No. 18-694

# In the Supreme Court of the United States

DEREK T. WILLIAMS, PETITIONER

*v.*

MERIT SYSTEMS PROTECTION BOARD, ET AL.

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

**BRIEF FOR THE RESPONDENTS IN OPPOSITION**

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## QUESTION PRESENTED

Whether the Merit Systems Protection Board correctly determined that it lacked jurisdiction to review petitioner's challenge to the termination of his service on the ground that petitioner was not a federal "employee" entitled to seek administrative review of an adverse personnel action, 5 U.S.C. 7513(d), 7701(a), because petitioner had not "completed 1 year of current continuous service." 5 U.S.C. 7511(a)(1)(B).

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 892 F.3d 1156. The decision of the Merit Systems Protection Board (Pet. App. 18a-36a) is not published in the M.S.P.R. but is available at 2017 WL 67110. The initial decision of an administrative judge (C.A. App. 52-58) is unreported. An earlier decision of the court of appeals (C.A. App. 22-24) is unreported. An earlier decision of the Merit Systems Protection Board (C.A. App. 285-289) is not published in the M.S.P.R. but is available at 2016 WL 7666157.

### JURISDICTION

The judgment of the court of appeals was entered on June 11, 2018. A petition for rehearing was denied on August 28, 2018 (Pet. App. 37a-38a). The petition for a writ of certiorari was filed on November 26, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

1. "Under the Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101 *et seq.*, certain Federal employees may obtain administrative and judicial review of specified adverse employment actions." *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 5 (2012). The CSRA provides that "[a]n employee against whom" certain final adverse personnel actions, including removal from service, are taken "is entitled to appeal to the Merit Systems Protection Board [Board] under [5 U.S.C. 7701]." 5 U.S.C. 7513(d); see 5 U.S.C. 7512(1).

Section 7701 provides that "[a]n employee * * * may submit an appeal to the Merit Systems Protection Board from any action which is appealable to the Board under any law, rule, or regulation" and the employee has the right to a hearing and to be represented by counsel or another representative. 5 U.S.C. 7701(a). Such "[a]ppeals shall be processed in accordance with regulations prescribed by the Board." *Ibid.* If the Board rules in favor of the employee, it may order various forms of relief, including reinstatement, back pay, and attorney's fees. See *Elgin*, 567 U.S. at 6 (citing 5 U.S.C. 1204(a)(2), 7701(g)); 5 U.S.C. 7701(b). An employee who appeals a personnel action to the Board and who is dissatisfied with its decision may seek review in the United States Court of Appeals for the Federal Circuit, which has exclusive jurisdiction over such appeals. See 5 U.S.C. 7703(a) and (b)(1); 28 U.S.C. 1295(a)(9).

The CSRA defines an "employee" entitled to invoke those review procedures to include several classes of persons. 5 U.S.C. 7511(a)(1) (2012 & Supp. V 2017). As relevant here, it defines "employee" to include a "preference eligible" person—*i.e.*, a veteran or relative of a

veteran who meets certain criteria for hiring preferences, see 5 U.S.C. 2108(3) (2012 & Supp. V 2017)—who is "in the excepted service" and "has completed 1 year of current continuous service in the same or similar positions." 5 U.S.C. 7511(a)(1)(B). The statute does not define "current continuous service." Congress has authorized the Office of Personnel Management (OPM) to "prescribe regulations to carry out the purpose of th[e] subchapter" of the CSRA that includes Section 7511. 5 U.S.C. 7514; *Wilder* v. *MSPB*, 675 F.3d 1319, 1322 (Fed. Cir. 2012). An OPM notice-and-comment regulation, in effect (with immaterial revisions) since 1988, defines the nearly identical phrase "current continuous employment" as "a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday." 5 C.F.R. 752.402 (emphasis omitted); see 53 Fed. Reg. 21,619, 21,623 (June 9, 1988).[1]

2. Petitioner is a preference-eligible veteran. Pet. App. 6a, 19a-20a. Effective June 15, 2013, the U.S. Postal Service appointed petitioner to the position of Rural Carrier Associate. *Id.* at 19a. More than 18 months later, petitioner applied and was selected for a time-limited appointment to a different position in the Postal Service, as a City Carrier Assistant. *Ibid.* Postal Service policy required a five-day break in service when an individual moved from a Rural Carrier Associate position to a time-

[1] Although the regulation uses the term "employment," whereas the statute uses the term "service," the court of appeals has treated the two terms as synonymous. *Wilder*, 675 F.3d at 1321-1322 & n.1; Pet. App. 9a n.1. In the court of appeals, "[n]either party argue[d] that the difference in terminology has any legal significance here," Pet. App. 9a n.1, and in this Court petitioner states (Pet. 4 n.1) that he "does not challenge the appropriateness of doing so."

limited City Carrier Assistant position.[2] See C.A. App. 449-450, 479. Accordingly, after petitioner was separated from his Rural Carrier Associate position on April 2, 2015, he remained separated from service for five days before his appointment to the City Carrier Assistant position took effect. Pet. App. 19a-20a.

Approximately three months after petitioner was appointed to the City Carrier Assistant position, he was involved in a motor-vehicle accident while on duty. Pet. App. 20a. The Postal Service terminated petitioner's employment, effective July 27, 2015. *Ibid.*; C.A. App. 52.

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[2] Before the Board and the court of appeals, the Postal Service mistakenly described the five-day break in service between appointments as a Rural Carrier Associate and City Carrier Assistant as required by a collective-bargaining agreement, and both the Board and the court of appeals so determined. Pet. App. 6a, 19a; Postal Service C.A. Br. 3-4. Evidence in the record supported that characterization. See C.A. App. 479 (chart summarizing Postal Service policy regarding required breaks in service between various positions); *id.* at 449-450 (declaration of Postal Service employment and placement specialist explaining that the "[c]hart is based on the Postal Service's legal and contractual obligations, including its obligations under the national collective-bargaining agreements," and "compiles and restates those obligations," and explaining why "a five-day break in service is necessary" when moving from a Rural Carrier Associate to City Carrier Assistant position). This Office has been informed, however, that the current position of the Postal Service is that the five-day break between the Rural Carrier Associate and City Carrier Assistant positions is required as a matter of Postal Service policy reflecting longstanding practice, not by the collective-bargaining agreement. The specific basis for requiring a break in service does not affect the outcome of this case because it is undisputed that a five-day break was required in these circumstances, that petitioner voluntarily applied for and accepted the City Carrier Assistant position requiring the break, and that petitioner in fact took the five-day break in service. The government, however, regrets its inaccurate description of the requirement's basis below.

3. a. Petitioner filed an appeal with the Board from the Postal Service's action terminating his employment. Pet. App. 20a. The Board apprised petitioner that, based on the information he provided, the Board might lack jurisdiction because petitioner "may not be eligible to file a Board appeal." C.A. App. 54. The Board afforded petitioner an opportunity to submit evidence and argument on that issue. *Ibid.* After receiving additional information from petitioner and briefing on a motion by the Postal Service to dismiss petitioner's appeal for lack of jurisdiction, a Board administrative judge dismissed the appeal on that basis. Pet. App. 20a; C.A. App. 52-58.[3]

The administrative judge determined that, although petitioner undisputedly was a "preference eligible" person, he was not an "employee" as defined in 5 U.S.C. 7511 (2012 & Supp. V 2017), and therefore was not eligible to appeal to the Board, because petitioner "failed to prove that at the time of his termination, he had completed one year of current, continuous service in the same or similar position." C.A. App. 57. The administrative judge explained that, under Board precedent and OPM's regulation, "[c]urrent continuous service is a period of employment or service, either in the competitive or excepted service[,] that immediately precedes an adverse action without a break in Federal civilian employment of a workday." *Ibid.* The administrative

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[3] Although petitioner had requested a hearing, the administrative judge dismissed the case "based on the written appeal record" because the administrative judge "f[ou]nd that [petitioner] failed to raise a non-frivolous allegation of fact which, if proven, could establish a prima facie case of Board jurisdiction." C.A. App. 52 n.1 (citing *Beets* v. *Department of Homeland Sec.*, 98 M.S.P.R. 451, 454 ¶ 9 (2005)). The administrative judge's factual findings were "based on undisputed documentary evidence." *Id.* at 56 n.4.

judge "f[ou]nd that [petitioner] had a break in service of more than one day between his first appointment and his second appointment, and therefore did not have one year of current, continuous service at the time of his removal on July 27, 2015." *Ibid.*

Petitioner appealed the administrative judge's decision to the Board. C.A. App. 285. In a February 2016 decision, the Board affirmed. See *id.* at 285-287. The Board agreed with the administrative judge that petitioner was not an "employee" eligible to file an appeal because "it [wa]s undisputed that the appellant had been employed as a City Carrier Assistant for less than 1 year at the time of his termination, and he concede[d] that he had a break in service of at least 5 workdays before being appointed to that position." *Id.* at 287.

b. Petitioner sought review of the Board's decision in the court of appeals. Pet. App. 21a. In the Federal Circuit, petitioner argued "for the first time * * * that, despite the required break in service, he was nevertheless an employee with Board appeal rights under the 'continuing employment contract' theory" adopted in *Roden* v. *Tennessee Valley Authority*, 25 M.S.P.R. 363 (1984). Pet. App. 21a. In *Roden*, which was decided before OPM issued its regulation defining "current continuous employment" in 1988, see 53 Fed. Reg. at 21,623, the Board had determined that an individual who worked in a series of temporary appointments, with "brief interruptions" in between, over a period lasting more than four years was engaged in "'continuous'" employment "as that term is used in section 7511(a)(1)(B)." 25 M.S.P.R. at 368. The Board stated in *Roden* that it "[wa]s obligated * * * to look beyond the form of statutory and other provisions, and to determine the purpose which those provisions were intended

to serve." *Id.* at 367. In the alternative, petitioner contended that he was nevertheless entitled to appeal under the Board's earlier decision in *Exum* v. *Department of Veterans Affairs*, 62 M.S.P.R. 344 (1994), because the Postal Service had not informed him that he would lose his appeal rights as a result of his voluntary transition from his previous Rural Carrier Associate position to his City Carrier Assistant position. See Pet. App. 21a.

The Board filed an unopposed motion requesting that the court of appeals remand the case to the Board so that it could reconsider "whether *Roden* [wa]s still good law and, if so, whether it would alter the Board's jurisdictional determination." C.A. App. 27; see Pet. App. 21a-22a. The court granted the motion to remand. C.A. App. 22-24. The court also granted a similar request by the Board to remand in another case in the same posture. See *Winns* v. *MSPB*, No. 16-1206 (Fed. Cir. Apr. 25, 2016) (per curiam), slip op. 2.

4. a. On remand in this case and in *Winns*, the Board directed the parties to address *Roden*. See Pet. App. 22a; *Winns* v. *United States Postal Serv.*, 124 M.S.P.R. 113, 116 ¶ 6 (2017). In January 2017, the Board issued a precedential decision in *Winns* that expressly "overrule[d]" *Roden*. 124 M.S.P.R. at 121 ¶ 18; see *id.* at 116-121 ¶¶ 7-18. The Board explained that, less than four years after *Roden* was decided, OPM had promulgated its 1988 regulation that (as amended) defines "current continuous employment" to "mean[] a period of employment or service immediately preceding an adverse action *without a break* in Federal civilian employment *of a workday*." *Id.* at 118 ¶ 11 (quoting 5 C.F.R. 752.402) (emphases added; brackets omitted); see *id.* at 117-118 ¶¶ 10-11. The Board further observed that, in a subsequent rulemaking, OPM had "made clear that 5 C.F.R.

§ 752.402 precludes the 'continuing employment contract' theory set forth in *Roden*." *Id.* at 118 ¶ 12 (citing 54 Fed. Reg. 26,172, 26,174 (June 21, 1989)).

The Board in *Winns* concluded that OPM's definition of "current continuous employment" to require no break in service of a workday or more was dispositive. 124 M.S.P.R. at 119-121 ¶¶ 13-28. The Board explained that "Congress has expressly authorized OPM to prescribe regulations implementing" Chapter 75 of Title 5, *id.* at 119 ¶ 13, and OPM's regulation comported with Section 7511's definition of employee, see *id.* at 119-120 ¶¶ 14-15. Drawing on dictionary definitions of "continuous," the Board reasoned that "the ordinary meaning of 'current continuous service' appears to preclude breaks in service." *Id.* at 119 ¶ 14. The Board also observed that, in light of the legislative history, "interpreting the 'current continuous service' requirement in section 7511(a)(1)(B) in accordance with the plain meaning of the term 'continuous' appears consistent with the intent of Congress." *Id.* at 120 ¶ 15. The Board further determined that, "[e]ven if [it] were to find that Congress had not expressed its intent on this matter, * * * or that its purpose and intent is unclear, [the Board] would find that OPM's interpretation in 5 C.F.R. § 752.402 is based on a permissible construction of the statute" and therefore entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 124 M.S.P.R. at 120 ¶ 16. The Board concluded that "*Roden* was incorrectly decided to the extent that it found that an appellant can establish Board jurisdiction based on a 'continuing employment contract' theory, regardless of whether he falls within the definition of an employee with Board appeal rights under the applicable statute," because the "parties cannot confer

jurisdiction by a contract or agreement where none otherwise exists." *Id.* at 120-121 ¶ 17.

b. The same day it decided *Winns*, the Board issued a nonprecedential decision in this case in which it again affirmed the administrative judge's initial decision dismissing petitioner's appeal for lack of jurisdiction. Pet. App. 18a-34a. The Board held that its decision in *Winns* foreclosed petitioner's argument that he is an "employee," despite his five-day break in service, on a "continuing employment contract" theory grounded in *Roden*. *Id.* at 24a-27a. The Board explained that all of petitioner's arguments "regarding why *Roden* should remain good law * * * were either addressed in" its decision in *Winns* or else "do not form a basis to revisit" *Winns*. *Id.* at 25a. In particular, the Board rejected petitioner's contentions that *Roden* should be retained because its rule "benefits preference-eligible veterans" and "ha[d] been precedent for many years," and that "any decision overruling *Roden* should not apply to cases involving matters that transpired before *Roden* was overruled." *Id.* at 26a; see *id.* at 25a-27a. The Board also rejected petitioner's contention that his five-day break in service did not constitute a "break" because he was selected for the City Carrier Assistant position before his previous service ended. *Id.* at 27a-28a.

The Board additionally rejected petitioner's alternative contention, which he had raised for the first time in the prior appeal to the Federal Circuit, that he was entitled to appeal under *Exum* on the ground that the Postal Service had not informed him that he would lose his appeal rights when he voluntarily left his Rural Carrier Associate position for a City Carrier Assistant position due to the break in service. Pet. App. 28a-34a. The Postal Service urged the Board to overrule or narrow

*Exum*. *Id.* at 30a-31a. The Board declined to do so, and it instead concluded that petitioner's argument based on *Exum* failed on its own terms. See *id.* at 30a-34a. The Board explained that, "[u]nder *Exum* and its progeny, an appellant may only retain Board appeal rights from a former position if he establishes that he would not have accepted his new position with the agency if he had known of the resulting loss of appeal rights." *Id.* at 33a. The Board noted that, on remand, it had directed petitioner "to submit evidence and argument regarding whether he would have accepted the [City Carrier Assistant] position if the agency had informed him that he would lose his appeal rights." *Id.* at 34a. Petitioner, the Board explained, had not only "failed to allege that he would not have accepted the [City Carrier Assistant] position if he had known that he would lose his appeal rights," but he had expressly stated in a sworn declaration that "'[he] d[id] not know whether [he] would have accepted'" that position had he been informed by the Postal Service that by doing so he would lose his appeal rights. *Ibid.* (citation omitted).

5. The court of appeals affirmed. Pet. App. 1a-17a. The court concluded that petitioner was not an "employee" entitled to seek Board review because he lacked at least one year of current continuous service. *Id.* at 8a-12a. The court determined that "Congress did not speak directly to whether a series of temporary appointments, with short breaks in between, can count as 'continuous service' under § 7511," *id.* at 10a, but it concluded that OPM's interpretation in its regulation was a permissible one and entitled to deference under *Chevron*, *id.* at 11a-12a. The court rejected petitioner's contention that the Board's prior decisions in *Roden* and other cases adopting a contrary reading of "continuous

service" compelled rejecting OPM's reading, explaining that "*OPM* is the agency * * * charged" with issuing implementing regulations, and "supposedly inconsistent Board decisions are not relevant." *Id.* at 10a-11a (emphasis added). The court also rejected petitioner's contention that OPM's regulation is not entitled to deference because "it merely parrots the statute." *Id.* at 11a. The court explained that the regulation "does more than paraphrase the statute" because it "also establishes the *break duration* that cuts off 'continuous employment,'" by requiring that there be no "'break . . . *of a workday*.'" *Id.* at 12a (quoting 5 C.F.R. 752.402).

The court of appeals also rejected petitioner's contention that he was entitled to appeal to the Board under *Exum* based on the Postal Service's alleged failure to inform petitioner that he would lose his appeal rights by taking his new position. Pet. App. 12a-17a. The court explained that, in an earlier case, it had held that a federal worker who transferred from one federal agency to another and who was not statutorily entitled to appeal could not appeal based on *Exum*. See *id.* at 13a-14a (discussing *Carrow* v. *MSPB*, 626 F.3d 1348 (Fed. Cir. 2010)). In *Carrow*, the court concluded that, "[b]y statute, [the worker's] position with the [agency] did not carry Board appeal rights, and the [agency's] failure to advise [him] of the terms of his appointment does not create appeal rights for positions as to which Congress has not given the Board appellate jurisdiction." *Id.* at 14a (quoting *Carrow*, 626 F.3d at 1353).

The court of appeals in this case determined that, "[a]lthough *Carrow* involved an inter-agency transfer, its rationale is equally applicable to transfers within the same agency" at issue here. Pet. App. 14a. The court explained that "[t]he agency's failure to advise an

employee cannot create appellate jurisdiction for positions that do not otherwise have appeal rights." *Ibid.* The court therefore "specifically disapprove[d] the *Exum* rule, even for intra-agency transfers, and h[e]ld that an agency's failure to inform an employee of the consequences of a voluntary transfer cannot confer appeal rights to an employee in a position which has no appeal rights by statute." *Id.* at 14a-15a.

The court of appeals distinguished petitioner's case from "situations in which an employee with appeal rights is coerced or deceived into resigning or retiring." Pet. App. 15a. "In those situations," the court observed, its "precedent makes clear that a seemingly voluntary act by an employee can be considered involuntary based on deceptive or coercive agency action," and such "an employee could exercise appeal rights to the Board." *Ibid.* The court also reserved judgment on "situations in which an agency coerces or deceives an employee into accepting a new position," observing that petitioner made no such allegation in this case. *Ibid.* The court additionally rejected petitioner's contention that the Board had violated his due-process rights by retroactively applying its decision overruling *Roden* in *Winns*, concluding that *Roden* "did not create an independent basis for appeal or a separate property right." *Id.* at 16a.

**ARGUMENT**

The court of appeals correctly held that the Board lacked jurisdiction to review petitioner's termination because he was not an "employee" entitled to seek Board review under the CSRA. The court's decision does not conflict with any decision of this Court or of another court of appeals. Further review is not warranted.

1. The Board has jurisdiction over only those adverse personnel actions that are "made appealable to it by

law, rule, or regulation." *Carley* v. *Department of the Army*, 413 F.3d 1354, 1356 (Fed. Cir. 2005); see *Thomas* v. *United States*, 709 F.2d 48, 49 (Fed. Cir. 1983) ("The MSPB has only that jurisdiction conferred on it by Congress."). Section 7513(d) permits an "employee" to appeal an adverse personnel action to the Board "under section 7701." 5 U.S.C. 7513(d). Section 7701 permits "[a]n employee" or an "applicant for employment" to "submit an appeal to the [Board]." 5 U.S.C. 7701(a). As relevant here, an "employee" is defined to include a preference-eligible, excepted-service employee of the Postal Service who "has completed 1 year of current continuous service in the same or similar positions." 5 U.S.C. 7511(a)(1)(B).

The statute does not define "current continuous service." OPM, the agency that Congress has charged with promulgating regulations to implement the statute, see 5 U.S.C. 7514, has adopted a rule defining the nearly identical phrase "current continuous employment" to mean "a period of employment or service immediately preceding an adverse action without a break in Federal civilian employment of a workday." 5 C.F.R. 752.402; see p. 3 & n.1, *supra*. The court of appeals correctly upheld the Board's decision applying OPM's interpretation.

OPM's interpretation of "continuous" to mean "without a break" reflects by far the best reading of the statutory language. As the Board observed, the "ordinary meaning" of "continuous" is "uninterrupted" or "unbroken." *Winns* v. *United States Postal Serv.*, 124 M.S.P.R. 113, 119 ¶ 14 (2017) (citation omitted); see *ibid.* (canvassing dictionary definitions); accord *Webster's New International Dictionary of the English Language* 577 (2d ed. 1960) ("Having continuity of parts; without

break, cessation, or interruption; without intervening space or time; uninterrupted; unbroken."). Even if another construction of "continuous" were permissible, OPM's reading of that term is the most natural interpretation, and at a minimum it is reasonable and entitled to deference. See *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009).

OPM's determination that a "break" in service occurs if two periods of employment are separated by at least one workday also accords with ordinary usage. It 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. As petitioner observes (Pet. 9), Section 7511's text indicates that Congress "intended a series of appointments" could constitute "continuous" employment. Section 7511(a)(1)(B) refers to "1 year of current continuous service in the same *or similar* positions," 5 U.S.C. 7511(a)(1)(B) (emphasis added), which presupposes (Pet. 9) that a person may satisfy the continuous-service requirement based on successive periods of employment in different positions. Congress presumably intended that language to encompass routine situations where a person in one position moves to a "similar position[ ]," 5 U.S.C. 7511(a)(1)(B), the next workday. Although Section 7511's text in isolation conceivably could be construed to permit no gap whatsoever between periods of employment, even overnight, OPM's interpretation reflects the best and at least a reasonable reading of the statute.

In any event, whether the phrase "continuous service" is better read to prohibit gaps of less than a workday is

immaterial in this case because petitioner undisputedly was separated from federal service for five days. See Pet. App. 12a. As required by Postal Service policy, when petitioner voluntarily accepted the new City Carrier Assistant position, for which he had previously voluntarily applied, he "took a five-day break." *Ibid.* Neither ordinary usage nor common practice regards periods of employment separated by the equivalent of a workweek as "continuous." The court of appeals thus correctly determined that petitioner lacked one year of current continuous service.

2. Petitioner's contrary arguments lack merit. He contends (Pet. 9) that, because Section 7511's language permits a person to satisfy the one-year continuous-employment requirement with "a series of appointments," it should not matter whether "one or more days pass between duty periods." Petitioner's premise that seriatim periods of service can collectively satisfy the one-year requirement is correct. But his conclusion that those periods can be separated by more than one workday yet still be "continuous" does not follow. Petitioner relatedly contends (Pet. 9-10) that "*non*-preference-eligible individuals" cannot satisfy the applicable continuous-employment requirement through temporary appointments, whereas preference-eligible workers can meet their requirement based on temporary appointments. But the fact that Congress permitted preference-eligible workers to rely on temporary positions that in the aggregate last one year or more does not mean that temporary appointments suffice even if they are separated by multiple workdays.

Petitioner also does not explain how his position can be reconciled with the ordinary meaning of "continuous."

Instead, he urges the Court to dispense with the ordinary meaning reflected in dictionaries in favor of "other evidence of congressional intent." Pet. 12 (quoting *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 454 (1989), in turn quoting *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 509 (1989)). But the Court has often and recently reiterated that, when a term "is not defined in the statute," courts typically should "'give the term its ordinary meaning,'" of which dictionaries are frequently the best evidence. *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1140 (2018) (quoting *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012)); accord, *e.g.*, *New Prime Inc.* v. *Oliveira*, 139 S. Ct. 532, 539 (2019) ("[I]t's a fundamental canon of statutory construction that words generally should be 'interpreted as taking their ordinary . . . meaning . . . at the time Congress enacted the statute.'" (citation omitted)). The ordinary meaning of the words Section 7511 uses thus is precisely the correct place to look for "evidence of congressional intent." Pet. 12; see *FMC Corp.* v. *Holliday*, 498 U.S. 52, 57 (1990) ("We begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." (citation and internal quotation marks omitted)). And because the ordinary meaning is clear on the question whether two periods of employment separated by a multi-day gap are "continuous," the inquiry "ends there as well." *National Ass'n of Mfrs.* v. *Department of Def.*, 138 S. Ct. 617, 631 (2018) (citation omitted).

Even if Section 7511's text were ambiguous on that question, such an ambiguity would provide no sound basis for rejecting OPM's reasonable interpretation. The Court "presum[es] that Congress, when it left ambiguity in a statute meant for implementation by an

agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005) (quoting *Smiley* v. *Citibank (S.D.), N. A.*, 517 U.S. 735, 742 (1996)). Even assuming "continuous" could also plausibly be read to permit slightly shorter or slightly longer interruptions in employment, OPM's reading disallowing a day-long break is permissible.

Petitioner contends (Pet. 12-13) that OPM's regulation deserves no deference because it merely "parrot[s]" the statutory language. Pet. 12 (quoting *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006)). But as the court of appeals observed, OPM's regulation clarifies that only a "break . . . *of a workday*" or more interrupts an otherwise-continuous employment period. Pet. App. 12a (quoting 5 C.F.R. 752.402). Petitioner then argues (Pet. 13) that OPM's regulation addressing the "*duration*" of a break in federal employment does not answer the "antecedent question" of "what *constitutes* a break in the employment relationship." The absence of a definition of the word "break" is unremarkable; that word appears in OPM's regulation interpreting the statute, not in the statute itself. Moreover, whatever uncertainty exists about what constitutes a break in employment is irrelevant in this case because petitioner was formally separated from federal employment for five days. See Pet. App. 12a, 19a-20a.

Petitioner argues that his five-day separation of employment is not a "break" in employment "of a workday," 5 C.F.R. 752.402, because the Postal Service "directed" him "not to present for work during his

five-calendar-day transitional leave period." Pet. 13-14 (emphasis omitted). Petitioner analogizes his break in service to time spent by seasonal workers in "nonpay status" during the offseason, which the Board has held is not the "break of a *workday*." Pet. 14 (quoting *Gutierrez* v. *Department of Treasury*, 99 M.S.P.R. 141, 147 (2005)). That analogy is unavailing.

The seasonal employee in *Gutierrez* worked ten months of her one-year probationary period and was placed in nonduty status for the remaining two months. 99 M.S.P.R. at 143-144. The Board determined that the time spent in nonduty, nonpay status did not constitute a break in service because "[s]easonal employees are permanent employees who have annually recurring periods of work of less than 12 months each year," and they remain on the agency's employment rolls in between those periods of work. *Id.* at 145. That conclusion accords with the view OPM articulated when it first promulgated its regulation 31 years ago. See 53 Fed. Reg. at 21,619 (explaining, in the context of defining "current continuous employment" in a parallel regulation, that the phrase "means employment without a break in Federal civilian service," and "[t]ime in a leave or nonduty, nonpay status counts toward completion of the period of current continuous employment for adverse action purposes").

Petitioner was not employed by the Postal Service under an annually recurring arrangement. He voluntarily left one position to take another, with a five-day gap in between. Unlike the seasonal employee in *Gutierrez*, petitioner was formally separated from his prior Rural Carrier Associate position before the break in service; he was not in federal service in any position during that break. And his new appointment to the City Carrier

Assistant position did not take effect until after the break ended. See Pet. App. 19a-20a & nn.3-4. Petitioner's suggestion that the five-day break in service was unilaterally imposed by the agency is also incorrect. Petitioner voluntarily chose to apply for and accept a new position that required such a break in service.

Finally, petitioner contends (Pet. 14-15) that the Board's decision applying OPM's regulation should not receive deference because it conflicts with the Board's prior decisions, including *Roden* v. *Tennessee Valley Authority*, 25 M.S.P.R. 363 (1984). That is incorrect. It is OPM's interpretation in its regulation, which the Board applied here, that warrants deference because it is OPM that Congress charged with adopting regulations that implement the statute. Pet. App. 11a; see 5 U.S.C. 7514. Petitioner's suggestion that the Board in this case abruptly abandoned its longstanding view overlooks that OPM authoritatively repudiated the view adopted by the Board in *Roden* more than 30 years ago and less than four years after *Roden* was decided.

3. Petitioner alternatively contends (Pet. 15-18) that due-process principles reflected in the Board's decision in *Exum* v. *Department of Veterans Affairs*, 62 M.S.P.R. 344 (1994), entitle him to appeal even though the CSRA does not. The court of appeals correctly rejected that contention.

It 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." *Dunklebarger* v. *MSPB*, 130 F.3d 1476, 1480 (Fed. Cir. 1997). *A fortiori*, as the court of appeals explained, "an agency's failure to advise federal employees on the terms of their appointment does not create appeal rights for positions as to

which Congress has not given the Board appellate jurisdiction." Pet. App. 13a (citation and internal quotation marks omitted). This Court has long "recognized that equitable estoppel will not lie against the Government as it lies against private litigants," and for more than two centuries it has held that "the Government c[an] not be bound by the mistaken representations of an agent unless it were clear that the representations were within the scope of the agent's authority." *OPM* v. *Richmond*, 496 U.S. 414, 419-420 (1990). Thus, even if the Board itself—which, like any agency, "literally has no power to act * * * unless and until Congress confers power upon it," *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986)—had made an inaccurate affirmative representation to a party about the scope of its authority, that representation could not enlarge the scope of its jurisdiction set by statute. It would be incongruous to conclude that a mere failure to provide adequate notice of the consequences of accepting a new job—especially a purported failure by a separate agency—could empower the Board to hear cases Congress did not authorize it to adjudicate.

Petitioner cites (Pet. 15) decisions recognizing that governmental employees have constitutionally protected property interests in employment in certain circumstances. But it does not follow that due process entitles employees to a particular manner of notice of the procedural protections they will forfeit by voluntarily changing jobs in particular circumstances. And petitioner identifies no basis in this Court's case law for a due-process requirement that an employee who is by statute ineligible to invoke a particular procedural mechanism can become entitled to invoke it based on

inadequate notice from his employer of the consequences of voluntarily applying for and accepting a different federal position.

Petitioner contends (Pet. 15) that the decision below overruling the Board's decision in *Exum* creates a "new license to federal agencies to lie to, mislead, and withhold material information from federal employees" and "contravenes due process." See Pet. 2 (alleging that the court of appeals has sanctioned "agencies to deliberately withhold information about the consequences of employment actions from federal employees"). That is incorrect. The court of appeals expressly recognized that appeal rights may exist if an employee is coerced or deceived into forfeiting employment, and it reserved judgment on whether an employee who changes positions based on coercion or deception might also have appeal rights. Pet. App. 15a-16a. As the court explained, none of those scenarios exists here, where petitioner voluntarily applied for and accepted his new position.

Moreover, even if petitioner were correct that due-process principles compelled the rule articulated by the Board in *Exum*, that would not avail petitioner here because, as the Board itself determined, petitioner's claim fails on its own terms. As the Board explained, its decisions applying *Exum* require an employee challenging an adverse personnel decision to demonstrate that he or she would not have accepted the new position but for the agency's purported failure to provide notice of the loss of appeal rights. Pet. App. 33a-34a. Far from making that showing, petitioner disclaimed it, averring in a sworn declaration that even at the time of this litigation he "*d[id] not know* whether [he] would have accepted" his new position if he had been fully informed by the Postal Service of the consequences for his appeal

rights. *Id.* at 34a (emphasis added). Petitioner's claim thus would fail even under the rule he urges the Court to adopt. At a minimum, this case would be an unsuitable vehicle to address that question. Further review is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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