Nos. 05-977 and 05-990

In the Supreme Court of the United States

DENA BRISCOE, ET AL., PETITIONERS

v.

JOHN E. POTTER, POSTMASTER GENERAL, ET AL.

LEROY RICHMOND, PETITIONER

v.

JOHN E. POTTER, POSTMASTER GENERAL, ET AL.

ON PETITIONS 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 comprehensive statutory scheme governing Postal Service employment, which includes remedies under the Federal Employees Compensation Act, 5 U.S.C. 8101 *et seq.*, and Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, precludes courts from creating a remedy for alleged constitutional violations under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

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In the Supreme Court of the United States

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OPINIONS BELOW

The opinions of the court of appeals (05-977 Pet. App. 1a-4a; 05-990 Pet. App. 1a-3a) are unreported. The opinion of the district court in No. 05-977 (Pet. App. 5a-45a) is reported at 355 F. Supp. 2d 30. The memorandum opinion of the district court in No. 05-990 (Pet. App. 4a-42a) is unreported.

JURISDICTION

The judgment of the court of appeals in each of the cases was entered on November 7, 2005. The petition for a writ of certiorari in No. 05-977 was filed on February 3, 2006. The petition in No. 05-990 was filed on February 6, 2006 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 12541.

STATEMENT

Petitioners are employees of the United States Postal Service who worked at the Brentwood Postal Facility in October 2001 when the facility was contaminated with anthrax as the result of a terrorist attack. They filed suits against Postmaster General Potter and other Postal Service officials in their individual capacities, alleging that the government officials violated petitioners' constitutional rights by knowingly misrepresenting hazards at the facility. Petitioners sought money damages for the alleged violations. The district court dismissed the suits. The court of appeals affirmed the dismissals, in unpublished per curiam opinions, concluding that the comprehensive statutory scheme governing Postal Service employment precludes the courts from creating additional remedies under *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

A. The Statutory Remedial Scheme

The Postal Reorganization Act (PRA), Pub. L. No. 91-375, 84 Stat. 719, establishes a comprehensive scheme governing employment relations within the Postal Service. "The PRA operates largely by incorporating other statutes, including the [Federal Employees Compensation Act], *see* 39 U.S.C. § 1005(c), and parts of

the Civil Service Reform Act [of 1978]." *American Postal Workers Union* v. *United States Postal Serv.*, 940 F.2d 704, 708 (D.C. Cir. 1991).

The Federal Employees Compensation Act (FECA), 5 U.S.C. 8101 *et seq.*, provides that "[t]he United States shall pay compensation * * * for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty." 5 U.S.C. 8102(a). Determinations regarding FECA coverage are made by the Department of Labor and are not subject to judicial review. See 5 U.S.C. 8124(a), 8128(b), 8145. Where the FECA is applicable, other remedies are expressly foreclosed: "The liability of the United States or an instrumentality thereof * * * with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality." 5 U.S.C. 8116(c).

In addition to the FECA remedy, the PRA affords collective bargaining rights to postal workers not covered by the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.* See *Bennett* v. *Barnett*, 210 F.3d 272, 274-275 (5th Cir.), cert. denied, 531 U.S. 875 (2000). Postal Service employees are also protected by Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, which provides the exclusive remedial scheme for discrimination in federal employment on the basis of race, color, religion, sex, or national origin. See *Brown* v. *General Servs. Admin.*, 425 U.S. 820, 835 (1976).

B. Petitioners' Allegations

Because petitioners' suits were dismissed on the pleadings, this Court must assume the truth of the alle-

gations in their complaints. Those allegations are summarized below.[1]

On Thursday, October 11, 2001, a letter addressed to United States Senator Tom Daschle arrived in a mail bag at Brentwood. The mail bag was opened and its contents were separated into the Delivery Bar Code Sorter (DBCS) #17. The letter was delivered to the Hart Senate Office Building on Friday, October 12, and was opened in the Senator's office on Monday, October 15. The envelope held a white powder that contained anthrax spores. See 05-977 Pet. App. 8a-9a.

On Tuesday, October 16, all Senate employees were tested for anthrax exposure and given antibiotics as a countermeasure. On Wednesday, October 17, the United States House of Representatives was shut down after several staff members tested positive for exposure to anthrax. Anthrax spores were found in a mail room in the Dirksen Senate Office Building, through which the letter to Senator Daschle had passed before being sent on to the Hart Senate Office Building. On Thursday, October 18, all buildings on Capitol Hill were closed and quarantined. See 05-977 Pet. App. 10a-11a.

The Postal Service sought guidance from the Centers for Disease Control (CDC) and the District of Columbia (D.C.) Department of Health. On Thursday, October 18,

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[1] Two publications from the General Accounting Office (GAO) discuss the events of October 2001 and the larger context in which they occurred. See GAO, *Report No. 04-239*, *U.S. Postal Service, Better Guidance Is Needed to Ensure an Appropriate Response to Anthrax Contamination* (Sept. 2004) <http://www.gao.gov/new.items/d04239.pdf>; GAO, *Report No. 04-205T*, *Testimony Before the Committee on Government Reform of the House of Representatives*, *U.S. Postal Service, Clear Communication with Employees Needed before Reopening the Brentwood Facility* (Oct. 23, 2003) <http://www.gao.gov/new.items/d04205T.pdf>.

a hazardous materials response team from Fairfax County conducted testing at Brentwood. On the same day, a private contractor conducted more extensive environmental testing. See 05-977 Pet. App. 12a-13a.

On Friday, October 19, Postal Service officials asked the D.C. Department of Health to place all Brentwood employees on antibiotics for exposure to anthrax. See *ibid.* The same day, Postal Service employee Leroy Richmond, petitioner in No. 05-990, was admitted to the hospital and was examined for inhalation anthrax. On Sunday, October 21, after it was confirmed that Mr. Richmond had contracted inhalation anthrax, the CDC concluded that the Brentwood facility should be closed, and the Postal Service shut down the facility. Mr. Richmond survived, but two other Brentwood employees died of inhalation anthrax. See 05-977 Pet. App. 14a-15a.[2]

Petitioners allege that Postal Service officials knew or should have known by Wednesday, October 17, or earlier, that the anthrax spores contained in the Daschle letter had created a dangerous health risk, but the Postal Service did not close the Brentwood facility until Sunday, October 21. See 05-977 C.A. App. 24-25; 05-990 Pet. App. 48a. Petitioners also allege that Postal Service officials withheld information from employees and provided them with false or misleading information. For example, the *Briscoe* petitioners allege that, on Friday,

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[2] The *Briscoe* petitioners do not claim to have tested positive for anthrax. They allege that they experienced and continue to experience "anthrax-like symptoms, in addition to substantial emotional distress, pain, suffering, and anxiety." 05-977 C.A. App. 40; see *id.* at 41. "05-977 C.A. App." refers to the joint appendix filed in the court of appeals in Appeal No. 04-5447. "05-990 C.A. App." refers to the appendix filed in the court of appeals in Appeal No. 04-5403.

October 19, a distribution manager told petitioner Alston that DBCS #17 was contaminated with anthrax spores, but a manager later told employees that the machine was not contaminated. See 05-977 C.A. App. 33-34. The *Briscoe* petitioners also allege that, on Saturday, October 20, Postal Service officials told employees that a Postal Service worker had been admitted to the hospital the previous day "and was being examined for potential inhalation anthrax" but falsely stated that his infection with anthrax had not been confirmed. See *id.* at 36.

Counts I, II, and III of the *Briscoe* complaint allege violations of the procedural due process component of the Fifth Amendment. Petitioners allege that they were deprived of the remedies under their collective bargaining agreements, the protections of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, and the benefit of the Postal Service's emergency response procedures because of respondents' alleged misrepresentations. See 05-977 C.A. App. 41-43. Count IV of the complaint alleges a violation of the Fifth Amendment's substantive due process component. *Id.* at 43-44. Petitioners allege that they were deprived of their "substantive due process liberty interest in a safe work environment free from needless danger." *Id.* at 44.

Count I of the First Amended Complaint in *Richmond* alleges a violation of substantive due process based on respondents' alleged false representations about the dangers at the Brentwood facility. See 05-990 C.A. App. 46-47. Count II alleges an equal protection violation based on the contention that workers at the Brentwood facility were treated differently than congressional workers because of the different racial compositions of the two work forces. See *id.* at 47-48.

C. Proceedings Below

Respondents filed motions to dismiss in both cases, and the district court in each case granted the motion. Both courts concluded that the comprehensive statutory scheme governing Postal Service employment, which includes remedies under the FECA, precludes the courts from creating an additional *Bivens* remedy for the alleged constitutional violations. 05-977 Pet. App. 21a–31a; 05-990 Pet. App. 13a, 32a-41a. The district court in *Richmond* also observed that, even if the FECA does not cover petitioner Richmond's claim of racial discrimination, he has recourse to Title VII, which provides the exclusive remedy for racial discrimination in federal employment. *Id.* at 41a n.9.

Both courts also held that dismissal of the due process claims is required in any event because petitioners failed to allege a violation of a clearly established right and respondents are therefore entitled to qualified immunity. 05-977 Pet. App. 30a n.9, 31a-45a; 05-990 Pet. App. 15a-27a. The district court in *Richmond* further concluded that the equal protection claim must be dismissed because petitioner did not allege that respondents played any role in or had any control over Congress's decision about how to treat its employees. *Id.* at 27a-31a.

The court of appeals affirmed the district court's judgments in two unpublished, per curiam opinions. 05-977 Pet. App. 1a-4a; 05-990 Pet. App. 1a-3a. In each opinion, the court of appeals concluded that the *Bivens* "claims are precluded by an 'elaborate, comprehensive scheme' that Congress has provided to govern employees' injuries in federal workplaces." 05-977 Pet. App. 3a (quoting *Bush* v. *Lucas*, 462 U.S. 367, 385 (1983)); 05-990

Pet. App. 2a (same). With respect to petitioner Richmond, the court of appeals also noted that "to the extent FECA does not cover Richmond's racial discrimination claim, Title VII of the Civil Rights Act of 1964 provides the exclusive judicial remedy for claims of racial discrimination in federal employment." *Id.* at 3a (citing *Brown*, 425 U.S. at 835).

ARGUMENT

The unpublished, per curiam decisions of the court of appeals are correct and do not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. Petitioners in both actions contend that review is necessary to clarify the application of principles set out in *Bush* v. *Lucas*, 462 U.S. 367 (1983), and *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988). Petitioners in *Briscoe* urge that review is required to address the application of those principles to their claims of procedural due process violations. 05-977 Pet. 20-22. Petitioner in *Richmond* asserts that review is necessary to determine the application of the principles to his substantive due process and equal protection claims. 05-990 Pet. 11-15.[3] The principles established by this Court in its *Bivens* cases are well-settled, and the court of appeals correctly applied those principles to the facts here.

a. This Court has "responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Chilicky*, 487 U.S. at 421. Indeed, in the past 25

[3] Petitioner Richmond also contends (05-990 Pet. i) that this Court should grant review to decide whether respondents are entitled to qualified immunity. That question is not properly before this Court because it was not addressed by the court of appeals. See *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999).

years, the Court has "consistently refused to extend *Bivens* liability to any new context or new category of defendants." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68 (2001). And, in cases like *Bush* and *Chilicky,* the Court has made clear that a *Bivens* remedy should not be created when Congress has enacted a "comprehensive statutory scheme[]" that provides some remedies. *Chilicky*, 487 U.S. at 428; see *Bush*, 462 U.S. at 368.

In *Bush*, the Court held that the "comprehensive procedural and substantive provisions" of the CSRA precluded a First Amendment *Bivens* claim by a plaintiff who asserted that he had been fired for criticizing his employing agency. 462 U.S. at 368. In reaching that holding, the Court expressly assumed that the civil service remedies were not as effective as a *Bivens* suit and would not fully compensate the employee for the alleged First Amendment violation. *Id.* at 372. But the Court concluded that the fact that "existing remedies do not provide complete relief" does not justify augmenting a carefully-crafted and "elaborate remedial scheme" by creating a "new judicial remedy" for constitutional violations. *Id.* at 388. The Court underscored "Congress' institutional competence in crafting appropriate relief for aggrieved federal employees as a 'special factor counseling hesitation in the creation of a new remedy,'" noting that "'Congress is in a far better position than a court to evaluate the impact of a new species of litigation between federal employees.'" *Malesko*, 534 U.S. at 68 (quoting *Bush*, 462 U.S. at 380, 389).

In *Chilicky*, the Court refused to imply a *Bivens* remedy for alleged procedural due process violations by Social Security officials because Congress had not included a money damages remedy in the "elaborate re-

medial scheme" created by the Social Security Act. 487 U.S. at 414. Once again, the Court explicitly noted that the statutory remedies did not provide complete relief. *Id.* at 425. The Court observed that the Social Security review scheme would provide the plaintiff with, at most, retroactive disability benefits and offered no possibility of additional redress for the harms caused by the alleged due process violations. *Id.* at 424-425. But the Court explained that, "[w]hen the design of a Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," it is inappropriate for a court to afford "additional *Bivens* remedies." *Id.* at 423.

Together, *Bush* and *Chilicky* firmly settled the principle that, when a statutory scheme provides a plaintiff with an "avenue for some redress, bedrock principles of separation of powers foreclose[] judicial imposition of a new substantive liability." *Malesko*, 534 U.S. at 69 (citing *Chilicky*, 487 U.S. at 425-427).

b. Applying that principle, the court of appeals correctly held that the statutory remedies available to Postal Service employees, including those provided by the FECA and Title VII, preclude implication of an extra-statutory *Bivens* remedy here.

Under the FECA, employees are "guaranteed the right to receive immediate, fixed benefits, regardless of fault and without need for litigation." *Lockheed Aircraft Corp.* v. *United States*, 460 U.S. 190, 194 (1983). An express condition of that comprehensive coverage is that liability under the FECA "with respect to the injury or death of an employee is exclusive and instead of all other liability." 5 U.S.C. 8116(c). Courts would disrupt the careful balance struck by Congress if they supplemented

the FECA remedial scheme with a judicially created money damages remedy. Congress has expressly addressed the question of monetary compensation for workplace injuries and has determined to foreclose litigation remedies in favor of guaranteed and "immediate, fixed benefits, regardless of fault." *Lockheed*, 460 U.S. at 194. Recognizing a *Bivens* remedy would re-open a door deliberately closed by Congress as a critical premise for creating a broad and comprehensive scheme to remedy workplace injuries.

Moreover, Postal Service employees have other statutory remedies besides the FECA that also make it inappropriate for courts to create a *Bivens* remedy. As described above, the PRA affords collective bargaining rights to postal workers not covered by the CSRA. See p. 3, *supra*. Employees thus have the right to file grievances over workplace safety and to have the grievances resolved through independent arbitration. See 05-977 C.A. App. 15-17; *Bennett* v. *Barnett*, 210 F.3d 272, 274-275 (5th Cir.), cert. denied, 531 U.S. 875 (2000). Several courts of appeals have held that the grievance procedures authorized by the PRA preempt *Bivens* claims.[4]

Congress has also addressed workplace safety through the OSH Act. The OSH Act is enforced by the Department of Labor, which has authority to issue citations, see 29 U.S.C. 658, and to seek injunctive relief, see 29 U.S.C. 662. Citations issued by the Department are

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[4] See *Bennett*, 210 F.3d at 275; *Pipkin* v. *United States Postal Serv.*, 951 F.2d 272, 275-276 (10th Cir. 1991); *McCollum* v. *Bolger*, 794 F.2d 602, 607 (11th Cir. 1986), cert. denied, 479 U.S. 1034, (1987); *Pereira* v. *United States Postal Serv.*, 964 F.2d 873, 875-876 (9th Cir. 1992); *Harding* v. *United States Postal Serv.*, 802 F.2d 766, 767-768 (4th Cir. 1986).

subject to review in the courts of appeals. See 29 U.S.C. 660; see generally *Cuyahoga Valley Ry.* v. *United Transp. Union*, 474 U.S. 3 (1985).

Finally, to the extent employees have claims about discrimination in the workplace, Postal Service workers, like other federal employees, are protected by Section 717 of Title VII, 42 U.S.C. 2000e-16. As this Court has held, Congress intended Title VII to provide the exclusive mechanism for federal employees to seek redress for claims of racial discrimination. *Brown*, 425 U.S. at 835.

2. The *Briscoe* petitioners urge this Court to augment the elaborate remedial scheme crafted by Congress with a *Bivens* remedy because, according to petitioners, respondents interfered with petitioners' use of the statutory remedies. See 05-977 Pet. 20-22. Petitioners cannot, however, meaningfully distinguish their situation from *Chilicky*, which also involved allegations that government officials violated the Constitution by preventing the plaintiffs from obtaining statutory benefits. The plaintiffs in *Chilicky* alleged that the officials deprived them of due process by deliberately undermining the procedures used to determine their eligibility for disability benefits; for example, by intentionally disregarding favorable evidence and by purposefully selecting biased physicians. 487 U.S. at 420 n.2. This Court nonetheless refused to create a *Bivens* remedy for what the Court described as "consequential damages for hardships resulting from an allegedly unconstitutional denial of a statutory right." *Id.* at 428.[5]

[5] Moreover, petitioners' situation does not actually present the question whether a *Bivens* remedy would be available if government officials had prevented all meaningful access to statutory remedies. As the district court found, petitioners "failed sufficiently to allege that their

The *Briscoe* petitioners also assert that other federal courts have recognized a *Bivens* remedy where plaintiffs have alleged that defendants unconstitutionally interfered with their access to statutory remedies. 05-977 Pet. 23-26. But petitioners rely principally on cases that pre-date the Court's decision in *Chilicky* and therefore have no continuing vitality after that decision. For example, petitioners cite *Bishop* v. *Tice*, 622 F.2d 349 (8th Cir. 1980), which was decided several years before both *Bush* and *Chilicky*. Moreover, the analysis in *Bishop* is inconsistent with the Eighth Circuit's later opinion in *McIntosh* v. *Turner*, 861 F.2d 524 (1988), which adheres to the principle set out in *Bush* and *Chilicky*. Petitioners also invoke *Grichenko* v. *United States Postal Serv.*, 524 F. Supp. 672 (E.D.N.Y. 1981), aff'd, 751 F.2d 368 (2d Cir. 1984) (Table), which likewise pre-dates *Chilicky*. Moreover, a conflict with a district court opinion is not a basis for this Court to grant a writ of certiorari. See Robert L. Stern et al., *Supreme Court Practice* 178 (7th ed. 1993).[6]

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access to all of the remedies that they were entitled to [was] blocked by [respondents]. Nothing in the complaint suggests that [petitioners] were precluded from filing a grievance under their collective bargaining agreement, or a charge with OSHA, or utilizing any other post-exposure remedies that were available to them." 05-977 Pet. App. 28a n.8. Indeed, even now, petitioners do not contend that they were precluded from seeking compensation under the FECA.

[6] For that reason, petitioners are not assisted by *Rauccio* v. *Frank*, 750 F. Supp. 566 (D. Conn. 1990), which, although it was decided after *Chilicky*, failed to follow this Court's guidance. Moreover, as explained in note 5, *supra*, petitioners here, unlike the plaintiffs in *Rauccio*, have not adequately alleged facts that, if true, would demonstrate that respondents "have rendered effectively unavailable any procedural safeguard established by Congress." 750 F. Supp. at 571.

3. Petitioner Richmond argues that this Court has not considered whether a comprehensive statutory scheme bars creation of a *Bivens* remedy for egregious misconduct of the kind alleged here. 05-990 Pet. 12, 14-15. The decisions in which the Court has declined to imply a *Bivens* remedy, however, have all assumed that the plaintiff stated a claim of the deprivation of a clearly established constitutional right. See, *e.g.*, *Bush*, 462 U.S. at 372; *Chilicky*, 487 U.S. at 428. The Court has never suggested that it would be possible or appropriate to establish a hierarchy of constitutional rights in applying the *Chilicky* analysis. In any event, there is no reason to conclude that the constitutional violations alleged here are more worthy of a damages remedy via *Bivens* than the serious violations alleged in *Bush* and *Chilicky*.

Petitioner Richmond tacitly admits that he could seek relief for his injuries under the FECA but argues that the statutory remedy is inadequate because it is paid by the government and will not deter misconduct by federal officials. 05-990 Pet. 16-18. That argument proves too much, however, because it applies to any instance in which a statutory scheme does not include a damages remedy against individual employees. In both *Bush* and *Chilicky*, for example, the monetary relief provided by the statutory remedies was paid by the United States rather than the individual government officials. See *Bush*, 462 U.S. at 372 & n.8; *Chilicky*, 487 U.S. at 424. Petitioner's argument is premised on the misconception that he is entitled to relief because the remedies provided by Congress do not provide for the same recovery that he might obtain in a *Bivens* action. As this Court stressed in *Malesko*, "[i]t is irrelevant to a special factors analysis whether the laws currently on the books afford [the plaintiff] an adequate federal rem-

edy for his injuries." 534 U.S. at 69 (quoting *United States* v. *Stanley*, 483 U.S. 669, 683 (1987)).

For similar reasons, petitioner errs in contending that Title VII does not preclude a *Bivens* action for his equal protection claim because he cannot state a claim under the statute. 05-990 Pet. 19-20. A *Bivens* remedy is not available simply because the statutory scheme does not provide complete or even adequate relief. See *Chilicky*, 487 U.S. at 425 (observing that "[t]he creation of a *Bivens* remedy would obviously offer the prospect of relief for injuries that must now go unredressed"); *Bush*, 462 U.S. at 373 (assuming that "Congress has provided a less than complete remedy for the wrong"). To the contrary, a court has no basis to create a damages remedy against a federal official for conduct that Congress chose not to make actionable. See *Chilicky*, 487 U.S. at 429; see also *Bush*, 462 U.S. at 385 n.28 (refusing to create a *Bivens* action even though the statutory scheme provided no remedy for short suspensions or adverse personnel actions against probationary employees).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 2006