No. 04-1131

In the Supreme Court of the United States

TERRY L. WHITMAN, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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By order dated May 2, 2006, the Court directed the parties "to file supplemental briefs addressing the applicability of *Darby* v. *Cisneros*, 509 U.S. 137 (1993), to this case."

As explained below, *Darby* involved the question of when exhaustion of administrative remedies is required, in the absence of any statute or regulation so providing, before a party may seek judicial review of a final agency decision. In this case, however, petitioner never presented his complaint about drug testing to *any* administrative procedure established by the Civil Service Reform Act (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, and he therefore has not obtained *any* agency decision—much less a final decision—addressing such a complaint. Furthermore, unlike the statute at issue in *Darby*, the CSRA precludes initial resort to the courts for all claims arising out of federal employment, and all such claims must in-

stead be channeled through the special administrative procedures Congress prescribed.

In enacting the CSRA, Congress provided a comprehensive and reticulated framework for resolving all employment-related disputes of federal employees. As an essential feature of that comprehensive regime, Congress specified administrative procedures for the resolution of employment-related claims. See Gov't Br. 3-8. In this case, for example, if petitioner had declined to take the requested drug test and had been disciplined, the CSRA provisions governing review of adverse actions or prohibited personnel practices would have been triggered. See *id.* at 35-36. Petitioner submitted to the test instead, and a different avenue of relief was then open to him. Petitioner is covered by a collective bargaining agreement (CBA). The CSRA expressly provides that the CBA "shall provide procedures for the settlement of grievances," 5 U.S.C. 7121(a)(1), and the term "grievance" is broadly defined to include "any complaint * * * by any employee concerning any matter relating to the employment of the employee," 5 U.S.C. 7103(a)(9)(A)—a definition that plainly encompasses petitioner's complaint in this case about drug testing. The CSRA further provides that "any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency." 5 U.S.C. 7121(b)(1)(C)(iii).

Where the CSRA provides for judicial review, it does so only after the employee has fully pursued the applicable administrative process. In no event does the CSRA authorize an employee to bypass that process and present his claim directly to a district court, as petitioner attempted to do here. To countenance that course where an employee is covered by a CBA would substantially undermine the CSRA's system of collective bargaining, negotiated grievance procedures, and

binding arbitration, and would frustrate the roles Congress intended for unions and agencies to play in settling disputes. That is no less true where the employee's claim involves constitutional contentions, for the grievance and arbitration process may address or allay the employee's constitutional concerns, resolve the dispute on other grounds, or at least focus the dispute and develop a record.

If a substantial constitutional claim remains at the conclusion of the grievance/arbitration or other administrative process prescribed by the CSRA, the CSRA does not foreclose judicial review *at that point*. But for constitutional claims, as for all other claims arising out of federal employment, "Congress has allocated *initial* review to an administrative body," and, correspondingly, has "preclude[d] *initial* judicial review" of such claims. See *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994) (emphasis added). Nothing in *Darby* casts doubt on that conclusion, and channeling such cases through an administrative process raises no serious constitutional question. See *Thunder Basin*, 510 U.S. at 215 & n.20 (citing *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975)); cf. *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 17, 19 (2000).

A. *Darby* arose out of a real estate developer's challenge to an administrative debarment order that temporarily excluded him from procurement programs administered by the Department of Housing and Urban Development pursuant to the National Housing Act. See 509 U.S. at 139-141. After an administrative law judge issued the debarment order, the developer declined to seek further review within the agency and instead filed suit in federal district court under the Administrative Procedure Act, 5 U.S.C. 701 *et seq*. (APA). *Darby*, 509 U.S. at 141-142. The government argued, and the court of appeals agreed, that the plaintiff's failure to exhaust

available administrative remedies precluded his APA suit. *Ibid.*

In defending the court of appeals' judgment in this Court, the government argued that, as a general principle of administrative law, courts possess "traditional authority to require exhaustion of administrative remedies (including appeals) when the needs of administrative autonomy and judicial efficiency outweigh private interests in early access to a judicial forum." Gov't Br. at 20, *Darby*, *supra* (No. 91-2045). The government further contended that the APA's judicial-review provisions did not divest the courts of their prior discretion to balance competing interests in determining whether exhaustion should be required. *Ibid.*; see *id.* at 13-30. The government did not contend that any provision of the National Housing Act channeled all claims through an exclusive statutory procedure that precluded initial judicial review, or that the Act required, or even expressed a preference for, further exhaustion of administrative remedies once the agency had rendered a decision on the specific claims at issue.

This Court reversed. The Court relied on the last sentence of Section 10(c) of the APA, which provides as follows:

> Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

5 U.S.C. 704; see *Darby*, 509 U.S. at 138-139 n.1, 143. The Court observed that "[w]hether courts are free to impose an exhaustion requirement as a matter of judicial discretion depends, at least in part, on whether Congress has provided

otherwise, for of paramount importance to any exhaustion inquiry is congressional intent." *Id.* at 144-145 (citation, brackets, and internal quotation marks omitted). The Court held that Congress had "effectively codified the doctrine of exhaustion of administrative remedies in § 10(c)" of the APA and had thereby divested courts of their prior authority to require exhaustion as a matter of judicial discretion. *Id.* at 153; see *id.* at 145-154. The Court concluded that, "where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review *only* when expressly required by statute or when an agency rule requires appeal before review and the administrative action is made inoperative pending that review." *Id.* at 154.

B. Three basic propositions are central to the proper resolution of this case, which is different from *Darby* in critical respects. First, when judicial review of employment-related action is available under the CSRA, the judicial remedies provided by the CSRA are exclusive, and a plaintiff may not file suit in district court under the APA. Second, if a non-constitutional challenge to the federal government's treatment of its employees is not cognizable in court under the CSRA itself, the CSRA's comprehensive scheme impliedly precludes any suit under the APA. Third, when a plaintiff asserts a colorable constitutional claim in circumstances in which judicial review is not expressly provided by the CSRA, that claim is subject to the uniform requirement under the CSRA that claims must first be presented to an administrative tribunal, and judicial review may be sought only at the conclusion of that process. Each of those propositions is fully consistent with this Court's decision in *Darby*.

1. Under the APA, "[t]he form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal

action." 5 U.S.C. 703. Thus, with respect to employment actions (*e.g.*, the discharge of a competitive service employee, see *United States* v. *Fausto*, 484 U.S. 439, 445-446 (1988); Gov't Br. 4) as to which the CSRA establishes a mechanism for judicial review, the CSRA procedures are exclusive—not because the CSRA supersedes or impliedly repeals the APA in this circumstance, but because the CSRA mechanism is a "special statutory review proceeding relevant to the subject matter" and therefore *is* the "form of proceeding for judicial review" under the APA itself. 5 U.S.C. 703. Although the procedural details vary depending on the nature of the employment action complained of, the CSRA's judicial-review provisions uniformly channel challenges to any such action to *some* administrative forum before an employee may invoke the jurisdiction of a reviewing court.[1] No one has suggested that the requirement that an employee must pursue that course rather than suing directly in court raises any problem under *Darby* or Section 10(c) of the APA. Indeed, as peti-

[1] For example, a competitive-service employee who is not covered by a CBA and who seeks to contest his discharge must first appeal that agency action to the Merit Systems Protection Board (MSPB) and may then obtain judicial review of the MSPB's decision in the Federal Circuit. See 5 U.S.C. 4303(e), 7513(d), 7701, 7703(b)(1); *Fausto*, 484 U.S. at 449, 451. An employee who is covered by a CBA may challenge his discharge through the contractual grievance process and may seek Federal Circuit review of any arbitral award to the same extent as if the matter had been decided by the MSPB. See 5 U.S.C. 7121(e) and (f), 7703. An employee who believes himself to be the victim of a "prohibited personnel practice" may file a complaint with the Office of Special Counsel (OSC), 5 U.S.C. 1214(a)(1) and (3), which may request that the agency and/or the MSPB take corrective action, 5 U.S.C. 1214(b)(2). If the OSC seeks corrective action from the MSPB and the MSPB issues an unfavorable ruling, the employee may obtain judicial review in the Federal Circuit. 5 U.S.C. 1214(c)(1), 7703(b)(1). An employee may also file a complaint alleging an "unfair labor practice," which is adjudicated by the Federal Labor Relations Authority (FLRA), 5 U.S.C. 7118, subject to judicial review in the appropriate regional circuit or in the District of Columbia Circuit, 5 U.S.C. 7123(a).

tioner has acknowledged (see Tr. Of Oral Arg., 2005 WL 3387693, at *7 (Dec. 5, 2005) (No. 04-1131); Pet. Reply Br. 5), where the CSRA provides for judicial review at the end of the specified administrative process, an employee may not bypass that statutory mechanism by filing suit in district court under the APA in the first instance. See *Fausto*, 484 U.S. at 450 n.3.

In *Darby*, this Court held that the reviewing court in an APA case lacks authority to require exhaustion of administrative remedies based on the court's own balancing of the interests favoring and disfavoring exhaustion. Nothing in *Darby* suggests, however, that the APA affords a means by which a plaintiff challenging federal agency action can avoid any preclusion of initial judicial review or exhaustion requirements that may apply under the "special statutory review proceeding relevant to the subject matter." 5 U.S.C. 703. Rather, consistent with the text of 5 U.S.C. 704, the Court in *Darby* recognized that exhaustion is a prerequisite to APA review when Congress so specifies. See 509 U.S. at 146-147, 154.

2. Judicial review of petitioner's *non-constitutional* claims is entirely precluded (not merely at the outset) in light of the comprehensive nature of the CSRA and the absence of any mechanism for judicial review under that statute. The APA expressly contemplates that other statutes may "preclude judicial review." 5 U.S.C. 701(a)(1). Where judicial review is precluded, the issue in *Darby*—whether administrative remedies must be exhausted before judicial review—never arises.

This Court has made clear that Congress's intent to foreclose judicial review in particular circumstances need not be manifested in a specific preclusion-of-review provision, but may appropriately be inferred from the totality of the statutory scheme. See, *e.g.*, *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349 (1984) ("[T]he presumption favoring judicial review of administrative action may be overcome by infer-

ences of intent drawn from the statutory scheme as a whole."); *id.* at 349-350 (discussing *Morris* v. *Gressette*, 432 U.S. 491 (1977)). In *Fausto*, the Court applied that principle in construing the CSRA. Relying on the CSRA's "comprehensive nature" (484 U.S. at 448), the Court held that the statute impliedly precluded a nonpreference eligible excepted service employee from invoking an alternative statutory mechanism (the Back Pay Act) to obtain judicial review of his suspension, even though the suspension was not subject to judicial review under the CSRA itself. See *id.* at 447-452.[2]

Darby does not cast doubt on this Court's preclusion-of-review jurisprudence. The exhaustion question essentially assumes that judicial review is available, and the government did not argue in *Darby* that judicial review of the challenged debarment order was precluded. As a result, the Court's statutory analysis focused exclusively on 5 U.S.C. 704, and the Court had no occasion to discuss the distinct question of when a statute may be found to "preclude judicial review" within the meaning of 5 U.S.C. 701(a)(1).

3. Petitioners' *constitutional* challenge is subject to a different preclusion analysis. This Court has required a "heightened showing" of congressional intent before it will construe a federal statute completely "to preclude judicial review of constitutional claims." *Webster* v. *Doe*, 486 U.S. 592, 603 (1988); but cf. *Tenet* v. *Doe*, 544 U.S. 1 (2005). In *Webster*, for example, the Court held that judicial review of the plaintiff's statutory challenge was precluded by 5 U.S.C. 701(a)(2)

[2] The plaintiff in *Fausto* did not file suit under the APA. The Court in *Fausto*, however, discussed and relied upon its prior decision in *Community Nutrition Institute*, *supra*, which did involve an APA suit. See *Fausto*, 484 U.S. at 452; *Community Nutrition Inst.*, 467 U.S. at 345. The *Fausto* Court's determination that the *Community Nutrition Institute* standard for inferring preclusion of review had been satisfied (see 484 U.S. at 452) necessarily implies that APA review of the challenged employment action would have been foreclosed as well.

because the contested employment decision was committed to agency discretion by law. 486 U.S. at 599-601. The Court nevertheless concluded that the plaintiff's *constitutional* claim could go forward. *Id.* at 603-604. Similarly here, although Congress's intent to preclude all APA review of non-constitutional challenges to federal employment actions is "fairly discernible" in the CSRA taken as a whole, *Fausto*, 484 U.S. at 452 (quoting *Community Nutrition Inst.*, 467 U.S. at 351), Congress has not expressed an intent to impose a complete bar to judicial review of constitutional claims with the degree of clarity that this Court's decisions require.[3]

But while the CSRA does not altogether preclude judicial review of petitioner's constitutional challenge, the uniform requirement under the CSRA that an employment-related claim first be submitted through the specified administrative process remains applicable. Thus, initial resort to the courts is barred, and a constitutional claim may be pursued in court under the APA only *after* the plaintiff has invoked administrative procedures under the CSRA. Cf. *Fausto*, 484 U.S. at 453 (referring to the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination"). That result is fully consistent with *Darby*.[4]

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[3] The APA separately authorizes reviewing courts to hold unlawful agency action that is "not in accordance with law" and agency action that is "contrary to constitutional right, power, privilege, or immunity." 5 U.S.C. 706(2)(A) and (B). It is consistent both with this Court's decisions and with the text of the APA to recognize that a particular manifestation of congressional intent to preclude judicial review may be sufficiently clear for challenges covered by Section 706(2)(A) but not for those covered by Section 706(2)(B).

[4] If petitioner had invoked the CBA's grievance procedures, which are applicable to bargaining-unit employees, and if his union had pursued the matter through arbitration and had then filed exceptions with the FLRA (see 5 U.S.C. 7122(a)), a question would have arisen as to which court should resolve any constitutional challenge after the FLRA issued its ruling. Because the CSRA's judicial-review provisions channel employment-related disputes to the courts of appeals, and because FLRA decisions in particular are made

a. In *Darby*, this Court addressed the question "[w]hether courts are free," in cases brought under the APA, "to impose an exhaustion requirement as a matter of judicial discretion." 509 U.S. at 144. The government argued that a court could require exhaustion in an APA case based on a generalized policy determination that full exhaustion should ordinarily be a prerequisite to judicial review. The government did not identify any provision of the National Housing Act, or of any other federal statute bearing on the subject matter of the suit, that reflected a congressional preference for exhaustion in that particular context. See p. 4, *supra*.

In *Thunder Basin*, decided the Term after *Darby*, the Court explained that it will find that "Congress has allocated initial review to an administrative body"—and thereby "preclude[d] initial judicial review"—"where such intent is 'fairly discernible in the statutory scheme.'" 510 U.S. at 207 (quoting *Community Nutrition Inst.*, 467 U.S. at 351). That standard is plainly satisfied here. Congress's determination that all federal employment-related claims must first be presented to a specialized administrative tribunal, and that judicial review is available (if at all) only after the applicable administrative mechanism has first been utilized, is a pervasive and integral feature of the CSRA. Various CSRA provisions authorize judicial review of federal employment actions *after*

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reviewable in the courts of appeals when they are reviewable at all (see 5 U.S.C. 7123(a)), the government's brief on the merits contended (at 48-49) that review in that hypothetical situation would be in the court of appeals. However, because the CSRA provision that authorizes court of appeals review of most FLRA decisions specifically *excludes* FLRA orders involving arbitral awards except in unfair-labor-practice cases (see 5 U.S.C. 7123(a)(1)), suit might instead lie in district court under the APA. The existence of uncertainty concerning the proper judicial forum in that one instance down the road, however, provides no basis for allowing petitioner to file suit in district court *at the outset*, without first seeking relief through the grievance and arbitration procedures prescribed by the CSRA and the CBA.

the conclusion of administrative processes (see note 1, *supra*), but the CSRA nowhere authorizes *initial* resort to a court. And because the CSRA's judicial-review provisions encompass many potential constitutional claims, the effect of the statutory scheme is to preclude initial judicial review and instead to require that claims first be presented through the applicable administrative channel even when the claims are cast in constitutional terms. See pp. 5-7, *supra*. Unlike the theory of residual judicial discretion proffered by the government in *Darby*, here the requirement of initial review by an administrative body—and the corresponding preclusion of initial judicial review—are squarely rooted in statutory provisions that define the prerequisites to judicial review under the CSRA.

Preclusion of judicial review under *Thunder Basin* is analytically distinct from the requirement of exhaustion of administrative remedies at issue in *Darby*, and it is governed by a different provision of the APA (5 U.S.C. 701(a)(1)) than exhaustion (5 U.S.C. 704). Section 701(a)(1) provides that "[t]his chapter [5 U.S.C. 701-706] applies, according to the provisions thereof, *except to the extent* that * * * statutes preclude judicial review." (emphasis added). Like the mine safety statute in *Thunder Basin*, the CSRA precludes judicial review "to the extent" that it allocates initial review to an administrative process. Because of that preclusion, the judicial review chapter of the APA—including 5 U.S.C. 704, the provision at issue in *Darby*—is inapplicable in this case.

b. The same result follows if the issue is analyzed as one of exhaustion under 5 U.S.C. 704. Consistent with the text of Section 704, the Court in *Darby* held that, "where the APA applies, an appeal to 'superior agency authority' is a prerequisite to judicial review" only when such an appeal is "expressly required by statute or * * * agency rule." 509 U.S. at 154. There is a substantial question whether invocation of negoti-

ated grievance procedures followed by binding arbitration is even subject to that provision, because arbitration between a union and an agency is not an appeal to "superior agency authority" and is deliberately distinct from intra-agency review. Moreover, the Court had no occasion in *Darby* to define the terms in which an "express" exhaustion requirement must be phrased. Of particular relevance here, the Court did not suggest that Congress's intent to require exhaustion in an APA case must be stated with the degree of specificity needed to preclude all judicial review of a constitutional claim.

In *Community Nutrition Institute*, the Court acknowledged and adhered to its prior holding that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." 467 U.S. at 350 (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 141 (1967)). The Court explained, however, that it has "never applied the 'clear and convincing evidence' standard in the strict evidentiary sense," *ibid.*, and that the standard is satisfied "whenever the congressional intent to preclude judicial review is fairly discernible in the statutory scheme," *id.* at 351 (citation and internal quotation marks omitted). There is no sound reason to require Congress to speak more explicitly in order to impose an exhaustion requirement than to indicate that judicial review of particular claims is precluded altogether. Cf. *Thunder Basin*, 510 U.S. at 207 (applying *Community Nutrition Institute* standard to determine whether "Congress has allocated initial review to an administrative body").

c. When (as in this case) an employee's complaint is subject to the grievance and arbitration procedures of an applicable CBA, permitting the employee to bypass those procedures and seek initial review in court would encourage disruptive and potentially unnecessary litigation and would disserve Congress's intent. Even when an employee's complaint is couched

in constitutional terms, use of the CBA grievance procedures may provide a mutually satisfactory resolution that obviates the need for judicial review, and it may clarify the pertinent issues in the event that judicial intervention ultimately proves necessary. And unlike in *Darby*, where the policy rationales proffered by the government for requiring exhaustion were not rooted in any statutory text, the CSRA clearly manifests a congressional preference for non-judicial resolution of employment-related disputes.

The CSRA includes congressional findings that protection of federal employees' unionization and collective bargaining rights "safeguards the public interest, * * * contributes to the effective conduct of public business, and * * * facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment." 5 U.S.C. 7101(a)(1)(A)-(C). Section 7101(b) then states that the purpose of the chapter governing labor-management relations—which includes the provisions in 5 U.S.C. 7121 and 7122 for grievances and binding arbitration—is "to establish procedures which are designed to meet the special requirements and needs of the Government." And Section 7101(b) further states that the provisions of the chapter "should be interpreted in a manner consistent with the requirement of an effective and efficient Government." It would be fundamentally inconsistent with Congress's findings and purpose to interpret the CSRA in a manner that would allow an employee to bypass the grievance and arbitration procedures that were intended to promote the efficient, effective, and amicable resolution of disputes and instead present a claim to a federal court in the first instance.

d. Although the CSRA does not specifically address the application of preclusion-of-review and exhaustion principles to complaints that include constitutional contentions, a specific provision on that point was unnecessary because the

CSRA requires that *all* employment-related claims be presented to a specialized administrative tribunal in the first instance. The rationale for allowing certain constitutional claims that remain at the conclusion of the administrative process to go forward in district court at that point rests not on any explicit statutory exception to the CSRA's otherwise comprehensive character, or even on extrinsic evidence that Congress had such suits in mind and intended to allow them, but on Congress's *failure* to preclude all judicial review of colorable constitutional claims with the degree of clarity that this Court's decisions require. The fact that Congress did not specifically preclude initial judicial review and expressly mandate exhaustion in a category of suits that it did not likely anticipate in the first place provides no reason to exempt those suits from the preclusion and exhaustion rules that uniformly apply to all judicial review proceedings that are actually authorized by the CSRA.[5]

While recognizing a presumption that administrative exhaustion is not ordinarily required in APA cases, the Court in

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[5] In *Gebser* v. *Lago Vista Independent School District*, 524 U.S. 274, 284 (1998), the Court observed that, when a court seeks to "shape a sensible remedial scheme" under a judicially-implied private right of action, its "endeavor inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken." The Court explained that, "[t]o guide the analysis, we generally examine the relevant statute to ensure that we do not fashion the scope of an implied right in a manner at odds with the statutory structure and purpose." *Ibid.* Although the APA provides an express right of action, its application in the current setting raises issues akin to those presented in implied-right-of-action cases. The rationale for allowing some colorable employment-related constitutional claims (*i.e.*, those for which the CSRA provides no judicial remedy) to go forward under the APA, notwithstanding the otherwise comprehensive character of the CSRA scheme, rests on a species of imputed congressional intent rather than on evidence that Congress actually anticipated such suits and intended to permit them. Compare *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 77 (1992) (Scalia, J., concurring in the judgment).

Darby observed that "of paramount importance to any exhaustion inquiry is congressional intent." 509 U.S. at 144-145 (citation, brackets, and internal quotation marks omitted). Under petitioner's theory, constitutional claims for which the CSRA does not authorize judicial review—often because the tangible consequences of the alleged constitutional violation are relatively minor—could be brought to court more speedily and directly than constitutional claims for which the CSRA provides a judicial remedy. Adoption of that rule would create anomalies similar to those that the Court in *Fausto* found to be inconsistent with the logic and structure of the CSRA scheme. See 484 U.S. at 449-450; see also *Graham* v. *Ashcroft*, 358 F.3d 931, 935 (D.C. Cir.) (Roberts, J.), cert. denied, 543 U.S. 872 (2004); *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983) (Scalia, J.). Neither 5 U.S.C. 704 nor the decision in *Darby* requires this Court to ignore the abundant evidence that the Congress that enacted the CSRA would not have intended that result.

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For the reasons stated above and in the brief for the respondents, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Solicitor General

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