No. 03-1418

In the Supreme Court of the United States

ROBERT HARRIS, ET AL., PETITIONERS

v.

FEDERAL AVIATION ADMINISTRATION, ET AL.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners, who were dismissed from their positions as Federal Aviation Administration (FAA) air traffic controllers in 1981, and who were re-hired by the FAA between 1995 and 1998, are entitled to sue in district court under the Administrative Procedure Act to challenge the FAA's decision to re-employ them at grade level GS-9 rather than at a higher grade level.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulation:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 353 F.3d 1006. The opinion of the district court (Pet. App. 14a-23a) is reported at 215 F. Supp. 2d 209.

JURISDICTION

The judgment of the court of appeals was entered on January 13, 2004. The petition for a writ of certiorari was filed on April 8, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1981, President Reagan fired more than 11,000 air traffic controllers because of their participation in an illegal strike organized by the Professional

Air Traffic Controllers Organization (PATCO). As a result of that unlawful job action, the controllers were barred from future employment with respondent Federal Aviation Administration (FAA). Pursuant to a subsequent directive issued by the Office of Personnel Management (OPM), the discharged employees were also barred from air traffic controller and related positions at specified Department of Defense facilities. In August 1993, President Clinton issued a directive lifting the lifetime ban on FAA employment. Later that month, the FAA implemented that directive by issuing Recruitment Notice 93-01, which invited controllers who were fired in 1981 as a result of the illegal job action to apply for air traffic controller positions. Pet. App. 1a-3a & n.1, 14a-16a & n.2; C.A. App. 25-27, 53-55.

Recruitment Notice 93-01 established an opening date of September 1, 1993, and a closing date of October 15, 1993, for applications pursuant to the Notice. C.A. App. 53. The Notice explained that "[t]he FAA is establishing an inventory of applicants who have reinstatement and transfer eligibility" and that "[e]ligible candidates will be ranked as vacancies occur on the basis of job-related criteria." *Ibid.* The Notice stated that the salary of any applicants rehired "will be within" the GS-9 range (at that time $27,789-$36,123 per year), and that promotion above that level "will be based upon successful completion of training and/or certification requirements for the next higher grade and applicable time-in-grade requirements." *Ibid.* The GS-9 level was chosen because 12 years had elapsed since the controllers had been fired, and any applicants who were re-hired would need "training to learn new air traffic control systems." Pet. App. 4a. The Recruitment Notice cautioned that "[b]ased on projected vacancies, the FAA expects to fill only a small

number of [air traffic controller] positions from a variety of sources over the next few years. As a result, employment opportunities are limited; there is no guarantee that candidates will be referred or selected." C.A. App. 53.

2. Petitioners were among the air traffic controllers fired in 1981. Pet. App. 2a. They applied for re-employment in 1993 pursuant to Recruitment Notice 93-01 and were re-hired as FAA air traffic controllers at the GS-9 level beginning in January 1995. *Id.* at 4a & n.2, 16a. On March 8, 2001, petitioners filed suit in federal district court under the Administrative Procedure Act (APA), 5 U.S.C. 704, claiming that the FAA's decision to re-hire PATCO controllers at the GS-9 level was arbitrary and capricious, and that such individuals should have been re-hired at their pre-termination grade levels. Pet. App. 4a, 16a. The complaint, which was subsequently amended to add additional parties, sought declaratory relief and an order directing the FAA to adjust petitioners' pay grades. See First Amended Comp. 22-23 (filed Oct. 18, 2001).

The government moved to dismiss the complaint on several alternative grounds. See Pet. App. 5a (listing bases for dismissal asserted by the government in the court of appeals). *Inter alia*, the government argued that petitioners' claims were barred by the six-year statute of limitations in 28 U.S.C. 2401(a), and that petitioners had failed to utilize the exclusive remedies available under the comprehensive scheme governing federal personnel actions set forth in the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111. The district court granted the government's motion to dismiss, ruling that the claims were time-barred because petitioners had filed suit more than six years after their cause of action accrued. The court did

not address the other grounds for dismissal asserted by the government. Pet. App. 14a-23a.

In holding that petitioners' claims were untimely filed, the district court found that Recruitment Notice 93-01 "constitutes the final agency action that triggered the statute of limitations period." Pet. App. 20a. The court rejected petitioners' contention "that the act of rehiring the [petitioners] represents the accrual of the final agency action." *Ibid.* The court stated that "[w]hen or whether the [petitioners] were rehired is irrelevant to this agency review action, because the [petitioners] are challenging the FAA's 1993 decision to rehire them at GS-9 and not the FAA's specific decision to rehire each individual." *Id.* at 21a.

The district court also rejected petitioners' contention "that their claim became ripe for judicial review only once they actually were rehired by the FAA." Pet. App. 21a. The court stated that "the ruling framed in Recruitment Notice [93-01], that the FAA would rehire PATCO controllers at the GS-9 level, presents terms specific enough that a court could have made a reasoned judgment about the ruling had the [petitioners] challenged the policy before the FAA actually rehired any controllers." *Id.* at 22a. The court held on that ground that petitioners' claims "became ripe when the FAA published the 1993 Recruitment Notice." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-13a.

The court of appeals held that Recruitment Notice 93-01 was a reviewable "final agency action" within the meaning of 5 U.S.C. 704. Pet. App. 6a-9a. The court explained that, although Recruitment Notice 93-01 "qualified the date, if ever, on which a former [air traffic] controller might be hired," the Notice "stated categorically that, when such hiring occurred pursuant to the Notice, it would be at the GS-9 grade level and at

a corresponding salary." *Id.* at 7a-8a. In the court's view, "[t]he hiring of the [petitioners] from 1995 to 1998 at the GS-9 level simply implemented the FAA's decision which was made in 1993 and spelled out in the Notice." *Id.* at 9a.

The court of appeals also held that an APA challenge to the pay-grade determination set forth in Recruitment Notice 93-01 would have been ripe for immediate judicial review when the Notice was issued in 1993. Pet. App. 10a-12a. The court observed that "[t]he ripeness inquiry requires a court to look both to 'the fitness of the issues for judicial review and the hardship to the parties of withholding court consideration.'" *Id.* at 10a (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 149 (1967)). The court found that an immediate challenge to the Notice would have been fit for judicial review because petitioners' claim of arbitrary and capricious agency conduct raised a "purely legal question." *Id.* at 11a. The court rejected petitioners' contention (see *id.* at 10a-11a) that, because they suffered no "direct hardship" from the agency's pay-grade determination until they were re-hired by the FAA and their own salaries were calculated, a challenge to the Notice would not have been ripe at the time of its issuance in 1993. The court stated that "[t]he 'prospect' of hardship is sufficient to make a claim fit for judicial review." *Id.* at 11a. The court of appeals concluded that "because the Notice sufficiently affected their legal rights as well as the obligations of the FAA and because there was no reason to postpone judicial review, the [petitioners'] claim was ripe in 1993." *Id.* at 12a.

ARGUMENT

Petitioners contend (Pet. 6-25) that the court of appeals erred in holding that an immediate challenge to

the pay-grade determination set forth in Recruitment Notice 93-01 would have been ripe for judicial review. Further review of that ripeness question is not warranted because the Court's resolution of the issue would not affect the outcome of petitioners' suit. Whether the suit is regarded as a challenge to FAA decisions concerning the salaries to be paid to individual agency employees, or as a challenge to the general agency policy determination reflected in the 1993 Notice, petitioners' complaint was properly dismissed.

1. If petitioners' suit is treated as a challenge to individual FAA classification and salary determinations, their claims are subject to the exclusive remedial scheme established by the CSRA. Enacted in 1978, the CSRA "comprehensively overhauled the civil service system." *Lindahl* v. *OPM*, 470 U.S. 768, 773 (1985). "A leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action" that had existed under prior law. *United States* v. *Fausto*, 484 U.S. 439, 444 (1988). The Act "replaced the patchwork system with an integrated scheme of administrative and judicial review, designed to balance the legitimate interests of the various categories of federal employees with the needs of sound and efficient administration." *Id.* at 445. If the CSRA itself does not authorize judicial review of a particular personnel decision, the appropriate conclusion is that review of the decision is precluded. See *id.* at 448-449.

A contention that a federal agency has acted arbitrarily and capriciously in determining the GS level for a particular position or employee is properly treated as a "classification" dispute. See Classification Act of 1949, ch. 782, 63 Stat. 954, as amended, 5 U.S.C. 5101 *et seq.* Neither the CSRA nor any other federal statute

specifically authorizes judicial review of an agency's classification decisions.[1]

However, to the extent that a classification determination is associated with or is alleged to constitute a "prohibited personnel practice," 5 U.S.C. 2302(a)(1), the CSRA allows the affected employee to file a complaint with the Office of Special Counsel (OSC). 5 U.S.C. 1214(a)(1)(A).[2] The OSC may pursue the matter before the Merit Systems Protection Board (MSPB or Board), 5 U.S.C. 1214(b)(2)(C), and, if the employee is adversely affected by the MSPB decision, he may seek judicial review in the United States Court of Appeals for the Federal Circuit. 5 U.S.C. 1214(c), 7703(b); 28 U.S.C. 1295(a)(9). With the exception of certain cases involving alleged agency reprisals for "whistleblowing"

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[1] As a general matter, an employee affected by an agency's classification decision "may request at any time" that OPM review that decision. 5 U.S.C. 5112(b); see 5 C.F.R. 511.603(a)(1). The Classification Act's definition of "agency" encompasses the FAA. See 5 U.S.C. 5102. Under 49 U.S.C. 40122(g)(2), however, the FAA's personnel management system is subject only to specified portions of Title 5, which do not include the provisions of the Classification Act. See p. 8, *infra*. In any event, the petitioners in this case did not invoke Section 5112(b) or seek OPM review of the FAA's classification decisions.

[2] The courts of appeals have frequently treated classification disputes as raising allegations of prohibited personnel practices. See, *e.g.*, *Hinkel* v. *England*, 349 F.3d 162, 165 (3d Cir. 2003) ("Courts that have addressed the interplay between the Classification Act and the CSRA have concluded that classifications running afoul of the Classification Act qualify as 'prohibited personnel actions' and therefore are subject to" OSC review under the CSRA.); *Houlihan* v. *OPM*, 909 F.2d 383, 384 (9th Cir. 1990) ("A misclassification of a federal employment position is a 'prohibited personnel practice' as that term is defined in the CSRA."); *Towers* v. *Horner*, 791 F.2d 1244, 1247 (5th Cir. 1986); *Barnhart* v. *Devine*, 771 F.2d 1515, 1518 n.3, 1523 & n.12 (D.C. Cir. 1985).

activities, see 5 U.S.C. 1214(a)(3), 1221, 2302(b)(8), the employee has no further administrative or judicial recourse if the OSC declines to pursue the complaint before the MSPB. See 5 U.S.C. 1214(a)(2)(A).

Both now and at the time when petitioners' complaint was filed, the FAA's personnel practices have been subject to a hybrid legal regime that combines features of the CSRA with a Personnel Management System devised by the FAA itself pursuant to statutory authorization. See 49 U.S.C. 40122. Under that regime, the FAA is exempt from much of Title 5 but is subject to the CSRA provisions that govern the filing of complaints with the OSC and subsequent review by the MSPB. See 49 U.S.C. 40122(g)(2)(H). The FAA Personnel Management System (see, *e.g.*, <http://www.faa.gov/ahr/policy/PMS/personel.htm>) contains a list of "prohibited personnel practices" that largely tracks the list set forth in 5 U.S.C. 2302(b). Thus, as with workers in other federal agencies, an FAA employee who is adversely affected by a personnel practice prohibited by the FAA Personnel Management System may file a claim with the OSC, which may in turn seek review in the MSPB. If the OSC declines to file a claim with the Board, judicial review is not available; if the OSC does file such a claim, the employee may seek review of the MSPB's decision in the Federal Circuit.[3]

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[3] Through legislation enacted in 1995, 1996, and 2000, Congress revised federal personnel law as it applies to FAA employees. See Department of Transportation and Related Agencies Appropriations Act of 1996, Pub. L. No. 104-50, § 347, 109 Stat. 436; Federal Aviation Reauthorization Act of 1996, Pub. L. No. 104-264, § 253, 110 Stat. 3237; Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, Tit. III, §§ 307(a) and (d), 308, 114 Stat. 124, 125, 126. As a result of those statutory revisions, the CSRA provisions governing OSC and MSPB review

In the instant case, petitioners did not file a complaint with the OSC. Even if petitioners had exhausted their OSC remedies, moreover, the judicial review that is potentially available to address a "prohibited personnel practice" is by way of a petition for review in the Federal Circuit (if the OSC pursues a claim before the MSPB and the employee is adversely affected by the Board's decision), not through an APA action filed in district court. Thus, if this suit is properly regarded as a challenge to FAA classification decisions concerning individual re-employed air traffic controllers, petitioners' APA claims are precluded by the exclusive remedial scheme established by the CSRA.

That is so, moreover, even if the gravamen of petitioners' challenge is that the individual classification decisions are invalid because they were made on the basis of an arbitrary or unreasonable general rule. Where case-specific application of an agency rule is a prerequisite to the assertion of a ripe, justiciable claim, any judicial review occurs under the procedural regime that governs challenges to the relevant category of individualized agency determinations. See, *e.g.*, *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 165 & n.3 (1967); cf. *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 245 (1980). Thus, if petitioners' challenge to the general pay-grade determination reflected in Recruitment Notice 93-01

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were inapplicable to the FAA for a period of time between 1996 and 2000. See *Stella* v. *Mineta*, 284 F.3d 135, 142-143 (D.C. Cir. 2002). The *prior* unavailability of OSC and MSPB review, however, cannot reasonably be thought to provide a basis for petitioners' APA action filed in March 2001. That is particularly clear in light of the fact that the statutorily defined objective of the FAA's Personnel Management System is to "provide for greater flexibility in the hiring, training, compensation, and location of personnel." 49 U.S.C. 40122(g)(1).

became ripe only through its application to individual FAA re-hirees, petitioners cannot avoid the CSRA's restrictions on challenges to agency classification decisions.

2. The courts below did not rely on the CSRA as a basis for dismissal of petitioners' suit. Rather, they held that the FAA's decision to re-hire former PATCO controllers at a GS-9 level was definitively announced in Recruitment Notice 93-01; that an APA challenge to that Notice would have been ripe for judicial review when the Notice was issued; and that petitioners' claims therefore accrued at that time. See Pet. App. 6a-12a, 18a-23a Because the instant suit was commenced in March 2001, more than six years after the Recruitment Notice was issued in August 1993, the courts below concluded that the suit was barred by the applicable statute of limitations. See *id.* at 5a-12a, 23a; 28 U.S.C. 2401(a) ("[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.").

In contesting the court of appeals' holding that this suit was time-barred, petitioners argue that their legal challenge did not become ripe for judicial review until the general classification decision reflected in Recruitment Notice 93-01 was applied to particular re-hirees, and that their claims consequently did not accrue until that time. Cf. *Bay Area Laundry & Dry Cleaning Pension Trust Fund* v. *Ferbar Corp.*, 522 U.S. 192, 195 (1997) ("A limitations period ordinarily does not begin to run until the plaintiff has a complete and present cause of action.") (internal quotation marks omitted). At least by that point, however, any challenge could have been brought only pursuant to the comprehensive and exclusive review provisions of the CSRA, not in an

APA suit in district court. Compare *Reno* v. *Catholic Social Services, Inc.*, 509 U.S. 43, 60 (1993).

Thus, if petitioners' challenge to Recruitment Notice 93-01 could be brought in district court under the APA at all, it was required to be brought independently and in advance of any individual hiring decision. Petitioners argue that any such challenge would have been unripe. That contention does not warrant this Court's review, however, because it arises in the context of the special jurisdictional regime of the CSRA and because the Court's resolution of the ripeness question would not affect the ultimate disposition of the case. If petitioners are correct that their claims became ripe only when individual PATCO controllers were re-hired by the FAA and their starting salaries were established, then, as explained above, petitioners' suit is foreclosed because they have no legitimate ground for bypassing the CSRA's comprehensive review procedures and instead seeking relief in district court under the APA. Nor could petitioners avoid dismissal of their claims by characterizing this suit as a facial challenge to Recruitment Notice 93-01. Assuming (as the court of appeals held) that a facial challenge to the Notice would have been ripe for judicial review, and that it would not have been barred by the CSRA, any such facial challenge was required to be filed within six years after the Notice was issued. Petitioners' APA suit was therefore subject to dismissal, whether that suit is treated as a challenge to the FAA's salary determinations with respect to individual FAA employees, or as a facial challenge to the Notice itself.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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