No. 03-624

In the Supreme Court of the United States

ANN S. AZDELL AND DONALD B. FISHMAN,
PETITIONERS

v.

KAY COLES JAMES, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Merit Systems Protection Board lacks jurisdiction to consider whether an award of statutory veterans' preference points by the Office of Personnel Management (OPM) in connection with OPM's ranking of administrative law judge candidates violates the Veterans' Preference Act, 5 U.S.C. 3309.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 319 F.3d 1368. The opinions of the Merit Systems Protection Board (Pet. App. 28a-63a, 64a-129a) are reported at 87 M.S.P.R. 133 and 89 M.S.P.R. 88.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2003. Two petitions for rehearing were denied on July 3, 2003. Pet. App. 130a-131a, 132a-133a. On September 23, 2003, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 22, 2003, and the

petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of 5 U.S.C. 7701, 3309 and 5 C.F.R. 300.101-300.104 are set forth at Pet. App. 138a-145a.

STATEMENT

1. Pursuant to its statutory authority to conduct competitive examinations for administrative law judge (ALJ) positions, 5 U.S.C. 1104, 1302, the Office of Personnel Management (OPM) developed the examination procedure found at 5 C.F.R. 930.203. Pet. App. 3a. This regulation requires that all ALJ applicants must first meet the minimum qualifications described in OPM Examination Announcement No. 318 with regard to the applicant's experience as an attorney in terms of the number of years the applicant has practiced, the area of specialization, and level of responsibility. 5 C.F.R. 930.203(b); Pet. App. 67a-68a. Applicants who satisfy these minimum qualifications are then ranked based upon their scores in four additional categories. 5 C.F.R. 930.203(c) and (d). A total weighted score of 70 on a 100-point scale is required to pass. 5 C.F.R. 930.203(e). Pursuant to the Veterans' Preference Act of 1994 (VPA), veterans' preference points are then awarded, as appropriate, after the applicants' test scores have been totaled into a combined weighted score, 5 C.F.R. 930.203(e), with ten and five points added to the scores of eligible veterans and other specified persons. 5 U.S.C. 3309(1) and (2); Pet. App. 4a, 69a.

Between October 1993 and June 1996, OPM's scoring formula (1993 formula) required that all applicants who complete the examination receive a total weighted

score of at least 70. Pet. App. 3a, 70a. But because the scores on the test did not result in all of the candidates achieving final ratings between 70 and 100, as provided for in the examination announcement, a fixed 10.9 points was added to the total weighted scores of each candidate to bring the lowest weighted score up to 70. *Id.* at 3a, 70a-71a.

In 1996, portions of the ALJ examination were rescored due to an investigation by OPM's inspector general. Pet. App. 4a, 71a. This rescoring resulted in the final weighted scores of all applicants ranging from 55 to 92, with approximately eighty percent of all applicants failing to achieve a passing score of 70. *Id.* at 4a, 72a.

After the 1996 rescoring, OPM determined it was not administratively feasible to apply the 1993 formula because the addition of a constant 10.9 points would give the top applicant a score of over 100 and still leave the bottom applicant below 70. Pet. App. 72a. OPM thus modified its scoring formula in 1996 (1996 formula), such that all applicants who satisfied the minimum employment qualifications and completed the competitive portions of the exam received a base score of 70, with the total weighted score of the four-part test, after being multiplied by a factor of .3, accounting for an additional possible 30 points. *Id.* at 4a, 76a. Again, veterans' preference points were then added, where applicable, to the total combined score. *Id.* at 5a, 76a.

Because the 1996 formula differed from that contained in the ALJ regulation, 5 C.F.R. 930.203, OPM obtained a variation pursuant to 5 C.F.R. 5.1. Pet. App. 5a, 73a-75a. This regulation allows the Director of OPM to grant a variation from a regulation "whenever there are practical difficulties and unnecessary hardships in complying with the strict letter of the regu-

lation," so long as the variation is "within the spirit of the regulations" and "the efficiency of the Government and the integrity of the competitive service are protected and promoted." 5 C.F.R. 5.1. The Director found the variation from 5 C.F.R. 930.203 was appropriate "to avoid the practical difficulty required to revise the final ratings of the more than 1700 candidates on the ALJ register." Pet. App. 17a, 75a. The Director also concluded that the variation was consistent with OPM's practices in other similar competitive examinations and, therefore, promoted merit principles. *Id.* at 19a.

2. Petitioners represent a class of non-veteran, non-preference eligible ALJ candidates whose scores were affected by the rescoring under the 1996 formula. Pet. App. 80a. Believing the 1996 formula violated various regulations and Federal statutes, petitioners filed an appeal with the Merit Systems Protection Board (MSPB or board), premising jurisdiction upon a regulation, 5 C.F.R. 300.104, which authorizes an appeal to the MSPB by a candidate for a Federal civil service position who believes that an "employment practice" applied to him or her by OPM violates a "basic requirement" of 5 C.F.R. 300.103. 5 C.F.R. 300.104(a); Pet. App. 7a, 80a-81a, 97a-98a. An "employment practice" is defined to include "the development and use of examinations, qualification standards, tests, and other measurement instruments." 5 C.F.R. 300.101. Section 300.103, in turn, requires that any "employment practice" of the Government satisfy the three "basic requirements" of being based on a professionally prepared job analysis, rationally related to the duties of the position, and nondiscriminatory. 5 C.F.R. 300.103(a), (b) and (c).

In their appeal to the MSPB, petitioners alleged OPM's 1996 formula was an employment practice that violated the basic requirements of 5 C.F.R. 300.103 and had the effect of increasing the relative weight of veterans' preference points, in violation of the VPA. Pet. App. 5a-6a, 32a, 80a, 89a-90a. In response, OPM argued that the MSPB lacked jurisdiction to entertain the appeal because its implementation of the VPA is not an "employment practice" for purposes of 5 C.F.R. 300.104 and that the variation OPM had obtained precluded the board from reviewing whether the 1996 formula complied with the basic requirements of Section 300.103. Pet. App. 37a-38a, 40a, 92a, 98a.

The MSPB rejected both of these arguments. It found that, although the "statutorily required addition of veterans' preference points to the earned ratings of competitive service applicants is not an employment practice *per se*," the "process embodied in the 1996 scoring formula" is an "employment practice" under 5 C.F.R. 300.101 over which it possessed jurisdiction. Pet. App. 94a-95a. Having determined it possessed jurisdiction to consider an OPM employment practice, the board stated it was required, pursuant to 5 U.S.C. 7701(c)(2)(C), "to consider whether OPM acted in accordance with law"—*i.e.*, whether the 1996 formula violates the VPA. Pet. App. 40a. On the merits, the MSPB ruled the 1996 formula violated the first two basic requirements set forth at 5 C.F.R. 300.103(a) and (b), and violated the VPA. Pet. App. 6a-7a, 89a- 90a.

3. The Federal Circuit reversed. It held first that, although the MSPB possessed jurisdiction to determine whether the 1996 formula complied with the basic requirements of 5 C.F.R. 300.103, it did not have jurisdiction to consider whether the formula violated the VPA. Pet. App. 7a-14a. To arrive at this conclusion,

the court of appeals began by reasoning that scoring an applicant's examination, on the one hand, and awarding preference points, on the other hand, are "separate steps in the process of calculating the final scores." *Id.* at 8a. Therefore, the petitioners' challenge to the 1996 formula based upon asserted violations of 5 C.F.R. 300.103 is "legally distinct" from their challenge based upon the VPA. Pet. App. 8a-9a.

The court then determined that the 1996 formula is an "employment practice" for purposes of 5 C.F.R. 300.101. Pet. App. 9a. Because the petitioners' challenge to the 1996 formula involved, "at least in part," an allegation that the formula did not satisfy the basic requirements of 5 C.F.R. 300.103, the Federal Circuit found the MSPB had jurisdiction to entertain that aspect of the petitioners' appeal. Pet. App. 10a-11a.

At the same time, however, the court held the MSPB lacked jurisdiction to determine whether the 1996 formula violated the VPA. Pet. App. 14a. It explained that 5 U.S.C. 7701(a) strictly limits the MSPB's jurisdiction to those matters contained in the statute, rule, or regulation conferring jurisdiction upon the MSPB. Pet. App. 12a. Because 5 C.F.R. 300.104(a) grants jurisdiction to the MSPB only to consider whether an employment practice complies with the three basic requirements set out in 5 C.F.R. 300.103, the court of appeals found that Section 300.104(a) does not give the board jurisdiction to entertain "any and all legal challenges to employment practices," including petitioners' VPA-based challenge to the 1996 formula. Pet. App. 12a. The Federal Circuit also specifically rejected the MSPB's reliance on 5 U.S.C. 7701(c)(2)(C) as a basis to review the 1996 formula for compliance with the VPA. Pet. App. 12a. Section 7701(c)(2)(C), the court held, may give the board authority to consider whether an

agency action is not in accordance with law, but only as to an action that is within the board's jurisdiction. *Id.* at 12a. It therefore concluded that exercising jurisdiction to entertain an OPM employment practice does not give the MSPB "free-standing jurisdiction" to determine if that employment practice "violates any law whatsoever." *Id.* at 12a-13a, 14a.

Finally, the court of appeals decided OPM's variation was both valid and broad enough to waive compliance with 5 C.F.R. Part 300. Pet. App. 16a. In determining that the variation met all of the requirements to be valid under 5 C.F.R. 5.1, the court specifically found OPM's use of a 70-to-100 point scale instead of a 0-to-100 point scale was consistent with the spirit of 5 C.F.R. 930.203(e). Pet. App. 18a.

In their petition to this Court, the petitioners have not sought review of the aspect of the Federal Circuit's opinion regarding the variation. Pet. I.

ARGUMENT

The Federal Circuit correctly held that the MSPB lacked jurisdiction to hear petitioners' VPA claim. Moreover, petitioners seek review of only one part of the court of appeals' decision, such that even if they prevail on that issue in this Court, they will not have an obvious avenue to obtain the relief they seek. For these reasons, the petition should be denied.

1. The petition should be denied because the Federal Circuit correctly held that the MSPB lacked jurisdiction over petitioners' VPA claim. Neither the statutory scheme controlling the MSPB's jurisdiction nor any of this Court's decisions support petitioners' jurisdictional theory.

a. Unlike Article III courts which exercise jurisdiction over cases arising under federal law, see 28

U.S.C. 1331, and supplemental jurisdiction over certain transactionally-related state law matters, see 28 U.S.C. 1367(a), Congress narrowly and precisely defined the MSPB's jurisdiction in order to effectuate its purpose of ensuring the orderly operation of the civil service system. Consequently, the MSPB's appellate jurisdiction is statutorily limited to matters over which it has been given jurisdiction by "law, rule, or regulation." 5 U.S.C. 7701(a); see *Goines* v. *MSPB*, 258 F.3d 1289, 1292 (Fed. Cir. 2001) (stating that MSPB's jurisdiction is limited to agency actions that are appealable pursuant to a specific "law, rule, or regulation"); *Maddox* v. *MSPB*, 759 F.2d 9, 10 (Fed. Cir. 1985) (same). OPM, the agency charged with prescribing regulations governing the civil service, 5 U.S.C. 1302, has defined the metes and bounds of the MSPB's jurisdiction. Among other things, OPM has stated that the MSPB has jurisdiction with respect to "employment practices." 5 C.F.R. 300.104(a). This jurisdictional grant is limited, however, to claims "that an employment practice which was applied * * * by the Office of Personnel Management violates a basic requirement in 300.103." 5 C.F.R. 300.104(a). Under 5 C.F.R. 300.103, employment practices must: (1) be based on a job analysis; (2) bear a rational relationship between performance in the position to be filled and the employment practice used; and (3) not discriminate. Thus, any claim about an employment practice that is based on something other than a violation of one of the three basic requirements falls outside the MSPB's employment practice jurisdiction.

In this challenge to OPM's addition of veterans' preference points, petitioners invoked the MSPB's employment practice jurisdiction. Pet. App. 37a, 92a. But petitioners do not currently allege that OPM violated

one of the three basic requirements when it added the preference points.[1] Nor could they: By its very nature, the addition of veterans' preference points pursuant to the VPA is a congressionally mandated exception to the merit system. It makes no sense, therefore, to ask whether the addition of preference points satisfies the job analysis, relevance, or equal opportunity requirements. For this reason, the Federal Circuit properly held that the petitioners' challenge to the 1996 formula and their challenge to the addition of preference points are "legally distinct." Thus, because petitioners no longer allege that OPM violated one of the basic requirements, the MSPB lacks jurisdiction to entertain the VPA claim.

b. Petitioners, however, assert that once the MSPB has jurisdiction over an agency decision, then under 5 U.S.C. 7701(c)(2)(C)—which states that the MSPB may not sustain an agency decision that is "not in accordance with law"—the MSPB may not uphold the decision if it is inconsistent with any federal law, in this case, the VPA. See Pet. 20-21. Moreover, petitioners contend, "OPM's regulation authorizing appeal to the MSPB of any employment practice that an employee believes violates the basic requirements of Section 300.103 is merely the vehicle by which MSPB authority to review the agency employment decision attaches. It does not, and cannot, restrict the statutorily defined

[1] Petitioners alleged before the MSPB that OPM's awarding of preference points violated Section 300.103(c)'s equal employment opportunity requirement. The MSPB rejected that argument noting that preference eligibility is a "congressionally-authorized *exception* to the merit system and competitive examining process." Pet. App. 111a (internal citation and quotations omitted). No party challenged that aspect of the Board's decision in the court of appeals. *Id.* at 14a.

scope of MSPB's authority on appeal." Pet. 21. This interpretation of Section 7701(c)(2)(C) is inconsistent with the statutory scheme.

As the court of appeals explained, far from independently extending MSPB's employment practice jurisdiction to include reviewing agency action for consistency with *every* law, Section 7701(c)(2)(C) merely describes the standard of review the MSPB applies within the confines of its limited jurisdiction. Pet. App. 12a ("The statute that the Board invoked, 5 U.S.C. 7701(c)(2)(C), gives the Board authority to consider whether any agency decision is not in accordance with law, but only with respect to agency decisions that are within the Board's jurisdiction."). In other words, Section 7701(c)(2)(C) instructs the MSPB to invalidate an agency decision that conflicts with agency action properly subject to its jurisdiction. With respect to its employment practice jurisdiction, Section 7701(c)(2)(C) means only that the board may not uphold an employment practice that is inconsistent with one of the basic requirements in 5 C.F.R. 300.103, it does not permit the MSPB to evaluate that practice in light of all federal laws. Indeed, the very purpose of 5 C.F.R. Part 300 (or any other similar jurisdictional statute, regulation, or rule), is to limit the MSPB's jurisdiction by specifically delineating the issues it may review, to the exclusion of all others.[2]

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[2] Nor does the petitioners' analogy to the "not in accordance with law" provision of the Administrative Procedure Act (APA), 5 U.S.C. 706, make the MSPB's interpretation of section 7701(c)(2)(C) any more reasonable. Pet. 24. In *FCC* v. *NextWave Personal Communications, Inc.*, 537 U.S. 293 (2003), this Court stated the APA "requires federal courts to set aside federal agency action that is 'not in accordance with law,' 5 U.S.C. 706(2)(A) —which means, of course, *any* law, and not merely those laws that

Moreover, petitioners' interpretation has the effect of rendering meaningless every OPM- and congressionally-imposed limit on the MSPB's jurisdiction. After all, if Section 7701(c)(2)(C) permits the MSPB to review agency decisions for consistency with federal law, then 5 C.F.R. 300.104(a) serves no purpose: candidates can simply challenge employment practices under the MSPB's "not in accordance with law" jurisdiction and have no reason to allege a violation of one of 5 C.F.R. 300.103's basic requirements. Petitioners' interpretation of Section 7701(c)(2)(C) as an independent jurisdictional source must also be rejected because it renders superfluous the MSPB's own jurisdictional statute, 5 U.S.C. 7701(a).[3] Because construction of a statute

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the agency itself is charged with administering." *NextWave*, 537 U.S. at 300. In sharp contrast to the strictly limited nature of the MSPB's employment practice jurisdiction under 5 C.F.R. 300.104, a United States District Court's jurisdiction is broadly worded to encompass any claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. 1331. Furthermore, the APA's scope of review section contemplates that the court will decide "all relevant questions of law" and "interpret constitutional and statutory provisions." 5 U.S.C. 706. Neither 5 C.F.R. 300.104 nor 5 U.S.C. 7701(c)(2)(C) contain any language resembling that found in the APA.

To the extent the APA has any bearing, the more instructive case is *Califano* v. *Sanders*, 430 U.S. 99 (1977). In that case, the Court held that Section 10 of the APA, which includes 5 U.S.C. 706, "is not to be interpreted as an implied grant of subject-matter jurisdiction to review agency actions." 430 U.S. at 105. Just as *Califano* means that Section 706(2)(A)'s "not in accordance with law" language does not independently establish jurisdiction for APA plaintiffs, the Federal Circuit correctly held that Congress's inclusion of the "not in accordance with law" standard in Section 7701(c)(2)(C) does not enlarge the MSPB's jurisdiction.

[3] Petitioners' related claim under 5 U.S.C. 7701(d) does not advance the argument. Pet. 21-22. Section 7701(d) generally pro-

that leaves statutory text "utterly without effect" is "a result to be avoided if possible," *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995), the court of appeals properly held that Section 7701(c)(2)(C) does not enlarge the MSPB's jurisdiction.

c. Nor is there any merit to petitioners' argument that, Section 7701(c)(2)(C) aside, the MSPB has jurisdiction to review the VPA claim under this Court's decisions. First, petitioners maintain that under *USPS* v. *Gregory*, 534 U.S. 1 (2001), the MSPB may review the VPA claim because it is "inextricably intertwined with OPM's adoption of the challenged scoring formula, a question plainly within the scope of the MSPB's jurisdiction." Pet. 18. *Gregory* held that in reviewing a United States Postal Service employee's termination, the MSPB had the authority to review three prior minor disciplinary actions against the employee that were the subject of continuing grievance procedures, even though the MSPB would have otherwise lacked statutory authority to review the prior grievances. The Court explained that "the Board was asked to review respondent's termination, something it clearly has

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vides the Director of OPM with a right to intervene in an appeal before the MSPB if the case involves "the interpretation or application of any civil service law, rule, or regulation" under OPM's jurisdiction. 5 U.S.C. 7701(d)(1). From this, petitioners conclude that "Congress did not intend that proceedings before the MSPB involving the MSPB's determination whether an agency decision is 'not in accordance with law' be limited to review for regulatory error under 5 C.F.R. 300.103." Pet. 22. Of course not. There are many civil service laws, rules, and regulations under OPM's jurisdiction other than 5 C.F.R. 300.103. It is only when the MSPB already has proper appellate jurisdiction to interpret such a law that Sections 7701(c)(2)(C) and 7701(d) would apply. In any event, Section 7701(d) no more expands the MSPB's "employment practice" jurisdiction than Section 7701(c)(2)(C) does.

authority to do. Because this termination was based on a series of disciplinary actions, some of which are minor, the Board's authority to review the termination must also include the authority to review each of the prior disciplinary actions to establish the reasonableness of the penalty as a whole." *Gregory*, 534 U.S. at 9-10 (internal citation omitted). But, unlike the employee's prior disciplinary actions in *Gregory*, the issue of whether the 1996 formula violates the VPA does not "underlie," is not "based on," and clearly is not "inextricably intertwined with," the issue of whether the 1996 formula violates the basic requirements of 5 C.F.R. 300.103. Pet. 17-18. Indeed, while the MSPB's review of the prior disciplinary actions in *Gregory* was essential to determining "the reasonableness of the penalty [i.e., the employee's termination] as a whole," petitioners never even assert that their VPA claim has any relevance whatsoever to adjudicating the matter within the board's jurisdiction; namely, whether the 1996 formula violates any of the basic requirements.

This Court's decisions on the authority of district courts to adjudicate affirmative defenses and counterclaims that do not fall within the courts' original jurisdiction are similarly unpersuasive. Pet. 18-19. For one thing, this authority has been repeatedly described as deriving from the courts' constitutionally based ancillary jurisdiction, now codified at 28 U.S.C. 1367(a). See, *e.g.*, *City of Chicago* v. *International Coll. of Surgeons*, 522 U.S. 156, 165 (1997); *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365, 375 & n.18 (1978). There is no analogous constitutional or statutory basis for holding that the MSPB, an administrative agency existing outside Article III's purview, may also review claims not included within Congress's delegation of jurisdiction to the Board.

Nor does anything in *Commodity Futures Trading Commission* v. *Schor*, 478 U.S. 833 (1986), suggest that every administrative agency has authority to hear counterclaims and affirmative defenses that are not themselves within the agency's original jurisdiction. Rather, *Schor* upheld the Commodity Futures Trading Commission's (CFTC) interpretation of Section 14 of the Commodity Exchange Act (CEA) as permitting it to exercise jurisdiction over state common law counterclaims based on the Court's examination of the CEA and its legislative history and purpose. See 478 U.S. at 841-842. "As our discussion makes manifest," the Court explained, "the CFTC's long-held position that it has the power to take jurisdiction over counterclaims such as Conti's is eminently reasonable and well within the scope of its delegated authority." *Id.* at 844. Because there is no suggestion that Congress similarly delegated to the MSPB the authority to define its own jurisdiction, *Schor* fails to support petitioners' position.[4]

d. Finally, petitioners criticize the Federal Circuit's decision on broader policy grounds that are more appropriately directed to Congress. For example, they claim that denying the MSPB authority to review

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[4] The MSPB's interpretation of Section 7701(c)(2)(C), which the Federal Circuit rejected, is also not entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). See Pet. 23-24. First, for the reasons discussed above, see pp. 9-11, *infra*, the MSPB's interpretation of Section 7701(c)(2)(C) is inconsistent with the statutory scheme as a whole and is, therefore, unreasonable. Second, unlike in *Schor*, where the Court deferred to the CFTC's interpretation of its jurisdictional statute because Congress specifically delegated this authority to it, *Schor*, 478 U.S. at 843-844, petitioners never even assert that the board has congressionally-delegated authority to interpret Section 7701(c)(2)(C).

whether agency actions are in accordance with law is contrary to "Congress's intent to channel all challenges to federal agency employment decisions through the MSPB," leaves employees such as petitioners without an avenue of recourse, and allows OPM to "ignore and violate Federal law in setting personnel rules with impunity." Pet. 22, 23 n.4, 28. First, Congress plainly did not intend to channel *all* Federal agency personnel matters to the MSPB, but only those for which it specifically vested jurisdiction in the MSPB. 5 U.S.C. 1204(a)(1), 7701(a). Second, petitioners themselves recognize this Court, in *United States* v. *Fausto*, 484 U.S. 439 (1988), held that the statutory scheme of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, can at times leave a Federal employee without a means of obtaining either MSPB or judicial review of a particular agency action. Pet. 23. In contrast, Congress, in enacting the Veterans Employment Opportunity Act of 1998 (VEOA), Pub. L. No. 105-339, 112 Stat. 3182, specifically provided a "preference eligible" person with a right to seek either administrative review with the Department of Labor and the MSPB or judicial review in a United States District Court to determine if a Federal agency has violated that person's rights "under any statute or regulation relating to veterans' preference."[5] 5 U.S.C. 3330a, 3330b. To the extent non-preference eligible persons such as peti-

[5] The VEOA directly refutes petitioners' contention that "[n]othing would prevent [OPM] * * * from implementing yet another scoring formula that could, at the whim of OPM, diminish the value or entirely eliminate the use of veterans' preference points." Pet. 16. If OPM ever were to implement such a scoring formula, the VEOA undeniably would give any "preference eligible" person affected by the formula the right to challenge that action either administratively or judicially.

tioners lack a similar right of review, and to the extent certain OPM employment actions may not be subject to judicial review, this is the result of the statutory framework Congress has devised. The fact remains that no statute, regulation, or rule confers jurisdiction upon the MSPB to consider the petitioners' challenge to the 1996 formula based upon the VPA.

2. This Court should reject the petition for the additional reason that the Federal Circuit's unchallenged holding that OPM's regulatory variation was lawful combined with the statutorily-required preference formula renders petitioners without an obvious avenue to obtain the relief they seek. Here, petitioners allege only that OPM's use of the 1996 formula—which changed the ALJ scoring by assigning a passing score of 70 to any applicant who meets the minimum employment qualifcations (and completes the remaining four parts of the exam) and attributes the remaining 30 points to the applicant's score on the four-part exam —"substantially increased the weight" of veterans' preference points because those points are added to the "new 30-point scale" as opposed to the previous 100-point scale that petitioners contend is required by the VPA. Pet. 9-10. Petitioners further allege that the addition of the allegedly over-weighted veterans' preference points harmed them by allowing all preference eligibles to leapfrog to the top of the ALJ list.

However, petitioners did not seek review of the Federal Circuit's decision holding that OPM did not abuse its discretion in granting itself a variation from 5 C.F.R. 930.203(e) to change from a 0-100 point scale to a 70-100 point scale. Pet. App. 18a. That aspect of the court's ruling is now final. See, *e.g.*, *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 802 (1988) (law of the case doctrine "expresses the practice of

courts generally to refuse to reopen what has been decided"); *United States* v. *United States Smelting Refining & Mining Co.*, 339 U.S. 186, 198 (1950) (under law of the case doctrine, "when an issue is once litigated and decided, that should be the end of the matter"). Accordingly, petitioners could only obtain relief by reducing the amount of veterans' preference to account for the truncated scoring system. But this relief is precluded because Congress specifically directed that preference eligibles should receive, depending on their disability status, 10 or 5 points, and neither the courts nor OPM can alter that statutory command. See 5 U.S.C. 3309.[6]

Thus, having failed to challenge the Federal Circuit's regulatory variation holding, petitioners have no obvious avenue to obtain the relief they seek. This Court "reviews judgments, not statements in opinions," *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956), and does not ordinarily "decide questions that cannot affect the rights of litigants in the case before them," *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) ("[T]his Court reviews judgments, not opinions."); *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945) (The Court's "power is to correct wrong judgments, not revise opinions."). Here, the unchallenged ground of the court of appeals' judgment would preclude effective review even if the Court were to grant review and resolve all of the questions presented

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[6] This is not to suggest that a remedy is not possible, just that in light of the statutorily-fixed nature of the veterans' preference, petitioners' failure to pursue a challenge to the move to a 70-100 point system precludes effective relief.

in petitioners' favor. Further review is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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