No. 99-1089

# In the Supreme Court of the United States

JOHN R. DEW, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

SETH P. WAXMAN
*Solicitor General*
*Counsel of Record*

DAVID W. OGDEN
*Acting Assistant Attorney General*

MICHAEL JAY SINGER
KATHLEEN MORIARTY MUELLER
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

## QUESTION PRESENTED

Whether the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.*, precludes judicial review of USERRA claims by employees of the Federal Bureau of Investigation.

TABLE OF CONTENTS



TABLE OF AUTHORITIES

Statutes and regulations—Continued: Page

Miscellaneous: Page

# In the Supreme Court of the United States

No. 99-1089

JOHN R. DEW, ET AL., PETITIONERS

*v.*

UNITED STATES OF AMERICA, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 192 F.3d 366. The opinion of the district court (Pet. App. 17a-31a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on September 28, 1999. The petition for a writ of certiorari was filed on December 27, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. The reserve components of the armed forces consist of a Ready Reserve, a Standby Reserve, and a Retired Reserve. 10 U.S.C. 10141(a). Members of the Reserve may be required to serve for the duration of a

war or national emergency and for six months thereafter. 10 U.S.C. 12301(a). Members of the Ready Reserve may be required to participate in at least 48 drills ("inactive duty for training") and to serve on "active duty for training" for at least 14 days each year. 10 U.S.C. 10147(a)(1); 32 C.F.R. 101.5. Members of the Standby Reserve do not have yearly training obligations, but may participate in training on a voluntary basis. C.A. App. 161a. Although the Department of Defense (DOD) generally does not authorize military pay to members of the Standby Reserve who volunteer for training, members who train voluntarily may nevertheless earn "points" towards retirement pay. *Ibid.*

Members of the Ready Reserve are "screen[ed]" on a continuous basis to ensure, among other things, that the Ready Reserve does not retain (1) members with "critical civilian skills" in greater numbers than necessary, or (2) members "whose mobilization in an emergency would result in an extreme * * * community hardship." 10 U.S.C. 10149(a). Under Department of Defense regulations, the Ready Reserve may not contain members holding a "key position" in the federal government, defined as one "that cannot be vacated during a national emergency or mobilization without seriously impairing the capability of the parent Federal agency or office to function effectively." 32 C.F.R. 44.3(e).

The Attorney General and the Director of the Federal Bureau of Investigation (FBI), with the concurrence of the Department of Defense, have classified the position of an FBI Special Agent as a "key position" under 32 C.F.R. 44.3(e). See C.A. App. 60a, 61a, 63a. As a result of that designation, Special Agents may not serve in the Ready Reserve, but they may serve in the

Standby Reserve. *Id.* at 24a-25a, 63a-64a. Since August 29, 1996, the FBI has permitted its Special Agents in the Standby Reserve to volunteer for active and inactive duty for training as long as the agency approves the timing of their leave. *Id.* at 24a-25a, 63a.

2. The Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.*, provides that an "employer" shall not deny "initial employment, reemployment, retention in employment, promotion, or any benefit of employment" on the basis of a person's "membership, application for membership, performance of service, application for service, or obligation" for service in the uniformed services of the armed forces. 38 U.S.C. 4311(a). An "employer" is defined to include a "State" and the "agencies and political subdivisions thereof," and the "Federal Government," which is defined as "any Federal executive agency, the legislative branch of the United States, and the judicial branch of the United States." 38 U.S.C. 4303(4), (6) and (14). The term "agency," however, excludes the FBI and the other federal intelligence community agencies. 5 U.S.C. 2302(a)(2)(C)(ii) (1994 & Supp. IV 1998); 38 U.S.C. 4303 (5).

Private or state employees who claim that their "employer has failed or refused, or is about to fail or refuse, to comply with" USERRA may file a complaint with the Secretary of Labor, who "shall investigate" and attempt to "resolve the complaint by making reasonable efforts to ensure that the person or entity named in the complaint complies" with USERRA. 38 U.S.C. 4322(a) and (d) (1994 & Supp. III 1997). If the Secretary's efforts do not resolve the complaint (or the employee did not ask the Secretary for assistance), a private employee may sue his or her employer in

federal district court, 38 U.S.C. 4323(a)(2) and (b), while a state employee may sue a state employer in state court, 38 U.S.C. 4323(b). In either instance, the court may require the employer to comply with USERRA, compensate the employee for any lost wages or benefits, and, if the employer's failure to comply was "willful," pay liquidated damages. 38 U.S.C. 4323.

Employees of federal executive agencies other than the federal intelligence community agencies similarly may file a complaint alleging a violation of USERRA with the Secretary of Labor. 38 U.S.C. 4322(a)(2)(B) (1994 & Supp. III 1997). If the Secretary is unable to resolve the complaint (or the employee did not request the assistance of the Secretary), the employee may submit a complaint to the Merit Systems Protection Board (MSPB or Board). 38 U.S.C. 4324(b) (1994 & Supp. III 1997). The Board is empowered to "enter an order requiring the agency or Office to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by such person by reason of such lack of compliance." 38 U.S.C. 4324(c)(2). The Board's final decision is reviewable by the Court of Appeals for the Federal Circuit. 38 U.S.C. 4324(d).

A different statutory enforcement scheme applies to employees of federal intelligence community agencies. An employee who alleges that a federal intelligence community agency failed to comply with its USERRA reemployment procedures, or that the failure of the agency to reemploy the person was "otherwise wrongful," may submit a claim to the inspector general of the agency. 38 U.S.C. 4325(a) and (b). The inspector general "shall investigate and resolve the allegation pursuant to procedures prescribed by the head of the agency." 38 U.S.C. 4325(b). The Act further provides that an agency's reemployment "determination * * *

shall not be subject to judicial review." 38 U.S.C. 4315(c)(3).

3. Petitioners filed this lawsuit in district court, alleging that the FBI's military reserve policy violates USERRA, the Leave With Pay Act, 5 U.S.C. 6323, and the Second Amendment to the United States Constitution. The district court dismissed petitioners' USERRA claims because petitioners did not exhaust their administrative remedies under USERRA. Pet. App. 23a-28a. The court explained that "in contrast to the procedure established for employees of 'States' or 'private employers,' who may file claims in federal district court, USERRA requires that an aggrieved FBI employee proceed along administrative channels by submitting a grievance under the Act to the inspector general of the agency." *Id.* at 24a. The district court dismissed petitioners' remaining claims on the merits, holding that the FBI's military reserve policy does not violate either the Leave With Pay Act or the Second Amendment. *Id.* at 28a-30a.

4. Petitioners appealed only the dismissal of their USERRA claims, Pet. App. 9a, and the court of appeals affirmed, holding that "it was clearly Congress' intent to preclude judicial review of USERRA claims by the employees of the intelligence community," *id.* at 11a. The court noted that "while section 4323 of USERRA expressly authorizes a civil enforcement action against state and private employers, and section 4324 allows review by the Courts of Appeal of MSPB decisions concerning certain federal agencies, section 4325 omits a similar civil enforcement scheme for FBI employees." *Id.* at 13a-14a. The Court further explained that, because Section 4315(c)(3) states that an intelligence community agency's initial decision regarding employment under USERRA "shall not be subject to judicial

review," and Section 4325(b) "provides that when an employee submits a grievance regarding that decision to the agency inspector general the inspector general 'shall investigate *and resolve* the allegation pursuant to procedures prescribed by the head of the agency,'" the Act "prescribes no further review of any kind." *Id.* at 13a (quoting 38 U.S.C. 4315(c)(3), 4325(b)).

**ARGUMENT**

Petitioners contend (Pet. 12-30) that the Administrative Procedure Act (APA) waives sovereign immunity and authorizes district courts to decide whether the FBI's military reserve policy violates USERRA. They also contend (Pet. 21-24) that the court of appeals' contrary holding "significantly erodes the precedential value of this Court's decisions" in *McNary* v. *Haitian Refugee Center, Inc.*, 498 U.S. 479, 498-499 (1991), and *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 680-681 (1986), which rejected arguments that the Immigration Reform and Control Act of 1986 and the Medicare Act, respectively, preclude judicial review of facial constitutional and statutory challenges to regulations implementing those statutes. Those contentions are without merit.

1. The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702. This Court has read that provision as "embodying a 'basic presumption of judicial review.'" *Lincoln* v. *Vigil*, 508 U.S. 182, 190 (1993) (quoting *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 140 (1967)). Because, however, the APA does *not* authorize judicial review if the relevant statute "preclude[s] judicial review" of agency action, 5 U.S.C. 701(a)(1), the "pre-

sumption of judicial review" is only "a presumption, and 'like all presumptions used in interpreting statutes, may be overcome by,' *inter alia*, 'specific language or specific legislative history that is a reliable indicator of congressional intent,' or a specific congressional intent to preclude judicial review that is 'fairly discernible' in the detail of the legislative scheme." *Michigan Academy*, 476 U.S. at 673 (quoting *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 349, 351 (1984)).

USERRA's text, structure and legislative history reveal a congressional intent to preclude judicial review of claims by employees of federal intelligence community agencies such as the FBI. USERRA expressly authorizes private and state employees to bring suit against their employers who violate the statute and obtain monetary and injunctive relief. 38 U.S.C. 4323 (1994 & Supp. III 1997). USERRA also expressly authorizes an employee of a federal agency other than intelligence community agencies to enforce USERRA by filing a complaint with the MSPB, which may order the agency to comply with USERRA and compensate the employee for any loss of wages or benefits resulting from its violation of the statute. 38 U.S.C. 4324(b) (1994 Supp. III 1997). The Act further permits federal agency employees to obtain appellate court review of the MSPB's final decision. 38 U.S.C. 4324(d).

Significantly, the Act contains no comparable provisions allowing either judicial review of, or the award of injunctive or monetary relief for, violations of USERRA by federal intelligence community agencies. Thus, the Act does not authorize judicial review of either the agency's underlying employment decision or the inspector general's resolution of an employee's complaint. Instead, the Act expressly precludes judicial review of federal intelligence community agencies'

determinations not to reemploy persons who have served in the military, 38 U.S.C. 4315(c)(3), while permitting those employees to pursue their reemployment rights under USERRA by submitting a claim to the inspector general of the agency, 38 U.S.C. 4325(b).

As the court of appeals recognized, the comprehensive nature of USERRA, and the fact that the statute "carefully addresses the rights of federal intelligence agency employees, yet does not include them in provisions for judicial review," reflect "a congressional judgment that those employees should not be able to demand judicial review." Pet. App. 14a (quoting *United States* v. *Fausto*, 484 U.S. 439, 448 (1988)); see also *Fausto*, 484 U.S. at 448 (inferring preclusion of judicial review under Civil Service Reform Act of 1978 from "[t]he comprehensive nature of the [CSRA], the attention that it gives throughout to the rights of nonpreference excepted service employees, and the fact that it does not include them in provisions for administrative and judicial review"); *Block* v. *Community Nutrition Inst.*, 467 U.S. at 345-348 (omission of review procedures for consumers affected by milk market orders, coupled with review procedures for affected milk handlers, evinces Congress's intent to preclude consumers from obtaining judicial review); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982) (concluding that where statute authorized review of eligibility determinations but not amount determinations under Medicare Part B that "[i]n the context of the statute's precisely drawn provisions, this omission provides persuasive evidence that Congress deliberately intended to foreclose further review of such [amount determination] claims").

The legislative history confirms Congress's intent to preclude judicial review of claims arising under

USERRA brought by employees of federal intelligence community agencies. An earlier version of USERRA permitted employees of federal intelligence community agencies, like employees of other federal executive agencies, to enforce the Act by filing a complaint with the MSPB and obtaining judicial review of the MSPB's decision. See S. Rep. No. 203, 102d Cong., 1st Sess. 9-10 (1991). The intelligence community agencies objected to that enforcement provision, because it was "inconsistent with the current legal framework, which protects from outside review the hiring and firing decisions in the national security context and the existing [intelligence community] agency personnel practices and procedures in national security matters." *Ibid.*; see also 5 U.S.C. 2302(a)(2)(C)(ii) (1994 & Supp. 1998) (exempting intelligence community agency employees from the Civil Service Reform Act of 1978); *Padula* v. *Webster*, 822 F.2d 97, 100 (D.C. Cir. 1987) (the FBI's "employment practices have been traditionally unreviewable" by courts); *Mead* v. *Merit Sys. Protection Bd.*, 687 F.2d 285, 286 (9th Cir. 1982) (the MSPB "lacks jurisdiction to consider allegations of improper personnel practices by excepted agencies like the FBI").

In response to those objections, Congress excluded employees of federal intelligence community agencies from the administrative and judicial review provisions applicable to other federal executive branch employees, and drafted special USERRA provisions giving intelligence community agency employees the right to complain only to their agency's inspector general. See Joint Explanatory Statement on H.R. Rep. No. 995, 103d Cong., 2d Sess. (1994); 140 Cong. Rec. H9136 (daily ed. Sept. 13, 1994). As the court of appeals correctly concluded, that history demonstrates that "Congress clearly intended to insulate the military service policies

of the [intelligence community] agencies from external review." Pet. App. 16a.

2. Petitioners contend (Pet. 16-20) that, because Section 4315(c) expressly states that the FBI's "re-employment" determinations under USERRA "shall not be subject to judicial review," the Act permits judicial review of other aspects of the FBI's military reserve policy, such as the requirement that Special Agents obtain approval of the timing of their military training leave from their FBI supervisors. That argument—which to our knowledge has not been addressed by any other court—is based on the erroneous premise that an express preclusion of judicial review of one type of agency action requires courts to hold that other agency actions are reviewable. As this Court has recognized, "[a]pplication of such a rule of statutory construction would prevent a court from giving effect to congressional intent that otherwise was clear from 'the context of the entire legislative scheme.'" *Morris* v. *Gressette*, 432 U.S. 491, 506 n.22 (1977) (quoting *Abbott Labs.*, 387 U.S. at 141).

As explained above, USERRA exempts employees of federal intelligence community agencies from the provisions that permit private, state, and other federal agency employees to obtain judicial review of their employers' compliance with USERRA's mandates, and the Act permits employees of federal intelligence community agencies to enforce USERRA's provisions only by filing a claim with their agency's inspector general. Thus, the absence of a provision expressly allowing judicial review of the intelligence community agencies' personnel policies is "not an uninformative consequence of the limited scope of the statute, but rather manifestation of a considered congressional judgment" that intelligence community agency employees should not be

permitted to obtain administrative or judicial review of their employers' compliance with USERRA. *Fausto*, 484 U.S. at 448.

3. Petitioners also argue (Pet. 20-30) that the court of appeals' decision conflicts with *McNary* v. *Haitian Refugee Center*, *supra*, and *Bowen* v. *Michigan Academy of Family Physicians*, *supra*. That argument—which was not advanced or addressed in the lower courts—is also incorrect and does not warrant further review.

*McNary* presented the question whether a provision of the Immigration Reform and Control Act of 1986, which limits judicial review of an INS decision to deny "special agricultural worker" (SAW) status to otherwise illegal aliens, 8 U.S.C. 1160(d)(3) and (e), "precludes a federal district court from exercising general federal-question jurisdiction over an action alleging a pattern or practice of procedural due process violations by the [INS] in its administration of the SAW program." 498 U.S. at 483. This Court held that "[g]iven Congress' choice of statutory language," the statute "applies only to review of denials of individual SAW applications" and does not preclude "challenges to the procedures used by the INS." *Id.* at 494. This Court explained that a contrary holding would bar the plaintiffs from obtaining judicial review of "substantial" constitutional challenges to the INS's administration of the SAW program. *Id.* at 498.

*Michigan Academy* held that provisions of the Medicare Act, which the Court had previously held in *United States* v. *Erika, Inc.*, 456 U.S. at 208, to preclude judicial review of the amount of benefits paid to individual beneficiaries under Medicare Part B, did not preclude judicial review of constitutional and statutory challenges to the regulations implementing Part B of the

Medicare Act. See 476 U.S. at 668, 676. The Court held that "[c]areful analysis of the governing statutory provisions and their legislative history" reveals that "Congress intended to bar judicial review only of determinations of the amount of benefits to be awarded under Part B" and did not intend to insulate "challenges to the validity of the Secretary's instructions and regulations" from judicial review. *Id.* at 678. The Court noted that this construction of the statute avoided the "serious constitutional question" that would arise if it interpreted the statute to "deny a judicial forum for constitutional claims arising under Part B of the Medicare program." *Id.* at 681 n.12 (citing *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975), and *Johnson* v. *Robison*, 415 U.S. 361, 366-367 (1974)).

Neither *McNary* nor *Michigan Academy* conflicts with the court of appeals' holding in this case, which interpreted a different statutory scheme to preclude judicial review. Because "the context of the entire legislative scheme differs from statute to statute," each decision involving implied preclusion of judicial review is, in some ways, unique. *Morris* v. *Gressette*, 432 U.S. at 505 n.20 (internal citations omitted). As explained above, USERRA's text and legislative history reveal that Congress exempted the federal intelligence agencies from the judicial review provisions of USERRA in order to preserve those agencies' historic authority to insulate their employment decisions and personnel practices from outside review.[1] Moreover, the decision

---

[1] Petitioner's argument would also turn the statutory scheme "upside down," *Fausto*, 484 U.S. at 449-450, by subjecting intelligence agency decisions to greater judicial scrutiny than those by other federal agencies, which are initially reviewed by the Merit System Protection Board and then the Federal Circuit under the

below holds only that the Act precludes judicial review of petitioners' claim that the FBI's military reserve policy violates USERRA.[2] The government did not argue, and the court of appeals did not hold, that USERRA precludes judicial review of *constitutional* challenges to the FBI's military policy.[3]

Thus, unlike *McNary* and *Michigan Academy*, this case does not raise the question whether Congress intended to preclude judicial review of substantial constitutional challenges to an agency's implementation of a statute. Although this Court has required a "heightened showing" that Congress intended to preclude judicial review of constitutional claims in order to avoid the "serious constitutional question" that such a statute would raise, it has not applied this more stringent standard in cases such as this, where the question is whether Congress intended to preclude judicial review of an agency's compliance with a statutory command. *Webster* v. *Doe*, 486 U.S. 592, 603-604

---

deferential arbitrary and capricious and substantial evidence standard. 5 U.S.C. 7703(c); 38 U.S.C. 4324.

[2] Petitioners also contend (Pet. 25-29) that the FBI's military reserve policy violates the DOD regulations concerning the designation of "key" federal employees. Their Complaint, however, alleges only that the FBI's policy violates USERRA, the Leave With Pay Act, and the Second Amendment (C.A. App. 8a-23a), and that is how the district court interpreted the Complaint (Pet. App. 17a-18a). Moreover, the court of appeals held only that USERRA precludes "judicial review of *USERRA claims* by the employees of the intelligence community." *Id.* at 11a (emphasis added). Therefore, the petition for certiorari does not properly raise the question whether the FBI's compliance with the DOD regulations is subject to judicial review.

[3] The district court dismissed on the merits petitioners' constitutional challenge to the policy, and petitioners did not appeal the district court's determination. Pet. App. 9a.

(1988) (quoting *Michigan Academy*, 476 U.S. at 681 n.12, and holding that Congress precluded judicial review of the CIA Director's decision to terminate an employee under the National Security Act of 1947, but did not preclude judicial review of constitutional challenges to the termination). The court of appeals' decision is thus consistent with this Court's precedents, and further review is not warranted.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

SETH P. WAXMAN
*Solicitor General*

DAVID W. OGDEN
*Acting Assistant Attorney General*

MICHAEL JAY SINGER
KATHLEEN MORIARTY MUELLER
*Attorneys*

FEBRUARY 2000