No. 18-694

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF

The government's brief in opposition crystallizes why the Court should grant the petition. Indeed, the government appears to agree that the plain language of Section 7511 manifests Congress's intent for "continuous service" to extend broadly to at least some circumstances in which an employee is placed in a non-pay status between duty periods, Br. in Opp. 18, but the government nonetheless would impose a narrow (but undefined) view of the statute. In the alternative, the government would insist on a rigid application of a regulation that refers ambiguously to a "break" "of a workday" and thus, at best, adds no clarity to the statute or, at worst, unreasonably narrows it.

The government's approach is particularly troubling in view of the brief in opposition's revelation (Br. in Opp. 4 n.2) that the Postal Service incorrectly informed both the Board and the Federal Circuit that Petitioner's five-day non-pay period between appointments was the result of a collective bargaining agreement—a fact that, if true, could suggest the five-day period was voluntary on the part of Petitioner. In fact, as the government now confesses, as a matter of "longstanding practice," Br. in Opp. 4 n.2, the Postal Service has been awarding preference-eligible employees new appointments within the agency, telling them to take five days off before starting their new duties, and thereby attempting to destroy employees' "current continuous service" and the rights attendant thereto.

To immunize the Postal Service's practice from the Court's review, the government agrees with Petitioner on a number of points, even where the court of appeals did not. Indeed, the government acknowledges that Section 7511 plainly allows a series of temporary appointments to qualify as "current continuous service" even if the employee does not literally continuously work. But it then imposes an arbitrary line: according to the government, Section 7511 is clear that "current continuous service" means that waiting until "the next workday" to start a new appointment is acceptable but a "multi-day gap" is not (regardless whether the days would qualify as workdays).

The government, like the courts below, mistakenly believes that Section 7511 draws a line depending on whether a preference-eligible employee takes a single calendar day off, two days off, or several months off (e.g., in the case of seasonal work) between temporary appointments. What matters is that the employee and the agency intend service to continue; the service is therefore "continuous."

The Court should grant review to clarify Section 7511's proper construction and to, ultimately, vindicate federal preference-eligible employees appeal rights.

I. The Postal Service's Now-Admitted "Practice" Of Undermining Employee Rights Underscores The Importance Of The Questions Presented.

In its brief in opposition, the government states: "Before the Board and the court of appeals, the Postal

Service mistakenly described the five-day break in service . . . as required by a collective-bargaining agreement, and both the Board and the court of appeals so determined. . . . This Office has been informed, however, that the current position of the Postal Service is that the five-day break . . . is required *as a matter of Postal Service policy reflecting longstanding practice*, *not by the collective-bargaining agreement*." Br. in Opp. 4 n.2 (emphasis added).

It has taken until a petition for a writ of certiorari for Petitioner to learn this basic information about why he has, thus far, been deprived of his vested employment rights. The Board and the court of appeals did not know. *E.g.*, Pet. App. 6a, 19a. More importantly, it reveals that the Postal Service unilaterally adopted a longstanding practice in which it appoints preference-eligible employees to a new position and tells them to take five days off, negating their vested employment rights apparently without notice.[1] (Mr. Williams received none.)

Securing preference-eligible employees' rights against this practice is exceptionally important. And, as more fully explained in the petition and below, both Section 7511 and due process are intended to protect preference-eligible employees against such practices.

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[1] Mr. Williams notes that whether the five-day break was required by the collective-bargaining agreement or unilaterally by the Postal Service does not change his position that he maintained "continuous service." At least, though, under a collective-bargaining agreement, employees have some representation, unlike with an agency's "longstanding practice."

This Court should grant review of the court of appeals' decision holding otherwise on these exceptionally important questions.

II. The Government's New Reading Of Section 7511 Proves Review Is Warranted.

1. The government agrees that Section 7511 "presupposes that a person may satisfy the continuous-service requirement based on successive periods of employment in different positions." Br. in Opp. 14 (citation omitted). Now, the government concedes that "Congress presumably intended that language to encompass routine situations where a person in one position moves to a 'similar position[]' . . . ." Br. in Opp. 14 (citation omitted). *But see* MSPB C.A. Br. 17 ("[B]oth the plain language of the statute and the legislative history demonstrate that Congress's unambiguous intent was to include only periods of *literal* continuous employment, without any breaks in the middle, within the definition of 'current continuous service.'" (emphasis added)).

But the government then asserts that "Congress's unambiguous intent" somehow extends only to "the next workday," Br. in Opp. 14, not to any "multi-day gap," Br. in Opp. 16. Section 7511's text contains no such arbitrary line.

Instead, the only way an employee could know she was to report back after completing her duties—whether the next day, two days later, or a week later—would be by virtue of a representation from the employing agency that she should return to the employing agency in a different position in the future. The government admits that "[i]t is commonplace for

a worker who moves to a new job in the same organization to leave her old job on one workday and start the new job on the next workday. One would naturally describe the person's employment with the organization in that scenario as 'continuous,' *i.e.*, uninterrupted and unbroken." Br. in Opp. 14. Thus, it *must* be that "current continuous service" reflects the parties' intention to maintain an ongoing employment relationship. Whether the future return date is the next calendar day, or after a two-day weekend, or after a vacation, or on some other date is immaterial to the "current continuous service" inquiry; indeed, the statute says nothing of the sort. Service is continuous because the agency intends to continue the employee's service.

2. The government tries to defeat Section 7511's clear statutory mandate by invoking OPM's regulation defining "current continuous employment" as "a period of . . . service . . . without a *break* in Federal civilian employment *of a workday*." 5 C.F.R. § 752.402 (emphasis added); Br. in Opp. 14. But "break in . . . employment" adds no clarity and is nowhere defined. Nor do the lower courts or the government attempt to define it. Instead, they assert that "continuous" means "without a break," Br. in Opp. 13–14, and thus "break" would mean "not continuous." This is circular. Where an employing agency intends continuing employment, continuous employment does not

"break."[2] Accordingly, OPM's regulation simply parrots what Section 7511 already made clear: a series of temporary appointments where the parties intend service to continue is "continuous service." *See Gonzales v. Oregon*, 546 U.S. 243, 257 (2006) ("[T]he 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.").

3. Even assuming OPM's regulation had anything to offer by defining "current continuous employment" as "break in . . . employment . . . of a *workday*," the government, like the lower courts, reads "work" out of "*work*day," pretending instead the regulation says "calendar day." (It does not.)

When an employer instructs an employee not to come to work, the employee by definition cannot have missed a "workday." Petitioner and the government agree that Petitioner did not present "for five days"

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[2] The facts presented in this case are illustrative of this issue: Petitioner was "reappointed" to his CCA position before separation from his RCA position; the Postal Service processed the notices of personnel action (SF-50) for *both* positions simultaneously *after* Petitioner entered duty in his CCA position; and the Form SF-50 reflecting Petitioner's separation from his RCA position acknowledges both (1) that the purpose of his separation was "for required break in service"; and (2) that at the time of separation he was already designated for "reappointment to different position." C.A. J. App. 157–58. When an agency takes personnel actions solely for the purpose of transitioning an employee from one position to another, it is hard to fathom that Congress would not have considered such employment "continuous."

only at the agency's direction. *See* Br. in Opp. 15. In an effort to convert five calendar days into a missed "workday," the government argues that "[n]either ordinary usage nor common practice regards periods of employment separated by the equivalent of a workweek as 'continuous.'" Br. in Opp. 15. Thus, the government suggests, whether someone's employment was "continuous" requires looking to "ordinary usage" and "common practice" to determine how many days off were too many for that employee to maintain "continuous service." But "jurisdictional tests, often applied at the outset of a case, should be 'as simple as possible.'" *Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115, 128 (2013) (quoting *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1186 (2010)). Evaluating whether "ordinary usage" or "common practice" would consider the number of days off a particular employee takes between duties to be too many to maintain "continuous service" is a test that could not be administered.[3]

The government admits as much, as it concedes that "seasonal employees" who work ten months of

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[3] Nor was such a test administered by the Board or the court below. And the government does not attempt to do so here. Indeed, if administered here, such a test would likely take into account at least (1) the now-acknowledged "practice" of the Postal Service, requiring set numbers of days in non-pay status between duty positions; and (2) the facts (a) that Petitioner's first day in non-pay status was April 3, 2015 (Good Friday—a state holiday in Louisiana); (b) second and third days were a Saturday and Sunday; (c) fourth day was Easter Monday; and (d) that Petitioner entered his duties as a CCA on Wednesday.

the year with two months off maintain "current continuous service." Br. in Opp. 18. Accordingly, in some instances at least, the government agrees that multi-day gaps nonetheless do not undo "continuous service." But the government offers no standard by which to adjudicate the application of Section 7511, and OPM's regulation does not offer any clarity on this point.

Thus, the Court should grant review to clarify that "continuous service" under Section 7511 means simply that that the agency intends the employee's service to continue.

III. The Government's Statutory Argument Cannot Override Due Process.

1. The government cites the court of appeals' decision in *Dunklebarger v. MSPB* (a case not previously addressed by either the parties or the court of appeals) for the proposition that "[i]t is well established that 'an agency cannot by acquiescence confer jurisdiction on the Merit Systems Protection Board to hear an appeal that Congress has not authorized the Board to entertain.'" Br. in Opp. 19 (citing 130 F.3d 1476, 1480 (Fed. Cir. 1997)). But the government overlooks (and, indeed, ignores) the court of appeals' decision in *Covington v. Department of Health and Human Services*, 750 F.2d 937 (Fed. Cir. 1984), on which the *Exum* Rule was based. As *Covington* makes clear, it is the *Constitution* that requires the agency to adjudicate the merits of the employee's claim in these circumstances. Thus, Petitioner's "point is straightforward: the Due Process Clause provides that certain

substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. . . . The right to due process 'is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards.'" *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985) (alteration in original) (quoting *Arnett v. Kennedy*, 416 U.S. 134,167 (1974)).

In *Covington*, the court of appeals recognized the fundamental unfairness of a situation in which an agency fails to inform an employee of material consequences of choosing an otherwise seemingly voluntary employment action. 750 F.2d at 943–44. The court of appeals explained that due process preserved MSPB jurisdiction because 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." *Id.*

Petitioner too was deprived of information relating to the employment consequences of accepting a CCA position and taking the agency-ordered five days off between duties. Due process requires then that the MSPB have jurisdiction over his appeal.

2. This case is the proper vehicle for the Court to consider the question because due process requires notice *before* the employee makes his decision.[4] Mr.

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[4] The government blames Petitioner for failing to declare what he would have done if the Postal Service had

Williams was denied such notice. Thus, due process preserves his right to appeal to the MSPB.

CONCLUSION

The Court should grant the petition.

March 12, 2019 Respectfully submitted,

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provided him with proper notice of the consequences of the personnel action. That, of course, is farcical, as a human cannot fairly be asked to declare under penalty of perjury what she would have done in the past if she had been presented with a scenario that did not, in fact, exist. Nor should a due-process violation be excused based on an inability to predict decision-making in response to a non-existent hypothetical.