

No. \_\_\_\_\_

\_\_\_\_\_  
**In the Supreme Court of the United States**  
\_\_\_\_\_

JOHN B. LEPORE

*Petitioner,*

v.

OFFICE OF PERSONNEL MANAGEMENT,

*Respondent.*

\_\_\_\_\_  
*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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## QUESTION PRESENTED

The calculation of annuities for government employees upon their retirement is governed by 5 U.S.C. 8331(4). This section requires a determination of

“the largest annual rate resulting from averaging an employee’s rates of basic pay in effect over any 3 consecutive years of creditable service....”

This requires an analysis of the employee’s rates of basic pay over his/her entire career, although the figure is usually determined by the last three years of that person’s employ by the government. In our case, the documents show that the last three years of Petitioner’s government service, ending on April 16, 1983 produced the “largest annual rate of basic pay” and the Administrative Judge found that it was **uncontested** that Petitioner’s retirement date was April 16, 1983.

The question presented is whether the court below had the right to ignore that finding, in plain violation of Rule 52(a)(6) which states that

“Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner, a retired former employee of the United States who was a criminal investigator, is now suffering from terminal cancer, and seeks to correct his annuity so that his wife will have money to live on after he is gone. Petitioner respectfully petitions this court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

## **OPINIONS BELOW**

The opinion of the MSPB Administrative Judge is reproduced in the appendix hereto (Appx.) at Appx001. The opinion of the Federal Circuit was entered on February 6, 2019 and reproduced in the appendix hereto at Appx 015.

## **JURISDICTION**

Jurisdiction is by writ of certiorari.

## **STATUTORY PROVISIONS INVOLVED**

5 U.S.C. 8331(4) describes exactly how to calculate the amount of an annuitant's retirement annuity.

## **INTRODUCTION**

The court below decided the case as though 5 U.S.C. 8331(4) did not exist and as though the Administrative Judge had not stated in the Initial Decision that the date of Petitioner's retirement was not disputed. The court then ignored the argument showing that Petitioner, who had maintained that OPM had failed to calculate his annuity correctly because it had used the wrong date for his retirement and that under the correct date of his retirement he would have received significantly more money in his annuity.

## **STATEMENT OF THE CASE**

The Federal Circuit decision appears to be the only circuit that has ignored the conclusion made by the Administrative Judge that the correct retirement date was uncontested as April 16, 1983, and, if left unchanged, would be as sharp a split in the circuits as could be imagined. There does not seem to be any other case where an uncontested fact was overturned by the appellate court. In addition, the opinion below does not even explain why that was done. The only comment by the court on this part of its opinion is that the issue was waived. However, the date of April 16, 1983 is the essential part of Mr. Lepore's constant insistence that his annuity was not calculated correctly. And the whole argument on that issue is the date of April 16, 1983. And the finding of that date as an uncontested fact, means that there was no record on appeal that could possibly have enabled the Federal Circuit to reach the conclusion it did because the record before it did not contain, nor did it need to contain, any

evidence as to why the Administrative Judge reached that conclusion.

### **CONCLUSION**

This case turns well established principles of the requirements of Rule 52(a)(6) upside down and implicates issues of the most fundamental importance. It clearly merits this court's plenary review. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted

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### ***CERTIFICATE OF COMPLIANCE***

I, Norman Jackman, Esq. hereby certify that the above document complies with the word limitation of this court and that it contains 860 words.

Norman Jackman