No. _____

In the Supreme Court of the United States

DEREK T. WILLIAMS,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD and
UNITED STATES POSTAL SERVICE,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Merit Systems Protection Board (MSPB) has jurisdiction to hear appeals of certain adverse employment actions by certain federal employees. An "employee" includes "a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions" in the United States Postal Service (USPS). 5 U.S.C. § 7511(a)(1)(B).

The questions presented are:

1. Whether a preference-eligible veteran maintains "current continuous service in the same or similar positions" under § 7511(a)(1)(B) when the agency and employee engage in a continuing employment relationship through a series of consecutive appointments.

2. Whether due process requires federal agencies to inform federal employees they will lose vested appeal rights by accepting a different appointment within the agency.

PARTIES TO THE PROCEEDING

Derek T. Williams is the petitioner here and was the petitioner below. The MSPB is a respondent here and was the respondent below. The USPS is a respondent here and was an intervenor before the Federal Circuit below.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

Page(s)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

This petition presents for review the Federal Circuit's vitiation of federal employees' rights to appeal adverse employment actions to the Merit Systems Protection Board (MSPB) where the employee serves the federal government under a series of appointments with at least one day between service duties.

To earn eligibility to appeal adverse employment actions to the MSPB, a federal worker must qualify as an "employee" within the meaning of 5 U.S.C. § 7511. A preference-eligible federal worker in the excepted service must attain one year of "current continuous service in the same or similar positions." 5 U.S.C. § 7511(a)(1)(B). For decades, the MSPB understood what the statute's plain language assumes: that "current continuous service in the same or similar positions" allows a worker to change appointments but nonetheless to maintain his "continuous" employment relationship with the federal government.

The decision below affirmed the MSPB's reversal of thirty years' understanding, holding that the statute's "current continuous service" language does not allow even a single day to pass between duty periods—even if the worker is appointed to the latter duty before completing the former—if the employee wishes to keep her "current continuous service" and thus her right to appeal adverse employment actions.

At the same time, the decision below trod on over thirty years of the Federal Circuit's own precedent recognizing that due process requires federal agencies

to notify federal employees of the employment consequences of selecting certain personnel actions—including loss of appeal rights—*before* the federal employee takes a particular action. No longer. The decision below minimizes due process and allows federal agencies to deliberately withhold information about the consequences of employment actions from federal employees.

The bottom line: federal agencies can reappoint a preference-eligible federal employee to a position within the agency, direct the employee to take a single day off before returning for duty, and in so doing destroy the employee's time-earned appeal rights without the employee ever having been the wiser.

The decision below contravenes the plain language of the statute conferring MSPB jurisdiction and the protections of due process. This Court should therefore grant review.

OPINIONS BELOW

The Federal Circuit's opinion is reported at 892 F.3d 1156 (Fed. Cir. 2018) and reproduced in the appendix, Pet. App. 1a–17a. The MSPB decision at issue before the Federal Circuit is unreported and reproduced in the appendix, Pet. App. 18a–36a.

JURISDICTION

The Federal Circuit entered judgment on June 11, 2018. Pet. App. 2a. On August 28, 2018, the Federal Circuit denied a timely petition for rehearing en banc. Pet. App. 38a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Relevant constitutional provisions, statutes, and regulations involved are reproduced in the appendix to this petition, Pet. App. 39a–41a.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The MSPB is an independent, quasi-judicial agency with the "mission" to "[p]rotect the Merit System Principles and promote an effective Federal workforce free of Prohibited Personnel Practices." About MSPB, Merit Sys. Prot. Bd. (last visited Nov. 26, 2018), https://perma.cc/QGP3-KHAC.

The MSPB has jurisdiction to hear appeals of certain adverse employment actions taken against certain federal employees. 5 U.S.C. § 7513(d). Section 7512 defines the specific "adverse actions" that provide the basis for appeal to the MSPB. *Id.* § 7512. The specific adverse actions include "removal." *Id.* § 7512(1).

Section 7511 defines the "employee[s]" over whose appeals the MSPB has jurisdiction. As relevant here, § 7511(a)(1)(B)(ii) defines an "employee" as "a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions . . . in the United States Postal Service or Postal Regulatory Commission."

The Office of Personnel Management (OPM) has promulgated a regulation defining "[c]urrent continuous employment" as "a period of employment or ser-

vice immediately preceding an adverse action without a break in Federal civilian employment of a workday." 5 C.F.R. § 752.402.[1]

B. Factual Background

Mr. Williams is a preference-eligible veteran. Pet. App. 6a. On June 15, 2013, USPS appointed Mr. Williams to serve as a Rural Carrier Associate (RCA). Pet. App. 19a. After serving more than eighteen months as an RCA, Mr. Williams applied to serve as a City Carrier Assistant (CCA). *Id.* USPS selected Mr. Williams for the CCA position. *Id.*

Twenty-two months after entering employment as an RCA, and after accepting his reappointment as a CCA, on April 2, 2015, Mr. Williams concluded his duties as an RCA and took a five-day "break in service" between duties at USPS's direction. *Id.* On April 8, 2015, Mr. Williams began his duties as a CCA. Pet. App. 20a.

USPS processed Mr. Williams's "notification of personnel action" reflecting his transition from an RCA to a CCA position on a single day, April 16, 2015. Pet. App. 20a nn.3–4. At no point did USPS inform Mr. Williams that accepting the CCA appointment

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[1] The Federal Circuit treats OPM's definition of "current continuous employment" as interpreting "current continuous service" for purposes of § 7511. *See Wilder v. Merit Sys. Prot. Bd.*, 675 F.3d 1319, 1321–22 & n.1 (Fed. Cir. 2012). Petitioner does not challenge the appropriateness of doing so.

would destroy his already vested right to appeal adverse employment actions to the MSPB. Pet. App. 13a.

Three months later, USPS terminated Mr. Williams's employment after he was involved in a motor vehicle accident. Pet. App. 20a.

C. Proceedings Below

1. Mr. Williams, proceeding pro se, timely filed an appeal with the MSPB challenging his termination. Pet. App. 6a. The administrative judge dismissed Mr. Williams's appeal for lack of jurisdiction finding that Mr. Williams had not completed one year of "current continuous service" at the time of termination because he took more than a day off between his RCA and CCA appointments. Pet. App. 6a–7a.

Mr. Williams, still pro se, filed a petition for review of the administrative judge's dismissal. Pet. App. 7a. On February 9, 2016, the MSPB denied Mr. Williams's petition for review. *Id.*

Mr. Williams appealed the MSPB's decision to the Federal Circuit. *Id.*; *see also* 5 U.S.C. § 7703(b)(1)(A). After securing counsel, Mr. Williams argued to the Federal Circuit that he maintained "current continuous service" despite a "break in service" under the MSPB's long-standing interpretation of "current continuous service" as encompassing "continuing employment contract[s]." Pet. App. 21a; *see also Roden v. Tenn. Valley Auth.*, 25 M.S.P.R. 363, 367–68 (1984), *overruled by Winns v. U.S. Postal Serv.*, 124 M.S.P.R. 113 (2017). Mr. Williams also argued that because USPS failed to inform him that he would lose his appeal rights by accepting the CCA position,

due process required that MSPB jurisdiction attach. Pet. App. 21a; *see also Exum v. Dep't of Veterans Affairs*, 62 M.S.P.R. 344, 348–49 (1994). The MSPB requested a remand to consider Mr. Williams's arguments, which the Federal Circuit granted. Pet. App. 21a–22a.

2. After the Federal Circuit's remand, in a similar case, the MSPB overruled its longstanding interpretation of "current continuous service." *See Winns*, 124 M.S.P.R. 113. In *Winns*, the MSPB held that the ordinary meaning of "current continuous service" did not include circumstances in which an employee completed a series of temporary appointments if the employee took a day off in between duties. *Id.* at 119–20. The MSPB further held that even if Congress had not spoken to the issue, OPM's implementing regulation defining "current continuous employment" as "without a break in Federal civilian employment of a workday" was a permissible construction of the statute that would prohibit a series of temporary appointments if the employee took a transitional day off between duties. *Id.* at 120.

On the same day it issued *Winns*, the MPSB decided Mr. Williams's case. Pet. App. 18a–36a. The MSPB applied *Winns* to Mr. Williams's case, holding that Mr. Williams's taking five days off at USPS's direction between completion of his RCA duties and the start of his CCA duties broke his "current continuous service." Pet. App. 24a–28a.

The MSPB also rejected Mr. Williams's due-process argument that USPS's failure to advise Mr. Williams of the loss of his appeal rights preserved his

"current continuous service" as a matter of due process. Pet. App. 28a–34a. The MSPB's only reason for rejecting Mr. Williams's due-process argument was that Mr. Williams could not definitively state under oath that "he would not have accepted the CCA position if he had known that he would lose his appeal rights." Pet. App. 34a.

3. Back before the Federal Circuit, Mr. Williams again raised his arguments that "current continuous service" in § 7511(a)(1)(B) extends to situations in which the federal government intends employment to continue under a series of consecutive appointments even if the employee takes a few days off between duties. Pet. App. 10a–11a. And Mr. Williams again raised his argument that USPS's failure to inform Mr. Williams that taking the agency-ordered break would result in the loss of his vested appeal rights. Pet. App. 12a–13a.

On June 11, 2018, the Federal Circuit issued its decision. Pet. App. 1a–17a. The Federal Circuit held that 5 U.S.C. § 7511(a)(1)(B) did not unambiguously show that "Congress intended the statute to cover an individual who was employed through a series of temporary appointments." Pet. App. 10a. The Federal Circuit then deferred to OPM's regulation defining "current continuous service" as "without a break . . . *of a workday*." Pet. App. 12a (quoting 5 C.F.R. § 752.402). The Court assumed that USPS's directing Mr. Williams not to appear for work for five days was a "break . . . of a workday" that defeated "current continuous service." *Id.*

The Federal Circuit also rejected Mr. Williams's argument that due process required USPS to inform Mr. Williams that he would lose his appeal rights by accepting the CCA position and taking the agency-ordered five days off. Pet. App. 12a–16a. The Court held that an agency "has no obligation to advise its employees of all the potential changes associated with a new job" where the employee "voluntarily applied, and was selected." Pet. App. 15a.

Mr. Williams timely filed a petition for rehearing en banc, which the Federal Circuit denied on August 28, 2018. Pet. App. 38a.

REASONS FOR GRANTING THE PETITION

I. Review Is Needed To Clarify That An Employee Maintains "Current Continuous Service In The Same Or Similar Positions" Through Service Under A Continuing Series Of Appointments

The lower courts' holding that "current continuous service in the same or similar positions" cannot encompass a preference-eligible individual's series of appointments under a continuing employment relationship with the employing agency contravenes the statute and robs preference-eligible individuals of critical appeal rights.

1. "'If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (quoting *Bd. of Governors, FRS v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986)); *Chevron, U.S.A., Inc. v. Natural Res. Def.*

Council, Inc., 467 U.S. 837, 842–43 & n.9 (1984) (emphasis added) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.").

The statute defines an "employee" as "a preference-eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions . . . in the United States Postal Service." 5 U.S.C. § 7511(a)(1)(B)(ii).

The statute's language is clear that a series of appointments can qualify as "current continuous service" for preference-eligible veterans even if one or more days pass between duty periods.

First, by extending service to "the same or similar positions," the statute presupposes that the employee can change appointments. Thus, Congress clearly intended a series of appointments to suffice; otherwise, it would have had no need to allow service in a "similar position." *See Setser v. United States*, 566 U.S. 231, 239 (2012) ("[W]e must 'give effect . . . to every clause and word' of the Act." (second alteration in original) (quoting *United States v. Menasche*, 348 U.S. 528, 538–39 (1955))).

Second, *non*-preference-eligible individuals cannot accumulate "current continuous service" by serving in temporary appointments. *See* 5 U.S.C. § 7511(a)(1)(C). Instead, the statute defines "employee" as "an individual in the excepted service (*other than* a preference eligible) . . . who has completed 2 years of current continuous service in the

same or similar positions . . . under *other than* a temporary appointment of two years or less." *Id.* (emphasis added). Congress's exclusion of a temporary-appointment limitation for preference-eligible individuals demonstrates that no such limit was intended for preference-eligible individuals. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.").

Thus, Congress clearly intended a preference-eligible individual's series of appointments—temporary or otherwise—to qualify as "current continuous service" for purposes of § 7511(a)(1)(B).

For over thirty years, the MPSB understood this, holding that preference-eligible veterans retained "current continuous service" when serving a continuing series of appointments with a few days off between duties. *See Roden*, 25 M.S.P.R. at 367–68; *see also Melvin v. U.S. Postal Serv.*, 79 M.S.P.R. 372 (1998); *Bradley v. U.S. Postal Serv.*, 69 M.S.P.R. 595 (1996); *Hayes v. U.S. Postal Serv.*, 36 M.S.P.R. 622 (1988). The federal agency's and the employee's clearly manifested intention that the employee will be continuously employed preserved "current continuous service" for purposes of § 7511(a)(1)(B).

The MSPB overruled its long-standing construction of § 7511(a)(1)(B) by relying only on ordinary dictionary definitions of "continuous" as "uninterrupted" or "unbroken." *Winns*, 124 M.S.P.R. at 119. The MSPB's rejection of its prior interpretation, which

considered statutory intent and purpose, cannot be so readily discarded. Rather, "[i]f a court, employing *traditional tools of statutory construction*, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 842–43 n.9 (emphasis added).

For this reason, this Court has rejected blind adherence to literal dictionary definitions. *See Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989) ("'[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary[.]'" (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.) (Hand, J.), *aff'd*, 326 U.S. 404 (1945))); *cf. Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) ("The definition of words in isolation, however, is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities. Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.").

The MSPB's construction of "current continuous service" as requiring "continuous service" in its literal dictionary sense would lead to absurd results that Congress could not have intended: must a federal employee *never stop working* lest his service be deemed "interrupted"? Surely not. *Cf. Logan v. United States*, 552 U.S. 23, 36 (2007) ("Statutory terms, we have held, may be interpreted against their literal meaning where the words 'could not conceivably have been intended to apply' to the case at hand." (quoting *Cabell*,

148 F.2d at 739)); *Pub. Citizen*, 491 U.S. at 454 ("Where the literal reading of a statutory term would 'compel an odd result,' we must search for other evidence of congressional intent to lend the term its proper scope." (quoting *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989))).

As explained above, the extension of service to "similar positions" and the lack of a "temporary appointment" prohibition confirms unambiguously that Congress intended a series of consecutive appointments to qualify as "current continuous service" for preference-eligible individuals under § 7511(a)(1)(B). Thus, where an agency reappoints an individual under a series of appointments—temporary or otherwise—maintaining a continuing employment relationship, the preference-eligible individual maintains "current continuous service."

2. The lower courts thought that the existence of an OPM regulation defining "current continuous employment" changed the analysis. *See* Pet. App. 11a–12a (citing 5 C.F.R. § 752.402); *Winns*, 124 M.S.P.R. at 120. It does not. OPM defines "current continuous employment" as a "period of . . . service immediately preceding an adverse action without a break in Federal civilian employment of a workday." 5 C.F.R. § 752.402. But OPM's regulation does not resolve the question here, as it "gives little or no instruction on a central issue in [the] case." *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006). "Simply put, the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute." *Id.*

The courts below said "continuous" means "unbroken," and OPM's regulation says "continuous" means "without a break." In other words, to be "continuous," service must not be subject to a "break," and to not be subject to a "break," service must be "continuous." The regulation therefore "gives no indication how to decide *this* issue," *id.* (emphasis added), namely, whether a preference-eligible individual's service is "continuous" if he serves a series of appointments with a few days off in between duties when the federal agency intends a continuous employment relationship.

The Federal Circuit believed that OPM's regulation informed the question because it added "without a break . . . *of a workday*." Pet. App. 12a. But OPM's "of a workday" language serves at most as an interpretation of the *duration* of *a break* in employment. *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (applying "the grammatical 'rule of the last antecedent,' according to which a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows"). It does *not* answer the antecedent question: what *constitutes* a break in the employment relationship. Because Congress clearly intended a series of consecutive appointments to qualify as "current continuous service," a federal agency's reappointment of a preference-eligible individual and intention to maintain a continuing employment relationship maintains "continuous" service even if the employee takes a few days off.

Finally, even if the duration of the time off between duties is the correct inquiry, USPS directed Mr.

Williams *not* to present for work during his five-calendar-day transitional leave period. He therefore could not have missed a "workday." *Cf. Butterbaugh v. U.S. Dep't of Justice*, 336 F.3d 1332, 1337 (Fed. Cir. 2003) ("As a general matter, employees are not accountable to their employers for time they are not required to work."); *Gutierrez v. Dep't of Treas.*, 99 M.S.P.R. 141, 147 (2005) ("When a seasonal employee is placed in a nonduty, nonpay status there is no break of a *workday*. A seasonal employee's time in a nonduty, nonpay status is contemplated as part of his employment. These off-duty days cannot be considered workdays, as it is anticipated that such an employee would not be working during these days." (citations omitted)).

Accordingly, OPM's regulation is not entitled to deference, and the lower courts' reliance on OPM's regulation cannot insulate their incorrect construction of "current continuous service in the same or similar positions" in 5 U.S.C. § 7511(a)(1)(B).

Nor should the MSPB's new implied interpretation of the statute and OPM's regulation as precluding a series of consecutive appointments receive any deference. That is because "an agency's interpretation of a statute or regulation that conflicts with a prior interpretation is 'entitled to considerably less deference than a consistently held agency view,'" *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987)), and because MSPB's interpretation is not a reasonable construction of either the statute or OPM's regulation, *Chevron*, 467 U.S. at 843.

In short, 5 U.S.C. § 7511(a)(1)(B) clearly provides that a preference-eligible individual maintains "current continuous service in the same or similar positions" by serving a series of consecutive appointments where the agency intends a continuing employment relationship.

II. Allowing Federal Agencies To Mislead Employees Into Relinquishing Vested Employment Rights Is Irreconcilable With Due Process

Along with eliminating appeal rights for preference-eligible individuals serving under a series of consecutive appointments, the Federal Circuit vitiated years of its precedent holding that when an agency misleads an individual as to the employment consequences of a particular personnel action (including loss of appeal rights), due process requires that the MSPB have jurisdiction over the merits of the employee's appeal. The Federal Circuit's new license to federal agencies to lie to, mislead, and withhold material information from federal employees contemplating selection of a personnel action contravenes due process.

Federal employees have a constitutionally protected property interest in their continued federal employment and the rights pertaining thereto. *See Arnett v. Kennedy*, 416 U.S. 134, 155–56 (1974); *Raney v. Fed. Bureau of Prisons*, 222 F.3d 927, 936 n.7 (2000) (en banc); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 539–40 (1985). As a result,

federal employees must receive due process with respect to their employment rights. U.S. Const. amend. V.

"'The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.'" *Arnett*, 416 U.S. at 155 (quoting *Cafeteria and Rest. Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

Fundamental notions of due process preclude federal agencies from misleading their employees as to their employment rights. Courts have found this particularly true when it comes to a federal employee's right to appeal an agency's employment actions. *E.g.*, *Bohn v. Dakota Cty.*, 772 F.2d 1433, 1442 (8th Cir. 1985) ("[S]erious misdirection by state officials which nullifies a complainant's right to appeal might well contribute to a due process violation."); *Covington v. Dep't of Health and Human Servs.*, 750 F.2d 937, 943 (Fed. Cir. 1984) ("The agency's . . . failure to inform him that a retirement election would preclude a later appeal denied him the right to consider this fact in making his decision."); *see also Goodrich v. U.S. Dep't of the Navy*, 686 F.2d 169, 178 (3d Cir. 1982) (rejecting application of rule that would "allow a federal agency, through inadvertence or intentional concealment, to neglect to notify an employee" of material fact bearing on his right to appeal); *cf. Republican Nat'l Comm. v. Fed. Election Comm'n*, 76 F.3d 400, 412 (D.C. Cir. 1996) (Sentelle, J., concurring in part) ("Courts have suggested that an agency cannot mislead an individual.").

In its seminal decision in *Covington*, the Federal Circuit ensured that federal employees misled by an agency into selecting a particular personnel action without informing them of the loss of appeal rights would retain their right to appeal. 750 F.2d at 943. A federal employee's "decision made 'with blinders on', based on misinformation or a lack of information, cannot be binding as a matter of fundamental fairness and due process." *Id.* Thus, the *Covington* Court recognized that an "agency's failure to inform [an employee] that a [particular] election would preclude a later appeal denied him the right to consider this fact in making his decision" and thus preserved the MSPB's jurisdiction over the employee's appeal. *Id.* at 943–44.

For over twenty years, the MPSB adhered to the rule that an agency has "an obligation to inform the appellant of the effects the change [in employment status] would have." *See Exum*, 62 M.S.P.R. at 347–50; *see also Clarke v. Dep't of Def.*, 102 M.S.P.R. 559, 562–63 (2006); *Edwards v. Dep't of Justice*, 86 M.S.P.R. 404, 406 (2000).

As the MSPB explained,

> An employee who has not knowingly consented to the loss of career tenure and appeal rights in accepting another appointment with the agency thus is deemed not to have "accepted" the new appointment and to have retained the rights incident to the former appointment; the Board therefore may exercise

> jurisdiction over an appeal of an adverse action against that employee.

Park v. Dep't of Health & Human Servs., 78 M.S.P.R. 527, 534 (1998);

Accordingly, in the absence of an agency's providing correct information concerning an employee's loss of appeal rights, due process requires that the MSPB retain jurisdiction over the appeal.

The Federal Circuit has now retreated from this fundamental due-process protection, giving agencies license to lie, mislead, and withhold material information from their employees to destroy vested employment rights without the employee ever having been the wiser, a result irreconcilable with fundamental notions of due process.

III. The Questions Presented Are Exceptionally Important and Have Far-Reaching Implications For Federal Employees' Rights

This Court has recognized that the MSPB's jurisdictional rules should offer "clear guidance" and be readily applied. *Elgin v. Dep't of Treas.*, 567 U.S. 1, 15 (2012). This rings particularly true because half of MSPB's appeals come from *pro se* appellants. *See* U.S. Merit Sys. Prot. Bd., *Congressional Budget Justification FY 2019* at 13 (Feb. 2018), https://perma.cc/TV5S-R2EN ("Generally, about 50 percent of appeals filed with the agency are from *pro se* appellants--employees representing themselves.").

Confusion as to the MSPB's jurisdiction can have serious consequences. Preference-eligible employees in the USPS can either appeal their termination to

the MPSB *or* seek relief under their collective bargaining agreement, but not both. 5 U.S.C. § 7121(e)(1); *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 4–5 (2001).

The combined effect of the holding below creates a jurisdictional trap for preference-eligible postal employees. The construction of § 7511(a)(1)(B) artificially severs current continuous service despite the agency's and employee's manifestations that the individual will be continuously employed. The lower court's holding that the agency does not have to inform the employee about collateral employment consequences compounds the error, allowing agencies to conceal that shifting positions will destroy vested appeal rights.

"The procedures governing federal employment, by statute and regulation, represent a careful balance of employer and employee needs. The benefits of these procedures are not rewards for the select few with the resources to penetrate agency errors." *Yuni v. Merit Sys. Prot. Bd.*, 784 F.2d 381, 388 (Fed. Cir. 1986).

The Federal Circuit's decision makes it unnecessarily complicated for unwary preference-eligible postal employees to decide whether to appeal to the MSPB or to pursue the collective-bargaining grievance process. Unwitting federal employees, like Mr. Williams, can serve for years, be reappointed to a new position in the agency, and understand that they remain a USPS employee with appeal rights though they must take a few days off. Instead, their appeal rights secretly vanish. And USPS has no obligation to correct such misunderstanding or lack of information.

The Federal Circuit's decision is further concerning in light of Congress's plain intent that USPS collective-bargaining provisions not be used to defeat preference-eligible individual's appeal rights. *See* 39 U.S.C. § 1005(a)(2) (providing that "title 5 relating to a preference eligible . . . shall apply to an . . . employee of the Postal Service . . . The provisions of this paragraph shall not be modified by any . . . collective-bargaining agreement . . .); 116 Cong. Rec. 20432 (1970) (statement of Rep. Olsen on the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 731 (1970)) ("If you believe in the preference rights of veterans as regards the Postal Service, in the matter of employment and re-employment and on returning from military service and the rights of appeal that veterans have concerning adverse actions and releasing of employees when reductions in the work force occur, then I urge that you support my amendment so the preference eligible rights of postal service veterans cannot be negotiated away in future collective bargaining."); *see also* 116 Cong. Rec. 22337 (1970) (statement of Sen. Hawke) (similar).

The USPS's use of collective-bargaining agreements to direct preference-eligible individuals to take a day off before beginning new duties and thereby defeat their vested appeal rights contravenes Congress's intent to preserve these respected individuals' rights.

Finally, the issues presented here extend far beyond the postal service, as the now-overruled *Roden* demonstrates. There, a preference-eligible veteran in the excepted service received five consecutive appointments as a welder over a period of nearly four years with "breaks in service . . . [ranging] from one

workday to 12 calendar days." *Roden*, 25 M.S.P.R. at 364, 367. The MSPB recognized that these five consecutive appointments over a period of four years "reflected [Roden's] nontemporary employment in a continuing position or positions." *Id.* at 368. The decision below would dictate a different—unfair—result for this and similar cases.

This Court should therefore grant review to clarify the rights of preference-eligible individuals that serve a federal agency under a continuing series of appointments, temporary or otherwise.

CONCLUSION

The Court should grant the petition.

November 26, 2018 Respectfully submitted,

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