No. 13-906

In the Supreme Court of the United States

J. JEREMIAH MAHONEY, ADMINISTRATIVE LAW JUDGE, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, PETITIONER

v.

SHAUN DONOVAN, SECRETARY OF HOUSING AND URBAN DEVELOPMENT, 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 the manner in which the Department of Housing and Urban Development (HUD) assigns cases to Administrative Law Judges (ALJs), HUD's provision of docket numbers and legal research resources to ALJs, a HUD supervisor's communication with the Department of Justice in advance of impending litigation, and the supervisor's alleged *ex parte* contacts with litigants appearing before ALJs, are part of an ALJ's "working conditions" within the meaning of the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 721 F.3d 633. The opinion of the district court (Pet. App. 21a-55a) is reported at 824 F. Supp. 2d 49.

JURISIDCTION

The judgment of the court of appeals was entered on June 28, 2013. A petition for rehearing was denied on August 30, 2013 (Pet. App. 14a-15a). On November 19, 2013, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including January 27, 2014, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Civil Service Reform Act of 1978 (CSRA), 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) (internal quotation marks and citation omitted). The CSRA describes the "protections and remedies applicable to such action, including the availability of administrative and judicial review." *Ibid.* 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. See 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 suspension 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. 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). See 5 U.S.C. 1212, 1214. OSC investigates the allegations, and if it concludes that there are reasonable grounds to believe a prohibited personnel practice has occurred, it reports that finding to the MSPB, the Office of Personnel Management (OPM), and the agency involved. See 5 U.S.C. 1214(a). 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), 1215(a). If the employee is dissatisfied with the MSPB decision, he may seek judicial review of a final order or decision of the MSPB in the Federal Circuit. See 5 U.S.C. 1214(c), 7703. The CSRA does not provide for judicial review of an OSC decision not to seek corrective action.

2. Petitioner is an Administrative Law Judge (ALJ) in the Department of Housing and Urban Development (HUD). Pet. App. 21a. Petitioner filed suit in federal district court against HUD, OPM, and his supervisor David Anderson (collectively, respondents). As relevant here, petitioner filed an action under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, alleging that respondents had interfered with his decisional independence. In particular, petitioner alleged that: (1) Anderson had failed to assign cases to petitioner in a rotational manner and had instead selectively assigned cases to ALJs based on political considerations; (2) Anderson had engaged in *ex parte* communications with a party pending before petitioner without petitioner's knowledge or consent; (3) HUD had a practice of sending "notices of election" in Fair Housing Act cases to the Department of Justice (DOJ) before the ALJs officially released the notice to the other party, thereby giving DOJ advance notice of impending litigation; (4) Anderson had prevented the docket clerk from providing docket numbers to petitioner and other ALJs; and (5) HUD had failed to provide legal research resources to the ALJs for more than a month during the summer of 2009. Pet. App. 2a-3a, 24a-25a.

3. The district court dismissed petitioner's claims. Pet. App. 21a-55a. The court explained that the CSRA

established the process that must be followed when an employee complains about a "prohibited personnel practice." *Id.* at 44a-45a. The court concluded, however, that petitioner was not required to follow that process, because petitioner was not complaining about "prohibited personnel practices" within the meaning of the CSRA. *Id.* at 48a. The court stated that, unlike disputes over reassignment, salary, or benefits, petitioner's claims "do not concern his employment status, compensation, job responsibilities, or * * * his working conditions." *Id.* at 48a-49a. Instead, the court explained, petitioner was complaining about the "neutrality of HUD's adjudicative process as a general matter." *Id.* at 49a.

The district court further concluded, however, that petitioner lacked standing to bring his claims. Pet. App. 49a-55a. The court explained that petitioner did not contend that the agency had influenced or sought to influence his decision-making through the actions of which he complained. Accordingly, he was not alleging that his judicial independence had been compromised, and he had suffered no cognizable injury under the APA. *Id.* at 52a. The court stated that selectively assigning cases, making *ex parte* contacts with parties, and providing DOJ with advance notice of impending litigation "might well result in unfair results for litigants," but "it is the litigants, not the judges who are injured" by those alleged actions. *Id.* at 53a.

4. The court of appeals affirmed. Pet. App. 1a-11a. The court explained that the CSRA establishes the exclusive remedial regime for federal employment and personnel complaints, and that federal employees may not circumvent the CSRA's requirements by using the APA to challenge agency employment actions. *Id.* at

5a-6a. The court concluded that the agency actions about which petitioner complained were "personnel actions" within the meaning of the CSRA because they affected petitioner's "working conditions." *Id.* at 6a-7a; see 5 U.S.C. 2302(a)(2)(A)(xii). Petitioner thus could not challenge those actions outside of the CSRA's remedial process.

The court of appeals explained that the selective assignment of cases to ALJs "affects the number or type of cases an [ALJ] will receive," which the court noted "strikes us as a working condition." Pet. App. 7a. The court further explained that 5 U.S.C. 3105, the provision of the APA requiring that ALJs "be assigned to cases in rotation so far as practicable," also governs the appointment of ALJs and provides that they "may not perform duties inconsistent with their duties and responsibilities as administrative law judges." Pet. App. 7a-8a. Because appointment and significant changes in duties or responsibilities are personnel actions within the meaning of the CSRA, see 5 U.S.C. 2302(a)(2)(A)(i) and (xii), the court stated that this provision "strongly suggests" that the assignment of cases is also a personnel action. Pet. App. 8a. The court further concluded that the failure to provide docket numbers and access to legal research resources "affect the ability of [ALJs] to do their jobs efficiently and effectively," and those actions therefore affect working conditions. *Ibid.*

The court of appeals concluded that the term "working conditions" was also broad enough to include both petitioner's allegations that Anderson engaged in *ex parte* communications with a party appearing before petitioner and his allegations that the agency provided DOJ with advance notice of impending litiga-

tion. Pet. App. 8a-9a. The court explained that the degree of an ALJ's independence to exercise his judgment free from the pressures of officials within the agency is a working condition. *Id.* at 8a. The court stated that it was "entirely consistent with the language and structure of the [CRSA] to treat an action alleged to interfere with an [ALJ's] decisional independence as a personnel action subject to investigation by the [OSC]." *Id.* at 10a. To conclude otherwise, the court explained, would impermissibly frustrate the CSRA's exhaustive remedial scheme by permitting "an access to the courts more immediate and direct than the statute provides with regard to major adverse actions." *Id.* at 10a-11a. The court concluded that the CSRA precluded petitioner's claims and that the district court had therefore lacked jurisdiction over them. *Id.* at 11a.

In light of that holding, the court of appeals did not reach the question whether petitioner lacked standing, as the district court had held.

ARGUMENT

Petitioner contends (Pet. 5-14) that his allegations are a challenge to respondents' interference with his decisional independence, not complaints about his "working conditions" within the meaning of 5 U.S.C. 2302(a)(2)(A), and that he may therefore bring his claims directly in federal court under the APA instead of using the CRSA's remedial process. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is therefore unwarranted.

1. The CSRA establishes "a comprehensive system for reviewing personnel actions taken against federal

employees." *United States* v. *Fausto*, 484 U.S. 439 (1988). Personnel actions that must be challenged through the CSRA's remedial process include significant changes to an employee's "duties, responsibilities, or working conditions" on an impermissible basis. See 5 U.S.C. 2302(a)(2)(A)(xii) and (b). This Court has recognized that claims "aris[ing] out of an employment relationship that is governed by the [CSRA]" must be addressed through the CSRA's remedial process and are not subject to additional judicial remedies. *Bush* v. *Lucas*, 462 U.S. 367, 368 (1983). Thus, in *Bush*, an engineer who was demoted by NASA after he made negative public comments about the agency could challenge the agency action only through the CSRA, not through a retaliation claim in federal court. *Id.* at 369-370, 389-390. The Court concluded that the employee's claim arose out of an employment relationship that was governed by the CSRA and that "it would be inappropriate for [the Court] to supplement that regulatory scheme with a new judicial remedy." *Id.* at 368.

a. In *Bush*, the employee's retaliation claim arose from the employer's decision to demote the employee, a personnel action covered by the CSRA. See 5 U.S.C. 2302(a)(2)(A)(iii). In petitioner's case, the claims arise from a change in petitioner's working conditions, which is likewise a personnel action covered by the statute. See 5 U.S.C. 2302(a)(2)(A)(xii). The court of appeals properly characterized petitioner's allegations as challenges to a change in his working conditions. As the court explained, the selective assignment of cases to ALJs affects either the amount or type of work that any particular ALJ receives and thus constitutes a change to his working conditions. Pet. App.

7a. The alleged failure to provide ALJs with docket numbers or with adequate legal research resources affects an ALJ's ability to do his job efficiently or effectively, and thus is likewise a change to his working conditions. *Id.* at 8a. And petitioner's allegations that the agency interfered with his judicial independence by communicating with a party to a case pending before him and providing DOJ with advance notice of impending litigation are similarly challenges to the conditions under which petitioner is expected to perform his job. *Ibid.* The types of personnel actions which can constitute grounds for a prohibited personnel practice "are extremely broad," *Carducci* v. *Regan*, 714 F.2d 171, 174 n.3 (D.C. Cir. 1983) (Scalia, J.); see *Schwartz* v. *International Fed'n of Prof'l and Technical Eng'rs*, 306 Fed. Appx. 168, 173 (5th Cir. 2009) (moving ALJ to inferior office space is a change in his working conditions within the meaning of the CSRA); *Saul* v. *United States*, 928 F.2d 829, 834 (9th Cir. 1991) (the term "corrective action" in Section 2302 is broad enough to encompass claims that a supervisor opened employee's personal mail addressed to him at work), and the court of appeals' characterization of petitioner's allegations as affecting working conditions fits comfortably within the statute's broad reach.

The court of appeals' decision is consistent with decisions of other courts of appeals, which hold that the CSRA precludes APA claims that arise from employment relationships governed by the CSRA. See, *e.g.*, *Tiltti* v. *Weise*, 155 F.3d 596, 600-601 (2d Cir. 1998) (CSRA precludes APA review of employee reassignments); *Ryon* v. *O'Neill*, 894 F.2d 199, 204 (6th Cir. 1990) ("Congress intended review of agency reas-

signment decisions to be confined to the specific procedures set out in the text of the CSRA."); *Weatherford* v. *Dole*, 763 F.2d 392, 394 (10th Cir. 1985) (concluding that plaintiff could not challenge his reassignment under the APA because "[c]ertain agency personnel decisions [not falling within the scope of the CSRA] are simply not subject to judicial review"); *Pinar* v. *Dole*, 747 F.2d 899, 913 (4th Cir. 1984) (rejecting APA challenge to various personnel actions taken against plaintiff because "Congress clearly intended the CSRA to be the exclusive remedy for federal employees"), cert. denied, 471 U.S. 1016 (1985); *Broadway* v. *Block*, 694 F.2d 979, 986 (5th Cir. 1982) (holding that the CSRA provided the sole means for plaintiff to challenge her reassignment; "[w]e decline to allow an employee to circumvent [the CSRA's] detailed scheme governing federal employer-employee relations by suing under the more general APA").

b. Petitioner does not specifically address the court of appeals' analysis and conclusion that his allegations amount to complaints about agency actions affecting his working conditions, except to say that under the canon of *ejusdum generis*, the term "working conditions" should be read with regard to the other personnel actions that are listed in Section 2302(a)(2)(A)(i) to (xi). But petitioner does not explain why any or all of the conditions about which he complains are not on par with the "garden-variety personnel management claims" (Pet. 13) that are governed by those other provisions.

Petitioner also points out (Pet. 11) that Congress has twice amended the list of "personnel actions" in Section 2302(a)(2)(A) to specify that an agency's deci-

sion to order a psychiatric test and an agency's implementation or enforcement of a nondisclosure policy are "personnel actions," and he contends that those amendments would have been unnecessary if the definition of "working conditions" was broad. Congress's decision to specify that certain agency actions are "personnel actions" that may not be taken for a prohibited reason says nothing about whether petitioner's complaints about respondents' actions constitute a "significant change in * * * working conditions," which is a separately listed "personnel action" under the statute. 5 U.S.C. 2302(a)(2)(A)(xii).

c. It is not relevant that petitioner may not be entitled to a *remedy* under the CSRA, either because the changes to his working conditions were not "significant," see 5 U.S.C. 2302(a)(2)(A)(xii), or because they were not imposed on an impermissible basis, see 5 U.S.C. 2302(b). See Pet. 10 (contending that petitioner could not have filed his claims with the OSC because the agency actions of which he complained were not retaliatory).

The remedial scheme of the CSRA would be "impermissibly frustrated" if challenges to insignificant changes in working conditions, or changes in working conditions for reasons other than those specified by Congress, could be brought directly in federal district court, while significant changes to working conditions based on considerations such as race, sex, or age were subject to a more limited remedial scheme. *Filebark* v. *United States Dep't of Transp.*, 555 F.3d 1009, 1013 (D.C. Cir.), cert. denied, 558 U.S. 1007 (2009). An APA remedy for claims that are not specifically covered by the CSRA's remedial scheme, but that arise from an employment relationship governed by the

statute such as a change in an employee's working conditions, is therefore "precluded by the comprehensiveness of the CSRA itself." *Ibid.*

This Court has reached a similar conclusion with respect to exclusion of particular employees from the CSRA. In *Fausto*, the Court concluded that the CSRA's failure to include nonpreference members of the excepted service as employees with a right to administrative or judicial review of suspension for misconduct did not mean that those employees were "free to pursue the remedies that had been available before enactment of the CSRA." 484 U.S. at 443-444. The CSRA's failure to mention such employees was instead a "manifestation of a considered congressional judgment that they should not have statutory entitlement to review." *Id.* at 448-449.

There is no question that ALJs occupy a critical position in the administrative scheme. But ALJs are federal employees subject to the provisions of the CSRA, and the court of appeals properly declined to create special access to the federal courts for claims relating to an ALJ's working conditions. See *Gray* v. *Office of Pers. Mgmt.*, 771 F.2d 1504, 1510 (D.C. Cir. 1985) (acknowledging "the pivotal importance of the work of the ALJ corps," but refusing "to confer special status on ALJs beyond that expressly provided by Congress"), cert. denied, 475 U.S. 1079 (1986).

2. Petitioner contends (Pet. 5-10) that the court of appeals' decision conflicts with decisions of other courts of appeals, decisions of this Court, and decisions of the MSPB. Petitioner has not identified a conflict warranting this Court's review.

a. Petitioner contends (Pet. 2, 5-8) that the court of appeals' decision "heightens tension" among the cir-

cuits concerning the scope of preemption under the CSRA. That is incorrect.

i. As an initial matter, petitioner does not contend that there is a conflict on the specific question presented in this case, *i.e.*, whether an ALJ's claim that his agency has interfered with his decisional independence is a complaint about a change to his working conditions within the meaning of 5 U.S.C. 2302(a)(2)(A)(xii). Rather, to support his claim that there is a circuit conflict, petitioner first recasts the court of appeals' decision as "a rigid but-for test" under which "*any* action arising from an employee's status as a civil service employee constitutes a personnel action." Pet. 5; see also Pet. 9 (characterizing court of appeals' decision as holding that "every claim arising from conduct that occurred on the job" is subject to the CSRA's remedial process); Pet. 11 (characterizing court of appeals' decision as holding that "anything that happens to an employee as a result of his job affects that employee's working conditions"); Pet. 16 (stating that court of appeals' decision forecloses direct resort to federal district court "for any violations of the law that are even colorably related to the workplace").

The court of appeals has not adopted the "rigid but-for test" that petitioner describes. See, *e.g.*, *Stewart* v. *Evans*, 275 F.3d 1126, 1130 (D.C. Cir. 2002) (holding that a warrantless search of a federal employee's private papers by supervisory employees was not a "personnel action" covered by the CSRA). Nor did the court adopt such a rigid rule in petitioner's case. Instead, the court examined each of the alleged agency actions of which petitioner complained and explained why each allegation was a complaint about

petitioner's working conditions within the meaning of Section 2302(a)(2)(A)(xii). See Pet. App. 7a-8a.

Nor have the Third, Fifth, or Tenth Circuits adopted the rigid rule that petitioner ascribes to them. In *Sarullo* v. *United States Postal Service*, 352 F.3d 789 (2003) (per curiam), cert. denied, 541 U.S. 1064 (2004), the Third Circuit examined the particular facts surrounding the plaintiff's malicious prosecution claim after he was arrested and discharged for dealing drugs at work and concluded that "measures designed to investigate an employee who is dealing drugs at work are actions arising out of the employment context" that can be addressed only through the CSRA's remedial process. *Id.* at 795-796. In *Rollins* v. *Marsh*, 937 F.2d 134 (1991), the Fifth Circuit analyzed the particular actions taken against the plaintiffs—a temporary suspension and a temporary suspension of a security clearance—and concluded that those were personnel actions under the CSRA "and hence arise out of the employment relationship" that is governed by the CSRA. *Id.* at 138 & n.18. And in *Lombardi* v. *Small Business Administration*, 889 F.2d 959 (1989), the Tenth Circuit held that the plaintiff's request for a *Bivens* remedy based on his termination from an intern position at the Small Business Administration must be rejected because the claim arose from the employee's termination, an employment relationship governed by the CSRA. *Id.* at 961.

None of those decisions establishes a rigid rule that "*any* action arising from an employee's status as a civil service employee is a personnel action." Pet. 5. Each decision analyzes whether the challenged agency

action arose from an aspect of the employment relationship that is governed by the CSRA.[*]

ii. In any event, the court of appeals' decision does not conflict with decisions of the Federal Circuit or the Ninth Circuit, as petitioner suggests (Pet. 7-8).

Petitioner cites several Federal Circuit decisions which he claims hold that some adverse personnel actions can be addressed outside of the CSRA's remedial scheme. The cases petitioner cites do not establish a circuit conflict. In *Hesse* v. *Department of State*, 217 F.3d 1372 (2000), cert. denied, 531 U.S. 1154 (2001), the Federal Circuit concluded that the MSPB did not have jurisdiction to consider the propriety of an agency's decision to revoke an employee's security clearance. *Id.* at 1377. The decision was not based on the definition of a "personnel action" under the CSRA; it was based on "the principle that Executive Branch agencies must be given broad discretion in making security clearance determinations." *Ibid.* (citing *Department of the Navy* v. *Egan*, 484 U.S. 518 (1988)). Importantly, the court did not hold that challenges to an agency's revocation of an employee's security clearance could instead be brought in federal district court, as petitioner suggests. See Pet. 7 (citing *Hesse* for the proposition that "revocation of security clearances does not fall within CSRA preemption"). The court stated that an employee's recourse for challeng-

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[*] The Federal Administrative Law Judges Conference contends (Amicus Br. 9) that the court of appeals concluded that "ALJ decisional independence is no more than a working condition." As discussed above, the court of appeals reached no such conclusion, but instead examined each of petitioner's specific allegations and determined that each agency action was a change to petitioner's working conditions within the meaning of the CSRA.

ing the revocation of a security clearance would be through "internal appeal procedures within the[] agenc[y]." *Hesse*, 217 F.3d at 1380.

In *Weber* v. *MSPB*, 113 F.3d 1258 (Fed. Cir. 1997) (table), 1997 WL 244325 (1997), the plaintiff had argued that the denial of his Sixth Amendment right to counsel in the revocation of his security clearance *was* a personnel action because he wanted the MSPB to review his challenge to the revocation. *Id.* at *1. The court concluded that an agency's denial of the Sixth Amendment right to confront a witness was not a personnel action covered by the CSRA, and the MSPB therefore had no jurisdiction over petitioner's claim. *Ibid.* The court did not consider whether a claim alleging such a constitutional violation could be brought in federal district court.

Nor does the court of appeals' decision conflict with the Ninth Circuit cases petitioner cites holding that a supervisor pointing a loaded gun at an employee, see *Orsay* v. *United States Dep't of Justice*, 289 F.3d 1125, 1131 (2002), or a supervisor raping an employee, see *Brock* v. *United States*, 64 F.3d 1421, 1424-1425 (1995), are not personnel actions subject to the CSRA's remedial process. In those cases, the Ninth Circuit concluded that the employees could bring tort claims in federal court for the wrongs they had suffered at work, separate and apart from their administrative challenges to any prohibited personnel practices the employees had experienced, because those actions were outside the scope of any employment relationship governed by the CSRA. Those decisions do not conflict with the court of appeals' conclusion that petitioner's allegations were complaints about his

changed working conditions within the scope of the CSRA.

b. Petitioner further contends (Pet. 9) that the court of appeals' decision conflicts with this Court's decision in *Bush*, *supra*, in which the Court stated that certain actions by federal employers, such as wiretapping, warrantless searches, and uncompensated takings would not constitute personnel actions subject to the CSRA's remedial scheme, see 462 U.S. at 385 n.28, and with the Court's decision in *Elgin* v. *Department of the Treasury*, 132 S. Ct. 2126, 2140 (2012), in which the Court stated that a claim would not be preempted if it is "wholly collateral" to the CSRA's remedial scheme.

Petitioner's assertion of a conflict again rests on his mischaracterization of the court of appeals' decision as holding that "*any* action arising from an employee's status as a civil service employee constitutes a personnel action." Pet. 5. As explained above (pp. 12-13, *supra*), the court of appeals does not follow such a rigid rule and in fact has held, consistent with the footnote from *Bush* that petitioner cites, that a warrantless search of a federal employee's private papers by supervisory employees is not a "personnel action" covered by the CSRA. See *Stewart*, 275 F.3d at 1130.

c. Finally, petitioner contends (Pet. 9-10) that the court of appeals' decision is inconsistent with decisions of the MSPB. That contention lacks merit. Petitioner contends (Pet. 9) that in *White* v. *Social Security Administration*, 76 M.S.P.R. 447 (1997), the MSPB concluded that the removal of cases from an ALJ's docket did not constitute a personnel action under the CSRA. The MSPB did not conclude, however, that an agency's method of assigning cases to ALJs could never be

part of an ALJ's working conditions. The Board concluded that the ALJ had not shown that the particular removal of cases from his docket "constituted a *significant* change in his duties, responsibilities, or working conditions" to invoke the MSPB's jurisdiction over his whistleblower claims under 5 U.S.C. 1221. *White*, 76 M.S.P.R. at 462 (emphasis added). Nor did the MSPB consider whether an APA action would be available to challenge the method of assigning cases to ALJs.

Petitioner further contends (Pet. 10) that in *Tunik* v. *Social Security Administration*, 93 M.S.P.R. 482 (2003), the MSPB suggested that because an ALJ cannot challenge interference with his decisional independence by proceeding directly to the MSPB under 5 U.S.C. 7521(a), he "*may* have a remedy in federal court" for an agency's alleged interference with his judicial independence. See 93 M.S.P.R. at 492 n.* (emphasis added). As the court of appeals explained, (Pet. App. 10a n.7), that footnote in the MSPB's decision is based on a district court case that did not address the CSRA at all, "perhaps because the plaintiff brought suit in 1977, before the Act was enacted." *Ibid.* (citing *Chocallo* v. *Bureau of Hearings & Appeals,* 548 F. Supp. 1349 (E.D. Pa. 1982)). Any conflict between the footnote in *Tunik* and the court of appeals' decision in this case does not warrant this Court's review.

3. Even if petitioner had identified a conflict among the circuits or an error in the court of appeals' reasoning, this case would be a poor vehicle in which to address the scope of the CSRA. The features of the APA that are designed to protect the independence of ALJs (see Amicus Br. 6-9) were not enacted for the benefit of ALJs, but to protect the ability of a party

appearing before the agency to receive a fair hearing. See *Ramspeck* v. *Trial Exam'rs Conf.*, 345 U.S. 128, 131-133 (1953). Petitioner does not have standing to challenge an agency's alleged interference with that independence. As the district court explained (Pet. 49a-55a), the agency actions about which petitioner complains, if true, would arguably injure litigants appearing before petitioner, but not petitioner himself. And petitioner has brought APA claims on the grounds that "*his own rights* were violated, not as a representative of litigants whose rights were violated." *Id.* at 53a.

The court of appeals found it unnecessary to address the district court's holding that petitioner lacked standing to bring his APA claims because it correctly determined that the CSRA's exclusive remedial scheme formed a separate barrier to the court's subject matter jurisdiction. Pet. App. 3a-4a. The doubtful status of petitioner's standing to assert the claims on which he bases his petition is an independent reason to decline to grant a writ of certiorari in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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