No. 16-399

In the Supreme Court of the United States

ANTHONY W. PERRY, PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether 5 U.S.C. 7703(b)(2), which creates an exception to exclusive Federal Circuit review of Merit Systems Protection Board (MSPB or Board) decisions in cases where "an action which [an] employee * * * may appeal to the [Board]" is alleged to involve discrimination, 5 U.S.C. 7702(a)(1)(A), applies to a case in which the MSPB determines that the relevant action is not one that the employee may appeal to the Board.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, and regulations:

Statutes and regulations—Continued: Page

Statutes and regulations—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 829 F.3d 760. The final order of the Merit Systems Protection Board (Pet. App. 20a-31a) is unreported but is available at 2014 WL 5358308. The initial decision of an administrative judge (Pet. App. 32a-58a) is unreported. An earlier order of the Merit Systems Protection Board (Pet. App. 59a-70a) is unreported but is available at 2013 WL 9678428. An earlier initial decision of an administrative judge (Pet. App. 71a-80a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2016. The petition for a writ of certiorari was filed on September 27, 2016, and was granted on January 13, 2017. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in an appendix to this brief. See App., *infra*, 1a-34a.

STATEMENT

A. Statutory And Regulatory Framework

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) (brackets omitted) (quoting *Lindahl* v. *OPM*, 470 U.S. 768, 774 (1985)). The CSRA "prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Ibid.* In fashioning the protections and remedies in the CSRA, Congress sought 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.

1. The Merit Systems Protection Board

a. The CSRA established the Merit Systems Protection Board (MSPB or Board), an administrative agency that acts as "an independent adjudicator of federal employment disputes." *Kloeckner* v. *Solis*, 133 S. Ct. 596, 600 (2012); see 5 U.S.C. 1201-1206. The MSPB may adjudicate only "matters within [its] jurisdiction * * * under [Title 5], chapter 43 of title 38, or any other law, rule, or regulation." 5 U.S.C. 1204(a)(1). An employee "may submit an appeal to" (*i.e.*, seek administrative review from) the Board when he or she has been subject to a personnel "action

which is appealable to the Board under any law, rule, or regulation." 5 U.S.C. 7701(a).

The relevant laws generally limit the Board's jurisdiction to "particularly serious" employment actions, *Kloeckner*, 133 S. Ct. at 600, such as a removal or suspension of more than 14 days on grounds of misconduct. See 5 U.S.C. 7512, 7513(a) and (d) (permitting appeal to Board from certain actions taken "for such cause as will promote the efficiency of the service"); 5 U.S.C. 7512 (2012 & Supp. III 2015); see *Cornelius* v. *Nutt*, 472 U.S. 648, 651 (1985) (observing that those provisions apply to a removal for "misconduct"); see also *Arnett* v. *Kennedy*, 416 U.S. 134, 160-163 (1974) (opinion of Rehnquist, J.) (describing history and meaning of statutory phrase "such cause as will promote the efficiency of the service"). Less severe types of actions—including reassignments and denials of promotions, see, *e.g.*, 5 U.S.C. 2302(a)(2)(A)(ii) and (iv)—typically are not appealable to the Board. See, *e.g.*, *Carducci* v. *Regan*, 714 F.2d 171, 175 (D.C. Cir. 1983).

In reviewing a serious action, the MSPB determines whether the action was supported by a preponderance of the evidence, was procedurally valid, and was otherwise in accordance with the CSRA and other law. 5 U.S.C. 7701(c)(1)(B) and (2); see *Cornelius*, 472 U.S. at 651. For an action based on employee misconduct, the Board may review not only the employing agency's finding that misconduct occurred, but also the appropriateness of the penalty that the employing agency imposed. See, *e.g.*, *Douglas* v. *Veterans Admin.*, 5 M.S.P.R. 280, 296-303 (1981).

b. "Nothing in 5 U.S.C. § 7512, which enumerates specific adverse actions over which the Board has

jurisdiction, extends the Board's jurisdiction to facially voluntary acts." *Garcia* v. *Department of Homeland Sec.*, 437 F.3d 1322, 1328 (Fed. Cir. 2006) (en banc); see 5 C.F.R. 752.401(b)(9); Pet. App. 4a. "A long line of cases, however, starting with the Board's predecessor, the Civil Service Commission * * * dealt with this question, and generally held that seemingly voluntary actions in some circumstances may be considered adverse actions." *Garcia*, 437 F.3d at 1328. Under that longstanding approach, the MSPB has asserted "jurisdiction over an appeal filed by an employee who has resigned or retired if his or her resignation or retirement was involuntary and thus tantamount to forced removal." *Ibid.* (quoting *Shoaf* v. *Department of Agric.*, 260 F.3d 1336, 1340-1341 (Fed. Cir. 2001)); see also, *e.g.*, *Gratehouse* v. *United States*, 512 F.2d 1104, 1108 (Ct. Cl. 1975); see, *e.g.*, *Putnam* v. *Department of Homeland Sec.*, 121 M.S.P.R. 532, 543 (2014) ("An involuntary retirement * * * is equivalent to a forced removal within the Board's jurisdiction under chapter 75.").

Under the Board's regulations, the appealing employee "has the burden of proof, by a preponderance of the evidence * * * with respect to * * * [i]ssues of jurisdiction." 5 C.F.R. 1201.56(b)(2)(i)(A); see 5 U.S.C. 7701(a) ("Appeals shall be processed in accordance with regulations prescribed by the Board."). If an employee "makes nonfrivolous allegations of jurisdiction, i.e., allegations that, if proven, would establish the Board's jurisdiction, he is entitled to a hearing at which he must prove jurisdiction by a preponderance of the evidence." *Mims* v. *Social Sec. Admin.*, 120 M.S.P.R. 213, 222 (2013); see *Garcia*, 437 F.3d at 1344. In cases where an employee has retired,

the Board generally applies a "presumption of voluntariness," which an employee may attempt to "rebut * * * in a variety of ways, for example, by showing that the retirement was the result of misinformation or deception by the agency, intolerable working conditions, or the unjustified threat of an adverse action." *Mims*, 120 M.S.P.R. at 222.

c. One "structural element[]" 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" in "disputes over adverse personnel action." *Fausto*, 484 U.S. at 449. In general, judicial review of "a final order or final decision" of the Board falls within the Federal Circuit's "exclusive jurisdiction." 28 U.S.C. 1295(a)(9); see 5 U.S.C. 7703(b)(1)(A) and (d). When the Federal Circuit reviews an MSPB decision, it may correct any procedural or substantive legal errors; vacate any action that is "arbitrary, capricious, [or] an abuse of discretion"; and set aside any findings that are "unsupported by substantial evidence." 5 U.S.C. 7703(c).

2. Mixed cases

The CSRA currently includes two exceptions to the generally exclusive authority of the Federal Circuit to review the MSPB's disposition of a federal employee's appeal. See 5 U.S.C. 7703(b)(1)(B) and (b)(2). The exception directly relevant here encompasses "[c]ases of discrimination subject to the provisions of section 7702." 5 U.S.C. 7703(b)(2); see Pet. App. 5a.[1] Those

[1] The other exception is a temporary exception under which cases that involve only claims of whistleblower reprisal may be reviewed in "any court of appeals of competent jurisdiction." 5 U.S.C. 7703(b)(1)(B) (2012 & Supp. III 2015).

are cases in which an employee (or applicant for employment) (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" one of several listed antidiscrimination laws, including laws prohibiting race, age, and disability discrimination in federal employment. 5 U.S.C. 7702(a)(1). When presented with a case that satisfies both of those criteria, the Board is required to "decide both the issue of discrimination and the appealable action," *ibid.*, and its decision is reviewable in district court, 5 U.S.C. 7703(b)(2).

a. The MSPB does not possess any generalized jurisdiction to review discrimination claims by federal employees, and most cases in which such a claim is raised will proceed without involving the MSPB at all. Title VII of the Civil Rights Act of 1964 (which prohibits race and sex discrimination), the Rehabilitation Act of 1973 (which prohibits disability discrimination), and the Age Discrimination in Employment Act of 1967 (ADEA) all contain freestanding provisions authorizing suit in district court against federal agencies alleged to have engaged in discrimination. See 29 U.S.C. 633a(c) (civil actions under ADEA); 42 U.S.C. 2000e-16(c) (civil actions under Title VII); see also 29 U.S.C. 794a(a)(1) (Rehabilitation Act incorporating Title VII remedial scheme). An employee may sue under those statutes only after exhausting his administrative remedies, a requirement that is typically satisfied by presenting a formal equal employment opportunity (EEO) complaint to the employing agency and obtaining a final decision. See 29 U.S.C. 633a(d), 794a(a)(1); 42 U.S.C. 2000e-16(c); 29 C.F.R.

1614.105(a); see, *e.g.*, *Green* v. *Brennan*, 136 S. Ct. 1769, 1775-1776 (2016); see also 29 U.S.C. 633a(d) (permitting ADEA suit without EEO complaint when employee gives Equal Employment Opportunity Commission (EEOC) 30 days' notice of intent to sue).

In 5 U.S.C. 7702, however, the CSRA specifies a set of "special procedures" governing administrative exhaustion of a so-called "'mixed case,'" in which "an employee complains of a personnel action serious enough to appeal to the MSPB *and* alleges that the action was based on discrimination." *Kloeckner*, 133 S. Ct. at 601. Under Section 7702, and implementing regulations promulgated by the MSPB and the EEOC, such an employee has the opportunity (although not the obligation) not only to exhaust his discrimination claim, but also to seek additional MSPB review of the relevant action's lawfulness under the CSRA (*e.g.*, whether the action was a valid penalty for misconduct). See 5 U.S.C. 7702; 5 C.F.R. 1201.151 (MSPB regulations); 29 C.F.R. 1614.302 (EEOC regulations).

Even in a mixed case, an employee may ignore the MSPB and pursue the case "much as an employee challenging a personnel practice not appealable to the MSPB could do." *Kloeckner*, 133 S. Ct. at 601. He may file what the regulations call a "mixed case complaint," in which he seeks review of the discrimination claim from the agency's EEO office, and then, if still aggrieved, file suit in district court under the antidiscrimination laws. 29 C.F.R. 1614.302(a)(1), (b), (d)(1)(i), and (d)(3); see 5 U.S.C. 7702(a)(2), 7703(b)(2); *Kloeckner*, 133 S. Ct. at 601. An employee who chooses that path is bypassing the opportunity to present

civil-service claims to the MSPB, and instead opting to focus solely on her discrimination claims.

b. An employee with a mixed case who wishes to exhaust his civil-service claims in the MSPB, or to obtain an additional layer of review on his discrimination claims from the MSPB, has two ways of doing so. First, he can file a mixed case complaint with the agency's EEO office as described above, but appeal to the MSPB rather than proceeding straight to district court. See 5 U.S.C. 7702(a)(2); 5 C.F.R. 1201.154; 29 C.F.R. 1614.302(d)(1)(ii); *Kloeckner*, 133 S. Ct. at 601. Second, he can file at the outset what the regulations call a "mixed case appeal," 29 C.F.R. 1614.302(a)(2), in which he "forgo[es] the agency's own system for evaluating discrimination charges" and instead "initiate[s] the process" of administrative review "by bringing [the] case directly to the MSPB." *Kloeckner*, 133 S. Ct. at 601; see 5 U.S.C. 7702(a)(1); 5 C.F.R. 1201.154(a); 29 C.F.R. 1614.302(b).

In either circumstance, the CSRA directs that 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 [its] appellate procedures." 5 U.S.C. 7702(a)(1); see 5 C.F.R. 1201.156(a). If the MSPB decides either issue in the employee's favor, it may require the employing agency to grant appropriate relief. See 5 U.S.C. 1204(a)(1)-(2). The Board's final decision on both issues becomes a "judicially reviewable action" unless the employee seeks additional administrative process from the EEOC. See 5 U.S.C. 7702(a)(3) and (b); 5 C.F.R. 1201.161; 29 C.F.R. 1614.303.

The regulations implementing Section 7702 provide curative measures that an employee can invoke if he

believes that his discrimination case involves an employment action appealable to the MSPB but the Board disagrees and therefore rejects the appeal. See 29 C.F.R. 1614.302(b). In such situations, the employing agency must protect the employee's ability to litigate his claim as a pure (*i.e.*, non-mixed) discrimination case under the antidiscrimination laws. See *ibid.* Specifically, if an employee "files a timely appeal with MSPB from the [employing] agency's processing of a mixed case complaint and the MSPB dismisses it for jurisdictional reasons," the employing agency must allow the employee to request a fresh decision on his EEO complaint, which will reset his time limit for filing an antidiscrimination suit in district court. *Ibid.*; see 29 C.F.R. 1614.110(a). Similarly, if an employee "files a mixed case appeal with the MSPB instead of a mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons," the employing agency must "promptly notify" the employee of his right to file an EEO complaint and must provide him with a new window of time in which to do so. 29 C.F.R. 1614.302(b). Once the employee exhausts his discrimination claim by filing the EEO complaint, he may (if still aggrieved) file an antidiscrimination suit in district court. See 29 C.F.R. 1614.110(a).

c. Under 5 U.S.C. 7703(b)(2), an employee may seek judicial review of an adverse MSPB decision in a mixed case through a "fil[ing] under the enforcement sections of the" relevant antidiscrimination laws. *Kloeckner*, 133 S. Ct. at 601 (brackets omitted) (quoting 5 U.S.C. 7702(a)(1), 7703(b)(2)). Those enforcement provisions "all authorize suit in federal district court," *ibid.*, where an employee is entitled to "trial de

novo" of his discrimination claim, without deference to the MSPB's decision, 5 U.S.C. 7703(c).

The judicial-review provisions do not explicitly prescribe how (or whether) a district court is to review the MSPB's disposition of the portion of a mixed case that does not arise under an antidiscrimination statute —*e.g.*, an MSPB determination that a removal constituted a valid penalty for employee misconduct. The courts of appeals, however, have interpreted 5 U.S.C. 7703(c) to permit district-court review of that aspect of the MSPB's decision under the same deferential standard of review that the Federal Circuit would apply if the action were challenged solely under the CSRA. See, *e.g.*, *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); see also *Kloeckner*, 133 S. Ct. at 607 n.4 (recognizing that, "[i]f the MSPB rejects on the merits a complaint alleging that an agency violated the CSRA as well as an antidiscrimination law, the suit will come to district court for a decision on both questions").

B. Petitioner's Case

1. Petitioner is a former employee of the United States Census Bureau who faced removal on charges that he was absent from work for hours at a time and refused to document his time properly. Pet. App. 3a. In response to the notice of proposed removal, petitioner claimed that he had an informal arrangement that permitted him to take walking breaks to relieve a medical condition. *Ibid.* Petitioner eventually entered into a settlement agreement with the Bureau, under which, *inter alia*, he agreed to serve a 30-day suspension, take an early retirement, and withdraw pending

complaints he had filed with the EEOC. *Ibid.* Petitioner served the agreed-upon suspension, took the retirement, and applied for the $25,000 in severance pay to which he would be entitled as a voluntary retiree. *Id.* at 21a, 38a n.3.

Petitioner later appealed his suspension and retirement to the MSPB, alleging that the Bureau's charges had been motivated by age, race, and disability discrimination and retaliation for his filing of discrimination claims. Pet. App. 4a. He also alleged that the Bureau had coerced him into signing the settlement agreement by threatening baseless discriminatory employment actions and by misrepresenting his appeal rights. *Id.* at 4a, 22a-23a. That second set of allegations was critical to the Board's authority since "the Board generally lacks jurisdiction to review voluntarily accepted actions." *Id.* at 4a.

2. An MSPB administrative judge initially dismissed the case for lack of jurisdiction, finding that petitioner had "voluntarily agreed to the 30-day suspension" and had "voluntarily entered into the settlement agreement that required him to retire." Pet. App. 75a; see *id.* at 71a-80a. The Board, however, "found that [petitioner's] claim, that the agency coerced him into signing the settlement agreement by misinforming him that he would not have Board appeal rights if it effectuated his removal, constituted a nonfrivolous allegation of involuntariness entitling him to a jurisdictional hearing." *Id.* at 22a; see *id.* at 59a-70a.

The administrative judge held such a hearing. Pet. App. 23a; see *id.* at 32a-58a. Petitioner "declined to testify" and "presented no evidence" in support of his allegation "that the agency misled him by stating that

he would have no right of appeal if the agency removed him." *Id.* at 23a, 25a. The witnesses at the hearing, including the union representative who had assisted him in negotiating the settlement agreement, "all testified that: (1) they did not advise [petitioner] that he would not have appeal rights if he failed to sign the settlement agreement and the agency removed him; and (2) they were not aware of anyone at the agency who so informed [petitioner]." *Id.* at 25a; see *id.* at 45a-46a. The union representative additionally testified that he and petitioner, rather than the agency, had "devised retirement as a possible settlement term," *id.* at 26a; that petitioner was "smart," *id.* at 46a; and that petitioner had "definitely understood what he was doing" when he agreed to the settlement, *ibid.* After the hearing, the administrative judge found "no fraud, coercion or misrepresentation" that would render the retirement involuntary; determined "that the Board lack[ed] jurisdiction over th[e] appeal"; and concluded that the appeal "must be dismissed." *Id.* at 47a, 51a.

The Board affirmed the administrative judge's jurisdictional dismissal. Pet. App. 20a-31a. "The evidence in the record," the Board found, "contradicts [petitioner's] claim that the agency misled him with respect to his potential appeal rights." *Id.* at 25a. The Board accordingly rejected petitioner's contention "that he [was] entitled to mixed appeal rights." *Id.* at 30a. The Board explained that petitioner's appeal was "not a mixed case because [the Board] lack[ed] jurisdiction over it." *Ibid.* (citing *Conforto* v. *MSPB*, 713 F.3d 1111, 1118 (Fed. Cir. 2013)).

3. After the MSPB dismissed his appeal, petitioner did not seek to exhaust his discrimination claim with

the Bureau's EEO office. Instead, he filed a pro se petition for D.C. Circuit review of the MSPB's decision. Pet. App. 4a.

Petitioner ultimately acknowledged that no CSRA provision gave the D.C. Circuit jurisdiction over the case. Pet. App. 5a. The court of appeals accordingly considered, with the aid of an appointed amicus curiae, the question of where to transfer the case. *Ibid.*; see 28 U.S.C. 1631 (permitting transfers of petitions for review of administrative action in order to cure lack of jurisdiction). The court concluded that the Board's decision was within the scope of the Federal Circuit's exclusive review. Pet. App. 1a-15a.

The court of appeals held that 5 U.S.C. 7703(b)(2)'s special rule for mixed cases—*i.e.*, cases in which an employee alleges discrimination in "an action which [he] may appeal to the [Board]," 5 U.S.C. 7702(a)(1)—does not apply to a case in which the underlying personnel action was determined not to be appealable to the MSPB. Pet. App. 7a-15a. The court observed that its prior decision in *Powell* v. *Department of Defense*, 158 F.3d 597 (D.C. Cir. 1998), had identified the Federal Circuit as the proper venue for judicial review in such a case. Pet. App. 7a-8a. The court further explained that, when "the Board dismisses [an employee's] appeal based on a lack of jurisdiction, the Board necessarily concludes that she has not 'been affected by an action which [she] may appeal to the' MSPB." *Id.* at 12a (second set of brackets in original) (quoting 5 U.S.C. 7702(a)(1)(A)).

The court of appeals joined the Federal Circuit in concluding that this Court's decision in *Kloeckner* v. *Solis*, *supra*, which held that MSPB "*procedural* dismissals" in mixed cases should be reviewed "in district

court," did not require the same result with respect to "*jurisdictional* dismissals." Pet. App. 3a; see *id.* at 9a-15a (citing *Conforto*, 713 F.3d at 1116-1119). The court noted that "all sides [in this case] agree that *Kloeckner* did not involve the precise issue raised by * * * this case." *Id.* at 8a. The court explained that *Kloeckner* "did not involve a jurisdictional dismissal," but instead the dismissal "on the procedural ground of untimeliness" of an "adverse action" that was "no doubt * * * within the Board's jurisdiction." *Ibid.* The court observed that oral argument in *Kloeckner* had highlighted the potential for a "material distinction between procedural and jurisdictional dismissals," and that the decision in *Kloeckner* had "specifically defined the issue by reference to MSPB dismissals on 'procedural grounds.'" *Id.* at 8a-10a (quoting *Kloeckner*, 133 S. Ct. at 600, 602, 603, 607).

The court of appeals further reasoned that the language of the CSRA—which "describes a mixed case as one in which the employee both alleges discrimination and 'has been affected by an action which [she] *may appeal* to the' MSPB"—"suggests a distinction between jurisdictional dismissals * * * and procedural dismissals." Pet. App. 11a-12a (brackets in original) (quoting 5 U.S.C. 7702(a)(1)(A)). The court explained that, even if an appeal is brought "in a procedurally deficient fashion," the "*action* affecting the employee" nevertheless may be one that "she can appeal to the Board," and the Board can hear the case if it chooses to disregard the procedural defect. *Id.* at 13a-14a. "That is not the case with a jurisdictional dismissal." *Id.* at 13a.

SUMMARY OF ARGUMENT

The court of appeals correctly held that judicial review of petitioner's asserted right to appeal his case to the MSPB falls within the exclusive jurisdiction of the Federal Circuit. Petitioner had and still has the right to pursue a pure discrimination case by exhausting his discrimination claims through an EEO complaint and then (if still aggrieved) seeking a de novo trial on those claims in district court. But if petitioner wants a court to review the MSPB's determination that he lacks the additional right to invoke the Board's jurisdiction, the only court that may do so is the Federal Circuit, which Congress created in part to serve as the centralized forum for exactly that type of issue.

I. District-court review of an MSPB decision is available only in "[c]ases of discrimination subject to the provisions of section 7702." 5 U.S.C. 7703(b)(2). Those are discrimination cases involving employment actions "which [the employee] may appeal to the [Board]," 5 U.S.C. 7702(a)(1)(A)—*i.e.*, the subset of discrimination cases (referred to as "mixed cases") in which an appeal to the Board would be available. When an employee asserts a right to have his discrimination case considered by the MSPB, but the Board determines that an appeal is unavailable, that determination warrants deference, and the case should not be treated as a mixed case "subject to the provisions of section 7702." Rather, the employee can either avail himself of procedures that allow him to start (or resume) pursuit of a pure discrimination case, see 29 C.F.R. 1614.302(b), or else seek judicial reversal of the MSPB's determination that Board review is unavailable. Unless and until that determination is reversed, however, the mixed-case provisions—including

the provision under which MSPB decisions in mixed cases are reviewed in district court—are inapplicable.

Applying the default rule of Federal Circuit exclusivity in these circumstances effectuates the CSRA's structural preference for "the primacy of the United States Court of Appeals for the Federal Circuit for judicial review," *United States* v. *Fausto*, 484 U.S. 439, 449 (1988). It also makes sound practical sense. In every other circumstance, the Federal Circuit would be the exclusive forum for review of an MSPB appealability determination. Divesting that court of authority to review this particular subset of appealability determinations would serve no evident purpose and would undermine the Federal Circuit's ability to create a uniform body of law on appealability.

II. The decision below does not deprive petitioner of the opportunity for a de novo trial on his discrimination claims. The judicial review that the court of appeals transferred to the Federal Circuit is not review of petitioner's *discrimination claims*, which he will be able to file in district court once he has exhausted them administratively. It is instead review of the discrete question whether the MSPB should have entertained his appeal. Review of that question is within the exclusive jurisdiction, and the exclusive competence, of the Federal Circuit.

Petitioner's reliance on *Kloeckner* v. *Solis*, 133 S. Ct. 596 (2012), is misplaced. In *Kloeckner*, "[n]o one * * * contest[ed]" that the employee's discrimination case involved "an action (*i.e.*, removal) appealable to the MSPB." *Id.* at 604. The Court accordingly held that the employee could seek district-court review of the MSPB's decision, notwithstanding the Board's dismissal of the appeal "on procedural grounds." *Id.*

at 600. Here, in contrast, the prerequisites for district-court review were not satisfied because the Board determined that petitioner was *not* "affected by an action * * * appealable to the MSPB," *id.* at 604.

Petitioner argues that an employee's allegation that an employment action is appealable to the Board should supersede the Board's own determination that it is not. But the CSRA defines the relevant "[c]ases of discrimination subject to the provisions of section 7702" as cases satisfying two criteria: that the employee "allege[] * * * discrimination," and that the employee "has been affected by an action which [she] may appeal to the [Board]." 5 U.S.C. 7702(a)(1), 7703(b)(2); see *Kloeckner*, 133 S. Ct. at 603-604. The statute thus makes an allegation conclusive of the former criterion but not of the latter. Accordingly, when the MSPB has determined that the latter criterion is absent, the employee's contrary view cannot be given controlling weight. If an employee wants to contest the MSPB's determination, he must do so in the Federal Circuit.

ARGUMENT

I. THE CSRA CHANNELS JUDICIAL REVIEW OF MSPB APPEALABILITY DECISIONS TO THE FEDERAL CIRCUIT

A federal employee who alleges discrimination in connection with "an action which [he] may appeal to the" MSPB may replace or supplement the default procedure for exhausting discrimination claims by bringing his case before the Board. 5 U.S.C. 7702(a)(1)(A). Sometimes, an employee alleging discrimination tries to appeal to the MSPB, but the Board determines that it lacks jurisdiction because the underlying personnel action is not one that he

"may appeal" to it. Such an employee can then exhaust his discrimination claims in a different way and proceed to district court. See 29 C.F.R. 1614.302(b); see, *e.g.*, *Green* v. *Brennan*, 136 S. Ct. 1769, 1775-1776 (2016). Alternatively, he can seek judicial review of the MSPB's determination that the underlying action is not appealable. If he chooses that course, however, he cannot disregard the MSPB's determination of nonappealability and treat the case as one "appealable to the MSPB and alleging discrimination," in which review of an MSPB decision is "route[d] * * * to district court," *Kloeckner* v. *Solis*, 133 S. Ct. 596, 604 (2012). Instead, the proper judicial forum in such circumstances is the Federal Circuit, which was created in part to centralize the law governing appealable actions and which has exclusive authority to review all MSPB appealability determinations.

A. The Mixed-Case Exception To Exclusive Federal Circuit Review Of MSPB Decisions Does Not Apply When The MSPB Determines That A Case Is Not Mixed

Judicial review of a "final order or final decision" of the MSPB is generally subject to the "exclusive jurisdiction" of the Federal Circuit. 28 U.S.C. 1295(a)(9); see 5 U.S.C. 7703(b)(1)(A) and (d). The CSRA's provision for district-court review of Board decisions, 5 U.S.C. 7703(b)(2), is limited to so-called "'mixed cases,'" in which an employee (or applicant for employment) "challenges as discriminatory a personnel action appealable to the MSPB." *Kloeckner*, 133 S. Ct. at 602, 604. When the Board has determined that the relevant personnel action is *not* "appealable to the MSPB," *ibid.*, the matter should not be treated as a mixed case for purposes of judicial review.

1. Under 5 U.S.C. 7703, which "governs judicial review of the MSPB's rulings," employees' "petitions to review the Board's final decisions should be filed in the Federal Circuit" unless one of two specific exceptions applies. *Kloeckner*, 133 S. Ct. at 603; see 5 U.S.C. 7703(b)(1)(A). The only exception that would permit judicial review of an MSPB decision in district court appears in Section 7703(b)(2), which instructs that in certain "'[c]ases of discrimination,'" judicial review of an MSPB decision may be initiated by filing suit in district court "'under' the enforcement provision of an enumerated antidiscrimination statute." *Kloeckner*, 133 S. Ct. at 603 (brackets in original) (quoting 5 U.S.C. 7703(b)(2)). The particular "[c]ases of discrimination" to which that special rule applies are the subset of discrimination cases that are "subject to the provisions of [5 U.S.C.] 7702." 5 U.S.C. 7703(b)(2); see *Kloeckner*, 133 S. Ct. at 603.

Section 7702 "identifies the cases 'subject to [its] provisions'" as "cases in which a federal employee '(A) has been affected by an action which [she] may appeal to the Merit Systems Protection Board, and (B) alleges that a basis for the action was discrimination prohibited by' a listed federal statute." *Kloeckner*, 133 S. Ct. at 603-604 (brackets in original) (quoting 5 U.S.C. 7703(b)(2); 5 U.S.C. 7702(a)(1)). "The subsection thus describes what," under "the lingo of the applicable regulations," are referred to as "'mixed cases'"—"those appealable to the MSPB *and* alleging discrimination." *Id.* at 604 (emphasis added).

Not every discrimination case will be a mixed case, because not every discrimination case will involve a personnel action that is appealable to the Board. Rather, "[i]f (but only if) the action is particularly

serious"—such as "a removal from employment or a reduction in grade or pay"—does "the affected employee ha[ve] a right to appeal the agency's decision to the MSPB." *Kloeckner*, 133 S. Ct. at 600. Chapter 75 of Title 5, for example, "makes MSPB review * * * generally unavailable for minor adverse personnel action, including suspensions of less than 14 days." *United States* v. *Fausto*, 484 U.S. 439, 450 (1988); see 5 U.S.C. 7512(2), 7513(d); see also *Kloeckner*, 133 S. Ct. at 600 & n.1. Similarly, certain actions are appealable to the MSPB only by certain types of employees. See 5 U.S.C. 7511(a)(1), 7512, 7513(d); *Fausto*, 484 U.S. at 447 (observing that relevant protections apply only to "covered employees"). And, as particularly relevant here, because no statute explicitly allows an employee to appeal a facially voluntary act (*e.g.*, a retirement) to the MSPB, the Board has required an employee seeking to appeal such an act to show that it was actually involuntary (*e.g.*, a constructive removal). See, *e.g.*, 5 C.F.R. 752.401(b)(9); *Garcia* v. *Department of Homeland Sec.*, 437 F.3d 1322, 1328 (Fed. Cir. 2006) (en banc); Pet. App. 4a; pp. 3-5, *supra*.

The MSPB "has not been granted jurisdiction over * * * 'pure' or 'naked' [discrimination] claims unaccompanied by an appealable action over which the Board does have jurisdiction." *Garcia*, 437 F.3d at 1342-1343 (citation omitted); see 5 U.S.C. 7702(a)(1). Accordingly, when an employee with a discrimination case tries to appeal to the MSPB, the Board must assure itself, as a threshold matter, that the case involves an appealable personnel action. See, *e.g.*, *Cruz* v. *Department of Navy*, 934 F.2d 1240, 1248 (Fed. Cir. 1991) (en banc) ("The Board was entirely correct in

looking first to its jurisdiction."). The Board's regulations require an employee who brings a case of discrimination (or any other case) to establish the appealability of the underlying action by a preponderance of the evidence. See 5 C.F.R. 1201.56(b)(2)(i)(A), 1201.152; *Garcia*, 437 F.3d at 1338-1340.

The appealability question is distinct from any procedural or merits question. An employee who is "affected by an action * * * appealable to the MSPB" remains so "[r]egardless whether the MSPB dismissed her claim on the merits or instead threw it out as untimely." *Kloeckner*, 133 S. Ct. at 604. "[T]he CSRA makes MSPB jurisdiction over an appeal dependent only on the nature of the employee and the employment action at issue." *Elgin* v. *Department of the Treasury*, 567 U.S. 1, 18 (2012).

2. When the MSPB determines that a discrimination case does not involve "an action which the employee * * * may appeal to the [Board]," 5 U.S.C. 7702(a)(1)(A), the case cannot be considered a "[c]ase of discrimination subject to the provisions of section 7702," 5 U.S.C. 7703(b)(2). See *Kloeckner*, 133 S. Ct. at 603-604. It must instead be treated as a pure discrimination case, of the sort that "an employee challenging a personnel practice not appealable to the MSPB could" bring, *id.* at 601.

Treating the case as mixed, notwithstanding the MSPB's determination that it does not involve an appealable action, would be inconsistent with fundamental principles of deference to administrative decisions. See *Federal Power Comm'n* v. *Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972) (recognizing "[t]he need to protect the primary authority of an agency to determine its own jurisdiction"). A court

reviewing the MSPB's decision would generally be required to give weight to the Board's findings. Both the CSRA itself and the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, prescribe an arbitrary-and-capricious standard of review for administrative decisionmaking. See 5 U.S.C. 7703(c)(1) (deferential review of MSPB determinations by the Federal Circuit); 5 U.S.C. 706(2)(A) (deferential review of agency decisions more generally); cf. *Kelliher* v. *Veneman*, 313 F.3d 1270, 1275 (11th Cir. 2002) (observing that courts reviewing mixed cases "uniformly" apply a deferential standard to "non-discrimination claims").[2] Thus, even when the employee seeks judicial review, the MSPB's decision as to appealability should be treated as presumptively correct.

The relevant EEOC regulations accordingly provide that, when the MSPB has found the underlying

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[2] Rejecting the contention that *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), is inapplicable in "jurisdictional disputes," the Federal Circuit has also accorded deference to MSPB regulations that address the procedures under which the Board will determine whether a particular action is appealable. See *Garcia*, 437 F.3d at 1338 (citation omitted). The Federal Circuit has stated, however, that (at least in the context of reviewing MSPB adjudications) it "review[s] the Board's legal conclusion[s] regarding the scope of its own jurisdiction * * * without deference." *Bolton* v. *MSPB*, 154 F.3d 1313, 1316 (1998), cert. denied, 526 U.S. 1088 (1999); see, *e.g.*, *Holderfield* v. *MSPB*, 326 F.3d 1207, 1208 (Fed. Cir. 2003). The Federal Circuit has not expressly reconciled those two approaches. Nor has it reconsidered its nondeferential approach to reviewing legal conclusions about jurisdiction in MSPB adjudications in light of this Court's recent reaffirmation of the principle that "*Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers." *City of Arlington* v. *FCC*, 133 S. Ct. 1863, 1871 (2013) (citation omitted).

employment action in a discrimination case not to be appealable, the employee should be repositioned to pursue a pure discrimination case instead. Under 29 C.F.R. 1614.302(b), the employing agency must effectively restore such an employee to the position he was in before seeking MSPB review, thereby ensuring that his unsuccessful Board appeal does not prejudice his ability to litigate his discrimination claims. If the employee has not yet exhausted his discrimination claims through an EEO complaint, the agency must grant him a new period in which to do so. *Ibid.*; see 29 C.F.R. 1614.302(c)(2)(ii) (instructing that, if an EEO complaint has been held in abeyance pending an appeal to the MSPB, "the agency shall recommence processing of the mixed case complaint as a non-mixed case" if the "MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter"). And if the employee has already exhausted his discrimination claims through an EEO complaint, he is entitled to a fresh final decision that will restart the clock for filing suit in district court. 29 C.F.R. 1614.302(b).

3. An employee whose Board appeal in a discrimination case has been dismissed for lack of jurisdiction may elect not to proceed immediately with a pure discrimination case, but instead to seek judicial review of the MSPB's determination that the underlying personnel action is not appealable. An employee who chooses that course, however, has no basis for seeking such review in district court.

A case that is litigated under the antidiscrimination statutes alone—either because the employee pursued it as a pure discrimination case from the outset or because the MSPB has found it to be one—comes to a

district court as a standalone lawsuit, not as a request for judicial review of an MSPB decision. The relevant antidiscrimination statutes authorize suit against the federal government, but they do not in themselves provide for judicial review of MSPB decisions. See 29 U.S.C. 216(b), 633a(c); 42 U.S.C. 2000e-5(f), 2000e-16(c). Instead, judicial review of MSPB decisions is available only in the circumstances described in 5 U.S.C. 7703, the CSRA's provision for "Judicial review of decisions of the Merit Systems Protection Board." And the only paragraph of Section 7703 that authorizes judicial review of MSPB decisions in district court, 5 U.S.C. 7703(b)(2), limits such authorization to "[c]ases of discrimination subject to the provisions of section 7702," *ibid.*—that is, discrimination cases that are, in fact, "appealable to the MSPB," *Kloeckner*, 133 S. Ct. at 604.

Accordingly, when an employee seeks review of an MSPB determination that a case is *not* appealable to the Board, he cannot rely on Section 7702(b)(2), but instead is subject to Section 7703's default rule for judicial review of Board decisions. Under that rule, "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." 5 U.S.C. 7703(b)(1)(A). The Federal Circuit will then decide the issue of appealability, just as it would in reviewing a nondiscrimination case that an employee unsuccessfully attempted to appeal to the MSPB. If it finds reversible error in the Board's determination, it will remand the case for further proceedings in the MSPB, to be followed by further processing of the matter as a mixed case under Section 7702. See *Conforto* v. *MSPB*, 713 F.3d 1111, 1120 (Fed. Cir. 2013); see, *e.g.*,

Colbath v. *Department of the Army*, 89 Fed. Appx. 727 (Fed. Cir. 2004) (per curiam). If it finds no such error, it will affirm the MSPB's determination. See, *e.g.*, *Cruz*, 934 F.2d at 1243-1248.

An employee who unsuccessfully seeks such review of an MSPB nonappealability decision does not lose his right to a de novo trial of his discrimination claims in district court. If the Federal Circuit affirms the Board's decision, the employee can then begin or continue to pursue his discrimination claims as a pure discrimination case under the antidiscrimination statutes, just as if he had never tried to appeal the case to the MSPB. The EEOC construes 29 C.F.R. 1614.302(b)'s requirement to reset an employee's time limit for pursuing a pure discrimination case to apply not only after an MSPB determination of nonappealability, but also after a Federal Circuit affirmance of such a determination. See, *e.g.*, *Karlene P.* v. *Burwell*, EEOC Decision No. 0320160054, 2016 WL 4425796, at *2 (Aug. 2, 2016); *Campbell* v. *Potter*, EEOC Decision No. 03-40046, 2004 WL 368078, at *1 n.2 (Feb. 17, 2004) (explaining that Section 1614.302(b) requires an agency to take steps "to process [a] claim as a 'non-mixed' matter" in that circumstance); see also *Sloan* v. *West*, 140 F.3d 1255, 1263 (9th Cir. 1998) ("[C]onsistent with the regulations, we hold that, when a 'mixed case claim' is filed with the MSPB, the statute of limitations for filing with the EEO and/or the EEOC are equitably tolled * * * until the appellant has received a final jurisdictional determination from the Federal Circuit.").[3] And courts have "uniformly

[3] The EEOC has previously viewed such tolling to be compelled by 5 U.S.C. 7702(f), which provides that, "[i]n any case in which an employee is required to file any action, appeal, or petition under

stated" that, in cases where the Board has dismissed for lack of jurisdiction, no determination of the Board or the Federal Circuit will have collateral-estoppel effect on a discrimination suit in district court. *Conforto*, 713 F.3d at 1120 n.4.

B. Exclusive Federal Circuit Review Of MSPB Nonappealability Determinations In Discrimination Cases Effectuates The CSRA's Structural Emphasis On Uniformity

Channeling review of MSPB nonappealability determinations in discrimination cases to the Federal Circuit preserves the ability of the Board and the Federal Circuit to develop a consistent body of law on federal employment matters. Permitting balkanized review of such determinations in the various district courts would subvert that critical feature of the CSRA.

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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." The government's brief in *Kloeckner* v. *Solis*, *supra*, took a similar view. See U.S. Br. at 37-38 (No. 11-184). The government has since determined, however, that Section 7702(f)—which explicitly applies only to cases governed by "this section" (*i.e.*, Section 7702)—cannot properly be construed to apply to a case that does not involve an appealable action. Such an interpretation would be inconsistent with Section 7702(a)(1)(A), which requires such an action, and with the EEOC's longstanding view "that where an individual files an appeal with the MSPB which is dismissed for lack of jurisdiction, the matter will not be viewed as a 'mixed case.'" *Nuno* v. *Rumsfeld*, EEOC Decision No. 04-60029, 2006 WL 1910448, at *2 (June 28, 2006).

1. One of the key "structural elements" of the CSRA is "the primacy of the United States Court of Appeals for the Federal Circuit for judicial review." *Fausto*, 484 U.S. at 449 (citing 5 U.S.C. 7703). The original 1978 version of the CSRA "provided, as the general rule, that a federal employee should appeal a Board decision to 1 of the 12 Courts of Appeals or the Court of Claims." *Kloeckner*, 133 S. Ct. at 607 n.4; see Pub L. No. 95-454, 92 Stat. 1143-1144. Shortly thereafter, however, Congress realized the "'special need for nationwide uniformity' in certain areas of the law," and in 1982 it created the Federal Circuit "to provide 'a prompt, definitive answer to legal questions' in these areas." *United States* v. *Hohri*, 482 U.S. 64, 71-72 (1987) (quoting S. Rep. No. 275, 97th Cong., 1st Sess. 1-2 (1981) (1981 Senate Report)). One of those areas was federal employment law. See *Fausto*, 484 U.S. at 449. Since its creation, the Federal Circuit has been the default forum for judicial review of MSPB decisions. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 127, 144, 96 Stat. 37-38, 45.

Throughout its history, the Federal Circuit has reviewed nonappealability determinations in cases where no issue of discrimination has been raised (see, *e.g.*, *Manning* v. *MSPB*, 742 F.2d 1424, 1426, 1429 (1984)), and the CSRA provides no basis for suggesting that review of such decisions should instead be routed to a different court. Any review of an MSPB decision determining that a particular action *is* appealable would likewise take place in the Federal Circuit. The CSRA limits the government's ability to seek judicial review of an unfavorable MSPB determination, requiring that (except in a limited set of cases not directly relevant here) any such review be sought in the

Federal Circuit. See 5 U.S.C. 7703(d)(1) (permitting judicial review in certain circumstances at the request of the Director of the Office of Personnel Management).[4]

Congress would have no evident reason to vest the Federal Circuit with exclusive jurisdiction over all

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[4] In light of the text and structure of the CSRA, the government's view is that, in an assertedly mixed case in which the employee prevails on appealability but loses on other grounds and seeks review in district court, the government cannot contest the Board's appealability determination within that district-court action. Thus, the only circumstance in which a district court might address an appealability question would be if an employee files suit in district court when the MSPB has taken too long to decide his case. Under 5 U.S.C. 7702(e)(1)(B), if an employee appeals a case of discrimination to the Board, and the Board fails to decide it within 120 days, the employee may "file a civil action" under anti-discrimination law at that point. Although the CSRA describes the relevant district-court filing as "a civil action," 5 U.S.C. 7702(e)(1), rather than as a request for judicial review of an MSPB decision, see 5 U.S.C. 7703, the precedent in at least some circuits suggests that a district court in such a case would be empowered to review both the issue of discrimination and any underlying appealable action. See *Bonds* v. *Leavitt*, 629 F.3d 369, 378-380 (4th Cir.), cert. denied, 565 U.S. 941 (2011); *Seay* v. *Tennessee Valley Auth.*, 339 F.3d 454, 470-472 (6th Cir. 2003); *Doyal* v. *Marsh*, 777 F.2d 1526, 1535-1537 (11th Cir. 1985). To the extent that a district court has such authority, the court would have to decide whether the case actually involves an appealable action. But in that scenario, the court would not be reviewing any actual MSPB determination, and its decision would not necessarily preclude the MSPB from later reaching a different result in a similar case. Cf. *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). In any event, a district court can avoid this situation entirely by opting to "stay the case, or hold it in abeyance, for a reasonable period of time" to allow the MSPB to issue a final decision. *Ikossi* v. *Department of Navy*, 516 F.3d 1037, 1043 (D.C. Cir. 2008) (citation omitted).

appealability determinations in nondiscrimination cases, plus employee-*favorable* appealability determinations in discrimination cases, while routing employee-*adverse* appealability determinations in discrimination cases elsewhere. Rules governing the appealability of employment actions are matters of general importance because they delineate the entire set of matters that the Board may consider. See, *e.g.*, 5 U.S.C. 7513(d) (allowing for appeal of certain personnel actions). The determination whether an action is appealable has additional important consequences because it may be tied to other procedural rights that an employee possesses. See 5 U.S.C. 7513(b) (specifying notice and process that are due when an employee is subjected to an action appealable to the Board under Section 7513(d)); see also *Garcia*, 437 F.3d at 1328 (explaining that "'mixed cases' are ordinary appeals of adverse agency actions that are accompanied by allegations of discrimination").

The CSRA's consolidation of review in the Federal Circuit "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.'" *Fausto*, 484 U.S. at 449 (brackets in original) (quoting S. Rep. No. 969, 95th Cong., 2d Sess. 52 (1978)). Federal Circuit review of MSPB determinations of nonappealability in discrimination cases furthers all of those goals. It enables the MSPB to develop "a unitary and consistent Executive Branch position," *ibid.*, on appealability with a focus on only one body of judicial precedent. It also avoids an "unnecessary layer of judicial review," *ibid.* (citation

omitted), by eliminating the potential need for sequential review of an MSPB nonappealability determination by both a district court and a regional court of appeals. And it "[e]ncourages more consistent judicial decisions," *ibid.*, by consolidating review in one judicial forum.

2. A carve-out allowing district courts (and thus regional circuits) to decide appealability issues in a subset of cases would frustrate Congress's effort to harmonize the law. It would, in particular, perpetuate the very situation that the Federal Circuit's creation was designed to curtail, "in which the appellate courts reach inconsistent decisions on the same issue, or in which—although the rule of law may be fairly clear—courts apply the law unevenly when faced with the facts of individual cases." *Hohri*, 482 U.S. at 72 (quoting 1981 Senate Report 3). Under such an approach, courts could reach different conclusions on a variety of legal questions, including whether and when two shorter (nonappealable) suspensions may be treated as a longer (appealable) one, see *Synan* v. *MSPB*, 765 F.2d 1099, 1101 (Fed. Cir. 1985); whether and when a facially voluntary action can be appealed, see *Shoaf* v. *Department of Agric.*, 260 F.3d 1336, 1340-1342 (Fed. Cir. 2001); and whether and when an employee can appeal from an action arising out of a settlement of a grievance, see *Mays* v. *USPS*, 995 F.2d 1056, 1058 (Fed. Cir. 1993).

Those problems would be magnified by the Board's inability to determine ex ante which court's law will ultimately apply. Under petitioner's approach, the proper forum for judicial review would depend in part on the MSPB's resolution of the appealability question, since if the employee prevails, any review at the

government's behest would be in the Federal Circuit, see 5 U.S.C. 7703(d)(1). In addition, if the Board held that a particular action was not appealable, the employee might have a choice of several fora in which to pursue judicial review of that determination. Title VII, for example, permits an employee to bring suit in "any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice." 42 U.S.C. 2000e-5(f)(3).

3. Similar difficulties already exist, to some degree, with respect to issues of Board procedure. Because MSPB decisions dismissing mixed cases on procedural grounds are reviewed by district courts, see *Kloeckner*, 133 S. Ct. at 600, 607 & n.4, the Board may be subject to conflicting judicial rulings on procedural questions. But conflicts on procedural issues are more manageable for the Board than conflicts on appealability issues.

The procedures for appeals to the Board, such as the time within which the Board's review must be sought, are governed by regulations rather than statutes. See 5 U.S.C. 7701(a) ("Appeals shall be processed in accordance with regulations prescribed by the Board."); 5 C.F.R. Pt. 1201. Potential conflicts of authority therefore can generally be resolved by the Board itself through amendments to the relevant regulations. Cf. *Braxton* v. *United States*, 500 U.S. 344, 348-349 (1991) (observing that U.S. Sentencing Commission could "eliminate [a] circuit conflict" about

interpretation of Sentencing Guidelines through amendment).

Issues of appealability, in contrast, are principally governed by statute. See, *e.g.*, 5 U.S.C. 7512, 7513(d); *Kloeckner*, 133 S. Ct. at 600 n.1. The MSPB cannot definitively resolve conflicting judicial interpretations of those statutes. Even if the MSPB's interpretations of the relevant jurisdictional statutes are given deference, see note 2, *supra*, a court could still potentially reach a different conclusion, see *ibid.* (noting Federal Circuit's hesitation to defer to legal determinations about jurisdiction in MSPB adjudications); see also *Tunik* v. *MSPB*, 407 F.3d 1326, 1345 (Fed. Cir. 2005) (noting Board's view "that it lacks delegated authority to promulgate legislative rules determining the scope of its jurisdiction" and declining to address issue).

II. PETITIONER'S APPROACH TO JUDICIAL REVIEW IS UNSOUND

The MSPB determined that petitioner was not "affected by an action which [he] may appeal" to the Board. 5 U.S.C. 7702(a)(1)(A). See, *e.g.*, Pet. App. 30a (initial decision stating that this is "not a mixed case"); *id.* at 52a (initial decision finding no "appealable action"); *id.* at 52a n.9 (initial decision dismissing "for lack of jurisdiction"); see also *id.* at 21a (affirming initial decision as final decision). In accord with every other court of appeals that has addressed the issue, the court below held that judicial review of that determination belongs in the Federal Circuit, not in district court. See *id.* at 8a-15a; *Conforto*, 713 F.3d at 1115-1121; *Burzynski* v. *Cohen*, 264 F.3d 611, 620-621 (6th Cir. 2001); *Sloan*, 140 F.3d at 1261-1262; *Wall* v. *United States*, 871 F.2d 1540, 1543-1544 (10th Cir. 1989), cert. denied, 493 U.S. 1019 (1990); see also

McCarthy v. *Vilsack*, 322 Fed. Appx. 456, 458-459 (7th Cir. 2009) (per curiam), cert. denied, 558 U.S. 1116 (2010). Petitioner's contrary argument misconstrues the issue in this case, this Court's decision in *Kloeckner* v. *Solis*, *supra*, and the statutory review scheme for federal-employee complaints.

A. Judicial Review Of The MSPB's Nonappealability Determination Is Distinct From A Potential Trial On Petitioner's Discrimination Claims

In characterizing (Br. 28) the decision below as "subverting federal employees' statutory right to try their discrimination claims de novo in district court," petitioner misconceives the court of appeals' holding. The court did not hold, and the government does not contend, that petitioner is precluded from filing a de novo antidiscrimination lawsuit against his employing agency in district court. See *Conforto*, 713 F.3d at 1119 (explaining that Federal Circuit review of an MSPB decision finding an employment action nonappealable "does not deprive [the employee] of the right to a ruling on her discrimination claims"). The disputed issue instead concerns petitioner's *path* to district court.

1. Petitioner has asserted that his discrimination case is a mixed case in which he has a special right to seek MSPB review before filing a discrimination suit in district court. The MSPB has determined that it is not a mixed case and that petitioner therefore must exhaust his claim by filing an EEO complaint before proceeding to district court. The question presented is not whether petitioner can ultimately litigate his discrimination claim in district court. It instead concerns the proper forum for "judicial review" of "an MSPB decision" that he cannot invoke the Board's

"jurisdiction" on his way there. Pet. i; see Pet. App. 6a.

As petitioner recognizes, the CSRA distinguishes between "pure discrimination cases" on the one hand and "mixed cases"—*i.e.*, "cases involving both discrimination and serious civil-service claims"—on the other. Br. 15-16. Although each kind of case "goes to district court," Br. 16, only a mixed case may be presented to the MSPB, or administratively exhausted through such presentation, Br. 14-15; see pp. 5-10, *supra*. Pure discrimination cases must be exhausted through an EEO complaint to the employing agency, not through any procedure that involves the Board. See Pet. Br. 13; see pp. 6-7, *supra*. If petitioner simply wishes to litigate his discrimination claims in district court, he need not seek "judicial review" of "an MSPB decision" (Pet. i) at all. He can instead take advantage of the procedure set forth in 29 C.F.R. 1614.302(b), exhaust his claims through an EEO complaint, and file suit under the antidiscrimination laws without any prejudice from his failed attempt to seek Board review.

Alternatively, petitioner was entitled to Federal Circuit review of the MSPB's decision that his case is not a mixed case appealable to the Board. A favorable Federal Circuit ruling on that issue would benefit petitioner in two respects. First, it would provide him with an additional forum in which he might obtain relief (and from which the government's own appeal rights are limited). See 5 U.S.C. 7701, 7702(a)(1), 7703(d). Second, it would allow him to exhaust any civil-service claims—*i.e.*, any claims that the challenged personnel action was unlawful for reasons other than discrimination—and then, if necessary,

litigate those claims in district court along with his discrimination claims. See 5 U.S.C. 7702(a)(1); pp. 8-10, *supra*.

2. It is therefore irrelevant to the question presented here that district courts are the only Article III courts "in the business of trying discrimination claims de novo," Pet. Br. 1. The judicial review that petitioner seeks at this stage will not involve such a trial.

Under Section 7703(a)(1), an employee "adversely affected or aggrieved by a final order or decision of the [MSPB] may obtain judicial review of the order or decision." At this point, the "final order or decision of the [Board]" by which petitioner is "adversely affected or aggrieved" is the Board's decision dismissing petitioner's appeal on the ground that the underlying employment action is not appealable. The only issue before a court in "judicial review" of that decision would be the issue that the MSPB actually decided—*i.e.*, whether petitioner "has been affected by an action which [he] may appeal to the [Board]," 5 U.S.C. 7702(a)(1)(A).

If the reviewing court determines that petitioner has been affected by such an action, then he has a mixed case, which should be remanded to the Board for further proceedings in which it may decide the merits of his claims. See *Conforto*, 713 F.3d at 1120. If the reviewing court instead affirms the Board's non-appealability holding, petitioner must exhaust his discrimination claims through an EEO complaint and will *then* be entitled to seek a trial de novo on those claims in district court. See *ibid.*; Pet. Br. 13; p. 9, *supra*. Under no circumstances would a court exercising judicial review of the MSPB's decision resolve the

merits of petitioner's discrimination claims. It will instead decide only an appealability issue that is within the exclusive jurisdiction and competence of the Federal Circuit.

B. This Court's Decision In *Kloeckner* Does Not Support Petitioner's Position

Petitioner contends (*e.g.*, Br. 1-2) that this Court's decision in *Kloeckner* effectively answers the question presented in his favor. That argument lacks merit. To the extent that *Kloeckner* touches on the question presented, it undercuts petitioner's argument.

1. In *Kloeckner*, this Court considered the proper forum for judicial review of an MSPB decision dismissing an appeal to the Board as untimely under the Board's procedural regulations. 133 S. Ct. at 603. The Court held that, "when the MSPB dismisses an appeal alleging discrimination * * * on procedural grounds," the employee's petition for judicial review "should go to district court." *Id.* at 600. As the court of appeals in this case observed (Pet. App. 9a-10a), *Kloeckner*'s framing of the question presented as involving an MSPB dismissal on "procedural grounds" was repeated throughout the decision. See *Kloeckner*, 133 S. Ct. at 600, 602, 603, 607.

The Court in *Kloeckner* emphasized that "[n]o one here contests that Kloeckner brought a mixed case—that she was affected by an action (*i.e.*, removal) appealable to the MSPB and that she alleged discrimination prohibited by an enumerated federal law." 133 S. Ct. at 604. The Court explained that, by satisfying those statutory criteria, the employee had "brought the kind of case that the CSRA routes * * * to district court," "[r]egardless whether the MSPB dismissed her claim on the merits or instead threw it out

as untimely." *Ibid.* The Court concluded that, "under the CSRA's terms," those statutory criteria are "all that matters." *Ibid.*

2. Here, by contrast, the MSPB determined that petitioner was *not* "affected by an action * * * appealable to the MSPB" and thus had *not* "brought the kind of case that the CSRA routes * * * to district court." *Kloeckner*, 133 S. Ct. at 604; see Pet. App. 20a-31a. Petitioner's reliance (Br. 15) on *Kloeckner* for the proposition that "a district court * * * is the proper forum for reviewing mixed cases arising from the MSPB, regardless of whether the MSPB reaches the merits of the discrimination claim," assumes that this is a mixed case. Unlike in *Kloecker*, that question is not only "contest[ed]" here, 133 S. Ct. at 604, but was decided adversely to petitioner by the administrative body charged with making such determinations.

Petitioner contends (Br. 19-20) that *Kloeckner* does not contemplate any distinction between Board determinations of nonappealability and Board procedural dismissals. He argues that, if the employee in *Kloeckner* was deemed to have been "'affected by an action which [she] may appeal' to the MSPB," even though the MSPB determined that "her appeal was time-barred," then he likewise was "'affected by an action which [he] may appeal to the [MSPB],'" even though the MSPB determined that the underlying action in his case was nonappealable. *Ibid.* (brackets in original) (quoting 5 U.S.C. 7702(a)(1)(A)). That is a false equivalency.

An action may be "appealable to the MSPB" even if "the MSPB * * * threw it out as untimely." *Kloeckner*, 133 S. Ct. at 604. An employee is "affected by an action which [he] may appeal to the [MSPB]," 5 U.S.C.

7702(a)(1)(A), when he is subject to the *kind* of action that the MSPB is authorized to review, whether or not he satisfies the procedural requirements for Board review. "That statutory language draws attention to the contested 'action,'" focusing the inquiry on whether "the *action* affecting the employee is one she can appeal to the Board." Pet. App. 13a. The statute reiterates that focus by referring to "the appealable action," 5 U.S.C. 7702(a)(1), again framing the availability of an appeal as an attribute of the action itself, rather than as a function of the Board's own procedures.

That interpretation also harmonizes Section 7702(a)(1)(A) with Section 7701, which uses similar terminology—"may submit an appeal" and "action which is appealable"—in reference to the types of actions the Board may review, as distinct from the procedures under which the Board reviews them. Section 7701(a) states that an employee "may submit an appeal to the [Board] from any action which is appealable to the Board under any law, rule, or regulation," and separately provides that such an appeal "shall be processed in accordance with regulations prescribed by the Board." The Congress that used the terms "may submit an appeal" and "appealable" as exclusive of procedural considerations in Section 7701 is unlikely to have used nearly identical terms in the next section (Section 7702) as inclusive of procedural considerations. See, *e.g.*, *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012) ("[I]t is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning.") (citations and internal quotation marks omitted).

Consistent with that understanding, this Court has explained that the "availability of administrative and judicial review under the CSRA generally turns on the type of civil service employee and adverse employment action at issue." *Elgin*, 567 U.S. at 12; see *id.* at 18 ("[T]he CSRA makes MSPB jurisdiction over an appeal dependent only on the nature of the employee and the employment action at issue."). And the Court has described review of an MSPB decision in district court under Section 7702(b)(2) as available in circumstances involving a "covered action," *id.* at 13, a term the Court used to refer to the kind of action that the MSPB is authorized to review, see *id.* at 6, 18.

The baseline appealability of an action is both formally and functionally distinct from whether an employee is procedurally barred from challenging it in a particular case. A nonappealable action was "never 'appealable to the MSPB.'" Pet. App. 13a. (quoting *Kloeckner*, 133 S. Ct. 604). In contrast, when an employee "brings her appeal in a procedurally deficient fashion—such as by bringing it too late— * * * the action itself was appealable." *Ibid.* Indeed, in the latter circumstance, the Board has authority to "excuse the procedural error and permit the appeal to go forward." *Ibid.*; see *id.* at 13a-14a (citing 5 C.F.R. 1201.12, 1201.22(c); *Conforto*, 713 F.3d at 1118 n.1).

3. Contrary to petitioner's suggestion (Br. 28), a distinction between MSPB determinations of nonappealability and MSPB procedural dismissals would not be "unworkable in practice." Petitioner analogizes that distinction to the more complicated question whether particular statutory requirements (such as filing deadlines) are "jurisdictional" or "procedural." See Br. 29 (citing, *inter alia*, *Henderson* v. *Shinseki*,

562 U.S. 428 (2011)). But applying the distinction here does not require any comparable inquiry into congressional intent. It instead requires only a reading of the MSPB's written opinion to determine whether the ground for dismissing the appeal was the nonappealability of the underlying personnel action (in which case any judicial review would be in the Federal Circuit) or instead a different ground (in which case any judicial review would go to district court).

The Board's decision here, for example, made clear that, "contrary to [petitioner's] contention that he is entitled to mixed appeal rights, his appeal is not a mixed case because we lack jurisdiction over it." Pet. App. 30a. The MSPB also informed petitioner that he could seek judicial review in the Federal Circuit. *Ibid.* Petitioner identifies no reason to believe that other Board decisions will be less clear. In any event, if the lack of clarity of a particular Board ruling led an employee to seek review in the wrong court, that court could transfer the case to the correct one, as the D.C. Circuit did here. See 28 U.S.C. 1631; Pet. App. 5a.

4. Petitioner also attempts to highlight asserted inconsistencies between the government's arguments in *Kloeckner* and in this case. That effort is misguided.

As petitioner observes (Br. 20), the government's merits brief in *Kloeckner* asserted that there was "no basis" for "a distinction" under which "MSPB dismissals of mixed cases on jurisdictional grounds are not subject to district court review under Section 7703(b)(2)," but "dismissals of such cases on procedural grounds are." U.S. Br. at 25 n.3, *Kloeckner*, *supra* (No. 11-184). The Court's subsequent decision in *Kloeckner*, however, demonstrates that this asser-

tion was incorrect. The Court explained that a procedural dismissal does not reflect any Board determination that the case is non-mixed, but a jurisdictional dismissal does. See *Kloeckner*, 133 S. Ct. at 604.[5]

Petitioner also observes (Br. 30) that the government's brief in opposition in *Kloeckner* asserted that "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." Br. in Opp. at 15, *Kloeckner*, *supra* (No. 11-184). The government does not now urge any such result. An employee who files an "untimely MSPB appeal" could obtain judicial review of the MSPB's procedural determination in district court, but she would not be entitled to "de novo review of her discrimination

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[5] At oral argument in *Kloeckner*, the government declined to concede that, if MSPB procedural dismissals in mixed cases are routed to district court, MSPB jurisdictional dismissals must be as well. See 10/2/12 Tr. at 25, *Kloeckner*, *supra* (No. 11-184). And Members of this Court noted reasons why the statute might require the two situations to be treated differently. See *id.* at 22 (observation by Justice Sotomayor that "the 7512 argument has more legs" because the "point is that you're only permitted to go to district court on issues of discrimination that are within the Board's jurisdiction"); *id.* at 23-24 (observation by Justice Kagan that "there does seem to be a good deal of difference between the question, what happens to something that is clearly a mixed case, and alternatively, the question of whether something is a mixed case; that is, whether it includes a claim about an action which the employee may appeal to the MSPB. And one could think that questions about what can be appealed to the MSPB ought to go to the Federal [C]ircuit under this statutory language in a way that questions that are involved in this case do not.").

claim" unless and until she exhausted her administrative remedies. Such an employee would thus have no practical advantage over "an employee who timely files her MSPB appeal, but mistakenly believes that her case falls within the MSPB's jurisdiction," who would obtain judicial review of the Board's decision in the Federal Circuit, and who could then likewise "obtain de novo review of her discrimination claim" after exhausting administrative remedies. Indeed, the employee with the procedural dismissal would be at a disadvantage, because 29 C.F.R. 1614.302(b)'s provisions for restoring an employee to her ex ante position for purposes of pursuing a pure discrimination case apply only to MSPB jurisdictional dismissals, not to MSPB procedural dismissals.[6]

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[6] It is likewise unproblematic that, "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." Pet. Br. 30 (brackets in original) (quoting Br. in Opp. at 15-16, *Kloeckner*, *supra* (No. 11-184)). An MSPB appeal that is both jurisdictionally and procedurally deficient may be routed to a different court for judicial review depending upon the precise ground the MSPB selects for its dismissal. But the judicial review would be review of the dismissal; the right to a trial de novo on the discrimination claims will depend on whether the employee has validly exhausted his administrative remedies. An employee would be disadvantaged by affirmatively seeking a procedural dismissal because Section 1614.302(b)'s reset provisions would be unavailable in that circumstance.

C. Petitioner Is Not Entitled To Disregard The MSPB's Decision And Insist On Treating His Case As Mixed For Purposes Of Judicial Review

Petitioner acknowledges (*e.g.*, Br. 21) that an employee alleging discrimination has no right to judicial review of an MSPB decision in district court unless he has been "affected by an action which [he] may appeal to the [Board]." 5 U.S.C. 7702(a)(1)(A). Petitioner contends (Br. 21), however, that so long as "the employee *claims* that he has been subjected to a personnel action sufficiently serious to warrant MSPB review," he may obtain district-court review of a contrary determination by the MSPB itself. That contention is unsound.

1. Petitioner's approach is at odds with the statutory text. Under the CSRA, an MSPB decision is reviewable in district court if the employee "*has been affected* by an action which the employee or applicant may appeal to the [Board]," 5 U.S.C. 7702(a)(1)(A) (emphasis added), and "*alleges* that a basis for the action was discrimination prohibited by" a listed anti-discrimination law, 5 U.S.C. 7702(a)(1)(B) (emphasis added). That language makes the employee's "alleg[ation]" sufficient as to discrimination but not as to appealability.

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Sebelius* v. *Cloer*, 133 S. Ct. 1886, 1894 (2013) (brackets omitted) (quoting *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997)). That presumption carries particular weight when, as here, the differing language appears in the "same sentence,"

Brown v. *Gardner*, 513 U.S. 115, 120 (1994); see *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (finding it "significant" that Congress used different language "two sentences" earlier).

Congress could have simplified the statute by placing the word "alleges" in a location where it would have applied to both criteria. It could, for example, have defined a mixed case as one in which an employee "alleges (A) an action which [he] may appeal * * * and (B) that a basis for the action was discrimination." The only discernible reason for the more complicated structure of the actual statutory text is to draw the very distinction—between the existence of an appealable action and the allegation of discrimination—that petitioner's interpretation elides. See, *e.g.*, *NLRB* v. *SW General, Inc.*, No. 15-1251 (Mar. 21, 2017), slip op. 10 (concluding that Congress did not intend interpretation that "it could easily have chosen clearer language" to implement).[7]

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[7] Petitioner does not substantially engage with the statutory text on this issue, and instead repeatedly cites *Kloeckner*'s statement that a "federal employee who claims that an agency action appealable to the MSPB violates an antidiscrimination statute listed in § 7702(a)(1) should seek judicial review in district court." Br. 22, 31-32 (emphasis omitted) (quoting 133 S. Ct. at 607). Any ambiguity in that statement is eliminated by the remainder of the Court's opinion, which adheres to the distinction drawn in the statutory text. See, *e.g.*, *Kloeckner*, 133 S. Ct. at 604 (defining relevant cases as "those appealable to the MSPB and alleging discrimination"); see also, *e.g.*, *id.* at 602 (explaining that a "removal from employment is appealable to the MSPB, * * * and Kloeckner believed the agency's action was discriminatory; she therefore now had a mixed case"). Petitioner's reliance (Br. 22) on potentially ambiguous language in the regulations is similarly misplaced: like the Court's opinion in *Kloeckner*, the regulations generally track the statutory language and do not attempt to redefine it. See, *e.g.*,

2. As petitioner explains (Br. 21-23), it is necessary as a practical matter to credit an employee's allegation of appealability at the "outset of a case," before the MSPB has had an opportunity to make a more definitive determination. Br. 22 (quoting *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 537 (1995)). Doing so allows, for example, for compliance with any time limits that would apply if the employee's characterization of the case turns out to be correct. See Br. 26-27.[8] In the very case on which petitioner relies, however, this Court recognized that allegations necessary to establish jurisdiction may be contested and ultimately rejected by the tribunal. *Jerome B. Grubart, Inc.*, 513 U.S. at 537-538. And when those allegations are found to be legally or factually infirm, they are no longer controlling. See, *e.g.*, *Arbaugh* v. *Y & H Corp.*, 546 U.S. 500, 513-514 (2006) (explaining that district courts should dismiss for lack of subject-matter jurisdiction in such circumstances); 5B Charles Alan Wright et al., *Federal Practice and Procedure* § 1350 (3d ed. 2004) (same).

For purposes of the question presented here, petitioner identifies no sound reason why an employee's allegation that a particular personnel action is appealable to the Board should supersede the MSPB's own contrary determination. Under the rule that petition-

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29 C.F.R. 1614.302(a)(1) ("A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or genetic information related to or stemming from an action *that can be appealed* to the [Board].") (emphasis added).

[8] The 120-day limit for the MSPB's resolution of a mixed case, 5 U.S.C. 7702(a)(1), "is only a timing requirement" and is not determinative of the proper forum for judicial review. *Kloeckner*, 133 S. Ct. at 606.

er advocates, although a suspension is typically appealable only if it exceeds 14 days, see 5 U.S.C. 7512(2), an employee's assertion that his one-day suspension actually lasted for a month would have dispositive weight. Petitioner appears to suggest that such a result could be avoided by requiring the employee's assertion of appealability to be "nonfrivolous," Br. 7, 22 (citations omitted), but that suggestion undercuts petitioner's entire argument. The statutory text provides no basis for distinguishing between MSPB determinations of nonappealability based on the strength of the employee's unsuccessful arguments. If an MSPB decision rejecting an employee's frivolous appealability arguments controls the choice of forum for judicial review, then an MSPB decision rejecting an employee's nonfrivolous (but mistaken) appealability arguments should as well.[9]

3. Petitioner alternatively contends (Br. 21) that judicial review of the MSPB's jurisdictional dismissal of his appeal belongs in district court "[b]ecause the MSPB indisputably had—and exercised—jurisdiction over this case." That contention, which concerns the

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[9] Petitioner may alternatively be suggesting that determinations of frivolousness would be made not by the MSPB, but instead by a district court. That is, he may be suggesting that an employee who claims to have a mixed case can seek review in district court, and that the district court can then transfer to the Federal Circuit any case in which it deems that claim to be frivolous. That cannot be what Congress intended. It is highly unlikely that the Federal Circuit would find the underlying action to be appealable in a case in which a district court has determined that an employee's appealability argument is frivolous. And Congress would not have designed a system in which the only MSPB nonappealability determinations in discrimination cases that are routed to the Federal Circuit are the ones *least* in need of judicial review.

correctness of the MSPB's decision, is irrelevant to the question presented, which concerns the *forum for judicial review* of that decision. It is also mistaken.

First, petitioner is wrong in suggesting (Br. 21) that the MSPB "exercise[s] jurisdiction" when it dismisses a case for a lack of jurisdiction. Not every action that an employee *tries* to appeal to the MSPB is "an action which [he] *may* appeal to the [MSPB]," 5 U.S.C. 7702(a)(1)(A) (emphasis added). An agency, like a court, "has jurisdiction to determine its own jurisdiction," *United States* v. *Ruiz*, 536 U.S. 622, 628 (2002). See, *e.g.*, *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 49 (1938) (recognizing that, although agency "ha[d] jurisdiction only if the complaint concerns interstate or foreign commerce," agency was proper body to make initial jurisdictional determination); see also *Garcia*, 437 F.3d at 1331. "Unless the [agency] finds" that it has jurisdiction, the matter "must be dismissed." *Myers*, 303 U.S. at 49. Although some preliminary proceedings may be necessary to decide the jurisdictional question, the issuance of a jurisdictional dismissal means that the Board "never acquired jurisdiction." *Garcia*, 437 F.3d at 1331 (quoting *Cruz*, 934 F.2d at 1248). An MSPB decision that an employee *may not* appeal the underlying action thus does not amount to a decision that the employee "may appeal" the underlying action, 5 U.S.C. 7702(a)(1)(A).

Petitioner is likewise wrong in advancing the case-specific argument (Br. 23) that the MSPB exercised jurisdiction over his case by effectively deciding the merits of his claims in the course of determining that it lacked jurisdiction to consider them. In the context of an allegedly involuntary separation, "involuntari-

ness and discrimination" are "distinct issues" because "[c]oercion can be found without proof that the improper conduct was the product of discrimination, and discrimination can be found without proof that the discriminatory conduct was so serious as to compel the employee to resign." *Conforto*, 713 F.3d at 1120 (citing *Garcia*, 437 F.3d at 1341). In any event, to the extent that the particular appealability issue in this case (whether the underlying actions were voluntary) overlaps to some degree with the merits issue (whether the underlying actions were lawful), "[t]he necessity of touching aspects of the merits in order to resolve preliminary matters, *e.g.*, jurisdiction and venue, is a familiar feature of litigation," *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 351-352 (2011). It does not make the MSPB's jurisdictional determination in this case any less jurisdictional, or the underlying action any more appealable.

Petitioner also contends (Br. 27) that "on the facts of this case * * * there can be no question that [he] was subjected to a personnel action (a thirty-day suspension) sufficiently serious to trigger the Board's jurisdiction." That argument ignores the established rule that a suspension an employee accepts in settlement of a proposed harsher penalty, see Pet. App. 21a, "is normally considered a voluntary action over which the [B]oard has no jurisdiction," *Mays*, 995 F.2d at 1058. The MSPB accordingly determined that petitioner's suspension, like his retirement, could not be appealed to the Board. See Pet. App. 51a ("Because the parties entered into a settlement agreement and [petitioner] chose to settle the matter by agreeing to a lesser discipline and retirement, those courses of action are presumptively voluntary and therefore

divest the Board of jurisdiction over the underlying matter.").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 1204(a) provides:

Powers and functions of the Merit Systems Protection Board

(a) The Merit Systems Protection Board shall—

(1) hear, adjudicate, or provide for the hearing or adjudication, of all matters within the jurisdiction of the Board under this title, chapter 43 of title 38, or any other law, rule, or regulation, and, subject to otherwise applicable provisions of law, take final action on any such matter;

(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order;

(3) conduct, from time to time, special studies relating to the civil service and to other merit systems in the executive branch, and report to the President and to the Congress as to whether the public interest in a civil service free of prohibited personnel practices is being adequately protected; and

(4) review, as provided in subsection (f), rules and regulations of the Office of Personnel Management.

2. 5 U.S.C. 7511 provides:

Definitions; application

(a) For the purpose of this subchapter—

(1) "employee" means—

(A) an individual in the competitive service—

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less;

(B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions—

(i) in an Executive agency; or

(ii) in the United States Postal Service or Postal Regulatory Commission; and

(C) an individual in the excepted service (other than a preference eligible)—

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less;

(2) "suspension" has the same meaning as set forth in section 7501(2) of this title;

(3) "grade" means a level of classification under a position classification system;

(4) "pay" means the rate of basic pay fixed by law or administrative action for the position held by an employee; and

(5) "furlough" means the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons.

(b) This subchapter does not apply to an employee—

(1) whose appointment is made by and with the advice and consent of the Senate;

(2) whose position has been determined to be of a confidential, policy-determining, policymaking or policy-advocating character by—

(A) the President for a position that the President has excepted from the competitive service;

(B) the Office of Personnel Management for a position that the Office has excepted from the competitive service; or

(C) the President or the head of an agency for a position excepted from the competitive service by statute;

(3) whose appointment is made by the President;

(4) who is receiving an annuity from the Civil Service Retirement and Disability Fund, or the Foreign Service Retirement and Disability Fund, based on the service of such employee;

(5) who is described in section 8337(h)(1), relating to technicians in the National Guard;

(6) who is a member of the Foreign Service, as described in section 103 of the Foreign Service Act of 1980;

(7) whose position is within the Central Intelligence Agency or the Government Accountability Office;

(8) whose position is within the United States Postal Service, the Postal Regulatory Commission, the Panama Canal Commission, the Tennessee Valley Authority, the Federal Bureau of Investigation, an intelligence component of the Department of Defense (as defined in section 1614 of title 10), or an intelligence activity of a military department covered under subchapter I of chapter 83 of title 10, unless subsection (a)(1)(B) of this section or section 1005(a) of title 39 is the basis for this subchapter's applicability;

(9) who is described in section 5102(c)(11) of this title; or

(10) who holds a position within the Veterans Health Administration which has been excluded from the competitive service by or under a provision of title 38, unless such employee was appointed to such position under section 7401(3) of such title.

(c) The Office may provide for the application of this subchapter to any position or group of positions excepted from the competitive service by regulation of the Office which is not otherwise covered by this subchapter.

3. 5 U.S.C. 7512 provides:

Actions covered

This subchapter applies to—

(1) a removal;

(2) a suspension for more than 14 days;

(3) a reduction in grade;

(4) a reduction in pay; and

(5) a furlough of 30 days or less;

but does not apply to—

(A) a suspension or removal under section 7532 of this title,

(B) a reduction-in-force action under section 3502 of this title,

(C) the reduction in grade of a supervisor or manager who has not completed the probationary period under section 3321(a)(2) of this title if such reduction is to the grade held immediately before becoming such a supervisor or manager,

(D) a reduction in grade or removal under section 4303 of this title, or

(E) an action initiated under section 1215 or 7521 of this title.

4. 5 U.S.C. 7513 provides:

Cause and procedure

(a) Under regulations prescribed by the Office of Personnel Management, an agency may take an action covered by this subchapter against an employee only for such cause as will promote the efficiency of the service.

(b) An employee against whom an action is proposed is entitled to—

(1) at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative; and

(4) a written decision and the specific reasons therefor at the earliest practicable date.

(c) An agency may provide, by regulation, for a hearing which may be in lieu of or in addition to the opportunity to answer provided under subsection (b)(2) of this section.

(d) An employee against whom an action is taken under this section is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title.

(e) Copies of the notice of proposed action, the answer of the employee when written, a summary thereof when made orally, the notice of decision and reasons therefor, and any order effecting an action covered by this subchapter, together with any supporting material, shall be maintained by the agency and shall be furnished to the Board upon its request and to the employee affected upon the employee's request.

5. 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, ad-

ministrative 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)(ll) 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.

6. 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 subsec-

tion, 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 respect 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 Com-

mission 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.

7. 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)(A) Except as provided in subparagraph (B) and 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 shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

(B) During the 2-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, a petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. Notwithstanding any other

provision of law, any petition for review shall be filed within 60 days after the Board issues 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)(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the

Director of the Office of Personnel Management. The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues 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 the discretion of the Director, 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.

(2) During the 2-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues 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

or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, 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.

8. 29 U.S.C. 633a provides in pertinent part:

Nondiscrimination on account of age in Federal Government employment

* * * * *

(c) Civil actions; jurisdiction; relief

Any person aggrieved may bring a civil action in any Federal district court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter.

(d) Notice to Commission; time of notice; Commission notification of prospective defendants; Commission elimination of unlawful practices

When the individual has not filed a complaint concerning age discrimination with the Commission, no

civil action may be commenced by any individual under this section until the individual has given the Commission not less than thirty days' notice of an intent to file such action. Such notice shall be filed within one hundred and eighty days after the alleged unlawful practice occurred. Upon receiving a notice of intent to sue, the Commission shall promptly notify all persons named therein as prospective defendants in the action and take any appropriate action to assure the elimination of any unlawful practice.

* * * * *

9. 29 U.S.C. 794a(a)(1) provides:

Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) (and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

10. 42 U.S.C. 2000e-5(f) provides:

Enforcement provisions

(f) Civil action by Commission, Attorney General, or person aggrieved; preconditions; procedure; appointment of attorney; payment of fees, costs, or security; intervention; stay of Federal proceedings; action for appropriate temporary or preliminary relief pending final disposition of charge; jurisdiction and venue of United States courts; designation of judge to hear and determine case; assignment of case for hearing; expedition of case; appointment of master

(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section, is dismissed by the Commission, or if within

one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(4) It shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

(5) It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.

11. 42 U.S.C. 2000e-16(c) provides:

Employment by Federal Government

(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.

12. 5 C.F.R. 1201.56 provides in pertinent part:

Burden and degree of proof.

* * * * *

(b) *Burden and degree of proof—*

* * * * *

(2) *Appellant.* (i) The appellant has the burden of proof, by a preponderance of the evidence (as defined in § 1201.4(q)), with respect to:

(A) Issues of jurisdiction, except for cases in which the appellant asserts a violation of his right to reemployment following military duty under 38 U.S.C. 4312-4314;

* * * * *

13. 29 C.F.R. 1614.302 provides:

Mixed case complaints.

(a) *Definitions*—(1) *Mixed case complaint.* A mixed case complaint is a complaint of employment discrimination filed with a federal agency based on race, color, religion, sex, national origin, age, disability, or genetic information related to or stemming from an action that can be appealed to the Merit Systems Protection Board (MSPB). The complaint may contain only an allegation of employment discrimination or it may contain additional allegations that the MSPB has jurisdiction to address.

(2) *Mixed case appeals.* A mixed case appeal is an appeal filed with the MSPB that alleges that an appealable agency action was effected, in whole or in part, because of discrimination on the basis of race, color, religion, sex, national origin, disability, age, or genetic information.

(b) *Election.* An aggrieved person may initially file a mixed case complaint with an agency pursuant to this part or an appeal on the same matter with the MSPB pursuant to 5 CFR 1201.151, but not both. An agency shall inform every employee who is the subject of an action that is appealable to the MSPB and who has either orally or in writing raised the issue of discrimination during the processing of the action of the right to file either a mixed case complaint with the agency or to file a mixed case appeal with the MSPB. The person shall be advised that he or she may not initially file both a mixed case complaint and an appeal on the same matter and that whichever is filed first shall be considered an election to proceed in that forum. If a person files a mixed case appeal with the MSPB instead of a

mixed case complaint and the MSPB dismisses the appeal for jurisdictional reasons, the agency shall promptly notify the individual in writing of the right to contact an EEO counselor within 45 days of receipt of this notice and to file an EEO complaint, subject to § 1614.107. The date on which the person filed his or her appeal with MSPB shall be deemed to be the date of initial contact with the counselor. If 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 under § 1614.108(f) giving the individual the right to elect between a hearing before an administrative judge and an immediate final decision.

(c) *Dismissal.* (1) An agency may dismiss a mixed case complaint for the reasons contained in, and under the conditions prescribed in, § 1614.107.

(2) An agency decision to dismiss a mixed case complaint on the basis of the complainant's prior election of the MSPB procedures shall be made as follows:

(i) Where neither the agency nor the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, it shall dismiss the mixed case complaint pursuant to § 1614.107(a)(4) and shall advise the complainant that he or she must bring the allegations of discrimination contained in the rejected complaint to the attention of the MSPB, pursuant to 5 CFR 1201.155. The dismissal of such a complaint shall advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. A dismissal of a mixed case complaint is not appealable to the Commission except

where it is alleged that § 1614.107(a)(4) has been applied to a non-mixed case matter.

(ii) Where the agency or the MSPB administrative judge questions the MSPB's jurisdiction over the appeal on the same matter, the agency shall hold the mixed case complaint in abeyance until the MSPB's administrative judge rules on the jurisdictional issue, notify the complainant that it is doing so, and instruct him or her to bring the allegation of discrimination to the attention of the MSPB. During this period of time, all time limitations for processing or filing under this part will be tolled. An agency decision to hold a mixed case complaint in abeyance is not appealable to EEOC. If the MSPB's administrative judge finds that MSPB has jurisdiction over the matter, the agency shall dismiss the mixed case complaint pursuant to § 1614.107(a)(4), and advise the complainant of the right to petition the EEOC to review the MSPB's final decision on the discrimination issue. If the MSPB's administrative judge finds that MSPB does not have jurisdiction over the matter, the agency shall recommence processing of the mixed case complaint as a non-mixed case EEO complaint.

(d) *Procedures for agency processing of mixed case complaints.* When a complainant elects to proceed initially under this part rather than with the MSPB, the procedures set forth in subpart A shall govern the processing of the mixed case complaint with the following exceptions:

(1) At the time the agency advises a complainant of the acceptance of a mixed case complaint, it shall also advise the complainant that:

(i) If a final decision is not issued within 120 days of the date of filing of the mixed case complaint, the complainant may appeal the matter to the MSPB at any time thereafter as specified at 5 CFR 1201.154(b)(2) or may file a civil action as specified at § 1614.310(g), but not both; and

(ii) If the complainant is dissatisfied with the agency's final decision on the mixed case complaint, the complainant may appeal the matter to the MSPB (not EEOC) within 30 days of receipt of the agency's final decision;

(2) Upon completion of the investigation, the notice provided the complainant in accordance with § 1614.108(f) will advise the complainant that a final decision will be issued within 45 days without a hearing; and

(3) At the time that the agency issues its final decision on a mixed case complaint, the agency shall advise the complainant of the right to appeal the matter to the MSPB (not EEOC) within 30 days of receipt and of the right to file a civil action as provided at § 1614.310(a).