No. 14-1025

In the Supreme Court of the United States

RICHARD ERICKSON, PETITIONER

v.

UNITED STATES POSTAL SERVICE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the attorney-fee provision of the Back Pay Act of 1966, 5 U.S.C. 5596(b)(1)(A)(ii), constitutes a "provision[] of title 5 relating to a preference eligible," 39 U.S.C. 1005(a)(2), that applies to preference-eligible employees of the United States Postal Service.

2. Whether 38 U.S.C. 4324(c)(4) authorizes the Merit Systems Protection Board (Board) to award to a prevailing veteran not only those attorney fees and costs that he incurred in administrative litigation before the Board, but also the fees and costs that he incurred on judicial review of the Board's decision in the court of appeals.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 759 F.3d 1341.

JURISDICTION

The judgments of the court of appeals in Appeal Nos. 08-3216 and 10-3096 were entered on July 18, 2014. A petition for rehearing in No. 10-3096 was denied on October 15, 2014 (Pet. App. 22a-23a). The petition for a writ of certiorari was filed on January 9, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the manner in which attorney fees and costs may be awarded for work performed in the court of appeals with respect to a petition for review from a decision of the Merit Systems Protec-

tion Board (MSPB or Board) concerning an employment action taken by the United States Postal Service against a military veteran. The Equal Access to Justice Act (EAJA), 28 U.S.C. 2412, generally authorizes fee awards for such work in the court of appeals when EAJA's criteria are satisfied. Petitioner first requested a fee award in 2014, however, several years after the time to seek EAJA fees for work in the court of appeals had passed. Pet. App. 10a. Petitioner contends that (1) the Back Pay Act of 1966, 5 U.S.C. 5596, permits the court of appeals to grant a fee award for work performed on his two petitions for review in that court, see Pet. 7-12; and (2) a provision (38 U.S.C. 4324(c)(4)) in the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. 4301 *et seq.*, permits the MSPB to grant an award for such work performed in the court of appeals during judicial review, see Pet. 12-20.

1. a. The Back Pay Act provides that an "employee of an agency" who is found to have been affected by an unjustified or unwarranted personnel action that reduced the employee's pay, allowances, or differentials shall be awarded "reasonable attorney fees related to the personnel action * * * in accordance with standards established under [5 U.S.C.] 7701(g)." 5 U.S.C. 5596(b)(1)(A)(ii). Section 7701(g), in turn, generally provides that the MSPB or an MSPB administrative law judge (ALJ) or hearing official "may require" the agency involved to pay reasonable attorney fees if "the employee * * * is the prevailing party" and such "payment by the agency is warranted in the interest of justice." 5 U.S.C. 7701(g)(1). In addition, the Federal Circuit has interpreted the Back Pay Act to authorize that court to award attorney fees

incurred in proceedings before the court of appeals during judicial review in a Back Pay Act case. Pet. App. 11a (citing *Gallo* v. *Department of Transp.*, 725 F.3d 1306, 1309-1310 (Fed. Cir. 2013)).

The Back Pay Act's protections extend to every employee of an "agency." 5 U.S.C. 5596(b)(1). The Act defines that term to mean "an Executive agency" or other listed governmental entities not relevant here. 5 U.S.C. 5596(a). As petitioner acknowledges, "[t]he Back Pay Act generally does not apply to Postal Service employees, as the Postal Service is not an 'executive agency' within the meaning of Title 5." Pet. 8; see 5 U.S.C. 104, 105. The Postal Reorganization Act, 39 U.S.C. 101 *et seq.*, further directs that "no Federal law dealing with public or Federal * * * employees * * * shall apply to the exercise of the powers of the Postal Service" "[e]xcept as provided by [39 U.S.C. 410(b)]." 39 U.S.C. 410(a). The statutes listed as applicable to the Postal Service in Section 410(b) do not include the Back Pay Act or its attorney-fee provision. See 39 U.S.C. 410(b).

A separate Postal Reorganization Act provision that governs employment within the Postal Service concerns "preference eligible[s]," 39 U.S.C. 1005(a)(2), *i.e.*, certain veterans (including petitioner) and relatives of veterans, 5 U.S.C. 2108(3). Section 1005(a)(2) states that "[t]he provisions of title 5 relating to a preference eligible * * * shall apply to * * * any officer or employee of the Postal Service in the same manner and under the same conditions as if the * * * officer[] or employee were subject to the competitive service under such title." 39 U.S.C. 1005(a)(2). The first question presented is whether the Back Pay Act's attorney-fee provision, 5 U.S.C. 5596(b)(1)(A)(ii),

qualifies under Section 1005(a)(2) as a "provision[] of title 5 relating to a preference eligible."

b. As relevant here, USERRA provides that "any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of [the Act] if," *inter alia*, "the cumulative length of the absence and of all previous absences from a position of employment with that employer by reason of service in the uniformed services does not exceed five years." 38 U.S.C. 4312(a)(2); cf. 38 U.S.C. 4311(a). Section 4324(b) further authorizes certain federal employees to "submit a complaint [under USERRA] against a Federal executive agency"—including the Postal Service—directly to the MSPB. 38 U.S.C. 4324(b); see 38 U.S.C. 4303(4)(A)(ii), (5), and (6) (defining "employer" and "Federal executive agency" to include the Postal Service).

Section 4324(c) governs the MSPB's adjudication of such an administrative complaint. Subsection (c) provides that "[t]he [MSPB] shall adjudicate" such a complaint and, if it determines that the agency has violated the employee's USERRA rights, "shall enter an order" requiring the agency to comply with USERRA and to compensate the employee for lost wages or benefits. 38 U.S.C. 4324(c)(1) and (2). Section 4324(c) further provides that, if the Board determines that the person is entitled to such an order "as a result of a hearing or adjudication conducted pursuant to a complaint submitted by [such] person directly to the Board pursuant to [Section 4324(b)]," "the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation ex-

penses." 38 U.S.C. 4324(c)(4). The second question presented is whether the MSPB may award attorney fees under Section 4324(c)(4) for work performed not before the Board during its adjudication of a USERRA complaint, but instead before the Federal Circuit on judicial review of the Board's decision.

2. Petitioner was employed by the United States Postal Service from 1988 to 2000. Pet. App. 2a. Due to his service in the Army National Guard Reserve, petitioner was frequently absent from his civilian position during that period. Between 1991 and 1995, petitioner was absent from his Postal Service position for more than 22 months. *Ibid.* Between 1996 and 2000, petitioner worked at the Postal Service for a total of only four days. *Ibid.* In January 2000, the Postal Service asked petitioner whether he intended to return to his job. *Ibid.* In response, petitioner stated that "he preferred military service to working for the Postal Service," and that he would not return until he had completed his then-current tour of duty in September 2001. *Ibid.* In March 2000, the Postal Service removed him from his position on the ground that petitioner had exceeded USERRA's five-year limit on military leave. *Erickson* v. *USPS*, 571 F.3d 1364, 1367 (Fed. Cir. 2009); see 38 U.S.C. 4312(a)(2). Petitioner re-enlisted in the National Guard and remained on active military duty until December 31, 2005. Pet. App. 3a.

In September 2006, petitioner challenged his removal from Postal Service employment and asserted his entitlement to reemployment upon his early 2006 return from military service by filing an appeal with the MSPB. Pet. App. 3a. The MSPB rejected his challenge. *Ibid.* In July 2009, the Federal Circuit

affirmed in part, reversed in part, and remanded the matter to the MSPB. See 571 F.3d at 1372 (No. 08-3216). On remand, the MSPB concluded that petitioner had waived his USERRA rights by abandoning his civilian career in favor of one in the military. Pet. App. 4a. In February 2011, the Federal Circuit vacated and again remanded for further proceedings. *Erickson* v. *USPS*, 636 F.3d 1353, 1359 (Fed. Cir. 2011) (No. 10-3096). Although petitioner thus prevailed in the court of appeals on both petitions for review (at least to the extent of obtaining judicial orders remanding the case for further Board proceedings), he did not ask the court for an award of EAJA fees in either of those cases.

In 2012, after the second remand, an MSPB ALJ granted petitioner's request for USERRA relief. Pet. App. 36a-42a. In December 2013, the MSPB affirmed that decision. *Id.* at 24a-35a.

3. a. On January 30, 2014, petitioner filed an application for attorney fees and costs in the two Federal Circuit judicial-review proceedings that had previously concluded in 2009 (No. 08-3216) and 2011 (No. 10-3096). Petitioner's application sought compensation for work performed during those proceedings in the court of appeals. Pet. App. 2a. Petitioner argued that a fee award would be appropriate under EAJA, the Back Pay Act, and USERRA. *Id.* at 4a-5a.[1]

b. The court of appeals denied petitioner's fee application, rejecting each of petitioner's three proffered statutory bases for fees. Pet. App. 1a-21a.

i. The court of appeals denied petitioner's request for EAJA fees. Pet. App. 8a-11a. The court explained

[1] Petitioner subsequently filed a separate motion for attorney fees in the MSPB. That fee request is not at issue in this case.

that, "[i]n a case in which the court of appeals remands to an agency due to agency error, without retaining jurisdiction over the case, the party that sought the remand is deemed to be the prevailing party, and the 30-day EAJA clock begins to run with the remand order itself." *Id.* at 9a (citation and internal quotation marks omitted). The court further explained that petitioner was "a prevailing party when the remand order issued in" No. 10-3096, so that "the 30-day EAJA clock began to run in 2011. That clock has long since expired. [Petitioner's] request for fees under EAJA is therefore untimely." *Id.* at 10a. As an alternative ground for its decision, the court concluded that petitioner would not be entitled to EAJA fees even if he had filed a timely application, because "[t]he cases on appeal were close" and the government's position was "substantially justified." *Id.* at 10a-11a.

ii. The court of appeals held that the Back Pay Act's attorney-fee provision, 5 U.S.C. 5596(b)(1)(A)(ii), did not apply to petitioner's case. Pet. App. 11a-21a. The court explained that the Back Pay Act extends only to employees within an "executive agency," and Congress has defined that term (for Back Pay Act purposes) to exclude the Postal Service. *Id.* at 13a.

The court of appeals further concluded that the Back Pay Act's attorney-fee provision is not one of the "provisions of title 5 relating to a preference eligible" that 39 U.S.C. 1005(a)(2) makes applicable to the Postal Service. Pet. App. 13a-21a. The court held that, although the attorney-fee provision is codified in Title 5, it is not a provision "relating to a preference eligible." *Id.* at 14a-17a. The court read that phrase as applying only to Title 5 provisions that *specifically* address preference eligibles, not to more general

provisions that cover preference eligibles along with other groups. See *id.* at 14a (explaining, by way of analogy, that "a statute that says that everyone who purchases goods in the District of Columbia must pay a sales tax would not naturally be interpreted as [a] statute 'relating to left-handed persons,' even though the statute would, of course, apply to lefthanders who purchase goods in the District of Columbia, along with everyone else who does so"). The court observed that, if the Back Pay Act were deemed to be a provision "relating to a preference eligible," the exception in Section 1005(a)(2) would "swallow the rule" because "all of title 5 would apply to preference eligibles in the Postal Service." *Id.* at 16a. The court further explained that petitioner's reading of Section 1005(a)(2) would render "entirely superfluous" another portion of Section 1005(a) that specifically extends Subchapter II of Chapter 75 of Title 5 to preference-eligible Postal Service employees. *Id.* at 16a-17a (discussing 39 U.S.C. 1005(a)(4)(A)(i)).

iii. The court of appeals likewise held that a fee award was not warranted under 38 U.S.C. 4324(c)(4). Pet. App. 5a-8a. Section 4324(c)(4) provides that "the [MSPB] may, in its discretion, award * * * reasonable attorney fees, expert witness fees, and other litigation expenses" if it determines that a complainant is entitled to relief "as a result of a hearing or adjudication conducted pursuant to a complaint submitted by [such] person directly to the Board." The court concluded that Section 4324(c)(4) was inapplicable here because that provision authorizes the Board, not the court, to award fees and costs. *Id.* at 7a-8a.

Although petitioner had elected to request attorney fees directly from the court of appeals rather than to

seek a fee award from the MSPB, the court addressed the question whether the Board could have awarded fees for work performed during the prior Federal Circuit proceedings. Pet. App. 5a-7a. The court expressed the view that Section 4324(c)(4) authorizes the MSPB to award attorney fees only for work performed in the administrative litigation and not for work performed in the court of appeals on a petition for review. *Ibid.* The court concluded that the statutory text does not "unambiguously grant[] the Board authority to award fees for work done on appeal," *id.* at 6a; that statutory fee provisions in analogous contexts require such fees to be awarded by the court rather than by the agency, *id.* at 5a-6a; and that Section 4324(c)(4)'s status as a waiver of sovereign immunity means that any ambiguity in the provision must be construed to preserve that immunity, *id.* at 7a.

c. On August 29, 2014, petitioner electronically filed a petition for rehearing in Appeal No. 10-3096. See 10-3096 Docket Entry Nos. 48, 51. Petitioner does not appear to have electronically filed his petition in Appeal No. 08-3216. See 08-3216 Docket. On October 15, 2014, the court of appeals denied rehearing in No. 10-3096. Pet. App. 22a-23a. Petitioner's certiorari petition is timely with respect to the court of appeals' judgment in No. 10-3096.[2]

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[2] The court of appeals' docket indicates that the court received paper copies of petitioner's rehearing petition on September 2, 2014. See 10-3096 Docket Entry No. 53. Although the caption of the rehearing petition includes Appeal Nos. 08-3216 and 10-3096, by the time the hardcopies were received by the court for paper filing, the 45-day deadline (September 1, 2014) for a petition for rehearing from the July 18, 2014 fee decision had passed. See Fed.

ARGUMENT

Petitioner contends (Pet. 7-12) that the Back Pay Act's attorney-fee provision, which covers every "employee" of an executive agency, 5 U.S.C. 5596(a)(1) and (b)(1), constitutes a "provision[] of title 5 relating to a preference eligible," 39 U.S.C. 1005(a)(2), and therefore applies to preference-eligible employees of the United States Postal Service. Petitioner alternatively contends (Pet. 12-20) that 38 U.S.C. 4324(c)(4) authorizes the MSPB not only to award attorney fees and costs incurred in proceedings before the Board, but also to award fees incurred in the court of appeals on review of an MSPB decision. The court of appeals correctly rejected both of those contentions, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.[3]

1. Section 1005(a)(2) of Title 39 states that "[t]he provisions of title 5 relating to a preference eligible * * * shall apply to an applicant for appointment and

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R. App. P. 35(c), 40(a)(1). The court of appeals therefore appears to have treated the rehearing petition as being properly filed only in No. 10-3096, not in No. 08-3216. See Pet. App. 22a (denying rehearing only in No. 10-3096). In the absence of a timely rehearing petition in No. 08-3216, petitioner's January 9, 2015 petition seeking a writ of certiorari from the court of appeals' July 18, 2014 decision would be jurisdictionally out of time with respect to the judgment in No. 08-3216. See 28 U.S.C. 2101(c); Sup. Ct. R. 13.1-13.3.

[3] A party who prevails on judicial review of an MSPB decision is potentially entitled to an award of reasonable attorney fees and costs under EAJA. In this case, the court of appeals rejected petitioner's EAJA application, both because it was untimely filed and because the government's position in the underlying appeals was "substantially justified." See Pet. App. 8a-11a. Petitioner does not seek this Court's review of those holdings.

any officer or employee of the Postal Service in the same manner and under the same conditions as if the applicant, officer, or employee were subject to the competitive service under such title." 39 U.S.C. 1005(a)(2). The court of appeals correctly held that the attorney-fee provision of the Back Pay Act, 5 U.S.C. 5596(b)(1)(A)(ii), is not a "provision[] of title 5 relating to a preference eligible" within the meaning of Section 1005(a)(2). See Pet. App. 11a-21a. Rather, Section 1005(a)(2) extends to the Postal Service only those Title 5 provisions that apply to an employee *because* he is a "preference eligible."

A provision "relat[es] to a preference eligible" under Section 1005(a)(2) if its operation has a "logical or causal connection" to an individual's status as a preference eligible. *Webster's Third New International Dictionary* 1916 (1966) (defining "relate"). The Back Pay Act's attorney-fee provision has no such logical or causal connection. The Back Pay Act's protections cover *every* "employee of an agency," 5 U.S.C. 5596(b)(1), regardless of whether the employee is a preference eligible. As the court of appeals explained, "a statute that says that everyone who purchases goods in the District of Columbia must pay a sales tax would not naturally be interpreted as [a] statute 'relating to left-handed persons,' even though the statute would, of course, apply to lefthanders who purchase goods in the District of Columbia, along with everyone else who does so." Pet. App. 14a. Similarly here, a provision that broadly applies to all agency employees is not naturally described as a provision "relating to a preference eligible," even though it includes preference eligibles within its coverage.

Petitioner appears to argue that the Back Pay Act's attorney-fee provision is a provision "relating to" a preference eligible because it can be "*appl*[*ied*] to preference eligible" employees (since it applies to all employees of executive agencies). See Pet. 9 (emphasis added). The court of appeals correctly recognized that petitioner's interpretation is "not the most natural meaning of the term 'relating to.'" Pet. App. 14a. The court also observed that such a reading would "mak[e] the exception set forth in section 1005(a)(2) swallow the rule" because "all of title 5 would apply to preference eligibles in the Postal Service." *Id.* at 16a. "If Congress had meant to make all of title 5 applicable to preference eligibles, it would have been much simpler just to say so directly rather than referring to particular provisions that 'relate to' preference eligibles." *Id.* at 17a.

The court of appeals further explained that petitioner's expansive reading of Section 1005(a)(2) would render Section 1005(a)(4)(A)(i) "entirely superfluous." Pet. App. 16a-17a. Section 1005(a)(4)(A)(i) makes "[s]ubchapter II of chapter 75 of title 5" applicable "to any preference eligible in the Postal Service who is an employee within the meaning of [5 U.S.C.] 7511(a)(1)(B)." 5 U.S.C. 1005(a)(4)(A)(i). "Subchapter II is the portion of title 5 that gives competitive-service employees rights to internal procedures and a [Board] appeal in the case of serious disciplinary actions against them." Pet. App. 16a. Like the Back Pay Act's attorney-fee provision, Subchapter II does not specifically focus on preference eligibles, but it does not exclude them either.

If, as petitioner argues, the Back Pay Act's attorney-fee provision is a provision "relating to a

preference eligible" within the meaning of Section 1005(a)(2), simply because it includes preference eligibles within its coverage, "then it is difficult to see why subchapter II of chapter 75 would not also be a provision of title 5 'relating to a preference eligible.'" Pet. App. 16a. But if Section 1005(a)(2) renders Subchapter II applicable to Postal Service preference eligibles, then Section 1005(a)(4)(A)(i) has no evident work to do. See *id.* at 16a-17a. Petitioner's position is therefore inconsistent with "one of the most basic interpretive canons" of statutory construction: a statute should be construed to give effect "'to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley* v. *United States*, 556 U.S. 303, 314 (2009) (citations omitted). Indeed, that canon is at its "strongest" in this context, "whe[re] [petitioner's] interpretation would render superfluous another part of the same statutory scheme." *Marx* v. *General Revenue Corp.*, 133 S. Ct. 1166, 1178 (2013).

Petitioner's approach would have particularly sweeping practical consequences because, under Section 1005(a)(2), the "provisions of title 5 relating to a preference eligible" do not apply only to the preference-eligible employees of the Postal Service. Rather, Section 1005(a)(2) makes those provisions applicable to "any officer or employee of the Postal Service." 39 U.S.C. 1005(a)(2). If Section 1005(a)(2) is correctly read as incorporating only those Title 5 provisions that apply *because* an employee is a preference eligible, the bulk of Title 5 will remain inapplicable to Postal Service employees as Congress intended. But if petitioner's expansive understanding of the term "provisions of title 5 relating to a preference eligible"

were adopted, Title 5's provisions would generally apply to all Postal Service employees, notwithstanding Congress's direction that "no Federal law dealing with public or Federal * * * employees * * * shall apply to the exercise of the powers of the Postal Service" "[e]xcept as provided by [39 U.S.C. 410(b)]." 39 U.S.C. 410(a). The court of appeals correctly rejected that self-defeating construction of the Postal Reorganization Act.

2. Petitioner challenges (Pet. 12-20) the court of appeals' conclusion that the MSPB's authority to award attorney fees and costs under 38 U.S.C. 4324(c)(4) is limited to an award for work performed in the administrative proceedings. That aspect of the court's opinion was unnecessary to the judgment and therefore does not warrant further review. In any event, the court of appeals' analysis is correct.

a. Even if this Court granted certiorari and held that Section 4324(c)(4) authorizes the MSPB to award attorney fees and costs for work performed in the court of appeals during judicial review of an MSPB decision, that conclusion would not alter the court of appeals' judgment. The only question squarely before the court of appeals was whether the court itself should award petitioner fees and costs. In this Court, petitioner does not dispute the court of appeals' holding that Section 4324(c)(4) does not authorize the court to issue such an award. See Pet. App. 7a-8a. Thus, regardless of the answer to the second question presented, the court's denial of petitioner's Federal Circuit fee application would be sustained. *Id.* at 21a.

Because "[t]his Court 'reviews judgments, not statements in opinions,'" this case would be an inappropriate vehicle for review. *California* v. *Rooney*,

483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Labs.*, 351 U.S. 292, 297 (1956)). Although the court of appeals discussed the question whether Section 4324(c)(4) authorizes the MSPB to award fees for work performed during judicial review, Pet. App. 5a-7a, its analysis on that point was unnecessary to its judgment denying the fee request that petitioner had filed in the court of appeals. If petitioner had actually asked the MSPB to award fees and costs for work done in the court of appeals, and had then appealed an adverse ruling to the Federal Circuit, the court's assessment of the Board's authority to grant that relief would have borne directly on the court's disposition of petitioner's appeal. But since petitioner filed his fee application in the court of appeals instead, the court's analysis of the Board's authority to act on a *hypothetical* fee application was unnecessary to the court's judgment.[4]

b. In any event, the court of appeals correctly concluded that, if petitioner had asked the MSPB to award fees for work performed in the court of appeals on review of the MSPB's earlier decisions, the MSPB would have lacked authority to award such fees. Pet. App. 5a-7a.

Section 4324(c) governs the MSPB's administrative proceedings on USERRA claims. That provision explains that, when an individual "seeks a hearing or adjudication by submitting * * * a complaint" to the MSPB under USERRA, the "Board shall adjudicate [the] complaint." 38 U.S.C. 4324(c)(1). If the MSPB

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[4] Petitioner filed a separate motion for attorney fees in the MSPB after he filed his application requesting fees in the court of appeals. That administrative fee request, however, was not before the court of appeals and is not before this Court.

concludes that a USERRA violation has occurred, "the Board shall enter an order" awarding appropriate relief. 38 U.S.C. 4324(c)(2).

The provision at issue here states that, "[i]f the Board determines as a result of a hearing or adjudication conducted pursuant to a complaint submitted by a person *directly to the Board*" that the complainant is entitled to relief, "the Board may, in its discretion, award such person reasonable attorney fees, expert witness fees, and other litigation expenses." 38 U.S.C. 4324(c)(4) (emphasis added). The italicized language indicates that the "hearing or adjudication" that forms the basis for a fee award is the *administrative* "hearing or adjudication" that the person "seeks * * * by submitting * * * a complaint," 38 U.S.C. 4324(c)(1), "directly to the Board," 38 U.S.C. 4324(c)(4). Although fees for work on petitions for review may be sought in the court of appeals under EAJA, neither Section 4324(c)(4) nor any other provision of law authorizes the MSPB to award such fees.

That division of responsibility between the MSPB and the court of appeals makes good sense, since the tribunal that has conducted the proceedings on the merits is best positioned to evaluate a fee request for work done before it. Cf. *Pierce* v. *Underwood*, 487 U.S. 552, 559-560 (1988) (explaining that a district court is "better positioned" to resolve an attorney-fee request under EAJA because of its familiarity with the district court litigation for which the fees are sought); *Hensley* v. *Eckerhart*, 461 U.S. 424, 437 (1983) (explaining that a district court has discretion to set the amount of a fee award because of its "superior understanding of the litigation" over which it presided). That approach is also "consistent with a

longstanding line of cases in which [the Federal Circuit] has held that the Board is not authorized to grant an award of fees for work done on appeal from a Board order." Pet. App. 5a; see *id.* at 5a-6a (citing decisions).

As the court of appeals explained, moreover, and as petitioner does not dispute, the question whether the MSPB may award fees incurred on judicial review in the court of appeals implicates the sovereign immunity of the United States. Pet. App. 7a. Any waiver of that immunity "'must be "unequivocally expressed" in statutory text,' and '[a]ny ambiguities in the statutory language are to be construed in favor of immunity.'" *Ibid.* (quoting *FAA* v. *Cooper*, 132 S. Ct. 1441, 1448 (2012)). To be sure, Section 4324(c)(4) unambiguously authorizes the MSPB to award fees incurred during the Board proceedings themselves. See Pet. 14, 17. But "[f]or the same reason that [the Court] refuse[s] to enforce a waiver that is not unambiguously expressed in the statute, [the Court] also construe[s] any ambiguities in the scope of a waiver in favor of the sovereign." *Cooper*, 132 S. Ct. at 1448. Even if Section 4324(c)(4) could plausibly be construed to authorize the MSPB to award fees incurred on judicial review, the provision does not unambiguously confer such authority.

Petitioner contends (Pet. 14-15) that the word "adjudication" in Section 4324(c)(4) suggests that fees cannot be awarded until "all appellate options [in the court of appeals] have been fully exhausted." As explained above, the "adjudication" to which the statute refers is the "adjudication" that an individual "seeks" by filing an administrative complaint "directly to the Board." 38 U.S.C. 4324(c)(1) and (4). And even if

petitioner were correct about the proper *timing* of a fee application in the MSPB, it would not follow that the Board can award fees incurred during judicial review. Rather, as explained above, such fees can be awarded (where the individual satisfies the statutory criteria) by the court of appeals under EAJA.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] Petitioner asserts (Pet. 16) that decisions of several courts of appeals show that USERRA "fees are recoverable at the appellate level." None of those decisions supports petitioner's position that the MSPB can award fees against the United States for litigation in the court of appeals. See, *e.g.*, *Serricchio* v. *Wachovia Sec. LLC*, 658 F.3d 169, 178 (2d Cir. 2011) (noting in the procedural statement of the case that a district court had awarded attorney fees under USERRA in district court litigation against a private defendant); *Fryer* v. *A.S.A.P. Fire & Safety Corp.*, 658 F.3d 85, 88, 93 (1st Cir. 2011) (rejecting a challenge to a district court's calculation of fees awarded in district court litigation against a private defendant under a different provision of USERRA, 38 U.S.C. 4323(h)(2), without discussing the challenge).