No.

IN THE

Supreme Court of the United States

ANTHONY W. PERRY,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the D.C. Circuit

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER LANDAU, P.C.
Counsel of Record
DEVIN S. ANDERSON
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

September 27, 2016

QUESTION PRESENTED

The Merit Systems Protection Board (MSPB) is authorized to hear challenges by certain federal employees to certain major adverse employment actions. If such a challenge involves a claim under the federal anti-discrimination laws, it is referred to as a "mixed" case. This case presents the following question:

> Whether an MSPB decision disposing of a "mixed" case on jurisdictional grounds is subject to judicial review in district court or in the U.S. Court of Appeals for the Federal Circuit.

TABLE OF CONTENTS

APPENDIX CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

This case presents this Court with an opportunity to finish the job it started in *Kloeckner v. Solis*, 133 S. Ct. 596 (2012): to bring coherence and clarity to the statutory regime governing judicial review of decisions by the Merit Systems Protection Board (MSPB or Board). That regime, as this Court explained in *Kloeckner*, bifurcates judicial review of MSPB decisions "in crystalline fashion." *Id.* at 604. Decisions in cases challenging certain major adverse employment actions under the federal civil-service laws are reviewed in the U.S. Court of Appeals for the Federal Circuit, whereas decisions in "mixed" cases challenging such actions at least in part under the federal anti-discrimination laws are reviewed in district court. *See id.* Here, as in *Kloeckner*, that simple point should have been the beginning and the end of the matter—petitioner challenged major adverse employment actions under the federal anti-discrimination laws, and hence the MSPB's decision is subject to judicial review in district court.

The D.C. Circuit, however, routed this appeal to the Federal Circuit on the theory that the MSPB disposed of the case on threshold jurisdictional grounds without reaching the merits of petitioner's discrimination claim. But *Kloeckner* specifically rejected the argument that district courts may review only those cases in which the MSPB actually reached the merits of a discrimination claim. *See id.* That argument, this Court explained, has no basis in the statute, which distinguishes only between "kind[s] of cases" (pure civil-service cases vs. "mixed" cases), not the ground on which the MSPB resolved a particular case. *Id.* Thus, *Kloeckner* held, MSPB

decisions in "mixed" cases are subject to review in district court *regardless* of whether the agency reached the merits of a discrimination claim or disposed of the case on non-merits procedural grounds. "[T]he merits-procedure distinction is a contrivance, found nowhere in the statute's provisions on judicial review." *Id.*

The decision below applies a distinction even more contrived than the merits-procedure distinction rejected in *Kloeckner*. Notwithstanding *Kloeckner*, the D.C. Circuit held that it was bound by pre-*Kloeckner* circuit precedent to send MSPB decisions disposing of "mixed" cases on jurisdictional (as opposed to procedural) grounds to the Federal Circuit instead of a district court. The Federal Circuit similarly has applied a jurisdiction-procedure distinction after *Kloeckner*, and thereby expanded its own jurisdiction over MSPB appeals. *See Conforto v. MSPB*, 713 F.3d 1111, 1115-21 (Fed. Cir. 2013). Both the Second and Tenth Circuits endorsed that distinction before *Kloeckner*, *see Downey v. Runyon*, 160 F.3d 139, 146 (2d Cir. 1998); *Harms v. IRS*, 321 F.3d 1001, 1007-08 (10th Cir. 2003), while the Eighth Circuit specifically rejected it in *Kloeckner* itself, *see Kloeckner v. Solis*, 639 F.3d 834, 838 (8th Cir. 2011), *rev'd on other grounds*, 133 S. Ct. 596 (2012).

The decisions applying a jurisdiction-procedure distinction have no basis in the statutory text, subvert the statutory objective of providing *de novo* trials in district court for discrimination claims, and and plunge a straightforward statutory scheme into a morass of complexity. The Government itself conceded in *Kloeckner* that the jurisdiction-procedure distinction "has no basis" in the statute, and is

"difficult and unpredictable" to apply in practice. Brief for Respondent at 25 n.3, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2012 WL 2883261 at *25 n.3; Brief for Respondent in Opposition at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6281813, at *15 (internal quotation omitted). Given that the Government has disavowed the very distinction on which the court below relied, and this Court has characterized that distinction as "confusing," *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010), this case warrants this Court's review. A distinction that is "hazy at best and incoherent at worst" deprives both courts and federal employees (many, if not most, of whom proceed *pro se*) of the necessary "clear guidance about the proper forum for the employee's claims at the outset of the case." *Elgin v. Department of the Treasury*, 132 S. Ct. 2126, 2134 (2012).

In this absence of review in this case, however, it is difficult to see how the situation will be resolved. The MSPB is bound to follow Federal Circuit law in this area, and thus directs aggrieved employees whose "mixed" cases are dismissed on jurisdictional grounds to seek review in that court. This petition reaches this Court only by serendipity: (1) petitioner, then proceeding *pro se*, sought review in what everyone—including petitioner—now acknowledges was the wrong court: the U.S. Court of Appeals for the D.C. Circuit, and (2) that court appointed counsel to present petitioner's jurisdictional arguments. This petition thus provides this Court with a unique vehicle to clarify the law in this area once and for all.

This Court has long recognized that the question whether an MSPB decision is to be appealed to a

district court or, alternatively, to the Federal Circuit is a matter of "substantial importance," *Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 771 (1985), given the millions of federal employees. Insofar as the D.C. Circuit is correct that *Kloeckner* did not expressly answer the question of which court reviews "mixed" cases dismissed by the MSPB on jurisdictional grounds, this Court should do so now. Few things are more wasteful than litigation over the proper court in which to litigate. Accordingly, this Court should grant this petition and reverse the judgment.

OPINIONS BELOW

The D.C. Circuit's opinion has not yet been published in the Federal Reporter, but is reported at 2016 WL 3947838 and reprinted in the Appendix ("App.") at 1-15a. The MSPB's most recent decision is reported at 2014 WL 5358308, and reprinted at App. 20-31a. The Administrative Law Judge's most recent decision is unreported, and reprinted at App. 32-58a. The MSPB's original decision is reported at 2013 WL 9678428, and reprinted at App. 59-70a. The Administrative Law Judge's original decision is unreported, and reprinted at App. 71-80a.

JURISDICTION

The D.C. Circuit entered judgment on July 22, 2016. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions are set forth in the Appendix, App. 90-99a.

STATEMENT OF THE CASE

A. Background

Petitioner Anthony W. Perry was hired by the U.S. Census Bureau in Suitland, Maryland, in 1982, and worked for that agency for the next thirty years. App. 3a. In the mid-2000s, Perry developed osteoarthritis in his lower back and hip. *Id.* To help Perry manage the pain, his supervisor allowed him to take breaks during normal working hours and to make up missed time or complete outstanding projects after hours. *Id.* Around the same time, Perry filed a series of Equal Employment Opportunity actions alleging employment discrimination based on race and age. App. 34a, 38a.

On June 7, 2011, Perry received a Notice of Proposed Removal from a Census employee who was not his direct supervisor. The Notice proposed to terminate Perry's employment, alleging that he had been absent during regular working hours and thus had been paid for hours he had not worked. Perry contested the charges and pointed to the informal accommodation that his supervisor had provided and his unblemished disciplinary record.

In August 2011, Perry and the agency entered into a settlement agreement that required him to serve a suspension for thirty calendar days, retire no later than September 4, 2012, and forfeit his discrimination claims against the agency. App. 35-38a.

B. Proceedings Below

After Perry served his 30-day suspension and his retirement took effect, he filed a *pro se* challenge with the Board. An administrative law judge (ALJ),

ordered him to show cause why the challenge should not be dismissed for lack of jurisdiction. App. 81-89a. "Specifically, resignations and retirements are presumed to be voluntary, and voluntary actions are not appealable to the Board," App. 82a, and "the Board cannot review the same claims over which you entered into a settlement agreement with the agency," App. 86a. Perry responded that the settlement agreement had been coerced, and that the subsequent major adverse employment actions were thus involuntary.

After reviewing the evidence but without holding a hearing, the ALJ dismissed the challenge for lack of jurisdiction. App. 71-80a. In particular, the ALJ decided that both the 30-day suspension and retirement were voluntary because they resulted from a voluntary settlement agreement. App. 74-76a. Perry petitioned the Board for review.

As relevant here, the Board granted the petition, and remanded the case to the ALJ for further proceedings. App. 59-70a. The Board concluded that Perry had "made a nonfrivolous allegation of involuntariness sufficient to warrant a jurisdictional hearing," App. 66a, and that the ALJ had thus erred by dismissing the case without holding such a hearing, App. 67-70a.

On remand, the ALJ held a hearing and concluded that Perry "failed to prove that he was coerced or detrimentally relied on misinformation when he agreed to settle his appeals." App. 33a. Accordingly, the ALJ once again dismissed the appeal for lack of jurisdiction. *See id.* And Perry once again petitioned the Board for review.

This time, however, the Board affirmed the ALJ. App. 20-31a. The Board concluded that Perry "failed to establish that he detrimentally relied on misinformation regarding his potential appeal rights when entering into the settlement agreement and, therefore, that we lack jurisdiction over his appeal because [he] validly waived his appeal rights therein." App. 27a. The Board's decision included a "**NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS**." App. 30a. That notice stated in pertinent part:

> You have the right to request review of this final decision by the United States Court of Appeals for the Federal Circuit. You must submit your request to the court at the following address:
>
> United States Court of Appeals
> for the Federal Circuit
> 717 Madison Place, N.W.
> Washington, DC 20439

Id.

Notwithstanding the notice, Perry—still proceeding *pro se*—filed a petition for review in the U.S. Court of Appeals for the D.C. Circuit. That court promptly entered an order directing Perry to "show cause why this petition should not be dismissed for lack of jurisdiction or transferred to the United States Court of Appeals for the Federal Circuit." App. 18a. After Perry and the Government both filed briefs on the jurisdictional issue, the D.C. Circuit discharged the show-cause order. App. 16-17a. The court directed the parties to "address in their briefs (1) whether this court has jurisdiction to hear this case under 5 U.S.C. § 7703(b)(1)(B); and

(2) if not, whether this case should be transferred to the Federal Circuit or a district court pursuant to 5 U.S.C. § 7703(b)(1)(A) or (2)," and appointed counsel as *amicus curiae* "to present arguments in favor of petitioner's position." App. 17a. Judge Henderson dissented from the order, noting that she "would grant [the Government's] request to transfer the case to the Federal Circuit." App. 16a n.*.

In the subsequent briefing, everyone (including petitioner) agreed that the D.C. Circuit lacked jurisdiction. App. 5a. Thus, the only question was whether that court should transfer the case to a district court or the Federal Circuit. *Id.* The D.C. Circuit held, based on pre-*Kloeckner* circuit precedent, that it was constrained to transfer the case to the Federal Circuit. *See* App. 2-3a (citing *Powell v. Department of Defense*, 158 F.3d 597 (D.C. Cir. 1998)). *Powell* was not necessarily incompatible with *Kloeckner*, the court declared, because the MSPB had dismissed the appeal in *Powell* (like the appeal here) on *jurisdictional* grounds, whereas the MSPB had dismissed the appeal in *Kloeckner* on *procedural* grounds. App. 7-15a. "In short," the court concluded, "we remain bound by *Powell*," and thus transferred this case to the Federal Circuit. App. 15a.

The Federal Circuit docketed the appeal, but granted Perry's unopposed motion to hold the briefing in abeyance until this Court resolves the jurisdictional issue presented in this petition. *See* Order [Dkt. 21], *Perry v. MSPB*, No. 2016-2377 (Fed. Cir. Aug. 31, 2016).

REASON FOR GRANTING THE WRIT

Review Is Necessary To Bring Coherence And Clarity To The Statutory Regime Governing Judicial Review Of MSPB Decisions.

The atextual jurisdiction-procedure distinction that the D.C. Circuit applied in this case contravenes the judicial review provisions of the Civil Service Reform Act, 5 U.S.C. § 7703, App. 97-99a, deepens a circuit conflict, and engenders the very confusion about the proper forum for judicial review that this Court sought to put to rest four years ago in *Kloeckner*.

This Court granted certiorari in that case to answer the following question: "If the MSPB decides a mixed case without determining the merits of the discrimination claim, is the court with jurisdiction over that claim the Court of Appeals for the Federal Circuit or a district court?" Petition for a Writ of Certiorari at i, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 3584742, at *i. This Court held that the statute provided a clear answer to that question: pure civil-service cases are reviewable in the Federal Circuit, while "mixed" cases involving a discrimination claim are reviewable in district court. *See Kloeckner*, 133 S. Ct. at 603-04.

Section 7703 of the Act, which addresses judicial review of MSPB decisions, generally routes such review to the Federal Circuit "[e]xcept as provided in ... paragraph (2) of this subsection." 5 U.S.C. § 7703(b)(1)(A), App. 97a. Paragraph (2), in turn, specifies that "[c]ases of discrimination subject to the provisions of section 7702 of this title"—*i.e.*, "mixed" cases—shall be filed in district court. *Id.* § 7703(b)(2), App. 98a. And "mixed" cases are those

in which a federal employee or applicant "(A) has been affected by an action which the employee or applicant may appeal to the [MSPB]"—*i.e.*, a major adverse employment action—and "(B) alleges that a basis for the action was discrimination prohibited by" federal anti-discrimination laws. *Id.* § 7702(a)(1)(A), (B), App. 93a. "Ergo, mixed cases shall be filed in district court," regardless of whether the MSPB reached the merits of the discrimination claim or disposed of the case on non-merits grounds. *Kloeckner*, 133 S. Ct. at 604.

This Court dismissed the Government's contrary interpretation of the statute as "tortuous," and based on a misguided policy argument. *Id.* at 607 n.4. The Government argued that it makes sense for the Federal Circuit to review MSPB decisions unless the Board reaches the merits of a discrimination claim, because Congress sought to "'ensur[e] that the Federal Circuit would develop a uniform body of case law governing federal personnel issues.'" *Kloeckner*, 133 S. Ct. at 607 n.4 (quoting Brief for Respondent at 32, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2012 WL 2883261, at *32). After rejecting that policy argument on its own terms (the Federal Circuit did not even exist when Congress enacted this statutory regime), the Court emphasized that "[i]n any event, even the most formidable argument concerning the statute's purposes could not overcome the clarity we find in the statute's text." *Id.*

Although the MSPB's non-merits ground for dismissal in *Kloeckner* was procedural, rather than jurisdictional, both the Government and the petitioner in that case recognized that this is a distinction without a difference. In opposing

certiorari, the Government acknowledged that the "distinction between procedural MSPB dismissals (reviewable in district court) and jurisdictional MSPB dismissals (reviewable only in the Federal Circuit) is 'difficult and unpredictable.'" Brief for Respondent in Opposition at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2010) (No. 11-184), 2011 WL 6281813, at *15 (quoting *Kloeckner*, 639 F.3d at 838). As the Government explained:

> The procedural-jurisdictional distinction rests on the premise that an appeal beyond the MSPB's jurisdiction "does not involve 'an action which the employee or applicant may appeal to the [Board]'" under Section 7702(a). But that description applies equally to an appeal, like this one, that is not timely filed. Moreover, as a practical matter, it would make little sense for an employee who files an untimely MSPB appeal to obtain de novo review of her discrimination claim in district court, while an employee who timely files her MSPB appeal, but mistakenly believes that her case falls within the MSPB's jurisdiction, proceeds to the Federal Circuit. And because the MSPB may dismiss on timeliness grounds without examining substantive jurisdiction, [the jurisdiction-procedure distinction] could allow employees with jurisdictionally deficient [civil-service] claims nevertheless to proceed to district court by filing an untimely MSPB appeal.

Id. at *15-16 (internal citations omitted).

The petitioner in *Kloeckner* agreed with the Government on this score. In her reply to the brief

in opposition, she noted that "[t]he government acknowledges that the significance of the [jurisdiction-procedure] distinction is far from clear, because determining whether an MSPB ruling was procedural or jurisdictional can be 'difficult and unpredictable.'" Reply to Brief in Opposition at 2, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012) (No. 11-184), 2011 WL 6859422, at *2 (quoting Brief for Respondent in Opposition at 15, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012), 2011 WL 6281813, at *15). "For example," the *Kloeckner* petitioner continued, "if the MSPB concluded that a claimant had failed to establish a prima facie case of discrimination, the Board and the Federal Circuit would apparently regard that failure as meaning the Board had no jurisdiction over the claim." *Id.* (citing *Burzynski v. Cohen*, 264 F.3d 611, 620-21 (6th Cir. 2001); *Hill v. Department of the Air Force*, 796 F.2d 1469, 1471 (Fed. Cir. 1986); *id.* at 1472-73 (Newman, J. concurring)).

The Government, for its part, returned to this point in its merits brief:

> [The jurisdiction-procedure] 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*.

Brief of Respondent at 25 n.3, *Kloeckner v. Solis*, 133 S. Ct. 596 (2012)(No. 11-184), 2012 WL 2883261, at *25 n.3 (emphasis added).

Notwithstanding the fact that even the *Government* in *Kloeckner* disavowed the jurisdiction-procedure distinction, a divided panel of the Federal Circuit thereafter embraced that very distinction. In *Conforto*, that court held that cases alleging discrimination but dismissed by the MSPB on jurisdictional, as opposed to procedural, grounds are subject to exclusive review in the Federal Circuit. *See* 713 F.3d at 1115-21. The court purported to base that decision on the text of the statute. According to the Federal Circuit, a case that the MSPB dismisses on jurisdictional grounds is not a "mixed" case at all, because the Board has determined that the case is not one in which an employee "'has been affected by an action *which the employee ... may appeal*'" to the MSPB. *Id.* at 1118 (emphasis added; quoting 5 U.S.C. § 7702(a)(1)(A), App. 93a); *see also* 5 U.S.C. § 7513(d), App. 92a ("An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board ...."); *id.* § 7512, App. 90a (listing the "[a]ctions covered" by that section). "[T]he plain import of this statutory language is that a purported mixed case appeal is reviewed by a district court only if the [MSPB] has jurisdiction to decide the appeal from the adverse action in issue." *Conforto*, 731 F.3d at 1118.

But that argument, as Judge Dyk explained in dissent in *Conforto*, "was necessarily rejected in *Kloeckner*," as it "would equally give our court jurisdiction to review procedural issues in mixed cases." 713 F.3d at 1123-24. "As the government

pointed out in *Kloeckner*, an employee also may only appeal to the Board if he does so within the applicable time limits." *Id.* at 1124 (Dyk, J., dissenting); *see also Stahl v. MSPB*, 83 F.3d 409, 412-13 (Fed. Cir. 1996) (employee's untimely claim that removal was based on discrimination not appealable to the Board under § 7702(a)). The statute does not "draw any textual distinction between different types of Board decisions, and there is no other basis for distinguishing between jurisdictional and procedural dismissals." *Conforto*, 713 F.3d at 1124 (Dyk, J., dissenting). If Congress had wanted to send procedural dismissals to district court and jurisdictional dismissals to the Federal Circuit, "it could have just said so." *Kloeckner*, 133 S. Ct. at 605.

Indeed, *Conforto*'s "textual" analysis begs the question. Here, the MSPB held that it lacked jurisdiction over petitioner's appeal on the ground that he had voluntarily entered into the settlement agreement, and thereby waived his right to appeal to the MSPB. App. 26-30a. But whether or not the settlement was voluntary is the key *merits* issue in the case. There is no question that the MSPB has jurisdiction over appeals in which employees contend that a settlement implicating a major adverse employment action was involuntary. *See*, *e.g.*, *Conforto*, 713 F.3d at 1120 ("The employee in such cases may claim that he was forced to resign or retire in part or in whole because of discrimination by the agency ...."); *Garcia v. Department of Homeland Sec.*, 437 F.3d 1322, 1324 (Fed. Cir. 2006) (*en banc*) (a "facially voluntary action by the employee may actually be involuntary" if coerced by the agency); *Schultz v. United States Navy*, 810 F.2d 1133, 1136

(Fed. Cir. 1987) (coercion established by showing "that the agency knew that the reason for the threatened removal could not be substantiated"). In this context, in short, "the MSPB's jurisdiction and the merits of an alleged involuntary separation are 'inextricably intertwined.'" *Shoaf v. Department of Agr.*, 260 F.3d 1336, 1341 (Fed. Cir. 2001) (quoting *Schultz*, 810 F.2d at 1136); *see also Conforto*, 713 F.3d at 1126-27 (Dyk, J., dissenting).

Thus, in this very case, the MSPB assumed jurisdiction over petitioner's appeal in the first round of litigation and remanded the case to the ALJ to hold a hearing and receive more evidence. App. 59-70a. If that appeal fell within the MSPB's jurisdiction, it necessarily follows that petitioner's subsequent appeal from the decision on remand also fell within the MSPB's jurisdiction. The MSPB's resolution of a challenge to the voluntariness of a settlement cannot retroactively strip the Board of jurisdiction to address that very issue. To the contrary, it is black-letter law that an adjudicatory body does not lack jurisdiction to address a claim simply because the claim may fail on the merits. *See, e.g.*, *Bell v. Hood*, 327 U.S. 678, 682 (1946). In other words, the merits of petitioner's allegation that he was subjected to a major adverse employment action because the settlement was involuntary do not involve the MSPB's "jurisdiction" as this Court has defined that term, whatever label the Board chooses to affix to its decision. *See, e.g.*, *Reed Elsevier*, 559 U.S. at 160-63; *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006); *Kontrick v. Ryan*, 540 U.S. 443, 452-56 (2004). And because the MSPB has jurisdiction to decide whether a settlement was voluntary, a case challenging the voluntariness of a settlement

implicating a major adverse employment action qualifies as "an action which the employee or applicant may appeal to the [MSPB]" 5 U.S.C. § 7702(a)(1)(A), App. 93a, *regardless* of the MSPB's resolution of that question on the merits.

The jurisdiction-procedure distinction also renders illogical other parts of the judicial review provisions. The statutory requirement for the Board to decide "mixed" cases within 120 days, *see* 5 U.S.C. § 7702(a)(1), App. 93-94a, would make no sense if there were no way to determine whether a case is "mixed" in the first place unless and until the Board resolved the claim. Rather, that timing provision underscores that the determination of whether a case is "mixed" must occur *at the time of filing*. If a claimant alleges that she has been subjected to a major adverse employment action and seeks relief under the federal anti-discrimination laws, she has brought a "mixed" case *regardless* of whether the Board accepts or rejects her allegations.

That is why, as this Court has explained, the correct forum for judicial review of an MSPB decision turns on "the nature of an employee's claim," not the basis for the MSPB's decision. *Elgin*, 132 S. Ct. at 2134. And this is not merely a technicality: Congress routed cases involving discrimination claims (*i.e.*, "mixed" cases) to district court precisely because the employee has the statutory "right" to have a discrimination claim "subject to trial de novo." 5 U.S.C. § 7703(c), App. 99a; *see also* S. Rep. No. 95-969, at 63 (1978) ("District court is a more appropriate place than the Court of Appeals for [cases involving discrimination claims] since they may involve additional fact-finding."). Civil-service

claims, in contrast, are subject to deferential review under the Administrative Procedure Act (APA), regardless of whether they are standalone claims (and thus subject to review in the Federal Circuit) or paired with discrimination claims (and thus subject to review in district court). *See*, *e.g.*, *Butler v. West*, 164 F.3d 634, 639 n.10 (D.C. Cir. 1999). A jurisdiction-procedure distinction that routes cases involving discrimination claims, like this one, to the Federal Circuit, and then subjects them to APA review, *see, e.g.*, *Shoaf*, 260 F.3d at 1340, "turns Congress' clear intent on its head," *Conforto*, 713 F.3d at 1127 (Dyk, J., dissenting); *see also* 5 U.S.C. § 7702(e)(3), App. 96a ("Nothing in this section shall be construed to affect the right to trial de novo" of discrimination claims).

And putting aside the lack of textual support for the jurisdiction-procedure distinction, it creates monumental practical difficulties. In particular, it forces MSPB claimants to decide whether their MSPB challenge has been dismissed on "jurisdictional" or "procedural" grounds. Many, if not most, of those claimants proceed *pro se*. *See, e.g.*, U.S. Merit Systems Protection Board, *Congressional Budget Justification FY 2017* (Feb. 2016), at 14 ("Generally, at least half or more of the appeals filed with the agency are from *pro se* appellants."), available at http://tinyurl.com/zcv6lxj (last visited Sept. 26, 2016). Even the Nation's most seasoned judges and lawyers have trouble distinguishing "jurisdictional" from "procedural" rulings. *See, e.g.*, *Reed Elsevier*, 559 U.S. at 160-61. "By contrast, a jurisdictional rule based on the type of employee and adverse agency action at issue does not involve such amorphous distinctions." *Elgin*, 132 S. Ct. at 2136.

As this Court has long recognized, "administrative simplicity is a major virtue in a jurisdictional statute." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010). "Complex jurisdictional tests complicate a case, eating up time and money as the parties litigate, not the merits of their claims, but which court is the right court to decide those claims." *Id.* The plain statutory text provides an administrable bright-line rule: MSPB decisions are generally subject only to APA review in the Federal Circuit, except that MSPB decisions in cases involving discrimination claims are subject to review in district court, where the employee is entitled to a trial de novo on the discrimination claim. *See* 5 U.S.C. §§ 7703(b),(c), App. 97-99a. Period. There is no need to dissect the MSPB decision, or to engage in a metaphysical distinction between "jurisdictional" and "procedural" grounds. The fact that the D.C. Circuit was unable to determine as a ministerial matter the correct court to which to transfer this case, but found itself constrained to appoint an *amicus* to brief this jurisdictional issue, underscores that the law in this area requires clarification.

The decision below, it is worth emphasizing, did not endorse *Conforto*'s jurisdiction-procedure distinction. Rather, the decision below rested on the entirely different ground that pre-*Kloeckner* circuit precedent compelled the result in this case. *See* App. 15a (citing *Powell*, 158 F.3d at 599-600). Because *Kloeckner* did not specifically address the jurisdiction-procedure distinction, the court concluded, *Powell* remained binding circuit law. *Id.* Regardless of whether that conclusion is correct as a matter of D.C. Circuit law, this Court obviously is not similarly constrained.

And the courts of appeals are squarely divided on this issue. The D.C. Circuit and the Federal Circuit have now the joined the Second and Tenth Circuits, which held—even before *Kloeckner*—that the statute bifurcates judicial review of MSPB decisions based on a jurisdiction-procedure distinction. *See* App. 5-15a; *Conforto*, 713 F.3d at 1115-21; *Harms*, 321 F.3d at 1007-08; *Downey*, 160 F.3d at 146. The Eighth Circuit, however, specifically rejected that distinction in the decision later reversed—on other grounds—in *Kloeckner*. *See Kloeckner*, 639 F.3d at 838 (rejecting the jurisdiction-procedure distinction applied in *Harms* and *Downey* as resting on "an unpersuasive textual analysis that would require courts to draw difficult and unpredictable distinctions"), *rev'd on other grounds*, 133 S. Ct. 596.

In any event, a circuit conflict is not an end in itself, but a red flag signaling an issue that warrants this Court's clarification. Here, another such red flag is the fact that the Government has taken diametrically opposed positions on this precise issue in this Court in *Kloeckner* and in the lower courts in this case and in *Conforto*. If the Government cannot speak with a single voice on this issue, it is a sure sign that this Court's clarification is warranted.

Indeed, in the absence of this Court's review, it is difficult to see how this issue will ever be clarified. As noted above, the Federal Circuit has held that it has exclusive jurisdiction to review MSPB decisions in mixed cases, like this one, that are dismissed on jurisdictional grounds. *See Conforto*, 713 F.3d at 1115-21. And because the MSPB is bound by the Federal Circuit in this area, *see* 5 U.S.C. § 7703(b)(1), App. 97-98a; 28 U.S.C. § 1295(a)(9); *Elgin*, 132 S. Ct.

at 2131, the Board specifically instructs claimants whose cases are dismissed on jurisdictional grounds (like petitioner) to seek review there. *See* App. 30a ("You have the right to request review of this final decision *by the United States Court of Appeals for the Federal Circuit*.") (emphasis added). The MSPB further refers litigants to the Federal Circuit's website, and in particular to that court's "Guide for Pro Se Petitioners and Appellants." App. 31a. That document, in turn, addresses "Discrimination claims in Merit Systems Protection Board cases," and states that district courts, as opposed to the Federal Circuit, "have jurisdiction over cases involving bona fide claims of discrimination ... that were raised before *and considered by* the [MSPB]." U.S. Court of Appeals for the Federal Circuit, *Guide for Pro Se Petitioners and Appellants* § 6 at 167, available at http://tinyurl.com/hntdsja (last visited Sept. 26, 2016) (emphasis added). That is precisely the position that this Court rejected four years ago in *Kloeckner*.

This Court need not and should not delay review to await further percolation on a matter that the Federal Circuit has decided falls within its exclusive jurisdiction. If a claimant were to file a "mixed" case like this one in federal district court, and that court were to transfer the case to the Federal Circuit per *Conforto*, that decision would not be appealable to the regional circuit. *See, e.g.*, *Miller v. Toyota Motor Corp.*, 554 F.3d 653, 655 (6th Cir. 2009); *FDIC v. McGlamery*, 74 F.3d 218, 221 (10th Cir. 1996). This petition arises only by the happenstance that Perry, proceeding *pro se*, mistakenly filed in the D.C. Circuit instead of (per the MSPB's instructions) the Federal Circuit, and the D.C. Circuit decided to

appoint counsel to address the jurisdictional issue rather than simply dismissing the case or transferring it to the Federal Circuit. This petition thus provides this Court with a unique vehicle to clarify this area of the law.

CONCLUSION

For the foregoing reasons, the Court should grant the petition.

September 27, 2016

Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
Counsel of Record
DEVIN S. ANDERSON
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com