Syllabus

WHITMAN *v.* DEPARTMENT OF TRANSPORTATION ET AL.

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

No. 04–1131. Argued December 5, 2005—Decided June 5, 2006

Without first pursuing his collective-bargaining agreement's grievance procedures, petitioner filed suit alleging that his constitutional rights and 49 U. S. C. § 45104(8) were violated when his employer, the Federal Aviation Administration (FAA), tested him for drugs and alcohol in a nonrandom manner. The District Court held that it had no jurisdiction to consider petitioner's claims under the Civil Service Reform Act of 1978 (CSRA), whose grievance rules the FAA has adopted. In affirming, the Ninth Circuit stated that petitioner's claims were precluded because 5 U. S. C. § 7121(a)(1) did not confer federal-court jurisdiction.

Held: This case is remanded for the Ninth Circuit to address whether the FAA's actions constituted a "prohibited personnel practice," see 5 U. S. C. § 2302(b); 49 U. S. C. § 40122(g)(2)(A), as well as to address the ultimate preclusion issue. The question is not whether 5 U. S. C. § 7121 confers jurisdiction, but whether it removes the jurisdiction given to the federal courts or otherwise precludes employees from pursuing remedies beyond those set out in the CSRA. Deciding the jurisdiction and preclusion questions requires ascertaining where petitioner's claims fit within the statutory scheme, as the CSRA provides different treatment for grievances depending on the nature of the claim. The Ninth Circuit did not decide whether petitioners' allegations state a "prohibited personnel practice." Other issues raised in this Court, but not decided below—*e. g.*, whether petitioner has challenged final agency action—may also be addressed on remand, for a decision on those issues can obviate the need to decide the more difficult preclusion question.

382 F. 3d 938, vacated and remanded.

Pamela S. Karlan argued the cause for petitioner. With her on the briefs were *Thomas C. Goldstein*, *Amy Howe*, and *Kevin K. Russell*.

Malcolm L. Stewart argued the cause for respondents. With him on the brief were *Solicitor General Clement*, *Assistant Attorney General Keisler*, *Deputy Solicitor General Kneedler*, *John P. Elwood*, *William Kanter*, *Jeffrey A.*

Rosen, Paul M. Geier, Jerome M. Mellody, Mark A. Robbins, Steven E. Abow, and *Robin M. Richardson.**

PER CURIAM.

Terry Whitman, the petitioner, is an employee of the Federal Aviation Administration (FAA) and is subject to the agency's drug and alcohol testing program. Without first seeking to pursue grievance procedures under his collective-bargaining agreement, he filed suit in the United States District Court for the District of Alaska, alleging the FAA tested him in a nonrandom manner, in violation of his constitutional rights and 49 U. S. C. § 45104(8).

The FAA has its own procedural framework for the resolution of claims by its employees; and for this purpose it adopts certain sections of the Civil Service Reform Act of 1978 (CSRA), including Chapter 71 of Title 5, which sets forth the rules for grievances. 49 U. S. C. § 40122(g)(2)(C). The District Court held that, under the provisions of the CSRA, it was without jurisdiction to consider the petitioner's claims. The Court of Appeals for the Ninth Circuit affirmed, stating that because "5 U. S. C. § 7121(a)(1), as amended in 1994, does not expressly confer federal court jurisdiction over employment-related claims covered by the negotiated grievance procedures of federal employees' collective bargaining agreements," his claims are precluded. 382 F. 3d 938, 939 (2004). This Court granted certiorari to review the judgment. 545 U. S. 1138 (2005).

The Court of Appeals was correct to say that 5 U. S. C. § 7121(a)(1) does not confer jurisdiction. Another statute, however—a very familiar one—grants jurisdiction to the

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*Briefs of *amici curiae* urging reversal were filed for the American Federation of Government Employees et al. by *Thomas S. Williamson, Jr., Sarah L. Wilson, Mark D. Roth,* and *Gony Frieder;* for the National Treasury Employees Union by *Gregory O'Duden, Elaine D. Kaplan,* and *Barbara A. Atkin;* and for Allen Dotson by *Amanda Frost* and *Brian Wolfman.*

federal courts over "all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U. S. C. § 1331. The question, then, is not whether 5 U. S. C. § 7121 confers jurisdiction, but whether § 7121 (or the CSRA as a whole) removes the jurisdiction given to the federal courts, see *Verizon Md. Inc.* v. *Public Serv. Comm'n of Md.*, 535 U. S. 635, 642 (2002) (holding that "even if [47 U. S. C.] § 252(e)(6) does not *confer* jurisdiction, it at least does not *divest* the district courts of their authority under 28 U. S. C. § 1331 to review the Commission's order for compliance with federal law"), or otherwise precludes employees from pursuing remedies beyond those set out in the CSRA, cf. *United States* v. *Fausto*, 484 U. S. 439, 443–444 (1988); *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967) ("The question is phrased in terms of 'prohibition' rather than 'authorization' because . . . judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress").

In deciding the question of jurisdiction and preclusion, the Court would be required first to ascertain where Whitman's claims fit within the statutory scheme, as the CSRA provides different treatment for grievances depending on the nature of the claim. It may be, for example, that the FAA's actions, as described by the petitioner, constitute a "prohibited personnel practice." See 5 U. S. C. § 2302(b); 49 U. S. C. § 40122(g)(2)(A). Both the petitioner and the Government say they do not, but because the ultimate question may be jurisdictional, this concession ought not to be accepted out of hand. See *Weinberger* v. *Bentex Pharmaceuticals, Inc.*, 412 U. S. 645, 652 (1973) ("Parties, of course, cannot confer jurisdiction; only Congress can do so"). The Court of Appeals did not decide whether the petitioner's allegations state a "prohibited personnel practice." The proper course, then, is to remand for the Court of Appeals to address the matter, see *National Collegiate Athletic Assn.* v. *Smith*, 525

U. S. 459, 470 (1999), as well as the ultimate issue of preclusion. The various other issues raised before this Court, but not decided below, may also be addressed on remand, including: whether the petitioner has challenged final agency action; whether the petitioner has exhausted his administrative remedies; whether exhaustion is required given this statutory scheme and the Administrative Procedure Act, as interpreted in *Darby* v. *Cisneros*, 509 U. S. 137 (1993); and whether the Government has forfeited its exhaustion-of-remedies argument. It may be that a decision on these questions can obviate the need to decide a more difficult question of preclusion.

The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE ALITO took no part in the consideration or decision of this case.