No. 04-1131

IN THE

Supreme Court of the United States

Terry L. Whitman,

Petitioner,

v.

U.S. Department of Transportation, *et al*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF FOR THE PETITIONER

Pamela S. Karlan
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

June 9, 2005

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

REPLY BRIEF FOR THE PETITIONER

The petition for certiorari in this case seeks review of two closely related questions concerning the availability of a judicial forum to adjudicate federal statutory and constitutional claims by federal employees. The first question asks whether the Civil Service Reform Act (CSRA), 5 U.S.C. 7101 *et seq.*, precludes direct judicial redress for violations of the rights of federal employees when the law otherwise provides an independent basis for judicial review of that claim. The second question concerns a subset of such suits, asking whether the CSRA precludes a claim for equitable relief to remedy a violation of a federal employee's *constitutional* rights.

The Solicitor General agrees that both questions are the subject of circuit splits, that both questions are important and frequently recurring, and that both questions implicate fundamental interests of federal employees and agencies alike. See Brief for the Respondents (Resp.) 19-23. For those reasons, the Solicitor General agrees that this Court should grant certiorari on the first question presented and determine whether the CSRA precludes petitioner from seeking judicial review of an alleged violation of his federal statutory rights. Resp. 11.

The Solicitor General nonetheless urges this Court to leave unresolved the split of authority over whether the CSRA precludes the same employee from seeking an injunction in federal court to remedy a violation of his federal *constitutional* rights. Resp. 23. That suggestion should be rejected and the petition for certiorari granted in its entirety.

I. The Second Question Presented Implicates A Longstanding Circuit Split On A Question Of Substantial Importance.

The Solicitor General agrees that "the courts of appeals have reached different conclusions" regarding whether federal courts have jurisdiction to enjoin violations of federal

employees' constitutional rights. Resp. 22. That division is longstanding and intolerable. To take just one example, the Solicitor General acknowledges that the Fourth and D.C. Circuits apply conflicting rules. *Id*. 22-23 (citing *Pinar* v. *Doe*, 747 F.2d 899, 909-12 (CA4 1984) (federal courts lack jurisdiction to issue injunctive relief for violations of federal employees' constitutional rights); *Steadman* v. *Governor, United States Soldiers' & Airmen's Home*, 918 F.2d 963, 967 (CADC 1990) (permitting such suits after claim is exhausted through administrative grievance process)). Given the predominance of federal employment and the dispersion of federal agencies throughout the D.C. metropolitan area, this division of authority will predictably result in disparate treatment of claims brought by similarly situated employees (and perhaps even employees from the same agency) depending on whether the claim proceeds in Maryland, the District of Columbia, or Virginia. This is precisely the type of "untenable lack of uniformity in federal employment law," Resp. 21, that led the Solicitor General to urge review of the first question presented.

Nor does the Solicitor General contest that the second question, like the first, presents "a recurring issue of considerable practical importance both to the Nation's largest employer and its employees." Resp. 20. The Government's interest in avoiding the burdens of litigation, securing the benefits of arbitration, and remedying the lack of uniformity in the law, *ibid*., equally support granting certiorari to resolve whether an employee may seek direct judicial review of employment decisions that implicate federal constitutional rights. The burdensomeness of litigation does not depend on the source of the employee's rights, the benefits of arbitration do not change depending on the nature of the employees' claims, and the lack of uniformity in federal employment law is no more tenable simply because the circuit split concerns the process for adjudicating constitutional rather than statutory claims.

Even if the Government would prefer to leave the question unresolved, federal employees and the lower federal courts have a substantial interest in eliminating the existing uncertainty over which, if any, claims by federal employees may be made directly in federal court and which may only be pursued through the CSRA administrative mechanisms. Moreover, employees' interest in the availability of a judicial remedy for violations of fundamental constitutional rights is at least as strong as their interest in securing review of employment actions that infringe on their rights under federal statutes.

II. There Are No Vehicle Problems That Counsel Against Resolving The Circuit Split In This Case.

The Solicitor General thus does not contest that the second question warrants review by this Court. See Resp. 23. Instead, the brief for respondents asserts that two aspects of the pending case make it a less than ideal vehicle for resolving the question: petitioner's failure to present his claims through a grievance to the agency, *ibid*., and the purported weakness of petitioner's constitutional claim on the merits, *id*. 26. Neither assertion provides a reason for delaying resolution of the circuit split.

Petitioner's failure to exhaust his claim through his agency's negotiated grievance procedure is no ground for denying certiorari on the question *whether petitioner was required to adjudicate his claim through that process in the first place*. The Solicitor General acknowledges that the Third Circuit permits federal employees to proceed directly to federal court to enjoin a violation of their constitutional rights. See Resp. 23 (discussing *Mitchum* v. *Hurt*, 73 F.3d 30, 35-36 (1995)). It is true that the D.C. Circuit applies a different rule, requiring exhaustion prior to seeking a judicial remedy. See *Steadman*, 918 F.2d at 967. But this Court should not decline to resolve a circuit split simply because petitioner's claims would fail under the rule applied by one side of the division. This is particularly so when neither

petitioner nor respondents have endorsed the exhaustion rule of the D.C. Circuit.

Nor is it likely that the administrative process would have "brought more sharply into focus," contra Resp. 25, any aspect of the question for which review is sought in this case. The legal question whether petitioner could pursue his claim in district court would not have been addressed in the administrative proceedings, and no party has suggested that the availability of judicial review should turn on any of the factual questions that might have been resolved in the grievance process.[1]

Second, the Solicitor General argues that review should be denied because petitioner's constitutional claim "is insubstantial." Resp. 26. That assertion is incorrect, see *infra*, but even if it were not, the merits of petitioner's claim are entirely distinct from the question whether the district court has jurisdiction to adjudicate it. See, *e.g.*, *Steel Co.* v.

---

[1] The Solicitor General suggests in a footnote that some of petitioner's arguments in favor of judicial review "might have informed the nature of the bypassed administrative review," Resp. 26 n.11, but does not describe how that possibility has any relevance to whether petitioner was required to bring his claims through the administrative process in the first place. The Solicitor General further intimates that these same arguments might have led a court to allow judicial review of petitioner's claims after exhaustion of administrative remedies. *Ibid.* That assertion is implausible as a factual matter. As the Solicitor General recognizes, *id*. 25, the Ninth Circuit's established precedents preclude any judicial review of constitutional claims outside the limited provisions of the CSRA. See, *e.g.*, *Saul* v. *United* States, 928 F.2d 829, 843 (1991). The Solicitor General does not contend that the Ninth Circuit rule is wrong and is careful not to state that petitioner's claims fall within the limited set of grievances entitled to eventual judicial review under the CSRA. See Resp. 25-26 & n.11. At any rate, this Court may consider for itself the extent to which petitioner's arguments favor permitting suits for injunctive relief, with or without an exhaustion requirement.

Citizens for a Better Env't, 523 U.S. 83, 89 (1998). This Court routinely grants certiorari limited to such jurisdictional questions. See, *e.g.*, *Exxon Mobil Corp.* v. *Saudi Basic Indus. Corp.*, 125 S. Ct. 1517 (2005); *Rasul* v. *Bush*, 124 S. Ct. 2686 (2004). Indeed, this Court has previously granted certiorari to decide whether the CSRA precluded jurisdiction over particular types of cases without considering the merits of the plaintiff's claims. See *United States* v. *Fausto*, 484 U.S. 439, 440-41 (1988); *Bush* v. *Lucas*, 462 U.S. 367, 368, 372 n.7 (1983).

In any case, petitioner's constitutional claim is substantial. In asserting otherwise, the Solicitor General fundamentally misconstrues the nature of the claim.[2] First, the Solicitor General asserts that the alleged violation arises solely from the "make-up drug urinalysis test at work on September 25, 2002," rather than from the entire course of non-random treatment alleged in the complaint. Resp. 26. Second, the Solicitor General argues that petitioner's constitutional claim is grounded solely in the First Amendment, to the exclusion of petitioners' rights under "the Fourth Amendment or petitioner's constitutional rights to equal protection or due process of law." *Id*. 27. There is no basis for reading either limitation into petitioner's *pro se* complaint. "It is settled law that the allegations of such a complaint, 'however inartfully pleaded' are held 'to less stringent standards than formal pleadings drafted by lawyers.'" *Hughes* v. *Rowe*, 449 U.S. 5, 9-10 (1980) (citations omitted). "Such a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id*. at 10.

[2] The Solicitor General's additional objection that petitioner has not "pointed to any facts in the record" to support his claim, Resp. 27, is baseless, given that this case was resolved on the Government's motion to dismiss at the outset of the litigation. Pet. App. 1a-2a.

Moreover, "[t]he pleadings need only identify the basis of the court's jurisdiction, demand for judgment for the relief sought, and contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Fed. R. Civ. P. 8. The pleadings need not identify any particular legal theory under which recovery is sought." *Crull* v. *Gem Ins. Co.*, 58 F.3d 1386, 1391 (CA9 1995). See also 2 J. Moore et al., Moore's Federal Practice § 8.04[3] ("Rule 8(a)(2) does not require a claimant to set forth any legal theory justifying the relief sought on the facts alleged, but does require sufficient factual averments to show that the claimant may be entitled to some relief." (collecting cases)).

Construed in light of these principles, petitioner adequately challenges the constitutionality of the entire course of the Government's conduct under the First, Fourth and Fourteenth Amendments. The original complaint begins by asserting "violations of my rights" arising from "misapplication of the Agency's random substance testing program which have resulted in my being tested an inordinate number of times, my selection from an 'alternate list' to replace employees already selected for testing, and in the denial of my rights to representation of my choosing while being tested." C.A. Supp. E.R. 7. The balance of the complaint sets forth the factual basis for these assertions in considerable detail, *id*. 8-11, and petitioner's request for injunctive relief, *id*. 11. The Solicitor General asserts that petitioner's motion to amend the complaint limited petitioner's constitutional claims to the September 25, 2002 make-up drug test, Resp. 26, but that motion simply sought to add additional factual support for petitioner's original claims, describing an incident that occurred after the filing of the original complaint. See C.A. Supp. E.R. 23-31.

Petitioner was not required to set forth in either document the legal theory of his complaint. See Fed. R. Civ. P. 8(a); *Crull*, 58 F.3d at 1391; *Harrell* v. *Cook*, 169 F.3d 428, 432 (CA7 1999); *Albert* v. *Carovano*, 851 F.2d 561, 571 n.3 (CA2 1988) (en banc). Accordingly, it makes no difference that

petitioner mentioned a statutory provision supporting his claim in the original complaint, C.A. Supp. E.R. 7, and the First Amendment in his motion to amend, *id*. 31. "[A] complaint need not point to the appropriate statute or law in order to raise a claim for relief under Rule 8 of the Federal Rules of Civil Procedure." *Tolle* v. *Carroll Touch, Inc.*, 977 F.2d 1129, 1134 (CA7 1992). Moreover, "a complaint sufficiently raises a claim even if it points to no legal theory or even if it points to the wrong legal theory as a basis for that claim, as long as 'relief is possible under any set of facts that could be established consistent with the allegations.'" *Ibid*. (citation omitted). See also *Carovano*, 851 F.2d at 571 n.3 (same).

Properly construed, petitioner's complaint presents a serious constitutional claim. Petitioner does not contest that the Government has a substantial interest in transportation safety and does not challenge the Government's right to conduct systematic or truly random drug testing of FAA employees. The constitutional question posed by petitioner's complaint is whether arbitrary, *non*-random testing, unsupported by *any* basis for individualized suspicion, is consistent with the Constitution. The Solicitor General fails to identify any decision by this Court, or any other, that permits such serious, stigmatizing invasions of privacy with so little justification. The only relevant case cited in respondents' brief, *Skinner* v. *Railway Labor Executive Association*, 489 U.S. 602 (1989), is not on point. In that case, this Court upheld the Federal Railroad Administration's practice of conducting drug and alcohol tests of employees involved in accidents and safety violations. *Id*. at 633-34. That case did not, however, purport to authorize an agency to arbitrarily subject particular employees to non-random drug testing without any basis for individualized suspicion.

To the contrary, this Court's cases demonstrate that even when a government has a sufficiently compelling interest (such as transportation safety) to allow an exception to the constitutional prohibition against suspicionless searches, it

must conduct those searches systematically, see *Skinner*, 489 U.S. at 629-30; *Deleware* v. *Prouse*, 440 U.S. 648, 663 (1979), or randomly, see *Vernonia School Dist. 47J* v. *Acton*, 515 U.S. 646, 650 (1995). What the government may *not* do – and what petitioner alleges it has done in this case – is subject citizens to searches based on the "standardless and unconstrainted discretion" of government officials. *Prouse*, 440 U.S. at 661. Thus, while this Court has upheld sobriety checkpoints that stop all oncoming traffic for inspection, see *Michigan Dep't of State Police* v. *Sitz*, 496 U.S. 444, 447-48 (1990), it has held unconstitutional "discretionary spot checks" of motorists because they expose citizens to precisely the type of "unbridled discretion of law enforcement officials" the Fourth Amendment was enacted to prevent, *Prouse*, 440 U.S. at 661. Similarly, whenever this Court has upheld a suspicionless drug testing practice, the testing was actually random, see *Vernonia*, 515 U.S. at 650 (random drug tests for student athletes), or subjected all similarly situated employees to testing in a systematic manner, see *National Treasury Employees Union* v. *Von Raab*, 489 U.S. 656, 660-61 (1989) (test required for all new employees and those seeking transfers); *Skinner*, 489 U.S. at 606 (testing employees involved in train accidents or safety violations). See also *Von Raab*, 489 U.S. at 672 n.2 (noting that such procedures "do not carry the grave potential for 'arbitrary and oppressive interference with the privacy and personal security of Individuals' that the Fourth Amendment was designed to prevent") (citation omitted).

* * * * *

The petition in this case affords this Court the opportunity to provide a definitive answer to what types of federal employee claims, if any, the federal courts have jurisdiction to hear. That question is important and has splintered the courts of appeals, some finding no jurisdiction over any claim, some finding jurisdiction over all claims, some finding jurisdiction only over requests for injunctive relief from constitutional violations. To conclusively resolve

that division, this Court must grant certiorari for both questions presented in this petition. Deciding only the first question, as urged by the Solicitor General, will leave intact a large part of the division and uncertainty that has burdened the courts, the Government, and federal employees for more than a decade. Further delay is unwarranted.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

Pamela S. Karlan
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Thomas C. Goldstein
(Counsel of Record)
Amy Howe
Kevin K. Russell
GOLDSTEIN & HOWE, P.C.
4607 Asbury Pl., NW
Washington, DC 20016
(202) 237-7543

June 9, 2005