At the *Bland* hearing, [redacted] didn't present any of her own evidence to controvert the defendants' preemption claim or to create an issue of material jurisdictional fact. The trial court granted the defendants' plea and dismissed her claims.

Standard of Review

When a plea to jurisdiction implicates the merits of the plaintiff's pleadings and includes evidence, the trial court must review the evidence to determine if a material fact issue as to jurisdiction exists.[31] If the defendant puts on evidence on the lack of subject matter jurisdiction, the plaintiff may offer his own evidence to create a disputed issue of material fact regarding jurisdiction and every reasonable inference and doubt will be indulged in its favor.[32] If the plaintiff's evidence does create a fact question, the trial court can't grant the plea (the factual dispute is left to the fact-finder),[33] but if the relevant evidence is undisputed, the court may rule on the plea as a matter of law and its granting of the plea is reviewed *de novo*.[34]

Argument

The trial court properly dismissed [redacted] s claims because the statement that forms the basis of her state-law claims—that an administrative law judge found that [redacted] possessed a reasonable belief that she had abused her authority—stems from a federal

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[31] *Bland*, 34 S.W.3d at 555.

[32] *Tex. Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004).

[33] *Id.*

[34] *Texas Nat. Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 955 (Tex. 2002).

employment relationship. The Civil Service Reform Act[35] (CSRA) stands as the established monopoly for federal employment disputes and grievances and [redacted] has failed to demonstrate how the statement falls outside of its coverage.

1. The Civil Service Reform Act preempts employment-related state-law torts.

Ample authority supports the conclusion that Congress intended that the CSRA's administrative structure provides the exclusive venue for the kind of conduct that serves as the basis of [redacted]s claims.

In *Bush v. Lucas*,[36] the Supreme Court held that federal employees, because of the CSRA's remedial structure, don't possess a Bivens[3] remedy against their employer for violations of their constitutional rights.[37] Bush, a NASA aerospace engineer, took to the airwaves when he was reassigned to undesirable positions within the agency.[38] After complaining on television that his job was "worthless," "a waste of time" and that NASA was fraudulently spending the taxpayers' money, he was demoted and his paygrade was reduced.[39] He filed an action against Lucas, the director of the space center,[40] for defamation and violation of his constitutional rights.[41] The district court dismissed his

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[35] 5 U.S.C. § 7101, *et seq*.

[36] 462 U.S. 367 (1983).

[37] *Id*. at 385.

[38] *Id*. at 369.

[39] *Id*. at 369-70.

[40] Lucas was the director of the George C. Marshall Space Flight Center, a major facility operated by NASA.

[41] *Id*.

claims and the Fifth Circuit affirmed, holding that he had no private cause of action in view of the remedies he had available under the CSRA.[42]

The Supreme Court upheld the dismissal, finding that the CSRA's "elaborate, comprehensive scheme" for claims to be a special factor mitigating against a Bivens remedy.[43] The court acknowledged that the CSRA might afford less protections for federal employees, but it hesitated to upset the CSRA's "elaborate remedial system that has been constructed step by step, with careful attention to policy considerations" with a new judicial remedy.[44]

In *United States v. Fausto*,[45] the Supreme Court upheld the CSRA's preemption of a federal employee's claim under the Back Pay Act.[46] Fausto, an employee of the Department of the Interior Fish and Wildlife Service, brought an action in the United States Claims Court for backpay for a 30-day suspension imposed by the department. The Claims Court dismissed his claim, holding that "the CSRA comprised the exclusive catalog of remedies for federal employees affected by adverse personnel action."[47] In affirming the Claims Court's dismissal, the Supreme Court noted that "[a] leading purpose of the CSRA was to replace the haphazard arrangements for administrative review of personnel action, part of the 'outdated patchwork of statutes and rules built up over almost a century' that was the

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[42] *Id*. at 372.

[43] *Id*. at 385.

[44] *Id*. at 388-89.

[45] 484 U.S. 439 (1988).

[46] *Id*. at 440, 454.

[47] *Id*. at 443.

civil service system."[48] It reasoned that the CSRA was an "integrated scheme of administrative and judicial review, designed to balance the legitimate interests of various categories of federal employees with the needs of sound and efficient administration"[49] so it preempted Fausto's claims even though it didn't provide him the remedy of an administrative appeal.[50] The court reasoned that Congress, by withholding certain remedies, didn't open the door to the courts, but rather intended to preclude judicial review.[51]

In *Karahalios v. National Federation of Federal Employees*,[52] the Court, again, declined to recognize a private cause of action for federal employees, in this case against their union.[53] Karahalios, a language teacher, was demoted when his union altered its promotion selection procedures to allow another instructor (a union board member) to fill his position.[54] He filed suit in district court, alleging that the union breached the duty of fair representation it owed him.[55] The district court recognized a private cause of action under the CSRA, but the court of appeals reversed, holding that the CSRA's statutory scheme precluded a parallel right to sue in federal courts.[56]

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[48] *Id*. at 444.

[49] *Id*.

[50] *Id*. at 447 (the CSRA displays a clear congressional intent to deny excluded employees certain protections, including judicial review).

[51] *Id*. at 443-44.

[52] 489 U.S. 527 (1989).

[53] *Id*. at 534.

[54] *Id.* at 530.

[55] *Id*.

[56] *Id*. at 531.

The Supreme Court upheld the dismissal, holding that the CSRA's Federal Labor Relations Authority—the body it created to enforce the duties imposed on agencies and unions— possessed the "exclusive and final authority to issue fair labor practice complaints"[57] and that the CSRA's administrative and remedial architectures through the direction of the FLRA excluded any other implied remedies.[58]

Relying on these precedents, both the First and Ninth Circuits have also held that the CSRA preempts state-law tort claims. In *Montplaisir v. Leighton*,[59] the First Circuit held that the CSRA preempted a federal employee's state-law legal malpractice claim against a union lawyer who had advised him to join an unlawful strike. In upholding the trial court's dismissal, the court held that the CSRA "establish[es] the sole mechanism for resolving labor conflicts in the federal arena" and "[p]erforming the requisite analysis in this case leads to the inescapable conclusion that Congress intended to preempt state-law tort actions."[60] The court concluded that *Bush*, *Karaharlios*, and *Fausto* "establish beyond peradventure that the disruptive effects of judicially-created, newly-implied rights of action upon [the] CSRA's statutory scheme would far outweigh any concomitant benefits."[61]

In *Saul v. United States*,[62] a Ninth Circuit case, a Social Security Administration claims and union representative, sued two of his supervisors. He alleged that one had seized and opened his private mail, had twice defamed him, and that both of them had

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[57] *Id*. at 533.

[58] *Id.* at 536.

[59] 875 F.2d 1 (1st Cir. 1989).

[60] *Id*. at 2-3, 5.

[61] *Id*. at 5 n.5.

[62] 928 F.2d 829 (9th Cir. 1991).

tortiously inflicted emotional distress upon him.[63] After considering the scope of the CSRA, the district court dismissed Saul's claims, ruling they were preempted under the act.[64]

The court analyzed Saul's claims in light of the remedies available under the CSRA and found that he could have redressed the alleged defamations—defamations that didn't result in a loss of pay or a demotion—and inflictions of emotional distress either by initiating an Office of Special Counsel investigation or filing a grievance. The court affirmed the trial court's dismissal because the CSRA is "a single unified personnel policy which takes into account the requirements of all the various law and goals governing Federal personal management."[65] The court thought that allowing Saul to pursue his state law claims "would interfere with the congressional objective of making CSRA an 'exclusive' forum for challenging personnel actions."[66] The court inferred that the act doesn't mention state-law tort remedies because Congress didn't leave room for them.[67]

The Fifth Circuit has relied on *Saul* to conclude that the CSRA decisively and conclusively preempts state law claims in the areas covered by the scope of the CSRA.[68] In *Rollins v. Marsh*,[69] Rollins was disciplined when he published his wife's nudes pictures in

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[63] *Id*. at 831.

[64] *Id*. at 843.

[65] *Id*. at 833 (quoting S. Rep. No. 95-969, at 53, reprinted in 1978 U.S.C.C.A.N. 2723, 2775).

[66] *Id*. at 841, *citing Broughton v. Courtney*, 861 F.2d 639, 644 (11th Cir. 1988).

[67] *Id*. at 841, 842.

[68] *See Rollins v. Marsh*, 937 F.2d 134, 137 n.13 & 140 n.36 (5th Cir. 1991).

[69] 937 F.2d 134 (5th Cir. 1991).

various adult magazines.[70] In response to a plea to jurisdiction, Rollins argued that his state-law claims against fifteen federal employees fell outside of the CSRA because his conduct was outside the scope of his work. The court rejected this argument, concluding "[w]e have little doubt that these actions constitute personnel decisions under the CSRA and hence arise out of the employment relationship."[71] The court observed that "[e]very circuit facing this issue had concluded that the remedies provided by the CSRA preempt state-law remedies for adverse personnel actions."[72] And in a subsequent unpublished case,[73] based on the logic of *Rollins*, the court affirmed a dismissal even while acknowledging that the plaintiff didn't have an effective remedy for his claims under the CSRA.[74] The court considered the act to be the "established monopoly" for all federal employment-related disputes, whether it provided a remedy or not.[75]

And at least one district court case supports the conclusion that the CSRA also preempts claims for defamation in the federal employment environment. In *Greene v. American Federation of Government Employees, AFL-CIO, Local 2607*,[76] Greene filed suit against his subordinate's union, claiming that the subordinate had made false statements

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[70] *Id*. at 135, 136.

[71] *Id*. at 138.

[72] *Id*. at 140.

[73] *Guitart v. United States*, 3 F.3d 439, 1993 WL 347206 at *1, *3 (5th Cir. Aug. 19, 1993) ("Due to the exclusivity of the CSRA, judicial review is ousted, even when no other remedy is available.").

[74] *Id*. *See also, e.g.s., Montplaisir v. Leighton*, 875 F.2d 1 (1st Cir. 1989); *Saul v. United States*, 928 F.2d 829 (9th Cir. 1991); *Carducci v. Regan*, 714 F.2d 171, 174 (D.C. Cir. 1993); *Berrios v. Department of Army*, 884 F.2d 28, 31-33 (1st Cir. 1989); *Broughton v. Courtney*, 861 F.2d 639, 641-44 (11th Cir. 1988); *Rollins v. Marsh*, 937 F.2d 134, 140 (5th Cir. 1991); *see also Spagnola v. Mathis*, 273 U.S. App. D.C. 247, 859 F.2d 223, 229 (D.C. Cir. 1988) (holding that the CSRA preempted the plaintiff's constitutional claims even though it didn't provide him a remedy).

[75] *Id*. at *2, *3.

[76] 2005 U.S. Dist. LEXIS 19983, 2005 WL 3275903 (D.D.C. Sept. 7, 2005).

about him while the union was prosecuting a sexual harassment grievance against him.[77] The court said, "Because the plaintiff's allegations concern a grievance that a coworker filed against him, as well as another federal employee's conduct resulting from that grievance, the court determines that his claims fall within the scope of the Act's provisions regarding personnel actions."[78] The court held that Greene's claim was preempted even when it didn't provide a remedy for him.[79]

These cases demonstrate that Congress intended the CSRA to be the established monopoly for claims and remedies arising out of the federal employment environment. And the courts have said that if the CSRA doesn't provide a remedy for certain classes of claims, Congress intended to preclude judicial review for them.

2. Anderson's claims stem out of a federal employment relationship.

When read in the context of [redacted] disclosure to the Office of Special Counsel, [redacted] alleged defamatory statement, "the MSPB Administrative Judge found that [redacted] disclosure was based on a reasonable belief that [redacted] was hoarding mail and that action constituted an abuse of her authority," no doubt relates to ODAR's working environment and, ironically, the CSRA remedial scheme, itself:

- "[redacted] disclosure" – [redacted] filed a 5 U.S.C. § 2302(b) disclosure—a disclosure of information which the employee reasonably believes evidences an abuse of authority— with the Office of Special Counsel about [redacted] [80]

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[77] *Id.* at *1.

[78] *Id.* at *3.

[79] *Id.*

[80] *See* 5 U.S.C. § 2302(b)(8)(B).