NO. _____

In the Supreme Court of the United States

DEBORAH KATZ PUESCHEL,
PETITIONER,
V.
ELAINE CHAO,
SECRETARY OF LABOR,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the rule in *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548 (1973), that the First Amendment does not prevent the federal government from significantly restricting the ability of federal employees to run for public office, permit the government to impose such restrictions on former employees who receive disability benefits?

STATEMENT OF DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the District of Columbia Circuit, No. 18-5330, *Pueschel v. Chao*, Opinion filed April 14, 2020.

United States District Court for the District of Columbia, No. 17-cv-1279, *Pueschel v. Chao,* Memorandum Opinion filed September 13, 2018.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

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Petitioner,

v.
ELAINE CHAO,
SECRETARY OF LABOR

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner Deborah Katz Pueschel respectfully requests that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered on April 14, 2020.

OPINIONS BELOW

The opinion of the District of Columbia Circuit is reported at 955 F.3d 163 and is set out in the Appendix at App. 1. The judgment of the United States District Court for the District of Columbia, dated September 13, 2018, is reported at 357 F.Supp.3d 18 and is set out in the Appendix at App. 14.

STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on April 14, 2020, and this Petition for Certiorari is timely filed by September 11, 2020. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Federal Employee Compensation Act, 5 U.S.C.A. 8101 *et seq.* ("FECA"), provides for "compensation . . . for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty . . ." *Id.,* § 8102(a).

The Act also provides that

> (a) While an employee is receiving compensation under this subchapter, or if he has been paid a lump sum in commutation of installment payments until the expiration of the period during which the installment payments would have continued, he may not receive salary, pay, or remuneration of any type from the United States, except--
>
> (1) in return for service actually performed;

5 U.S.C. § 8116.

Finally, FECA affords the Secretary of Labor the authority to "end, decrease, or increase the compensation previously awarded," 5 U.S.C. § 8128(a), and provides that the Secretary's decision is

> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

Id., § 8128(b).

The freedom of association implicit in the First Amendment to the Constitution has repeatedly been held to protect the right to present oneself to voters as a candidate for public office. *See, e.g.*, *Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984) ("we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and

cultural ends"); *Buckley v. Valeo,* 424 U.S. 1, 15 (1976) ("The First Amendment protects political association as well as political expression"), citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *Lubin v. Panish,* 415 U.S. 709, 716, 718-719 (1974) (imposing a fee an indigent candidate cannot pay, without alternative means of gaining ballot access, violates the rights of expression and association guaranteed by the First Amendment).

STATEMENT OF THE CASE

The Statutes Involved

Since 1883, Congress has restricted the political activity of federal employees. *See United Public Workers of America (C.I.O.) v. Mitchell,* 330 U.S. 75, 79-80 (1947). In 1940, Congress enacted the Hatch Act, which more specifically provided that "No officer or employee in the executive branch of the Federal Government, . . . shall take any active part in political management or in political campaigns." *Id.* at 78 and n.2, quoting 18 U.S.C.A. 61h (1940). The penalty for violating the Hatch Act was dismissal. *Mitchell*, 330 U.S. at 79.

With some revisions, the Hatch Act continues in effect. For purposes of this case, Congress has continued to provide that employees "may not . . . (3) run for the nomination or as a candidate for election to a partisan political office." 5 U.S.C.A. § 7323(a)(3). This Court has more recently considered the restrictions in the Hatch Act and has held that "neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by

federal employees." *U.S. Civil Service Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 556 (1973) ("*Letter Carriers*").

The Federal Employee Compensation Act, 5 U.S.C.A. 8101 *et seq.* ("FECA"), provides for "compensation . . . for the disability or death of an employee resulting from personal injury sustained while in the performance of his duty . . ." *Id.,* § 8102(a).

FECA affords the Secretary of Labor the authority to "end, decrease, or increase the compensation previously awarded," 5 U.S.C. § 8128(a), and provides that the Secretary's decision is

> (1) final and conclusive for all purposes and with respect to all questions of law and fact; and
>
> (2) not subject to review by another official of the United States or by a court by mandamus or otherwise.

Id., § 8128(b). Nevertheless, the District of Columbia Circuit has held that Section 8128(b) "does not rule out judicial review of constitutional challenges," further noting that "[w]ithout exception, every other circuit to consider the scope of § 8128(b) has concluded that it does not bar judicial review of constitutional claims." *Lepre v. Dep't of Labor,* 275 F.3d 59, 67–68 (D.C. Cir. 2001), citing *Czerkies v. United States Dep't of Labor*, 73 F.3d 1435, 1442 (7th Cir. 1996) (en banc); *id.* at 1443 (Easterbrook, J., concurring in the judgment); *Brumley v. United States Dep't of Labor*, 28 F.3d 746, 747 (8th Cir. 1994) (per curiam); *Benton v. United States*, 960 F.2d 19, 22 (5th Cir. 1992) (per curiam); *Woodruff v. United States Dep't of Labor*, 954 F.2d 634, 639 (11th Cir. 1992) (per curiam); *Owens v. Brock*, 860 F.2d 1363,

1367 (6th Cir. 1988); *Paluca v. Secretary of Labor*, 813 F.2d 524, 525–26 (1st Cir. 1987); *Rodrigues v. Donovan*, 769 F.2d 1344, 1347–48 (9th Cir. 1985).

The Proceedings Below

Mrs. Pueschel was an Air Traffic Controller with the Federal Aviation Administration for about 25 years. In the late 1970's, Mrs. Pueschel alleged that she had been the victim of a campaign of sexual harassment at her facility, an allegation ultimately sustained by the Fourth Circuit. *See Katz v. Dole*, 709 F.2d 251 (4th Cir. 1983).[1] Between the filing of her administrative discrimination complaint of sexual harassment and the Fourth Circuit's decision, Mrs. Pueschel was terminated during the PATCO (Air Traffic Controllers) strike in 1981. Following the Fourth Circuit's decision, Mrs. Pueschel's termination was reversed by the Merit Systems Protection Board, citing, *inter alia,* the sexual harassment to which she had been subjected. *Katz v. Department of Transportation*, 17 M.S.P.R. 303 (1983).

After her reinstatement, Mrs. Pueschel experienced several physical and emotional conditions caused by her work environment, including her treatment by colleagues and superiors. In April 1992, the Office of Worker Compensation Programs (OWCP), part of the U.S. Department of Labor, found that Mrs. Pueschel's conditions were caused or exacerbated by her employment and granted her disability benefits, retroactive to January 1, 1980.

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[1] Petitioner's maiden name is Katz.

In April 1994, Mrs. Pueschel suffered an anxiety attack on the job and never returned to work. In September 1998, OWCP approved Mrs. Pueschel's claim for disability benefits relating to the 1994 incident. Finally, in January 1999, the FAA removed Mrs. Pueschel based upon her medical inability to return to work. Since September 1998, she has received full-time OWCP disability benefits, which are administered by OWCP but paid by the FAA. Mrs. Pueschel has not been a federal employee since January 1999.

In 2000-2004 and 2012-2016, Mrs. Pueschel ran unsuccessfully for the U.S. House of Representatives in Jacksonville, Florida, where she currently lives. In 2012, the FAA began questioning OWCP whether "Pueschel's campaign activities demonstrated an ability to work that was inconsistent with the full-time OWCP benefits she was receiving." The record does not indicate the extent of Mrs. Pueschel's campaigns, but the FAA cited no campaign activities other than a website. On October 9, 2015, the FAA wrote to OWCP that

> Ms. Pueschel demonstrated, and continues to demonstrate, the ability to run for elective office. . . . Her actions in this regard disprove Dr. Leonard Hertzberg's contention . . . "that Ms. Pueschel is 'permanently disabled'" and that "it is doubtful that she will be able to work in *any* (emphasis added) capacity".

Less than three months later, in January 2016, OWCP reduced Pueschel's disability benefits on the ground her candidacy demonstrated she was now capable of working full time as a "customer service representative." Complaint, ¶¶ 30-31.

Mrs. Pueschel filed this action in the District Court for the District of Columbia on June 29, 2017, raising, *inter alia*, a claim that Respondent Department of Labor,

through OWCP, infringed upon her First Amendment right to run for Congress when it reduced her disability benefits based on her candidacy.[2] Respondent moved to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6); the district court granted the motion.

The district court agreed that such FECA benefit decisions were not exempt from Constitutional challenge. App. at 25, citing *Lepre, supra*, 275 F.3d at 64. Nevertheless, the district court dismissed Mrs. Pueschel's First Amendment claim for failure to state a claim. The district court acknowledged that "the right to seek political office . . . is undeniable, though the Constitution and the Supreme Court's cases in the area do not pinpoint the precise grounds on which it rests." App. at 27, quoting *Branch v. F.C.C.*, 824 F.2d 37, 47 (D.C. Cir. 1987). In *Branch*, a local TV reporter wanted to run for local office and his station told him that, because it would have to give his opponents "equal time" under then-existing FCC rules, he would have to give up his candidacy or take an unpaid leave of absence with no guarantee of reinstatement. "Thus," the district court found, "the reporter had to choose between his job and running for office." App. at 28.

The district court noted that *Branch* relied upon this Court's decision in *Letter Carriers*, *supra*, upholding the Hatch Act, which "requires government employees to resign from work if they wish to run for certain political offices." App. at 28, quoting *Branch,* 824 F.2d at 48. The district court also observed that this Court had

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[2] The Complaint also included two claims of discrimination against the FAA. Mrs. Pueschel is not pursuing any claims against the FAA and is here challenging on the dismissal of her First Amendment claim.

upheld "similar [] restrictions against constitutional challenge," *id.,* citing *Clements v. Flushing*, 457 U.S. 957 (1982) (state could require office holders to serve out their term before running for legislature); *Mitchell*, *supra*, (Hatch Act's burden on federal employees was not unconstitutional). Relying on those precedents, the district court concluded that "nobody has ever thought that a candidate has a right to run for office *and at the same time to receive full-time disability benefits*." App. at 28 (emphasis in original).

Mrs. Pueschel timely appealed the dismissal to the Court of Appeals for the District of Columbia Circuit, arguing that the district court's decision should be reversed because a) American citizens have a First Amendment right to run for public office, subject to the government's balancing of that right against competing interests, *Letter Carriers, supra,* 415 U.S. 548; b) neither Congress nor the Department of Labor has provided for reduction of FECA benefits merely because a beneficiary is a candidate for federal office; and c) Congress allows a FECA beneficiary to earn a federal salary in addition to receiving disability benefits, undermining the argument that benefits may be reduced to a *candidate*, 5 U.S.C. § 8116(a)(1).

Respondent argued that the First Amendment did not prohibit reduction of Mrs. Pueschel's – or anyone else's – disability benefits if she ran for Congress. On the contrary, Respondent told the Court that Mrs. Pueschel could not "plausibly claim that her First Amendment rights are implicated by the FAA's letter to OWCP regarding her political campaign activities or OWCP's reduction of her disability

benefits," because "the First Amendment does not prohibit conduct that imposes 'incidental burdens on speech.'" Brief for Respondent, R-1801172, at 36 (August 7, 2019), quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) (Vermont statute restricting use of doctors' prescription practices violated First Amendment).

The court of appeals affirmed, but not on the ground advanced by Respondent. The court ignored Respondent's argument that the First Amendment did not apply, acknowledging that the constitutional "right to seek political office . . . is undeniable". App. at 11, quoting *Branch, supra*, 824 F.2d at 47. The court, however, failed to decide the extent of that right, or whether the government had a legitimate interest in abridging that right as applied to Mrs. Pueschel. Instead, the court adopted the analysis in *Letter Carriers* and *Branch*, cases in which *Congress* restricted the candidacies of certain *employees* based upon interests found by the courts to be compelling. Ignoring entirely the particular interests at issue in those cases, the court of appeals simply repeated the district court's opinion that the issue

> is not whether Congress has prohibited political candidates from receiving full workers' compensation benefits, but whether the burden imposed by the federal statutes in *Branch* and *Letter Carriers* is analogous to the alleged burden imposed by OWCP's determination. . . . That Pueschel may have to choose between retaining full disability benefits and her candidacy "does not differ in kind from the fact 'many people find it necessary to choose between their jobs and their candidacies.'" *Pueschel*, 357 F. Supp. 3d at 29–30 (quoting *Branch*, 824 F.2d at 48).

App. at 12.

As the result, the court of appeals failed to address the question presented in the appeal: may the government, consistent with the First Amendment, withdraw or reduce the disability benefits received by an individual who runs for public office,

without any regard for or examination of the nature or extent of the disability. Mrs. Pueschel timely petitions this Court to determine whether the imposition of a financial penalty on her disability benefits solely because she was a candidate for Congress violated her First Amendment rights, a question raised but not resolved below.

REASONS FOR GRANTING THE WRIT

1. The court of appeals failed to reach the fundamental issue of Petitioner's First Amendment right to run for Congress without bearing a significant financial penalty in the form of a reduction of her disability benefits.

a. The right to run for office is protected by the First Amendment, subject to regulation by Congress

There is no doubt that the right of a citizen to run for elective office is a right of association guaranteed by the First Amendment to the Constitution. *Roberts v. U.S. Jaycees,* 468 U.S. 609, 622 (1984) ("we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends"); *Buckley v. Valeo,* 424 U.S. 1, 15 (1976) ("The First Amendment protects political association as well as political expression"), citing *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *Lubin v. Panish,* 415 U.S. 709, 716, 718-719 (1974) (imposing a fee an indigent candidate cannot pay, without alternative means of gaining ballot access, violates the First Amendment of candidates and voters). *See also Storer v. Brown,* 415 U.S. 724, 756, (1974) ("The right to vote derives from the right of association that is at the core of the First Amendment") (Brennan, J., dissenting).

It is also undisputed that the First Amendment is not absolute, and that Congress and the States have the authority to impose restrictions on candidates' ability to run for office. *See, e.g.*, *Letter Carriers, supra*; *Jenness v. Fortson,* 403 U.S. 431, 438-40 (1971) (requirement for nominating petitions as a condition to appear

on the ballot does not violate First Amendment). However, a governmental restriction on the First Amendment's right of association "can survive constitutional scrutiny only if the State shows that it advances a compelling state interest." *Eu v. San Francisco County Democratic Cent. Committee*, 489 U.S. 214, 223 (1989), citing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217, 222 (1986). *See also Kusper v. Pontikes*, 414 U.S. 51, 58 (1973) ("a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest.").

The cases relied upon by the court of appeals demonstrate conclusively that some limitations imposed by Congress will satisfy scrutiny if they address a compelling interest. In *Mitchell*, and again in *Letter Carriers*, this Court addressed the Hatch Act, which bars federal employees from engaging in partisan political activity, including running for elective office. From its enactment in 1907, the Hatch Act and its related Civil Service Rule 1 have required that classified civil service employees "shall take no active part in political management or in political campaigns." *Mitchell*, 330 U.S. at 79, n.4. *Mitchell* concerned the 1940 version of the Hatch Act, which included the same restriction. In the face of the constitutional challenge, the Court concluded that

> . . . Congress may regulate the political conduct of Government employees 'within reasonable limits,' even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the general existing conception of governmental power. . . . Congress and the administrative agencies have authority over the discipline and efficiency of the public service. When actions of civil

> servants in the judgment of Congress menace the integrity and the competency of the service, legislation to forestall such danger and adequate to maintain its usefulness is required. The Hatch Act is the answer of Congress to this need. *We cannot say with such a background that these restrictions are unconstitutional.*

Mitchell, 330 U.S. at 102 (emphasis added).

Letter Carriers, involving a later version of the same restrictions, reached the same conclusion:

> We unhesitatingly reaffirm the *Mitchell* holding that Congress had, and has, the power to prevent Mr. Poole and others like him from holding a party office, working at the polls, and acting as party paymaster for other party workers. An Act of Congress going no farther would in our view unquestionably be valid. So would it be if, in plain and understandable language, the statute forbade activities such as organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of *partisan political conduct by federal employees*.

Letter Carriers, 413 U.S. at 556 (emphasis added).

In the decision below, the court of appeals also cited its earlier decision in *Branch, supra.* The issue in *Branch* concerned the FCC's adoption of regulations implementing the "equal time" provisions of the Communications Act of 1934. 47 U.S.C. § 315(a). Branch was a reporter for a local television station in Sacramento, California, who was told by the station that if he wanted to run for town council in his home town, because of the "equal time" regulations, it would have to offer equal time to each of Branch's opponents every time he appeared on the air, a total of

about 33 hours. 824 F.2d at 39. The station told Branch that if he wished to maintain his candidacy, "he must take an unpaid leave of absence during the campaign, with no guarantee that he would be able to resume his duties after the election." *Id.*

Ultimately, the court of appeals rejected Branch's claim that the equal time rule violated the First Amendment. 824 F.2d at 49. Citing *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 391 (1969), the court of appeals held that "the statutory 'equal opportunities' rule in [the Communications Act] and the Commission's own fairness doctrine rested on the same constitutional basis of the government's power to regulate 'a scarce resource which the Government has denied others the right to use'." *Id.* In response to Branch's claim that the equal time rule "imposes an undue burden on his ability to run for office because he cannot, during the time he is a candidate, do his normal work of reporting news on the air," the court of appeals responded that "nobody has ever thought that a candidate has a right to run for office and at the same time to avoid all personal sacrifice," and "many people find it necessary to choose between their jobs and their candidacies."*Id.* at 48.

b. While acknowledging a First Amendment right, the court of appeals simply failed to identify or assess any compelling interest justifying reduction of Mrs. Pueschel's disability benefits based on her candidacy.

Clearly, the plaintiffs in both *Letter Carriers* and *Branch* were employees. Left undecided by the court of appeals is the application of those cases to non-employees and, accordingly, the government's interest justifying the reduction of

Mrs. Pueschel's disability benefits because she was a candidate, a right protected by the First Amendment. None of the cases relied upon by the court of appeals supports its analysis.

The court's reliance upon *Letter Carriers* simply is misplaced. In *Letter Carriers* and *Mitchell,* this Court addressed Congress' restriction on partisan activities by *employees*. This Court recognized the constitutional implications, but identified three fundamental interests justifying the restrictions. First, "it seems fundamental in the first place that *employees* in the Executive Branch of the Government, or those working for any of its agencies, should administer the law in accordance with the will of Congress, rather than in accordance with their own or the will of a political party." 413 U.S. at 564-65 (emphasis added).

Second, "it is not only important that the Government *and its employees* in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent." *Id.* at 565 (emphasis added). And third, the other "major concern of the restriction against partisan activities *by federal employees* was . . . the conviction [in 1939] that the rapidly expanding Government work force should not be employed to build a powerful, invincible, and perhaps corrupt political machine." *Id.* (emphasis added).

The court of appeals' recitation of the district court's interpretation of *Letter Carriers* – that "many people find it necessary to choose between their jobs and their candidacies," App. at 12, quoting App. at 28 – simply ignores the obvious fact that

Mrs. Pueschel was not a federal employee, but an individual living on disability benefits. While the Court in *Letter Carriers* went to great lengths to explain why the First Amendment gave way to the government's overriding interest in ensuring a non-partisan workforce, the court of appeals made no effort to explain the corresponding governmental interest in reducing Mrs. Pueschel's disability benefits.

Mrs. Pueschel is not suggesting that Respondent is precluded from deciding that a candidate for office may no longer be disabled, thereby justifying a revision or withdrawal of her benefits. However, that decision cannot be based solely on the fact of the candidacy. A paraplegic or other severely disabled recipient of benefits may decide to run for office and set up a website. She should be able to make that decision without fear that her benefits will be withdrawn or reduced, leaving her unable to support herself. There is no compelling interest in forcing that individual to make that choice, thereby depriving the candidate and the voters of their First Amendment freedom of association.

CONCLUSION

Because the court of appeals' decision failed entirely to address the constitutional implications of Respondent's reduction of Petitioner's benefits in this case, a writ of certiorari should issue to review and/or vacate the decision of the court of appeals of the District of Columbia Circuit and remand it for further review.

Respectfully submitted,

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