No. 11-184

In the Supreme Court of the United States

CAROLYN M. KLOECKNER, PETITIONER

v.

HILDA L. SOLIS, SECRETARY OF LABOR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Acting Assistant Attorney General
SRI SRINIVASAN
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
MARLEIGH D. DOVER
STEPHANIE R. MARCUS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Under the Civil Service Reform Act of 1978, 5 U.S.C. 1101 *et seq.*, when a federal employee bases a complaint on an adverse personnel action that is appealable to the Merit Systems Protection Board (MSPB) and alleges that unlawful discrimination was a basis for the action, she has filed what is known as a "mixed case." The question presented is:

Whether the United States Court of Appeals for the Federal Circuit has exclusive jurisdiction over review of an MSPB decision dismissing a mixed case on threshold procedural grounds without reaching the merits of the employee's civil service or discrimination claims.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

Regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 11-184

CAROLYN M. KLOECKNER, PETITIONER

v.

HILDA L. SOLIS, SECRETARY OF LABOR

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 639 F.3d 834. The opinion of the district court (Pet. App. 11a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 2011. The petition for a writ of certiorari was filed on August 11, 2011, and was granted on January 13, 2012. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-23a.

STATEMENT

1. a. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, creates a comprehensive "framework for evaluating adverse personnel actions against federal employees." *United States* v. *Fausto*, 484 U.S. 439, 443 (1988) (quoting *Lindahl* v. *OPM*, 470 U.S. 768, 774 (1985)) (brackets omitted). "It prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Ibid.* Congress chose the particular protections and remedies in the CSRA in order to strike a "balance" between "the legitimate interests of the various categories of federal employees" and "the needs of sound and efficient administration." *Id.* at 445. Because of its comprehensive nature, courts have routinely held that "Congress meant to limit the remedies of federal employees bringing claims closely intertwined with their conditions of employment to those remedies provided in the [CSRA]." *Lehman* v. *Morrissey*, 779 F.2d 526, 527-528 (9th Cir. 1985); see *Fornaro* v. *James*, 416 F.3d 63, 67 (D.C. Cir. 2005) ("what you get under the CSRA is what you get"); *Graham* v. *Ashcroft*, 358 F.3d 931, 933-936 (D.C. Cir.), cert. denied, 543 U.S. 872 (2004).

The CSRA essentially creates a tiered system providing graduated procedural protections based on the seriousness of the personnel action at issue. See generally *Fausto*, 484 U.S. at 445-447; *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983). For some of the most serious types of actions—termed "adverse actions" under the statute and including actions such as termination, demotion, and suspension for more than 14 days—an employee has a right to appeal the employing agency's decision to the Merit Systems Protection Board (MSPB or Board). See, *e.g.*, 5 U.S.C. 4303(e); 5 U.S.C.

7513(d); 5 U.S.C. 7512 (enumerating appealable actions); see also 5 U.S.C. 7701(a). As particularly relevant here, certain types of employees may appeal to the MSPB actions removing them from employment "for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a); see 5 U.S.C. 7513(d). For other less serious types of actions—termed "prohibited personnel practices" under the statute and including actions such as appointments, promotions, and reassignments—an employee is not entitled to appeal to the MSPB, see 5 U.S.C. 2302, but is entitled to review by the Office of Special Counsel (OSC), with judicial scrutiny "limited, at most, to insuring compliance with the statutory requirement that the OSC perform an adequate inquiry," *Carducci*, 714 F.2d at 175 (quoting *Cutts* v. *Fowler*, 692 F.2d 138, 140 (D.C. Cir. 1982)).

The MSPB is an independent government agency with an adjudicative role. See 5 U.S.C. 1204(a) (specifying that the MSPB shall "hear [and] adjudicate * * * all matters within the jurisdiction of the Board"). It can supervise discovery, hold hearings, and take evidence (including witness testimony). See 5 U.S.C. 1201, 1204, 7701; 5 C.F.R. 1201.11-1201.113. And it can order appropriate relief if it determines that the employing agency acted improperly. 5 U.S.C. 1204(a). When an employee challenges his removal for "the efficiency of the service," the MSPB may uphold the removal only if the employing agency can prove by a preponderance of the evidence that its action was justified. 5 U.S.C. 7701(c)(1).

b. The CSRA provides special procedures for handling what are known as "mixed cases"—*i.e.*, cases in which an employee has been affected by an adverse action that is appealable to the MSPB *and* "alleges that a

basis for the action was discrimination prohibited by" Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. 2000e *et seq.*, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, or certain other federal antidiscrimination laws. 5 U.S.C. 7702(a)(1)(A)-(B); see, *e.g.*, *Ballentine* v. *MSPB*, 738 F.2d 1244, 1245 (Fed. Cir. 1984); 29 C.F.R. 1614.302. The CSRA procedures for mixed cases, which are primarily set forth in 5 U.S.C. 7702, allow the employee to elect among various administrative-review options that can lead to a final "judicially reviewable action." Both the Equal Employment Opportunity Commission (EEOC) and the MSPB have promulgated regulations that apply to mixed cases. See 29 C.F.R. 1614.302 (EEOC regulations); 5 C.F.R. 1201.151 (MSPB regulations).

Under the CSRA, an employee may initiate a mixed case in one of two ways. 5 U.S.C. 7702(a)(1)-(2); see also 29 C.F.R. 1614.302(b); 5 C.F.R. 1201.154(a). First, he can proceed (at least initially) along essentially the same path that the antidiscrimination laws and their implementing regulations provide for any discrimination claim (including those challenging prohibited personnel practices that are not appealable to the MSPB) by filing a formal equal employment opportunity (EEO) complaint with the employing agency. See 29 C.F.R. 1614.302(b); see also 5 U.S.C. 7702(a)(2); 5 C.F.R. 1201.154(a). That is called a "mixed case complaint." 29 C.F.R. 1614.302(a)(1). Second, he can forgo the EEO complaint process and simply appeal the employing agency's action directly to the MSPB, alleging that the adverse employment action was motivated by discrimination. 5 U.S.C. 7702(a)(1); 5 C.F.R. 1201.154(a); 29 C.F.R. 1614.302(b). That is called a "mixed case ap-

peal." 29 C.F.R. 1614.302(a)(2). The employee must initially elect to pursue one, but not both, of those two remedies. The regulations provide that a mixed-case complainant "may not initially file both a mixed case complaint and an appeal on the same matter," and specify that "whichever is filed first" (*i.e.*, either an EEO complaint with the agency or an appeal with the MSPB) "shall be considered an election to proceed in that forum." 29 C.F.R. 1614.302(b).

If the employee files a mixed-case complaint, the agency "shall resolve [the] matter within 120 days." 5 U.S.C. 7702(a)(2)(A)-(B); see 29 C.F.R. 1614.302(d)(1)(i). "The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board." 5 U.S.C. 7702(a)(2); see 29 C.F.R. 1614.302(d)(1)(ii). An employee at that point has two options for seeking review of an agency's final decision on a mixed-case complaint: he can either file suit in district court or appeal to the MSPB. If the employee appeals the matter to the MSPB, the appeal follows the same procedural path (described in the following paragraph) as would an initial mixed-case appeal. 5 U.S.C. 7702(a)(2); 5 C.F.R. 1201.151, 1201.153-1201.154.

If the employee files a mixed-case appeal (either instead of filing a mixed-case complaint or from a final agency decision on a mixed-case complaint), the MSPB "shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with [its] appellate procedures under [5 U.S.C. 7701 and 7702]." 5 U.S.C. 7702(a)(1); see 5 C.F.R. 1201.156(a). The cross-referenced "appellate procedures" include the "regulations prescribed by the Board" for handling employee appeals, 5 U.S.C. 7701(a), which allow the MSPB, among other things, to "dis-

miss[]" an untimely appeal without deciding any substantive issues at all, 5 C.F.R. 1201.22(c); see 5 C.F.R. 1201.152 (incorporating 5 C.F.R. 1201.22(c) in mixed cases).

c. The CSRA provides for judicial review of the MSPB's decisions. 5 U.S.C. 7703. One of the "structural elements" that is "clear in the framework of the CSRA" is "the primacy of the United States Court of Appeals for the Federal Circuit for judicial review" "of disputes over adverse personnel action." *Fausto*, 484 U.S. at 449. As a general matter, the Federal Circuit has "exclusive jurisdiction" over appeals from "final order[s] or final decision[s] of the [MSPB], pursuant to sections 7703(b)(1) and 7703(d) of title 5." 28 U.S.C. 1295(a)(9). Section 7703(b)(1) of Title 5 states that, "[e]xcept as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit." Thus, if an employee prevails in the MSPB, any petition for review by the government must be filed in the Federal Circuit. 5 U.S.C. 7703(d). That review is limited, however, to cases in which the Director of the Office of Personnel Management (OPM) determines "that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive," *ibid.*, and thus does not provide for review of determinations against the agency on the merits of discrimination claims. If the employee does not obtain the relief he seeks from the MSPB, Section 7703(b)(1) requires that his petition for judicial review of the MSPB's final order or final decision likewise "shall be filed in the United States Court of Appeals for the Fed-

eral Circuit," "[e]xcept as provided in" Section 7703(b)(2).

The sole exception to the Federal Circuit's exclusive jurisdiction to review MSPB decisions, set forth in Section 7703(b)(2), provides for a different form of judicial review of final MSPB decisions in mixed cases—*i.e.*, "[c]ases of discrimination subject to the provisions of [5 U.S.C.] 7702." In such cases, "[n]otwithstanding any other provision of law," an employee may file suit in district court under certain enumerated antidiscrimination laws, including Title VII and the ADEA, "within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702." 5 U.S.C. 7703(b)(3). Section 7702(a)(1) in turn requires that, in mixed cases (both mixed-case appeals and appeals of agency action on mixed-case complaints), the MSPB must, within 120 days, decide "both the issue of discrimination and the appealable action." When the Board issues a decision under Section 7702(a)(1), that decision becomes "a judicially reviewable action as of" the date the decision is issued if the employee does not petition the EEOC for review. 5 U.S.C. 7702(a)(3)(A). MSPB decisions that are not "judicially reviewable action[s] under * * * section 7702" do not fall within Section 7703(b)(2)'s exception to the Federal Circuit's exclusive jurisdiction to review final MSPB decisions. 5 U.S.C. 7703(b)(1)-(2).

d. When the Federal Circuit reviews an MSPB decision, it may correct any errors of procedural or substantive law; vacate any action that is "arbitrary, capricious, [or] an abuse of discretion"; and set aside any findings "unsupported by substantial evidence." 5 U.S.C. 7703(c). The courts of appeals have interpreted Section 7703(c) as requiring a district court, in a proceeding un-

der the Section 7703(b)(2) exception for mixed cases, to apply those same administrative-law standards in reviewing CSRA-related issues (*e.g.*, whether the challenged employment action was undertaken for "the efficiency of the service" or whether the discipline was too harsh under the circumstances). See, *e.g.*, *Williams* v. *Wynne*, 533 F.3d 360, 373 (5th Cir. 2008); *Lawrence* v. *Department of Interior*, 525 F.3d 916, 920 (9th Cir.), cert. denied, 555 U.S. 888 (2008); *Sher* v. *United States Dep't of Veterans Affairs,* 488 F.3d 489, 499 (1st Cir. 2007) (citing Federal and D.C. Circuit decisions), cert. denied, 552 U.S. 1309 (2008). District courts review an employee's discrimination claims under a de novo standard. 5 U.S.C. 7703(c).

2. a. Petitioner is a former federal employee who worked as a Senior Investigator for the Employee Benefits Security Administration of the Department of Labor (DOL) in St. Louis, Missouri. Pet. App. 1a. In May 2005, petitioner began an extended period of leave from her job. J.A. 15. On June 13, 2005, petitioner filed an EEO complaint with DOL's Civil Rights Center (the agency) alleging that DOL had discriminated against her on the basis of age and sex by subjecting her to a hostile work environment during her time in the St. Louis office. Pet. App. 13a; J.A. 10-11. Because that complaint did not concern an employment action appealable to the MSPB, it was not a mixed-case complaint. See 29 C.F.R. 1614.302(a)(1).

After petitioner had used all of her accumulated leave, as well as advanced leave granted to her by DOL, petitioner was permitted to assume leave-without-pay status. J.A. 33. When petitioner did not respond to DOL's requests for documentation to support her absence, DOL placed her on absent-without-leave status.

J.A. 19-20, 31-34. In August 2005, petitioner responded by adding a retaliation claim to her EEO complaint. Pet. App. 2a-3a. In June 2006, the agency completed its investigation of petitioner's complaint and provided her with its report of investigation. J.A. 13. Pursuant to the procedures applicable to non-mixed EEO complaints, petitioner then requested a hearing with an EEOC administrative judge. *Ibid.*; see 29 C.F.R. 1614.108(f).

b. Petitioner never returned to work, and, in July 2006, DOL terminated her employment. Pet. App. 3a. In August 2006, while her EEO hostile work environment and retaliation complaint was still pending before the EEOC administrative judge, petitioner filed a mixed-case appeal of her removal with the MSPB. *Ibid.* One month later, petitioner filed a motion to dismiss her mixed-case appeal without prejudice because she desired instead to add her claim of discriminatory removal to her already-pending EEO complaint. *Ibid.*; J.A. 4. Petitioner stated that she wished to avoid the expense of conducting discovery before both the EEOC and the MSPB. Pet. App. 3a; see J.A. 4. In her motion, petitioner, who was represented by counsel, requested that the "MSPB appeal be dismissed, without prejudice, for a period of four months, to allow the discovery phase of her EEOC appeal to proceed." Pet. App. 14a. DOL objected to the extent that petitioner sought a temporary dismissal only until the completion of discovery before the EEOC, arguing that petitioner should be required at that point to elect the forum in which to litigate her removal. J.A. 4.

On September 18, 2006, an MSPB administrative judge granted petitioner's motion. J.A. 3-5. At the request of petitioner, the dismissal order provided that petitioner's appeal was dismissed "without prejudice" to

her "right to refile her appeal either (A) within 30 days after a decision is rendered in her EEOC case; or (B) by January 18, 2007—*whichever occurs first*." J.A. 5. The order further provided that "[t]his case will not be accepted for refiling after January 18, 2007." *Ibid.*

c. Shortly thereafter, the EEOC administrative judge permitted petitioner to amend her EEO complaint to include the discrimination challenge to her removal. J.A. 13. The EEOC also scheduled a hearing on petitioner's complaint. Pet. App. 4a. Petitioner later sought to amend her EEO complaint again, this time to add allegations of discrimination based on disability (work-related depression, stress, and anxiety). J.A. 14. The EEOC denied that motion as untimely and insufficiently related to the already-pending claims. *Ibid.*

The EEOC administrative judge subsequently canceled the hearing and returned the complaint to the Department of Labor for a final decision because petitioner had abused the discovery process. Pet. App. 4a; J.A. 15 (hearing canceled due to petitioner's "bad-faith pre-hearing conduct"). DOL's Civil Rights Center later noted that returning the complaint to the agency was warranted for the additional reason that, in light of the newly added challenge to petitioner's removal, it was now a mixed-case complaint, which an agency, rather than the EEOC, must resolve in the first instance. J.A. 15 n.2; see 5 U.S.C. 7702(a)(2); see also 29 C.F.R. 1614.302(b) and (d)(2).

In October 2007, the agency issued a final decision rejecting petitioner's claims of discrimination and retaliation, and upholding her removal. J.A. 10-49. The agency concluded that "a review of the evidence does not support [petitioner's] contention that her age and sex were factors in management's treatment of her" and

that "[t]he record is replete with management's legitimate, non-discriminatory justifications for its treatment of [her]." J.A. 42, 46. Petitioner's supervisors, the agency explained, "had reasons to believe that [she] engaged in her personal business and educational pursuits during work time, and [had] received telephone calls and faxes [at the office] regarding these matters"; "were legitimately concerned about her leave use, her extended and unexplained absences from the office, and her relatively low case productivity"; and had received neither responses to their letters "regarding [petitioner's] intentions to return to work" nor "medical documentation to support her extended absence." *Ibid.* In accordance with the default procedures for mixed-case complaints, see 29 C.F.R. 1614.302(d)(3), the agency's decision stated that petitioner could either appeal her mixed case to the MSPB or file a civil action in federal district court within 30 days, but not both. J.A. 48-49.

d. Petitioner filed an appeal with the MSPB on November 28, 2007—within 30 days of the agency's final decision, but more than ten months after the deadline of January 18, 2007, previously imposed by the MSPB at petitioner's request. Pet. App. 4a. Petitioner argued that her appeal should be permitted because it was a different appeal from the one the Board had previously dismissed. J.A. 53. On February 27, 2008, an MSPB administrative judge rejected petitioner's argument and dismissed the appeal as untimely. J.A. 50-60. The administrative judge reasoned that the "adverse action from which [petitioner] is appealing remains the same, i.e., [DOL's] decision to remove her from employment." J.A. 54-57. The normal 30-day window for appealing from an agency's resolution of an EEO complaint did not apply here, the administrative judge explained, "because

[petitioner's] first MSPB appeal was dismissed—and the re-filing deadline was established—before the removal action was merged into [petitioner's] EEO complaint." J.A. 54. And the "initial decision dismissing [petitioner's] first MSPB appeal set a clear deadline for refiling the appeal—within 30 days after the EEO decision or by January 18, 2007, *whichever occurs first*." J.A. 55; see also *ibid*. ("[T]he initial decision stated that the appeal 'will not be accepted for re-filing after January 18, 2007.'").

The administrative judge also declined to excuse the untimely filing. J.A. 55-57. The administrative judge explained that the MSPB "will not waive its timeliness requirements when an appellant consciously elects another forum in which to challenge an adverse action." J.A. 54. Here, "[i]n the face of clear notice of the refiling deadline, as well as the consequences for failing to meet that deadline, [petitioner], with assistance of counsel, decided to pursue her EEO complaint." J.A. 55. The administrative judge emphasized that petitioner "did not have the discretion to determine on her own the best use of agency and [MSPB] resources" and that if she "believed it was inconvenient to pursue her MSPB appeal before the agency issued the final decision on her EEO complaint, she could have asked the [MSPB] for an extension of time in which to re-file" or re-filed and sought another non-prejudicial dismissal. J.A. 56.

The administrative judge's dismissal order became the final decision of the MSPB when petitioner did not seek further administrative review. Pet. App. 4a; see 5 C.F.R. 1201.113-1201.114. The dismissal order specified that, within 30 days of the order's becoming final, petitioner could file a petition for review in the Federal Cir-

cuit if she were "dissatisfied" with the MSPB's resolution of her case. J.A. 59.

3. Rather than seeking review in the Federal Circuit, petitioner filed a complaint in district court, requesting relief under Title VII and the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* (which covers disability discrimination).[1] J.A. 61-70. Petitioner stated that her complaint was "a timely appeal from the Final Agency Decision" and that it was "filed within 30 days of the date of the final decision of the MSPB on [petitioner's] appeal of the Final Agency Decision." J.A. 62, 64.

The district court dismissed the case for lack of jurisdiction. Pet. App. 11a-22a. As an initial matter, the district court determined that petitioner's complaint was "properly characterized as an appeal from the [latest] MSPB decision," rather than from the agency's final decision on her EEO complaint. *Id.* at 21a-22a. The court explained that, once the agency decided the EEO complaint, petitioner "was permitted either to file an appeal with the MSPB or in federal district court, but not both." *Id.* at 20a-21a. By choosing to appeal to the MSPB, the district court explained, petitioner "foreclosed her ability to appeal the [final agency decision] directly to" the district court. *Id.* at 21a.

The court concluded that the Federal Circuit had exclusive jurisdiction over petitioner's appeal of the MSPB's decision. Pet. App. 19a-20a. The district court explained that, "to qualify as a case of discrimination appealable to a federal district court, the MSPB must have resolved the merits of the discrimination claim." *Id.* at 19a. Here, however, the MSPB had not resolved the

[1] Although petitioner's complaint also asserts that DOL discriminated against her on the basis of age, it does not mention the ADEA. See J.A. 61-70.

merits of petitioner's discrimination claims, but instead had dismissed her appeal as untimely, "and appeal of such a threshold issue is properly filed with the Federal Circuit." *Id.* at 22a.

4. The court of appeals affirmed. Pet. App. 1a-10a. The court agreed with the longstanding view of the Federal Circuit and a majority of other circuits that, "until the *merits* of a 'mixed' discrimination case are reached by the MSPB, procedural or threshold matters, not related to the merits of a discrimination claim before the MSPB, may properly be appealed" only to the Federal Circuit. *Id.* at 6a (quoting *Ballentine*, 738 F.2d at 1247). The court relied on the Federal Circuit's reasoning that, as a matter of statutory construction, the "judicially reviewable action by the MSPB which makes an appeal a 'case of discrimination' under § 7703(b)(2) that can be filed in district court is that the MSPB has decided both the issue of discrimination and the appealable action." *Ibid.* (quoting *Ballentine*, 738 F.2d at 1246). And it emphasized that the Federal Circuit's "functional approach" rests on a "logic[al] infer[ence] that Congress intended to require the de novo district court review that federal anti-discrimination statutes provide when the MSPB has ruled on the merits of discrimination issues in a 'mixed case,' but intended that the Federal Circuit provide uniform review of MSPB rulings on procedural, non-merits issues." *Id.* at 9a.

SUMMARY OF ARGUMENT

I. A. As this Court has previously held, one of the primary structural elements of the CSRA is the primacy of the Federal Circuit as the forum for judicial review. That structure implements Congress's intent that case law governing the MSPB develop in a uniform way.

Congress permitted only a narrow exception to the exclusivity of the Federal Circuit's judicial review of MSPB decisions, granting district courts jurisdiction to review final MSPB decisions only in mixed cases and only when such decisions are "judicially reviewable action[s]." 5 U.S.C. 7703(b)(2). In order for a case to be a mixed case—a "[c]ase[] of discrimination subject to the provisions of section 7702"—the complaining employee must have been affected by an action appealable to the MSPB and allege that a basis for the action was discrimination prohibited by enumerated laws such as Title VII. In order for a final Board decision to be a "judicially reviewable action under [5 U.S.C.] 7702," as required for the exception to the Federal Circuit's exclusive jurisdiction to apply, the decision must reach the merits of the employee's discrimination claim.

When the MSPB disposes of a case on procedural or jurisdictional grounds without reaching the discrimination claim (as it did in petitioner's case), the Board does not issue a "judicially reviewable action" under Section 7702, and the Board's final action disposing of the case must be reviewed in the Federal Circuit. That scheme of judicial review is reflected throughout the provisions of Sections 7702 and 7703. For example, Section 7702(b) permits an employee to seek review by the EEOC of a Board decision, but only to the extent such decision reached the employee's discrimination claim. If a Board decision does not reach any discrimination issue, the employee may not seek review either in district court or by the EEOC; the only type of review available for such decisions is in the Federal Circuit.

The sole exception to the requirement that a final MSPB decision reach the issue of discrimination in order to be eligible for de novo review in district court is

the escape hatch provided in Section 7702(e)(1)(B), which protects employees from being held in limbo by Board inaction. That provision states that, when the Board fails to issue a judicially reviewable action within 120 days of the filing of the appeal, the employee may file suit in district court. That provision is an exception to the requirement that the Board issue a final decision before an employee may seek judicial review, *not* to the requirement that any final decision reach the discrimination issue before an employee may file suit in district court. When, as here, the Board issues a final decision that does not reach the discrimination issue, Section 7702(e)(1)(B) does not apply.

B. Limiting the availability of de novo district court review of MSPB decisions to cases in which the Board issues a final decision on the discrimination issue best promotes congressional intent. First, it preserves as much as possible Congress's objective to provide exclusive Federal Circuit review of MSPB procedural and jurisdictional questions. That exclusivity is sacrificed only to the extent necessary to achieve Congress's other important objective, *i.e.*, ensuring that discrimination claims are heard de novo in district court. When an MSPB decision does not reach any discrimination issue, there is no reason to permit a district court to review it.

Petitioner suggests that the complexity of the CSRA's administrative review scheme works to deprive employees of their right to bring discrimination claims in district court. That is not so. Employees such as petitioner have multiple opportunities throughout the administrative process to file suit in district court. Indeed, petitioner does not dispute that she could have filed such a suit following the agency's decision on her EEO complaint. Under petitioner's view of Section 7703(b)(2),

there would be no consequence for an employee who fails, after receiving a final agency decision, to either file a timely suit in district court or file a timely MSPB appeal because she could file an untimely appeal with the MSPB and then seek district court review of the MSPB's decision dismissing her appeal as untimely.

The fact that the CSRA gives employees multiple review options is a benefit to employees, not a trap. If petitioner had timely filed her MSPB appeal, she would have had essentially a free chance to obtain relief—because if she had prevailed before the Board on her discrimination claim, the agency could not have sought judicial review of that determination, and if she had not prevailed, she would have been entitled to seek de novo review in the district court. The CSRA and its implementing regulations also provide various safeguards to protect employees who timely file complaints or appeals, but file them in the wrong place. Because petitioner did not timely file her appeal (by failing to comply with a deadline imposed at her own request and with the advice of counsel), she is not entitled to those safeguards. But employees who pursue their claims in a timely fashion will not accidentally forfeit their right to de novo district court review.

II. Petitioner newly contends that, in fact, she does not wish to seek review of the MSPB's decision at all, but only wishes to pursue her discrimination claims directly under Title VII or the ADEA. That new contention is belied by the manner in which she has litigated her case thus far. And, in any case, it is clear from the briefs filed at the petition-for-certiorari stage that the question before the Court is whether, *under the CSRA*, petitioner may seek review in the district court of the MSPB's dismissal of her appeal on procedural grounds.

The question whether the district court would have jurisdiction over petitioner's discrimination claims directly under Title VII or the ADEA (and if so whether such claims were timely filed) is not before the Court. We note, however, that the antidiscrimination statutes on which petitioner relies do not give district courts jurisdiction to review MSPB decisions. Only the CSRA does that, and only in the specified circumstances.

Here, petitioner chose to appeal the agency's final decision to the MSPB rather than seek review in the district court. She cannot now recharacterize her complaint as seeking review of the agency's decision. By the terms of the CSRA, that decision ceased being a "judicially reviewable action" when petitioner filed her MSPB appeal. Once she elected to proceed before the MSPB, she was required to exhaust those remedies. If petitioner felt that the MSPB erroneously dismissed her appeal as untimely, she was entitled to seek review of that decision in the Federal Circuit. If the Federal Circuit had agreed with her, it would have remanded her case to the MSPB for a determination on the merits of her discrimination claim—a determination that would then qualify as a "judicially reviewable action" subject to de novo district court review.

ARGUMENT

The MSPB has nationwide jurisdiction over administrative appeals in mixed cases. The procedural rules governing such appeals do not vary with the particular judicial district in which the employee, or the employing agency, is located. And Congress did not invite geographic variance in the interpretation of those rules by allowing for judicial review of threshold procedural MSPB decisions across the various district courts.

Nothing in the CSRA mandates such an impractical system, and petitioner offers no reason why Congress could have desired it. To the contrary, Congress wished to provide uniform review of MSPB decisions in the Federal Circuit, except insofar as necessary to enable de novo district court review of statutory discrimination claims in mixed cases. The latter concern is entirely absent where, as here, the MSPB does not even reach the discrimination issue.

Petitioner now attempts to suggest that the district court could adjudicate her case without regard to anything the MSPB did. That suggestion is misplaced. Petitioner had the option of proceeding immediately to district court after the agency denied her EEO complaint, but she elected instead to pursue an administrative appeal by submitting her case to the jurisdiction of the MSPB. If she believed that the MSPB erred in dismissing her case on threshold procedural grounds, she could have sought review of that dismissal in the Federal Circuit. She may not now, however, proceed as though the MSPB's decision never happened.

I. THE FEDERAL CIRCUIT HAS EXCLUSIVE JURISDICTION TO REVIEW MSPB DECISIONS IN MIXED CASES THAT DO NOT REACH THE ISSUE OF DISCRIMINATION

Congress created the Federal Circuit in order "to provide 'a prompt, definitive answer to legal questions' " in "ceratin areas of the law" that have a "'special need for nationwide uniformity.'" *United States* v. *Hohri*, 482 U.S. 64, 71-72 (1987) (quoting S. Rep. No. 275, 97th Cong., 1st Sess. 1-2 (1981)). Because Congress viewed MSPB decisions as one such area of the law in need of uniformity, Congress provided for centralized judicial review of those decisions. See Federal Courts

Improvement Act of 1982, Pub. L. No. 97-164, § 127, 96 Stat. 37-38; *id.* § 144, 96 Stat. 45; 5 U.S.C. 7703; 28 U.S.C. 1295(a)(9). This Court recently reaffirmed that, notwithstanding the existence of other general grants of subject matter jurisdiction to federal district courts, the CSRA vests exclusive judicial review of MSPB decisions in the Federal Circuit. *Elgin* v. *Department of the Treasury*, 132 S. Ct. 2126, 2132-2141 (2012). The only exception to the Federal Circuit's otherwise exclusive review of MSPB decisions is provided in 5 U.S.C. 7703(b)(2). 132 S. Ct. at 2134. That provision allows an employee who has filed a mixed-case appeal (including an appeal of a mixed-case complaint) with the Board to file suit in district court under the applicable antidiscrimination statute when the MSPB issues a final decision that is a "judicially reviewable action" under 5 U.S.C. 7702. When, as here, the MSPB dismisses an employee's mixed-case appeal on threshold procedural grounds, that decision is not a "judicially reviewable action" under Section 7702 and thus does not entitle an employee to file suit in district court pursuant to the exception in Section 7703(b)(2).

A. The Text Of Sections 7702 And 7703 Dictate That An MSPB Dismissal For Untimeliness Is Not A "Judicially Reviewable Action" In District Court

1. Section 7703 of the CSRA provides that, "[e]xcept as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the [MSPB] shall be filed in the United States Court of Appeals for the Federal Circuit." 5 U.S.C. 7703(b)(1); see 28 U.S.C. 1295(a)(9) (Federal Circuit has "exclusive jurisdiction" over MSPB final decisions pursuant to 5 U.S.C. 7703(b)(1)). The referenced exception to the

Federal Circuit's exclusive jurisdiction over final MSPB decisions applies in "[c]ases of discrimination subject to the provisions of section 7702." 5 U.S.C. 7703(b)(2). In those cases, the CSRA permits an employee to seek review of the MSPB's decision by filing suit in district court within 30 days after the employee receives "notice of the judicially reviewable action under such section 7702." *Ibid.* Whether a final decision of the MSPB gives rise to an employee's right to file suit in district court must therefore be determined with reference to (1) whether the case qualifies as a "[c]ase[] of discrimination subject to the provisions of section 7702" and (2) whether the Board's final decision is a "judicially reviewable action under * * * section 7702." 5 U.S.C. 7703(b)(2). That inquiry therefore requires an examination of Section 7702 itself.

A case qualifies as a "[c]ase[] of discrimination subject to the provisions of section 7702" when an employee has both "been affected by an action which [she] may appeal" to the MSPB *and* "alleges that a basis for the action was discrimination" prohibited under a federal antidiscrimination statute such as Title VII. 5 U.S.C. 7702(a)(1)(A)-(B). Section 7702(a)(3) defines for the most part which MSPB decisions qualify as "judicially reviewable action[s]," providing that "[a]ny decision of the Board *under paragraph (1)* of this subsection shall be a judicially reviewable action as of" the date of the decision (unless the employee seeks review of the decision by the EEOC). 5 U.S.C. 7702(a)(3) (emphasis added). Paragraph (1), in turn, requires that "the [MSPB] shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701." 5 U.S.C. 7702(a)(1). The

"*decision* of the Board" under Section 7702(a)(1) that constitutes a "judicially reviewable action" therefore is one that "*decide[s]* both the issue of discrimination and the appealable action." 5 U.S.C. 7702(a)(1). In short, a "judicially reviewable action" in a "[c]ase[] of discrimination" under Section 7702—*i.e.*, the type of MSPB decision to which the exception in Section 7703(b)(2) applies—is a Board decision in a mixed case on "both the issue of discrimination and the appealable action."

The Board's decision here is not a judicially reviewable action under Section 7702 because the MSPB did not reach the merits of either petitioner's discrimination claim or her appealable action. Instead, the MSPB dismissed petitioner's appeal as untimely. That decision was a final decision pursuant to the Board's appellate procedures under Section 7701, which authorize the Board to promulgate regulations governing appeals before it. See 5 U.S.C. 7701(k). Because it was a *non*-merits decision, however, it was not a decision "under paragraph (1) of this subsection," *i.e.*, Section 7702(a)(1). It is not, therefore, a "judicially reviewable action under" Section 7702 and does not fall within Section 7703(b)(2)'s exception to the Federal Circuit's exclusive jurisdiction over review of final MSPB decisions. Review thus must lie in the Federal Circuit.

The MSPB's regulations—promulgated pursuant to the specific statutory grant of authority to do so in 5 U.S.C. 7701(k)—reinforce that a final MSPB decision in a mixed case is subject to review in district court only if it decided the issue of discrimination. In the provision governing judicial review of mixed-case decisions, the regulations acknowledge that employees generally have the right to seek judicial review in district court of final decisions "under 5 U.S.C. 7702." 5 C.F.R. 1201.157. The

same provision states, however, that an appeal of the Board's decision may be filed in the Federal Circuit instead "[i]f an appellant elects to waive the discrimination issue." *Ibid.* Although that provision does not speak directly to the question presented here, it is consistent with the idea that the Federal Circuit should have exclusive jurisdiction to review final MSPB decisions unless those decisions reach the merits of a discrimination claim.[2]

2. Other provisions in Sections 7702 and 7703 further support the conclusion that a judicially reviewable action under Section 7702 must be a final decision under Section 7702(a)(1), which in turn must be a merits decision on both the issue of discrimination and the appealable action.

First, Section 7702(a)(3) provides that a final Board decision "under" Section 7702(a)(1) becomes a "judicially reviewable action" upon issuance of the decision only if the employee opts not to petition the EEOC to review the decision pursuant to Section 7702(b)(1). See 5 U.S.C. 7702(b)(1) ("An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision."). Section 7702(b) makes clear, in turn, that the EEOC's review of such a decision is limited to determining whether (1) "the decision of the Board constitutes an incorrect interpretation of any provision of" the federal antidiscrimination law at issue, or (2) "the decision involving such [antidiscrim-

[2] The interim, proposed, and initial rules promulgated by the MSPB after passage of the CSRA (and relied on by petitioner, see Br. 50-52) are not to the contrary. By their terms, those regulations generally govern Board decisions under Section 7702—which, as explained, are decisions on the merits of the discrimination claim.

ination] provision is not supported by the evidence in the record as a whole." See 5 U.S.C. 7702(b)(3)(B)(i)-(ii). Because the EEOC's review of a Board decision "under" Section 7702(a)(1) is thereby limited to substantive questions regarding the issue of discrimination, such a decision must be a decision on "both the issue of discrimination and the appealable action," as specified in Section 7702(a)(1). Petitioner's suggestion (Br. 45) to the contrary is thus incorrect. Where, as here, the Board does not reach the merits of the discrimination claim, the Board's decision is not a decision "under subsection (a)(1)" subject to review by either a district court or the EEOC rather than the Federal Circuit.

Second, 5 U.S.C. 7703(a) differentiates between final MSPB decisions that address the merits of the challenged personnel action and those that do not. Section 7703(a)(1) provides generally that any employee "adversely affected or aggrieved by a final order or decision of the [MSPB] may obtain judicial review of the order or decision." Section 7703(a)(2) specifies that the MSPB, rather than the employing agency, "shall be named respondent in any proceeding brought pursuant to" Section 7703(a)—"*unless* the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action * * * , in which case the agency responsible for taking the personnel action shall be the respondent." 5 U.S.C. 7703(a)(2) (emphasis added). Here, there is no MSPB "order or decision on the merits on the underlying personnel action." Any action seeking judicial review of the Board's decision must therefore name the MSPB, rather than the Department of Labor or its Secretary, as the responding party. That alignment of parties emphasizes that the only judicial review available for a Board deci-

sion that disposes of a mixed case on threshold procedural or jurisdictional grounds is review of the MSPB's actions in disposing of the case. See S. Rep. No. 413, 100th Cong., 2d Sess. 36 (1988) (explaining that this provision, which was amended in 1989, requires that, "[i]n appeals involving procedural or jurisdictional matters, the Board would be the respondent"); *id.* at 22. Where, as here, the Board does not reach the merits of the employee's discrimination claim, review of the Board's order cannot include review of the discrimination claim—and therefore does not fall within the exception specified in Section 7703(b)(2). Review of such an order must be in the Federal Circuit.[3]

3. Petitioner's contrary reading of the language of Sections 7702 and 7703 is misguided. Petitioner argues (see, *e.g.*, Br. 30-33) that, by using the phrase "[c]ases of discrimination subject to the provisions of section 7702," Section 7703(b)(2) grants district courts jurisdiction over all mixed cases filed before the Board as soon as they are filed. That construction reads critical language out of Section 7703. It also defies common sense.

---

[3] As noted in the government's brief in opposition to the petition for a writ of certiorari (at 13-16), the Second and Tenth Circuits have held that, although MSPB dismissals of mixed cases on jurisdictional grounds are not subject to district court review under Section 7703(b)(2), dismissals of such cases on procedural grounds are. See *Downey* v. *Runyon*, 160 F.3d 139, 146 (2d Cir. 1998); *Harms* v. *IRS*, 321 F.3d 1001, 1008 (10th Cir.), cert. denied, 540 U.S. 858 (2003). Such a distinction has no basis and petitioner does not ask this Court to adopt it. The reason for creating an exception to the Federal Circuit's exclusive jurisdiction over final MSPB decisions is to allow discrimination claims to be heard in district courts. When the Board disposes of an appeal on grounds that do not touch on discrimination, that exception does not apply, regardless of whether the decision rests on jurisdictional or procedural grounds.

a. The text of Section 7703(b) makes clear both that Section 7703(b) as a whole addresses a court's jurisdiction to review "a final order or final decision of the Board," 5 U.S.C. 7703(b)(1), and that Section 7703(b)(2) in particular grants district courts jurisdiction to review only "judicially reviewable action[s] under such section 7702." Thus, although it is true that all mixed cases appealed to the MSPB are subject to the requirements of Section 7702, no court has jurisdiction to review such a case until there is a judicially reviewable action under Section 7702. It is therefore true but irrelevant that, as petitioner puts it (Br. 32), "several provisions of section 7702 clearly apply to claims *before* the MSPB has acted at all." The fact that Section 7702 governs an agency's handling of mixed-case complaints as well as the MSPB's initial handling of appeals does not mean that Section 7703(b)(2) grants district courts jurisdiction over such cases at any point in the administrative process an employee may opt to seek review. Employees may not, for example, seek de novo district court review of non-final Board orders governing discovery requests and briefing schedules. And there must be a "judicially reviewable action"—a final decision on the merits of the discrimination claim—before a district court can have jurisdiction to review the case.

To put it another way, petitioner would draw the distinction between cases governed by Section 7703(b)(1) and cases governed by Section 7703(b)(2) on the basis of the underlying factual allegations. If a case alleges discrimination in an action appealable to the Board, petitioner argues, a district court has jurisdiction to review it at any point pursuant to Section 7703(b)(2). That is incorrect. Section 7703 distinguishes between different types of final Board decisions, not different types of un-

derlying allegations, assigning review of all such decisions to the Federal Circuit except Board decisions on the merits of both the discrimination and CSRA claims in mixed cases.

b. The only exception to the requirement that there be a final Board decision before any court may exercise judicial review is in Section 7702(e)(1)(B). Petitioner errs in relying (Br. 45-46) on that provision. Section 7702(e)(1)(B) specifies in relevant part:

> Nothwithstanding any other provision of law, if at any time after * * * the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee [with the EEOC,] * * * an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in [Title VII and the ADEA].

5 U.S.C. 7702(e)(1)(B). That provision is an exception to the final-decision prerequisite to judicial review; it is not an exception to the requirement that any final decision actually issued by the Board reach the discrimination issue in order to be subject to review in district court rather than the Federal Circuit.

Insofar as petitioner reads Section 7702(e)(1)(B) to allow filing suit in district court whenever 120 days have passed from the filing of an appeal with the Board if the Board has issued no "judicially reviewable action"—*i.e.*, even if the Board has dismissed the case on non-merits grounds—such a reading would defy common sense. Properly read, Section 7702(e)(1)(B) applies only to cases over which the Board continues to exert jurisdiction, not to cases in which the Board has already issued

a decision. The purpose of the provision is to save employees from being held in perpetual uncertainty by Board inaction. But that escape hatch serves no purpose when the MSPB *does* act by issuing a final decision, even if the decision does not reach the merits of the discrimination claim. Thus, although the Board has not issued a "judicially reviewable action" in petitioner's case and many more than 120 days have passed since she filed her appeal to the Board, Subsection (e)(1)(B) affords no basis for seeking review in district court in this case.[4]

Petitioner asserts (Br. 46) that an employee may file suit in district court under Section 7702(e)(1)(B) "at '*an*y' time" if the MSPB does not act within 120 days of the filing of an appeal, even if the MSPB acts before such a suit is filed. In petitioner's view, an employee would therefore have the right under Section 7702(e)(1)(B) to file suit in district court several years after filing an appeal with the MSPB even if the Board had issued a final decision on the merits of the case on day 125. That cannot be correct. Section 7702(e)(1)(B)'s escape hatch applies only when the Board has not issued a final decision of any kind within 120 days after an appeal in a mixed case is filed and it ceases to apply when the Board issues a final decision, even if the Board does so after more than 120 days.

[4] Applying Section 7702(e)(1)(B) to cases in which the Board has disposed of a case on non-merits grounds would lead to absurd results. Consider, for example, a situation in which an employee voluntarily dismisses his MSPB appeal after reaching a mutually agreeable resolution of his claims with his employing agency. The Board's order closing the case would not be a "judicially reviewable action" under Section 7702, and thus would not trigger district court jurisdiction under Section 7703(b)(2). But Congress would not have wanted to allow an employee to file suit in district court raising such claims anew 121 days—or five years—after the date she filed her MSPB appeal.

c. Petitioner argues that, if her case is not a "[c]ase[] of discrimination subject to the provisions of section 7702" under the exception to Federal Circuit jurisdiction in Section 7703(b)(2), then the 30-day limitations period set forth in Section 7703(b)(2) does not apply to her case. Pet. Br. 27 (first brackets in original). That is true, but it does not advance petitioner's argument. The essence of the question presented in this case is whether judicial review of the MSPB's decision in petitioner's case is governed by Section 7703(b)(1) or Section 7703(b)(2). In the government's view, it is governed by Section 7703(b)(1) because the Board's decision here was not a "judicially reviewable action" under Section 7702. There is therefore no reason why the 30-day limitations period set forth in Section 7703(b)(2), rather than the 60-day limitations period set forth in Section 7703(b)(1), would apply with respect to petitioner's seeking judicial review of the MSPB's decision.

Petitioner conflates separate stages of the administrative review process when she asserts (Br. 36) that the government "has repeatedly insisted that [her] claim is indeed controlled by the 30-day limitations period in section 7703(b)(2)," and insists that the government "cannot have it both ways." The 30-day limitations period in Section 7703(b)(2) would have applied if petitioner had sought judicial review of the agency's final decision on petitioner's mixed-case complaint rather than appealing to the MSPB. Section 7703(b)(2) governs district court review only of "judicially reviewable action[s]" of the Board, as such actions are defined in Section 7702. Section 7702(a)(2) makes clear that a final agency decision is a "judicially reviewable action" under Section 7702 by specifying that a "decision of the agency in [a mixed case] shall be a judicially reviewable action

unless the employee appeals the matter to the Board." 5 U.S.C. 7702(a)(2) (emphasis added). Petitioner was thus entitled under Section 7703(b)(2) to file suit in district court within 30 days of the agency's final decision. But she did not do so, instead opting to file an untimely appeal with the MSPB. Once she filed her MSPB appeal, the agency's final action was no longer a judicially reviewable action under the plain terms of Section 7702(a)(2), and therefore was no longer reviewable in district court under the exception in Section 7703(b)(2).[5]

There is therefore no merit to petitioner's argument (Br. 35) that, "[a]bsent the application of * * * section 7702(b)(2)" to MSPB decisions like the one in her case, "the applicable limitations period would vary" based on the particular type of discrimination alleged. The Federal Circuit is the only court that is authorized to review final MSPB decisions in mixed cases when such decisions are based on threshold procedural or jurisdictional grounds and do not reach the merits of the underlying discrimination issue. In all such cases, the 60-day limitations period in Section 7703(b)(1) applies. The limitations periods provided in statutes such as Title VII and the ADEA would not apply because judicial review of

[5] Petitioner asserts (Br. 20) that she would have had to "forfeit her CSRA claim" if she had timely filed suit in district court following the agency's final decision. That is not correct. Section 7702(a)(2) specifies that a final agency decision in a mixed case is a "judicially reviewable action." Section 7703(b)(2) authorizes district court review of a "judicially reviewable action under * * * section 7702." Nothing in the CSRA indicates that the district court review authorized in Section 7703(b)(2) would preclude petitioner's raising her related CSRA and discrimination claims. See, *e.g.*, *Doyal* v. *Marsh*, 777 F.2d 1526, 1536-1537 (11th Cir. 1985) (noting that courts of appeals agree that district courts reviewing mixed cases should not bifurcate an employee's discrimination and nondiscrimination claims).

MSPB decisions is not available under such statutes. See pp. 44-46, *infra*. And in all cases in which the MSPB decides "both the issue of discrimination and the appealable action," 5 U.S.C. 7702(a)(1), the 30-day limitations period in Section 7703(b)(2) applies. Indeed, Section 7703(b)(2) specifically provides that its 30-day limit applies to district court actions seeking review of judicially reviewable actions under Section 7702 "[n]otwithstanding any other provision of law."

4. This Court recently issued a decision in *Elgin* v. *Department of the Treasury*, 132 S. Ct. 2126 (2012), which presented the question "whether the CSRA provides the exclusive avenue to judicial review when a qualifying employee challenges an adverse employment action by arguing that a federal statute is unconstitutional." *Id.* at 2130. In the course of answering that question in the affirmative, the Court stated:

> In only one situation does the CSRA expressly exempt a covered employee's appeal of a covered action from Federal Circuit review based on the type of claim at issue. When a covered employee "alleges that a basis for the action was discrimination" prohibited by enumerated federal employment laws, 5 U.S.C. § 7702(a)(1)(B), the CSRA allows the employee to obtain judicial review of an unfavorable MSPB decision by filing a civil action as provided by the applicable employment law. See § 7703(b)(2). Each of the cross-referenced employment laws authorizes an action in federal district court. See 42 U.S.C. § 2000e–5(f); 29 U.S.C. § 633a(c); § 216(b).

Id. at 2134. The Court did not explain whether the reference in the second sentence to the "unfavorable MSPB decision" was intended to refer to an unfavorable MSPB

decision *on the issue of discrimination*. No party in *Elgin* had occasion to address—and this Court had no occasion to consider—that question because the employee in *Elgin* did not allege discrimination. For the reasons explained, the sole exception to the Federal Circuit's exclusive jurisdiction arises when the MSPB reaches the issue of discrimination. No such decision was rendered in this case.

B. Requiring Review In The Federal Circuit Of Non-Merits MSPB Decisions In Mixed Cases Is Consistent With Congress's Intent That There Be A Unified Body Of Law Governing MSPB Jurisdiction And Procedure

1. Construing the exception in Section 7703(b)(2) to apply only to cases in which the MSPB decides "both the issue of discrimination and the appealable action," 5 U.S.C. 7702(a)(1), best serves the balance of interests Congress struck when it created the federal merit system. The two primary interests Congress sought to balance were (1) ensuring that the Federal Circuit would develop a uniform body of case law governing federal personnel issues and (2) protecting employees' right to have discrimination claims adjudicated de novo in district court. And Congress of course sought to conserve judicial resources where possible.

As this Court noted in *Fausto*, inherent in the "structure" of the CSRA is the "primacy of the United States Court of Appeals for the Federal Circuit for judicial review" of CSRA matters before the MSPB. 484 U.S. at 449 (citing 5 U.S.C. 7703). Channeling review of such matters to the Federal Circuit, the Court explained, "enables the development, through the MSPB, of a unitary and consistent Executive Branch position on matters involving personnel action, avoids an 'unnecessary layer

of judicial review' in lower federal courts, and '[e]ncourages more consistent judicial decisions.'" *Ibid.* (brackets in original) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 52 (1978)). Allowing "the district courts and the regional courts of appeals throughout the country" to review MSPB decisions would "undermin[e] the consistency of interpretation by the Federal Circuit envisioned by § 7703 of the Act." *Id.* at 451.

The basic rule set forth in Section 7703 thus ensures that one court—the Federal Circuit—will develop a uniform body of law governing federal personnel matters and the operation of the MSPB. Requiring Federal Circuit review of MSPB decisions that do not address the merits of a discrimination claim is consistent with that objective. Conversely, that objective would be disserved by having district courts and courts of appeals around the country review MSPB decisions that dispose of a case on threshold grounds such as timeliness or jurisdiction. Indeed, such a scheme could work to require the MSPB to apply different procedural or jurisdictional rules depending on which district court it anticipates would have jurisdiction to review its application of such rules. That is not what Congress intended.

The only exception to that structural principle protects employees' right to have agency decisions on discrimination claims subject to a de novo determination in district court. When the MSPB "decide[s] both the issue of discrimination and the appealable action" "under" Section 7702(a)(1), Congress authorized employees to seek review of such a decision by the EEOC and/or a district court. 5 U.S.C. 7702(a)(1) and (b), 7703(b)(2). But allowing district court review of MSPB decisions that do *not* reach discrimination issues would not further that interest. And requiring review in the Federal

Circuit of MSPB decisions that do not reach discrimination issues would not undermine employees' right to de novo district court review of discrimination claims because, in such cases, the Federal Circuit will not address any discrimination issue in deciding whether the MSPB properly disposed of a case on threshold procedural or jurisdictional grounds.

Here, the MSPB disposed of petitioner's appeal solely on the basis of its own regulations and case law; it did not apply or interpret any provisions of the federal antidiscrimination laws. J.A. 52-57. If the Federal Circuit were to reverse the MSPB's procedural determination, it would remand petitioner's case to the Board for a decision on "both the issue of discrimination and the appealable action" under Section 7702(a)(1). Such a decision by the MSPB on remand would qualify as a "judicially reviewable action" under Section 7702 and petitioner would at that point have the right under the exception in Section 7703(b)(2) to seek de novo review in the district court. That scheme—under which decisions on the merits of all mixed cases are reviewable in district court—protects employees alleging discrimination.

Congress's scheme also ensures, as much as possible, the development of a uniform body of case law governing the jurisdiction and functioning of the MSPB. It is true that certain discrimination claims filed in district court after a merits decision by the MSPB under Section 7702(a)(1) may involve questions of MSPB jurisdiction and procedure.[6] To that extent, Congress sought to pro-

[6] Petitioner argues (Br. 44) that accepting the government's interpretation of Section 7703(b)(2) "would mean that different federal courts could have jurisdiction over the same procedural question, depending on whether that question was decided by the agency or the MSPB." District courts' jurisdiction to review final agency actions if an

tect employees' right to de novo determination of discrimination claims over ensuring absolute uniformity with respect to MSPB operations. But the Court should reject petitioner's invitation to expand Section 7703(b)(2)'s narrow exception to the general rule of exclusive jurisdiction in the Federal Circuit. Although that exception is important to protect employees' ability to obtain a de novo determination of discrimination claims, Congress did not intend that it encompass review of MSPB decisions that do not address any discrimination issue at all.

Petitioner relies (Br. 46-49) on portions of the CSRA's legislative history to argue that district courts should have jurisdiction "over all mixed cases." At best, however, that legislative history merely confirms that Congress intended district courts to have jurisdiction to review MSPB determinations in mixed cases when the Board decides the issue of discrimination. The two unenacted versions of the CSRA on which petitioner relies (*ibid.*) stated that review of MSPB decisions would be in the federal Court of Claims or a court of appeals, "except for actions filed in the United States district courts" under specified antidiscrimination statutes. See 2 *Legislative History of the Civil Service Reform Act of 1978*, Comm. Print, 96th Cong., 1st Sess. 1333, 1395 (1979). But neither bill specified which actions *could* be filed in district court. And the Senate report on which petitioner relies (Br. 48) simply expressed the view that district courts should have jurisdiction over discrimination claims, a view that is fully consistent with the government's interpretation of Sections 7702 and 7703.

---

employee so chooses would not, however, undermine Congress's interest in having a uniform body of law apply to the MSPB's procedural and jurisdictional rules.

Under the CSRA, district courts are the only courts with jurisdiction to review or determine the merits of discrimination claims.

2. Petitioner is correct in suggesting (see Br. 7-10, 24) that the CSRA offers many administrative-review options to employees asserting mixed-case claims. When the agency issued a final decision on the merits of petitioner's discrimination claim, for example, petitioner had the option of either appealing to the MSPB within 30 days pursuant to 5 C.F.R. 1201.156 and 5 U.S.C. 7702(a)(2) or filing suit in district court within 30 days pursuant to Sections 7702(a)(2) and 7703(b)(2). If the Board had issued a final decision on the merits of her discrimination claim, petitioner would have had the option of either seeking review by the EEOC within 30 days pursuant to Section 7702(b)(1) or filing suit in district court within 30 days under Section 7703(b)(2). Perhaps the scheme would be simpler if Congress afforded an employee fewer options. But affording more options for review provides employees with a greater number of opportunities to obtain relief on their claims.

The advantage to employees is clear. Had petitioner filed a timely appeal with the MSPB, the Board would have decided her discrimination claim on the merits. If the Board had concluded that DOL did in fact discriminate against petitioner on the basis of sex or age, petitioner would have prevailed. The CSRA does not authorize the employing agency to seek review of a determination in favor of an employee on discrimination grounds in either the district court or the Federal Circuit. Section 7703 authorizes the Director of OPM to seek review in the Federal Circuit of a Board decision only if the Director determines that such decision reflects an "err[or] in interpreting a civil service law, rule, or regu-

lation affecting personnel management and * * * will have a substantial impact on a civil service law, rule, regulation, or policy directive." 5 U.S.C. 7703(d). There is no provision for appeal by the government of discrimination issues decided in favor of an employee or applicant for employment.

If, in the alternative, the Board had concluded that DOL did not discriminate against petitioner, petitioner would have been able to seek de novo review of her discrimination claim in district court. Petitioner is therefore incorrect to suggest (Br. 61) that the government's position provides employees with a disincentive to appeal to the MSPB. Allowing an employee to appeal a final agency decision on a claim of discrimination to the MSPB in fact provides the employee with another bite at the apple—because it allows the employee to seek review of an agency decision without either incurring the expense of filing suit in district court or bearing the risk that the government will seek judicial review of a determination in favor of the employee on the discrimination claim.

The applicable provisions also establish various safeguards to protect employees from adverse consequences if they or their representatives are confused about which matters are appealable to the MSPB. First, Section 7702(f) provides that, whenever an employee "timely files [an] action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency." Thus, if an employee initiates a case by timely filing a mixed-case appeal with the MSPB, but it turns out that the personnel action at issue is not the type of action that is appealable

to the MSPB, her appeal will be treated as a timely initiation of a complaint with her employing agency.

Second, EEOC regulations give an employee a second chance to seek de novo review of her discrimination claim in district court when she timely files an appeal to the MSPB in a case over which the MSPB has no jurisdiction. The regulations provide that, "[i]f a person files a *timely* appeal with MSPB from the agency's processing of a mixed case complaint and the MSPB dismisses it *for jurisdictional reasons*, the agency shall reissue a notice" to the employee that she may request either a hearing with an EEOC administrative judge or "an immediate final decision" from the agency. 29 C.F.R. 1614.302(b) (emphases added); see 29 C.F.R. 1614.109(f). Because petitioner's appeal to the MSPB was untimely, she was ineligible for the protections of Section 7702(f) and the specified regulatory provisions.

Petitioner's interpretation of Section 7703(b)(2) would in fact tend to diminish an employee's incentive to comply with the rules governing the timing of MSPB appeals. In the government's view, if an employee desires further review of a final agency decision in a mixed case, she must either file a timely suit in district court or file a timely appeal with the MSPB. But under petitioner's interpretation of the CSRA, an employee who files neither a complaint nor a timely appeal could later resurrect a mixed case by filing an untimely appeal with the MSPB—even an appeal that is untimely by several years—and then seek district court review of the Board's order dismissing the appeal as untimely pursuant to Section 7703(b)(2). That cannot be what Congress intended when it created a narrow exception to the Federal Circuit's exclusive review of MSPB decisions.

II. PETITIONER CANNOT CIRCUMVENT THE FEDERAL CIRCUIT'S EXCLUSIVE JURISDICTION BY RETROACTIVELY WITHDRAWING HER ELECTION TO APPEAL HER CLAIMS TO THE MSPB

1. Petitioner now contends (Br. 37) that her complaint in this case was "not a request that the district court review the decision of the MSPB" and insists that she "seeks vindication only of [her] discrimination claims, and does not raise her CSRA claim." Although the question presented in the petition for a writ of certiorari is phrased broadly, both the petition and the government's brief in opposition make clear that the question at issue in this case is whether, *under the CSRA*, the district court has jurisdiction to review petitioner's discrimination claim, which the MSPB did not reach in its final decision. See, *e.g.*, Pet. 12-25 (discussing disagreement among courts of appeals about whether Section 7703 grants subject matter jurisdiction to review MSPB decisions on procedural or jurisdictional grounds); Gov't Br. in Opp. 13-16 (same). In her brief on the merits, petitioner appears to acknowledge (Br. 29 n.45), albeit in passing, that "a district court would only have jurisdiction over a Title VII or ADEA claim decided by the MSPB if that claim fell within the scope of the section 7703(b)(2) exception to section 7703(b)(1)."

As explained, petitioner's claim does not fall within the Section 7703(b)(2) exception. If petitioner now wishes to abandon her CSRA claim, including her reliance on Section 7703(b)(2) as a basis of the district court's jurisdiction, then her case is no longer a mixed case under Section 7702, and neither of Section 7703(b)'s jurisdictional provisions applies. The relevant questions for petitioner would then be whether her complaint was timely filed under Title VII and the ADEA and whether she

adequately exhausted her administrative remedies. But those are not the questions presented in her petition.

Moreover, petitioner's recent assertions (Br. 37-38) that she is not seeking review of the MSPB's decision contradict the manner in which she has litigated her case thus far. Petitioner alleged in her complaint that she had filed the complaint "within 30 days of the * * * final decision of the MSPB on [her] appeal" of the agency's decision, J.A. 64, and the district court held that it did not have jurisdiction to review the MSPB's decision, Pet. App. 9a-10a. In addition, petitioner argued in the court of appeals that her case could "be appealed from the MSPB to the district court" even though the MSPB had decided her "appeal entirely on procedural grounds and [had] not reach[ed] the merits of [her discrimination] claim." Pet'r C.A. Br. 11. Indeed, in her reply brief in the court of appeals, petitioner stated: "In spite of the convoluted facts of this case, the overriding issue is straightforward. Which court has jurisdiction over decisions of the MSPB in mixed cases, when those decisions are based on procedural grounds?" Pet'r C.A. Reply Br. 1; see *ibid.* ("If the [MSPB's] dismissal of [petitioner's] termination claim was properly before the Federal Circuit on record review, then the district court lacked subject matter jurisdiction and properly dismissed this action."). As the case came to this Court on petition for a writ of certiorari, therefore, it presented the question whether district courts have jurisdiction *under Section 7703(b)(2)* to review non-merits decisions of the MSPB in mixed cases, not whether the district court in this case had jurisdiction to consider petitioner's discrimination allegations directly under Title VII or the ADEA.

2. a. The CSRA provides federal employees with the right to seek de novo review in district court of discrimination claims at several points in the administrative process—*e.g.*, after a final decision by the employing agency, see 5 U.S.C. 7702(a)(2), 7703(b)(2); after a final MSPB decision on the merits of the claim, see 5 U.S.C. 7702(a)(1), 7703(b)(2); after review of an MSPB decision on the merits by the EEOC and subsequent reconsideration by the Board on remand from the EEOC, see 5 U.S.C. 7702(b)(5), 7703(b)(2); and after review by a special panel constituted to resolve disputes between the MSPB and the EEOC, see 5 U.S.C. 7702(d)(1) and (6), 7703(b)(2). See also 29 C.F.R. 1614.310 (EEOC regulation listing judicial review options in mixed cases). But if an employee elects at any of those points to opt for further administrative review (or no review within the relevant limitations period) rather than filing suit in district court, she cannot later pretend that she made a different choice, thereby resurrecting the previously eschewed option of seeking district court review of the earlier administrative decision.

Contrary to petitioner's assertion (Br. 57), the filing of an appeal with the MSPB does not "merely postpone[] the date on which an employee can file suit" seeking review of the agency's final decision. By the terms of Section 7702(a)(2), the filing of an appeal with the MSPB removes the agency's decision from the category of "judicially reviewable actions" that are subject to judicial review in either the Federal Circuit or a district court pursuant to Section 7703(b). See 5 U.S.C. 7702(a)(2) ("The decision of the agency in any such matter shall be a judicially reviewable action *unless the employee appeals the matter to the Board*.") (emphasis added). Once petitioner elected to appeal to the MSPB, the CSRA

both required her to exhaust that remedy before seeking judicial review and limited the availability of such review under the express statutory terms of Sections 7702 and 7703 as set forth above. Because petitioner elected to file an appeal with the Board, the district court no longer had jurisdiction under the CSRA over the agency's disposition of petitioner's discrimination claim.

The EEOC's regulations governing mixed cases also reflect the CSRA's election-of-remedies scheme. Those provisions explicitly state that an employee may seek review in district court of a mixed case "[w]ithin 30 days of receipt of a final decision issued by an agency on a complaint *unless an appeal is filed with the MSPB.*" 29 C.F.R. 1614.310(a) (emphasis added); see also 29 C.F.R. 1614.302(d)(1)(i) (noting that, if a mixed-case complaint becomes a judicially reviewable action pursuant to Section 7702(e)(1)(A) by virtue of the agency's failure to act on the complaint within 120 days, "the complainant may appeal the matter to the MSPB at any time thereafter * * * or may file a civil action * * * , *but not both*.") (emphasis added).

b. Consistent with applicable statutory and regulatory provisions, the agency's final decision advised petitioner that she could either appeal to the MSPB or file a civil action in district court within 30 days, but not both. J.A. 48-49. That notice accurately reflects the options for review generally provided under the CSRA to employees upon receiving an agency decision on the merits in a mixed case. See 5 U.S.C. 7702(a)(2); 29 C.F.R. 1614.302(d)(1)(ii). Here, however, petitioner was already on clear notice that her option to seek MSPB review of the agency's decision had been curtailed at her own request when the MSPB granted her motion to set a specific deadline for appeal, a deadline that had long

since expired when she received the agency's final decision. See J.A. 4-5. Petitioner nonetheless chose to appeal to the MSPB rather than filing a civil action in district court, although she was also on notice that doing so would preclude her from seeking district court review of the agency's decision under the CSRA. Having elected to appeal to the MSPB rather than file suit in district court, petitioner was required to exhaust her administrative remedies before seeking later judicial review.

The MSPB dismissed petitioner's appeal as untimely because of her own actions in pursuing her administrative remedies. Although petitioner initially filed an appeal with the MSPB in August 2006—while represented by counsel—she subsequently moved to dismiss her appeal without prejudice so that she could add her discrimination claim to her already pending EEO complaint. Pet. App. 3a. In her motion, petitioner specifically requested that her "'MSPB appeal be dismissed, without prejudice, *for a period of four months*, to allow the discovery phase of her EEOC appeal to proceed.'" *Id.* at 14a (emphasis added). On September 18, 2006, an MSPB administrative judge granted petitioner's motion, dismissing her appeal "without prejudice" to her "right to refile her appeal either (A) within 30 days after a decision is rendered in her EEOC case; or (B) by January 18, 2007—*whichever occurs first*." J.A. 5. The order further specified that "[t]his case will not be accepted for refiling after January 18, 2007." *Ibid.*

Petitioner, however, refiled her appeal on November 28, 2007, more than ten months after the deadline set by the MSPB at petitioner's request. See J.A. 64. Because petitioner did not refile her appeal within the specified time, the MSPB dismissed her appeal as untimely. If petitioner believed that the dismissal was in error, she

could have filed an appeal with the Federal Circuit. And, if the Federal Circuit had agreed with her, it would have remanded her case to the MSPB for a merits determination of her discrimination claims—a determination that would have been eligible for de novo review in district court pursuant to Section 7703(b)(2) had petitioner not prevailed.

3. Petitioner is also incorrect in arguing (Br. 42-44) that the government's interpretation of Sections 7702 and 7703 conflicts with the specific grant of jurisdiction to district courts provided in Title VII.[7] As noted, the question presented in this case is whether the district court had jurisdiction under the CSRA over petitioner's discrimination claim, not whether the district court had jurisdiction under Title VII. Thus, it is irrelevant to the resolution of this case whether petitioner could have filed suit directly under Title VII.

Title VII gives district courts jurisdiction over federal employees' discrimination claims, 42 U.S.C.

---

[7] Although petitioner relies in her brief on the ADEA, she did not invoke the ADEA in her complaint. See J.A. 61-70. The ADEA provides federal employees with two avenues to reach district court. First, an employee may file suit if she notifies the EEOC of her intent to do so within 180 days after the alleged unlawful conduct and at least 30 days before filing suit. 29 U.S.C. 633a(c)-(d). Second, she may file suit in district court after first seeking relief from the EEOC. 29 U.S.C. 633a(b)-(c). The question whether such a complaint would be timely if filed at this point is not before the Court. In her complaint, petitioner also purported to rely on the Rehabilitation Act of 1973, J.A. 70, although she does not appear to be pursuing such a claim any longer. Because her claim of disability discrimination was not included in the appeal of her mixed-case complaint, the MSPB had no occasion to reach that claim. Thus, even under petitioner's view of the CSRA, the district court would not have jurisdiction under Section 7703(b)(2) over her claim of disability discrimination.

2000e-16(d) (incorporating 42 U.S.C. 2000e-5(f)(3)), and generally requires federal employees to file suit in district court within 90 days of, *inter alia*, the agency's final decision on the employee's complaint of discrimination, 42 U.S.C. 2000e-16(c). Title VII does not give district courts jurisdiction to review MSPB decisions in mixed cases. See *ibid.* Such jurisdiction is governed by the CSRA, which, for the reasons discussed, does not extend such jurisdiction to review of MSPB decisions that do not reach the merits of an employee's discrimination claims. When the MSPB does decide a discrimination issue, the CSRA permits the employee to seek de novo review of that decision in a district court, provided the employee files suit within 30 days, "[n]othwithstanding any other provision of law." 5 U.S.C. 7703(b)(2).

To the extent petitioner could have filed suit under Title VII raising solely her discrimination claim within 90 days of the agency's final decision on her EEO complaint pursuant to 42 U.S.C. 2000e-16(c), she did not do so. And insofar as petitioner might seek equitable tolling of the limitations period, see *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 385, 392-398 (1982) (Title VII limitations period is not jurisdictional), no tolling question is presented here. Instead, petitioner alleged in her complaint that she filed her complaint within 30 days of the MSPB's decision—a requirement she would have had to satisfy if the district court had jurisdiction to review that decision under Section 7703(b)(2)—and she relied below on the CSRA as the source of the district court's jurisdiction in litigating the dismissal of her case. J.A. 64; Pet'r C.A. Br. 11; Pet'r C.A. Reply Br. 1. Because the question presented in this case concerns district courts' jurisdiction under the CSRA, there is no

occasion for this Court to decide whether petitioner could have filed suit directly under Title VII after the MSPB dismissed her appeal as untimely.

4. Finally, there is no merit to petitioner's contention (Br. 38-42) that maintaining exclusive Federal Circuit review of MSPB procedural and jurisdictional decisions "would in certain circumstances conflict with the express statutory guaranties of a trial de novo" in federal antidiscrimination statutes and with this Court's holding in *Chandler* v. *Roudebush*, 425 U.S. 840 (1976), that federal employees filing suit under Title VII are entitled to a de novo determination of factual questions. As petitioner acknowledges (Br. 39), "[i]n discrimination cases, factual disputes will most often concern the merits of the underlying claims." Because the Federal Circuit has no jurisdiction to review discrimination claims, that court would have no occasion to review factual disputes going to the merits of such claims.

Petitioner argues (Br. 39) that "disputes can also arise with regard to procedural or jurisdictional issues." But in a case such as petitioner's, the only facts the Board considered were facts relevant to whether the MSPB itself had jurisdiction. Federal employees do not have a right to a de novo determination of such facts in district court under Title VII or any other law. If the Board had dismissed petitioner's claim on other procedural or jurisdictional grounds—*e.g.*, because the underlying employment action is not appealable to the Board or because petitioner failed to prosecute a timely filed appeal—those decisions also would not have determined any facts related to her discrimination claim. The only specific example petitioner offers in support of her argument is a hypothetical case in which a federal employee could be denied a de novo determination of facts related

to whether she initiated her administrative complaint process by contacting an EEO counselor within 45 days of the effective date of the relevant employment action or of the employee's notice of such action. Pet. Br. 39-41 (citing 29 C.F.R. 1614.105(a)). But if an employing agency issues a final decision in a mixed case that determines that an employee did not initiate her complaint process in a timely fashion, the employee is entitled to seek de novo district court review of that determination at that point.

Under the EEOC's regulations, the employing agency may waive noncompliance with the 45-day initiation rule, 29 C.F.R. 1614.105(a)(2), and nothing in either the CSRA or the MSPB's regulations would permit the MSPB to override such a waiver if the employee appealed an adverse agency decision to the Board. On the contrary, the Board has stated that it defers to an agency's determination of whether an EEO complaint was timely filed. See *Cloutier* v. *USPS*, 89 M.S.P.R. 411, 414 (2001). Although the Board may make factual findings about whether the agency or the EEOC has already made a timeliness determination in a particular case, it should not make its own factual findings about the timeliness of a complaint filed with the agency or an appeal filed with the EEOC. See *Moore* v. *USPS*, 91 M.S.P.R. 277, 280-281 (2002) ("[A]n [MSPB] administrative judge may not dismiss an appeal as untimely filed under [29 C.F.R.] 1201.154 based on the untimeliness of the [employee's] formal EEO complaint absent evidence of either a final agency decision dismissing the EEO complaint as untimely that was not appealed to the EEOC, or a decision by the EEOC dismissing the complaint as untimely.").

Here, the only issue the Board decided was whether petitioner had complied with the deadline she requested for filing an appeal with the MSPB. Resolution of that question does not touch on any issue of discrimination and is not, therefore, a judicially reviewable action under Section 7702. Any judicial review of that decision must be in the Federal Circuit.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Acting Assistant Attorney General
SRI SRINIVASAN
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
MARLEIGH D. DOVER
STEPHANIE R. MARCUS
Attorneys

JULY 2012

APPENDIX

Relevant Provisions of the Civil Service Reform Act

1. 5 U.S.C. 7701 provides:

Appellate procedures

(a) An employee, or applicant for employment, 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. An appellant shall have the right—

(1) to a hearing for which a transcript will be kept; and

(2) to be represented by an attorney or other representative.

Appeals shall be processed in accordance with regulations prescribed by the Board.

(b)(1) The Board may hear any case appealed to it or may refer the case to an administrative law judge appointed under section 3105 of this title or other employee of the Board designated by the Board to hear such cases, except that in any case involving a removal from the service, the case shall be heard by the Board, an employee experienced in hearing appeals, or an administrative law judge. The Board, administrative law judge, or other employee (as the case may be) shall make a decision after receipt of the written representations of the parties to the appeal and after opportunity for a hearing under subsection (a)(1) of this section. A copy of the decision shall be furnished to each party to the appeal and to the Office of Personnel Management.

(2)(A) If an employee or applicant for employment is the prevailing party in an appeal under this subsection, the employee or applicant shall be granted the relief provided in the decision effective upon the making of the decision, and remaining in effect pending the outcome of any petition for review under subsection (e), unless—

(i) the deciding official determines that the granting of such relief is not appropriate; or

(ii)(I) the relief granted in the decision provides that such employee or applicant shall return or be present at the place of employment during the period pending the outcome of any petition for review under subsection (e); and

(II) the employing agency, subject to the provisions of subparagraph (B), determines that the return or presence of such employee or applicant is unduly disruptive to the work environment.

(B) If an agency makes a determination under subparagraph (A)(ii)(II) that prevents the return or presence of an employee at the place of employment, such employee shall receive pay, compensation, and all other benefits as terms and conditions of employment during the period pending the outcome of any petition for review under subsection (e).

(C) Nothing in the provisions of this paragraph may be construed to require any award of back pay or attorney fees be paid before the decision is final.

(3) With respect to an appeal from an adverse action covered by subchapter V of chapter 75, authority to mitigate the personnel action involved shall be available,

subject to the same standards as would apply in an appeal involving an action covered by subchapter II of chapter 75 with respect to which mitigation authority under this section exists.

(c)(1) Subject to paragraph (2) of this subsection, the decision of the agency shall be sustained under subsection (b) only if the agency's decision—

(A) in the case of an action based on unacceptable performance described in section 4303, is supported by substantial evidence; or

(B) in any other case, is supported by a preponderance of the evidence.

(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment—

(A) shows harmful error in the application of the agency's procedures in arriving at such decision;

(B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or

(C) shows that the decision was not in accordance with law.

(d)(1) In any case in which—

(A) the interpretation or application of any civil service law, rule, or regulation, under the jurisdiction of the Office of Personnel Management is at issue in any proceeding under this section; and

(B) the Director of the Office of Personnel Management is of the opinion that an erroneous decision

would have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office;

the Director may as a matter of right intervene or otherwise participate in that proceeding before the Board. If the Director exercises his right to participate in a proceeding before the Board, he shall do so as early in the proceeding as practicable. Nothing in this title shall be construed to permit the Office to interfere with the independent decisionmaking of the Merit Systems Protection Board.

(2) The Board shall promptly notify the Director whenever the interpretation of any civil service law, rule, or regulation under the jurisdiction of the Office is at issue in any proceeding under this section.

(e)(1) Except as provided in section 7702 of this title, any decision under subsection (b) of this section shall be final unless—

(A) a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision; or

(B) the Board reopens and reconsiders a case on its own motion.

The Board, for good cause shown, may extend the 30-day period referred to in subparagraph (A) of this paragraph. One member of the Board may grant a petition or otherwise direct that a decision be reviewed by the full Board. The preceding sentence shall not apply if, by law, a decision of an administrative law judge is required to be acted upon by the Board.

(2) The Director may petition the Board for a review under paragraph (1) of this subsection only if the Director is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.

(f) The Board, or an administrative law judge or other employee of the Board designated to hear a case, may—

(1) consolidate appeals filed by two or more appellants, or

(2) join two or more appeals filed by the same appellant and hear and decide them concurrently,

if the deciding official or officials hearing the cases are of the opinion that the action could result in the appeals' being processed more expeditiously and would not adversely affect any party.

(g)(1) Except as provided in paragraph (2) of this subsection, the Board, or an administrative law judge or other employee of the Board designated to hear a case, may require payment by the agency involved of reasonable attorney fees incurred by an employee or applicant for employment if the employee or applicant is the prevailing party and the Board, administrative law judge, or other employee (as the case may be) determines that payment by the agency is warranted in the interest of justice, including any case in which a prohibited personnel practice was engaged in by the agency or any case in which the agency's action was clearly without merit.

(2) If an employee or applicant for employment is the prevailing party and the decision is based on a finding of discrimination prohibited under section 2302(b)(1)

of this title, the payment of attorney fees shall be in accordance with the standards prescribed under section 706(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(k)).

(h) The Board may, by regulation, provide for one or more alternative methods for settling matters subject to the appellate jurisdiction of the Board which shall be applicable at the election of an applicant for employment or of an employee who is not in a unit for which a labor organization is accorded exclusive recognition, and shall be in lieu of other procedures provided for under this section. A decision under such a method shall be final, unless the Board reopens and reconsiders a case at the request of the Office of Personnel Management under subsection (e) of this section.

(i)(1) Upon the submission of any appeal to the Board under this section, the Board, through reference to such categories of cases, or other means, as it determines appropriate, shall establish and announce publicly the date by which it intends to complete action on the matter. Such date shall assure expeditious consideration of the appeal, consistent with the interests of fairness and other priorities of the Board. If the Board fails to complete action on the appeal by the announced date, and the expected delay will exceed 30 days, the Board shall publicly announce the new date by which it intends to complete action on the appeal.

(2) Not later than March 1 of each year, the Board shall submit to the Congress a report describing the number of appeals submitted to it during the preceding fiscal year, the number of appeals on which it completed action during that year, and the number of instances

during that year in which it failed to conclude a proceeding by the date originally announced, together with an explanation of the reasons therefor.

(3) The Board shall by rule indicate any other category of significant Board action which the Board determines should be subject to the provisions of this subsection.

(4) It shall be the duty of the Board, an administrative law judge, or employee designated by the Board to hear any proceeding under this section to expedite to the extent practicable that proceeding.

(j) In determining the appealability under this section of any case involving a removal from the service (other than the removal of a reemployed annuitant), neither an individual's status under any retirement system established by or under Federal statute nor any election made by such individual under any such system may be taken into account.

(k) The Board may prescribe regulations to carry out the purpose of this section.

2. 5 U.S.C. 7702 provides:

Actions involving discrimination

(a)(1) Notwithstanding any other provision of law, and except as provided in paragraph (2) of this subsection, in the case of any employee or applicant for employment who—

(A) has been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board, and

(B) alleges that a basis for the action was discrimination prohibited by—

(i) section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16),

(ii) section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d)),

(iii) section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),

(iv) sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a), or

(v) any rule, regulation, or policy directive prescribed under any provision of law described in clauses (i) through (iv) of this subparagraph,

the Board shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with the Board's appellate procedures under section 7701 of this title and this section.

(2) In any matter before an agency which involves—

(A) any action described in paragraph (1)(A) of this subsection; and

(B) any issue of discrimination prohibited under any provision of law described in paragraph (1)(B) of this subsection;

the agency shall resolve such matter within 120 days. The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board under paragraph (1) of this subsection.

(3) Any decision of the Board under paragraph (1) of this subsection shall be a judicially reviewable action as of—

(A) the date of issuance of the decision if the employee or applicant does not file a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, or

(B) the date the Commission determines not to consider the decision under subsection (b)(2) of this section.

(b)(1) An employee or applicant may, within 30 days after notice of the decision of the Board under subsection (a)(1) of this section, petition the Commission to consider the decision.

(2) The Commission shall, within 30 days after the date of the petition, determine whether to consider the decision. A determination of the Commission not to consider the decision may not be used as evidence with re-

spect to any issue of discrimination in any judicial proceeding concerning that issue.

(3) If the Commission makes a determination to consider the decision, the Commission shall, within 60 days after the date of the determination, consider the entire record of the proceedings of the Board and, on the basis of the evidentiary record before the Board, as supplemented under paragraph (4) of this subsection, either—

(A) concur in the decision of the Board; or

(B) issue in writing another decision which differs from the decision of the Board to the extent that the Commission finds that, as a matter of law—

(i) the decision of the Board constitutes an incorrect interpretation of any provision of any law, rule, regulation, or policy directive referred to in subsection (a)(1)(B) of this section, or

(ii) the decision involving such provision is not supported by the evidence in the record as a whole.

(4) In considering any decision of the Board under this subsection, the Commission may refer the case to the Board, or provide on its own, for the taking (within such period as permits the Commission to make a decision within the 60-day period prescribed under this subsection) of additional evidence to the extent it considers necessary to supplement the record.

(5)(A) If the Commission concurs pursuant to paragraph (3)(A) of this subsection in the decision of the

Board, the decision of the Board shall be a judicially reviewable action.

(B) If the Commission issues any decision under paragraph (3)(B) of this subsection, the Commission shall immediately refer the matter to the Board.

(c) Within 30 days after receipt by the Board of the decision of the Commission under subsection (b)(5)(B) of this section, the Board shall consider the decision and—

(1) concur and adopt in whole the decision of the Commission; or

(2) to the extent that the Board finds that, as a matter of law, (A) the Commission decision constitutes an incorrect interpretation of any provision of any civil service law, rule, regulation or policy directive, or (B) the Commission decision involving such provision is not supported by the evidence in the record as a whole—

(i) reaffirm the initial decision of the Board; or

(ii) reaffirm the initial decision of the Board with such revisions as it determines appropriate.

If the Board takes the action provided under paragraph (1), the decision of the Board shall be a judicially reviewable action.

(d)(1) If the Board takes any action under subsection (c)(2) of this section, the matter shall be immediately certified to a special panel described in paragraph (6) of this subsection. Upon certification, the Board shall, within 5 days (excluding Saturdays, Sundays, and holidays), transmit to the special panel the administrative record in the proceeding, including—

(A) the factual record compiled under this section,

(B) the decisions issued by the Board and the Commission under this section, and

(C) any transcript of oral arguments made, or legal briefs filed, before the Board or the Commission.

(2)(A) The special panel shall, within 45 days after a matter has been certified to it, review the administrative record transmitted to it and, on the basis of the record, decide the issues in dispute and issue a final decision which shall be a judicially reviewable action.

(B) The special panel shall give due deference to the respective expertise of the Board and Commission in making its decision.

(3) The special panel shall refer its decision under paragraph (2) of this subsection to the Board and the Board shall order any agency to take any action appropriate to carry out the decision.

(4) The special panel shall permit the employee or applicant who brought the complaint and the employing agency to appear before the panel to present oral arguments and to present written arguments with respect to the matter.

(5) Upon application by the employee or applicant, the Commission may issue such interim relief as it determines appropriate to mitigate any exceptional hardship the employee or applicant might otherwise incur as a result of the certification of any matter under this subsection, except that the Commission may not stay, or order any agency to review on an interim basis, the action referred to in subsection (a)(1) of this section.

(6)(A) Each time the Board takes any action under subsection (c)(2) of this section, a special panel shall be convened which shall consist of—

(i) an individual appointed by the President, by and with the advice and consent of the Senate, to serve for a term of 6 years as chairman of the special panel each time it is convened;

(ii) one member of the Board designated by the Chairman of the Board each time a panel is convened; and

(iii) one member of the Commission designated by the Chairman of the Commission each time a panel is convened.

The chairman of the special panel may be removed by the President only for inefficiency, neglect of duty, or malfeasance in office.

(B) The chairman is entitled to pay at a rate equal to the maximum annual rate of basic pay payable under the General Schedule for each day he is engaged in the performance of official business on the work of the special panel.

(C) The Board and the Commission shall provide such administrative assistance to the special panel as may be necessary and, to the extent practicable, shall equally divide the costs of providing the administrative assistance.

(e)(1) Notwithstanding any other provision of law, if at any time after—

(A) the 120th day following the filing of any matter described in subsection (a)(2) of this section with

an agency, there is no judicially reviewable action under this section or an appeal under paragraph (2) of this subsection;

(B) the 120th day following the filing of an appeal with the Board under subsection (a)(1) of this section, there is no judicially reviewable action (unless such action is not as the result of the filing of a petition by the employee under subsection (b)(1) of this section); or

(C) the 180th day following the filing of a petition with the Equal Employment Opportunity Commission under subsection (b)(1) of this section, there is no final agency action under subsection (b), (c), or (d) of this section;

an employee shall be entitled to file a civil action to the same extent and in the same manner as provided in section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), or section 16(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 216(b)).

(2) If, at any time after the 120th day following the filing of any matter described in subsection (a)(2) of this section with an agency, there is no judicially reviewable action, the employee may appeal the matter to the Board under subsection (a)(1) of this section.

(3) Nothing in this section shall be construed to affect the right to trial de novo under any provision of law described in subsection (a)(1) of this section after a judicially reviewable action, including the decision of an agency under subsection (a)(2) of this section.

(f) In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

3. 5 U.S.C. 7703 provides:

Judicial review of decisions of the Merit Systems Protection Board

(a)(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.

(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after

the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d) The Director of the Office of Personnel Management may obtain review of any final order or decision of the Board by filing, within 60 days after the date the Director received notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in his discretion, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such

petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

Relevant Provisions of Title VII of the Civil Rights Act of 1964

42 U.S.C. 2000e-16 provides:

Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Regulatory Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the Government Accountability Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity Commission shall—

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publish-

ing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to—

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e–5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e–5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e–5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for de-

lay in payment shall be available as in cases involving nonpublic parties..[1]

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity

Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478 relating to equal employment opportunity in the Federal Government.

(f) Section 2000e–5(e)(3) of this title applicable to compensation discrimination

Section 2000e–5(e)(3) of this title shall apply to complaints of discrimination in compensation under this section.

---

[1] So in original.