[t]here is no express suggestion in [the FSLMRS] that Congress intended to furnish a parallel remedy in a federal district court to enforce the duty of fair representation." *Karahalios*, 489 U.S. at 532. The Court noted that the FSLMRS provides recourse to the courts only in specific circumstances: review of some final orders of the FLRA, enforcement of FLRA orders, and pursuit of temporary injunctive relief to assist the FLRA in the discharge of its duties. *Ibid.* (citing 5 U.S.C. 7123). The Court concluded that, in light of the language and structure of the FSLMRS, Congress did not "inten[d] to provide a private cause of action to enforce federal employees unions' duty of fair representation." *Id.* at 533.

b. Under this Court's precedents, the FSLMRS precludes petitioner from pursuing a breach-of-contract claim against the NLRB in federal district court. With limited exceptions not relevant here, see 5 U.S.C. 7121(a)(2), (d), (e), and (g); p. 4, *supra*, the grievance procedures that are required to be negotiated and included in the CBA are the "exclusive administrative procedures" for resolving claims against an employer for breach of the CBA. 5 U.S.C. 7121(a)(1). Those procedures were followed by the parties, and the grievances were settled under those procedures. Petitioner had no right under the FSLMRS to insist that the Union take his claims to arbitration. See 5 U.S.C. 7121(b)(1)(C)(iii).

If a union fails to fairly represent an employee in the grievance procedures, the employee may file an unfair labor practice charge with the FLRA. See 5 U.S.C. 7114(a)(1), 7116(b)(8), 7118. And the employee can obtain judicial review of a final decision of the

FLRA on his claim. 5 U.S.C. 7123. Petitioner did not even attempt to file an unfair labor practice charge with the FLRA. When he was dissatisfied with the settlement reached by his union using the negotiated grievance procedures, he instead sought to enforce the CBA directly against the NLRB in federal district court.

When Congress wanted to allow claims to be heard in federal court under the CSRA, it specifically provided for federal court review. There is no provision in the FSLMRS—or anywhere else in the CSRA—that permits an employee to file a breach-of-contract claim against a public employer. "To hold that the district courts must entertain such cases * * * would seriously undermine * * * the congressional scheme, namely to leave the enforcement of union and agency duties under the [FSLMRS] to the * * * FLRA and to confine the courts to the role given them under the Act." *Karahalios*, 489 U.S. at 536-537.

c. Petitioner contends (Pet. 5-6, 18-25) that the Court's decision in *Karahalios* is wrong because it is inconsistent with *Vaca* v. *Sipes*, 386 U.S. 171 (1967). In *Vaca*, the Court held that an employee could bring a claim against a union in federal court to enforce an implied duty of fair representation, which was not a statutory unfair labor practice subject to review by the NLRB, as part of a "hybrid action" with the employee's breach-of-contract claim against his employer brought under Section 301 of the LMRA. *Id.* at 183-188.

In *Karahalios*, the Court distinguished *Vaca* in two ways. First, the Court explained that, in contrast to the implied duty of fair representation in *Vaca*, the FSLMRS creates a statutory duty of fair representa-

tion and gives the FLRA the authority to enforce that duty. 489 U.S. at 535; see 5 U.S.C. 7114(a)(1), 7116(b)(8), 7118. Petitioner contends (Pet. 13-18) that the duty of fair representation he seeks to enforce is also an implied duty because it is broader than the statutory duty of a labor organization to "represent[] the interests of all employees in the unit it represents without discrimination." 5 U.S.C. 7114(a)(1). Petitioner never gave the FLRA an opportunity, however, to decide whether failure to consult with an employee before reaching a settlement is a breach of the statutory duty of fair representation. See 5 U.S.C. 7116(b)(8).

More importantly, the fact that the FSLMRS may give petitioner no remedy if he is dissatisfied with the grievance procedures provided for relatively minor employment grievances (like his) does not mean that a suit in federal district court is permitted. To the contrary, the CSRA's "integrated scheme of administrative and judicial review," which includes the negotiated grievance procedures that were the exclusive administrative remedy for petitioner's grievances, prevents petitioner from filing a suit in federal district court. *Fausto*, 484 U.S. at 445; see *id.* at 448-449; *Elgin*, 132 S. Ct. at 2133 ("[T]he CSRA's elaborate framework demonstrates Congress' intent to entirely foreclose judicial review to employees to whom the CSRA denies statutory review.") (emphasis, citation, and internal quotation marks omitted).

Second, the Court in *Karahalios* distinguished *Vaca* on the ground that the decision rested in part on the fact that Section 301 of the LMRA specifically provides that an employee may sue a private-sector employer for violation of a CBA in federal district

court. 489 U.S. at 536; see 29 U.S.C. 185(a). The Court noted that "the question of whether a union has breached its duty of fair representation will in many cases be a critical issue" in a suit brought under Section 301 alleging breach of a contract against an employer. *Vaca*, 386 U.S. at 183. In *Karahalios*, the Court explained that the FSLMRS, in contrast, has "no provision * * * for suing an agency in federal court" that could justify permitting another related claim as part of a hybrid action. 489 U.S. at 536.

d. Petitioner further contends (Pet. 6-9) that *Karahalios* has been overruled by *Whitman* v. *Department of Transportation*, 547 U.S. 512 (2006) (per curiam). He contends (Pet. 6) that *Whitman* holds that 28 U.S.C. 1331, which confers federal question jurisdiction on the federal courts, "creates a presumption that federal statutes create a private right of action," and overrules *Cort* v. *Ash*, 422 U.S. 66 (1975), and *Karahalios*, which require courts to focus on congressional intent to determine whether a statute provides an implied private right of action. Petitioner is wrong.

In *Whitman*, the court of appeals had held that the employee's claims were precluded because Section 7121(a)(1) "does not expressly confer federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal employees' [CBAs]." 547 U.S. at 513 (citation omitted). The Court stated that the court of appeals "was correct to say that [Section] 7121(a)(1) does not confer jurisdiction," *ibid.*, but the Court further explained that Section 1331 confers jurisdiction on the federal courts over all actions arising under federal law, *id.* at 513-514. The Court explained that the court of ap-

peals should not have analyzed whether Section 7121 conferred jurisdiction, but whether Section 7121 (or the CSRA as a whole) removed the jurisdiction given to the federal courts, "or otherwise precludes employees from pursuing remedies beyond those set out in the CSRA." *Id.* at 514. Because the court of appeals had not ascertained how the employee's claims fit within the CSRA's statutory scheme, the Court remanded for the court of appeals to address the issue of preclusion. *Id.* at 514-515.

Whitman established that although the CSRA is not a jurisdiction-conferring statute, it can "preclude employees from pursuing remedies beyond those set out in the CSRA." 547 U.S. at 514 (citing *Fausto*, 484 U.S. at 443-444). In *Elgin*, the Court explained that "the appropriate inquiry" to determine whether the CSRA precludes an action in federal court is "whether it is 'fairly discernible' from the CSRA that Congress intended covered employees appealing covered agency actions to proceed exclusively through the statutory review scheme." 132 S. Ct. at 2132-2133. The Court concluded that, "[g]iven the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions, it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court." *Id.* at 2134.

Petitioner does not explain how *Karahalios* would have come out differently after *Whitman* and *Elgin*. In *Karahalios*, the Court concluded that the FSLMRS did not create an implied right of action in federal district court for duty-of-fair-representation claims because "hold[ing] that the district courts must entertain such cases in the first instance would seriously

undermine what we deem to be the congressional scheme," which "leave[s] the enforcement of union and agency duties under the Act to the * * * FLRA" and "confine[s] the courts to the role given them under the Act." 489 U.S. at 536-537. That is no different than the Court's holding in *Elgin*, that it was fair to discern that Congress intended to deny employees who had suffered an adverse employment action an avenue of review in federal court, where it had already provided a detailed method for covered employees to obtain review of adverse employment actions. 132 S. Ct. at 2134-2135.

Although most of the cases on this subject frame the issue in terms of whether the CSRA precludes employees from seeking a judicial remedy, see *Elgin*, 132 S. Ct. at 2132-2133; *Whitman*, 547 U.S. at 514; *Fausto*, 484 U.S. at 440-441 (defining issue as whether the CSRA precludes a suit in the Court of Claims), the issue was framed before the Court in *Karahalios* as whether the employee had an implied right of action against his union under the FSLMRS for breach of the duty of fair representation, see 489 U.S. at 529. Regardless of how the issue is framed, the result is the same: the remedial scheme of the FSLMRS (and the CSRA in general) does not permit petitioner to bring either a breach-of-contract claim against the NLRB in federal district court, or a related claim against the Union as part of a hybrid action.

e. Petitioner further contends (Pet. 25-26) that because Section 7121(a)(1) provides that the negotiated grievance procedures are the "exclusive *administrative* procedures" for resolving an employee's grievances against an agency employer, 5 U.S.C. 7121(a)(1) (emphasis added), Congress did not "intend[] to re-

move federal court jurisdiction over claims of federal employees which also constitute grievances subject to the [CBA]." Petitioner's argument is misconceived.

Before 1994, if a grievance was covered by both the negotiated grievance procedures and by other procedures, an employee was required to elect which of those procedures he wished to pursue. 5 U.S.C. 7121(d) and (e)(1) (1988). If the grievance did not involve one of those specified prohibited personnel practices or adverse employment actions for which alternative remedies were preserved, and if the matter was not excluded from the grievance procedures under the CBA, Section 7121(a)(1) provided that the negotiated grievance "procedures shall be the exclusive procedures for resolving grievances which fall within its coverage." 5 U.S.C. 7121(a)(1) (1988).

In 1994, Congress added a new Subsection (g) to Section 7121, which expanded employees' available options by giving employees covered by a CBA a choice of alternative remedies for prohibited personnel practices not previously covered by Subsection (d). Act of Oct. 29, 1994 (1994 Act), Pub. L. No. 103-424, § 9(b), 108 Stat. 4365. Under the 1994 amendment, employees may challenge a personnel action under the negotiated grievance procedure, or they may elect to pursue available administrative remedies through an appeal to the MSPB, or by seeking corrective action from the OSC in the case of a prohibited personnel practice. 5 U.S.C. 7121(g). Thus, under current law, where a grievance is covered both by a CBA's negotiated grievance procedures and by other procedures under Section 7121(d), (e) or (g), an employee has a choice of administrative remedies. 5 U.S.C. 7121(d), (e)(1), (g)(2), and (3).

To accommodate the addition of Section 7121(g), Congress also made what it characterized as "Technical and Conforming Amendments" to Section 7121(a)(1). 1994 Act § 9(c), 108 Stat. 4366 (capitalization altered). The amendment made two revisions to the second sentence of Section 7121(a)(1): it added Subsection (g) to its list of statutory exceptions to the provision making grievance procedures exclusive, and it added the word "administrative" between "exclusive" and "procedures." *Ibid.*; 5 U.S.C. 7121(a)(1).

Congress's 1994 technical amendment to Section 7121(a)(1) did not *sub silentio* reverse long-standing law and create a new right to judicial review of federal employee grievances. This Court held twice prior to 1994 that "the CSRA's 'integrated scheme of administrative and judicial review' foreclose[s] an implied right to [district court] review." *Karahalios*, 489 U.S. at 536 (quoting *Fausto*, 484 U.S. at 445). There is no reason to believe that Congress would have thought in 1994 that the mere insertion of the word "administrative" in 5 U.S.C. 7121(a)(1) would create a new independent right to judicial review of matters subject to grievance procedures under a CBA.

2. Petitioner contends (Pet. 27-34) that the court of appeals erred when it concluded that petitioner's First Amendment claim against the NLRB became moot when he retired from federal employment. According to petitioner (Pet. 28-30), the Court has jurisdiction over his First Amendment claim because he has standing to bring it under the Court's "overbreadth" exception to traditional standing requirements in First Amendment cases. Petitioner's argument does not withstand scrutiny.

a. Article III of the Constitution limits the jurisdiction of the federal courts to cases or controversies. U.S. Const. Art. III. "To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 67 (1997) (citations and internal quotation marks omitted). Petitioner voluntarily retired from federal employment in 2014. The speech restriction placed upon him by the agency, which prohibited him from speaking about his suspension to "parties, lawyers, other representatives, and witnesses to [his] cases or other members of the public who contact the NLRB about NLRB matters," C.A. Supp. App. 45, therefore no longer applies to him. Petitioner can obtain no benefit from the injunctive relief that he sought in his complaint, and his First Amendment claim is moot.

b. Petitioner contends that the Court should continue to exercise jurisdiction over his First Amendment claim because he has standing to bring it under the Court's exception to traditional standing requirements for statutes containing overly broad speech restrictions. See Pet. 27-29 (citing *Broadrick* v. *Oklahoma*, 413 U.S. 601 (1973)). Under that doctrine, even when the conduct of the person challenging the speech restriction is not constitutionally protected, *i.e.*, his conduct could be prohibited under a valid limiting interpretation of the statute, the challenger is still entitled to attack an "overly broad" statute because of its chilling effect on others. *Broadrick*, 413 U.S. at 612; see *id.* at 611-613.

Petitioner's invocation of the overbreadth exception does not change the fact that his claim is moot. A

person bringing an overbreadth challenge to a government speech restriction must still have some live controversy with the government, *i.e.*, the person wants to engage in speech that is prohibited. Petitioner, in contrast, is no longer subject to the speech restriction that had been placed upon him by the NLRB before his retirement. He does not have any live controversy with the NLRB, regardless of whether any restriction imposed upon him was overbroad.

c. In any event, review of petitioner's mootness question is not warranted because petitioner's First Amendment claim lacks merit. When a public employee sues a government employer under the First Amendment, the employee must show that he or she spoke as a citizen on a matter of public concern. *Connick* v. *Myers*, 461 U.S. 138, 147 (1983). If an employee does not speak as a citizen, or does not address a matter of public concern, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Ibid.* Even if an employee does speak as a citizen on a matter of public concern, the employee's speech is not automatically privileged. Courts balance the First Amendment interest of the employee against "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering* v. *Board of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968).

As the district court correctly concluded, petitioner's grievances stemmed from a personal and professional dispute with his supervisor, and his speech about the discipline he received would not be a matter of public concern. Pet. App. 17a-20a. And even if the

restrictions outlined by Pye prevented petitioner from speaking as a citizen on matters of public concern, the NLRB's interest in promoting the efficiency of the public services it performs by prohibiting petitioner, who acted as a hearing officer in this context, from telling persons involved in his cases that he had been disciplined by the agency was a reasonable restriction necessary to "promot[e] the efficiency of the public services [the NLRB] performs through its employees." *Pickering*, 391 U.S. at 568. Review of petitioner's First Amendment claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
RICHARD A. BOCK
Deputy Associate General Counsel
BARRY F. SMITH
Senior Special Counsel
National Labor Relations Board

JULY 2015