1 IN THE SUPREME COURT OF THE UNITED STATES

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3 CAROLYN M. KLOECKNER, :

4 Petitioner : No. 11-184

5 v. :

6 HILDA L. SOLIS, SECRETARY OF LABOR:

7 - - - - - - - - - - - - - - - - - - x

8 Washington, D.C.

9 Tuesday, October 2, 2012

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 10:02 a.m.

14 APPEARANCES:

15 ERIC SCHNAPPER, ESQ., Seattle, Washington; on behalf of

16 Petitioner.

17 SARAH E. HARRINGTON, ESQ., Assistant to the Solicitor

18 General, Department of Justice, Washington, D.C.;

19 on behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:02 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument

4 first this morning in Case 11-184, Kloeckner v. Solis.

5 Mr. Schnapper.

6 ORAL ARGUMENT OF ERIC SCHNAPPER

7 ON BEHALF OF THE PETITIONER

8 MR. SCHNAPPER: Mr. Chief Justice, and may

9 it please the Court:

10 The first sentence of Section 7703(b)(2)

11 provides that district courts have jurisdiction over all

12 mixed cases, and that provision is largely dispositive

13 here.

14 The second section of 7703(b)(2) on which

15 the Government relies is a statute of limitations, and

16 it doesn't limit the jurisdiction of Federal courts.

17 That subsection is set out at pages 16a to

18 17a of the Government's brief. The first sentence

19 provides that for a described category of cases, they

20 are to be, quote, "filed under one of the listed Federal

21 antidiscrimination statutes."

22 As this Court pointed out in Elgin, all of

23 those are statutes which authorize jurisdiction

24 in claims in district courts. Indeed, in Title VII and

25 the ADEA, that is the only Federal court which is

1 authorized to hear the cases.

2 JUSTICE GINSBURG: Mr. Schnapper, could you

3 clarify what the district court, as you see it, does?

4 Does it deal only with the discrimination claim, or does

5 it deal with the MSPB's procedural ruling?

6 MR. SCHNAPPER: With regard to the -- when

7 the case gets to district court, there may be two

8 substantive claims, a discrimination claim and a CSRA

9 claim. Your question, I take it, is about the former.

10 Our view is that the claim is filed and

11 pled, as indeed it was pled in this case, as a

12 discrimination case; in this case, under several

13 different statutes. And the complaint here reads very

14 much like an ordinary discrimination complaint.

15 The Government may raise the -- that sort of

16 procedural issue as an affirmative defense, and it would

17 be free to do so here. And that -- that happens on a

18 number of occasions.

19 For example, if there were a case in which

20 the Plaintiff had not, as required by the regulations,

21 appealed to the MSPB within 30 days of the -- of receipt

22 of the agency decision, the Government could move to

23 dismiss that claim on what the lower courts call

24 exhaustion grounds. And the lower courts have

25 repeatedly sustained those motions --

1 CHIEF JUSTICE ROBERTS: Mr. Schnapper --
2 MR. SCHNAPPER: -- but that's a
3 determinative defense.
4 CHIEF JUSTICE ROBERTS: But the critical
5 point, I gather, is what standard of review the district
6 court will apply to that exhaustion question, or the
7 bottom question, right?
8 I assume you think that the standard review
9 in the district court is going to be more favorable to
10 your client than the standard -- the arbitrary and
11 capricious standard that would be applicable in the
12 Federal circuit?
13 I guess --
14 MR. SCHNAPPER: When it's come up,
15 Your Honor, it has generally been a question of law,
16 like whether the 30-day rule had applied. If you had
17 something that was -- if it were a factual issue, our
18 contention is then those Section 7703(c) factual issues
19 have to be decided de novo.
20 JUSTICE GINSBURG: Why don't we take this --
21 this very case, where the MSPB said that -- that the
22 claim was time barred, so the Government would raise it
23 as an affirmative defense.
24 MR. SCHNAPPER: And the first question would
25 be whether it's an affirmative defense at all, and our

1 position would be that it is not. Not everything that
2 could go awry in the internal procedure is an
3 affirmative defense.
4 One of the central principles of the
5 1972 amendments to Title VII was to create an exhaustion
6 regime which is precise, simple and short. And if --
7 JUSTICE SOTOMAYOR: Counselor, can I back
8 you up a minute to join the two questions that my
9 colleague posed to you?
10 Let's assume there's a merits-based decision
11 on the CSRA and one on the discrimination. In the
12 normal course, assuming you are not barred by being
13 untimely, you could go to the district court, and the
14 district court presumably would have jurisdiction, if
15 one is a discrimination-based decision, to decide both
16 questions.
17 What's the standard of review that a court
18 would apply to each of those claims independently or
19 together? I mean --
20 MR. SCHNAPPER: They're there --
21 JUSTICE SOTOMAYOR: -- that that's --
22 MR. SCHNAPPER: -- it's -- yeah, I totally
23 understand the question.
24 JUSTICE SOTOMAYOR: We can then fight about
25 whether the factual issue regarding the timeliness and

1 exhaustion should be subject to one or the other
2 standard of review, but what are the standards of
3 review?
4 MR. SCHNAPPER: They -- they are different.
5 JUSTICE SOTOMAYOR: All right.
6 MR. SCHNAPPER: The -- the discrimination
7 claim is dealt with de novo. The intent of Congress was
8 that it would generally be treated like a private
9 discrimination claim.
10 However, the CSRA claim is dealt with under
11 the same standard that would apply in the Federal
12 circuit. And that's --
13 JUSTICE ALITO: Well, could you tell me
14 what --
15 MR. SCHNAPPER: -- well established.
16 JUSTICE ALITO: I'm sorry. I didn't mean to
17 interrupt you.
18 MR. SCHNAPPER: That's what the lower courts
19 have been doing. And we don't -- we think that's
20 correct.
21 JUSTICE SCALIA: Could you finish your prior
22 answer? You -- you started to say --
23 MR. SCHNAPPER: I doubt it.
24 JUSTICE SCALIA: -- you started to say that
25 the Civil Service Reform Act made some fundamental

1 change?

2 MR. SCHNAPPER: No, Your Honor. I was

3 talking about the amendments to the 19 -- to Title VII

4 in 1972.

5 JUSTICE SCALIA: Yes.

6 MR. SCHNAPPER: Prior to that, courts were

7 applying the -- judicially fashioned exhaustion

8 requirements. And the -- Congress made a decision to

9 replace that.

10 As this Court noted in Chandler and in Brown

11 v. GSA, Congress concluded, I think correctly, and the

12 Court's opinion suggests that, that the steps necessary

13 to exhaust were not clear.

14 So the regime established by Section 717 of

15 Title VII, which was adopted in 1972, sets up an

16 exhaustion requirement which is clear, simple and

17 limited in time. It requires the plaintiff to file a

18 complaint, wait at that point 180 days, and at that

19 point, the plaintiff was done and could go to district

20 court.

21 Plaintiff also had the option at that point

22 of going to the Civil Service Commission, waiting

23 180 days. But as long as a timely complaint was filed,

24 that was all that was required of the plaintiff. And

25 that was a fundamental change in the way this had been

1 dealt with.

2 The ADEA regime, which was adopted in 1974,

3 was actually even simpler, although it's been changed a

4 little bit since. The plaintiff to exhaust had to do

5 only one of two things, either file a complaint with the

6 EEOC, period, or give the EEOC notice that the plaintiff

7 was going to sue and wait 30 days.

8 As the Government pointed out in its brief

9 in Stevens, the exhaustion regime under the ADEA hadn't

10 -- didn't in any way address what happened after the

11 complaint was filed. It simply said, file the

12 complaint.

13 That is the fundamental principle that's

14 animated the Title VII exhaustion requirement in Title

15 VII and the ADEA, and we don't think the CSRA was

16 written to change that.

17 Indeed, to the contrary, the CSRA has -- it

18 doesn't do so expressly -- it incorporates by reference

19 those statutes; it expressly reiterates the de novo

20 exhaustion requirement. It actually shortened the

21 period of time that plaintiff has to wait for these

22 cases.

23 JUSTICE GINSBURG: That's -- you're talking

24 about the discrimination claim. In your view, could the

25 plaintiffs now in the district court say, I'll forget

1 the CSRA remedy; district court, you have authority to
2 hear the Title VII case, the ADEA case, and that's all I
3 need? And so I'm not -- I'm abandoning my CSRA.
4 MR. SCHNAPPER: Yes, Your Honor. Plaintiff
5 can do that.
6 JUSTICE GINSBURG: And then that would take
7 care of the whole thing you discussed before about the
8 affirmative defense and the Government. It would be the
9 plaintiff's choice, I want my Title VII case and that's
10 it.
11 MR. SCHNAPPER: No, Your Honor. The
12 affirmative defenses could still be raised. It's just
13 that the CSRA claim under Section 7703(c) would -- would
14 be abandoned. And that's --
15 JUSTICE ALITO: Well, what provision --
16 MR. SCHNAPPER: -- that's what happened
17 here. It's not uncommon.
18 The CSRA claim involves a right that is much
19 more valuable to the plaintiff in the administrative
20 process.
21 JUSTICE ALITO: What provision authorizes
22 the filing of anything other than a discrimination claim
23 in district court? I don't see it.
24 MR. SCHNAPPER: The statute says "Cases of
25 discrimination subject to" --

1 JUSTICE ALITO: "Cases of discrimination" --

2 MR. SCHNAPPER: "Cases of discrimination

3 subject to 7702." And 7702 --

4 JUSTICE ALITO: Yes. It says, "shall be

5 filed under Title VII."

6 So you are saying that a nondiscrimination

7 claim can be filed under Title VII?

8 MR. SCHNAPPER: No. The way the courts have

9 read this, and I think correctly, is this: If -- so

10 this is just one case. It's a little bit like

11 supplemental jurisdiction. So long as the plaintiff is

12 asserting a discrimination claim, the CSRA claim comes

13 along with it.

14 If the plaintiff were to abandon the

15 discrimination claim, then the case would have to go to

16 the Federal Circuit. That's the way the courts have

17 interpreted that.

18 JUSTICE ALITO: Well, I understand that a

19 lot of courts have read it that way. I find it

20 difficult to see how it fits in the statutory language.

21 And in particular, since the second sentence of

22 subsection (2) there has its own filing deadline, it

23 seems strange to have a district court review the

24 timeliness of the filing before the MSPB.

25 MR. SCHNAPPER: Well, the second point you

1 make is really separate from the first, because even if
2 only a discrimination claim is filed, the Government can
3 insert an affirmative defense, and one possible
4 affirmative defense which the Government has repeated
5 asserted successfully is that the appeal to the MSPB was
6 untimely. So that happens either way.
7 CHIEF JUSTICE ROBERTS: Even if you give up
8 your CSRA claim, they can assert that defense?
9 MR. SCHNAPPER: Yes. Yes. It's because --
10 because the discrimination statutes themselves have two
11 requirements. You have to have filed the complaint or
12 an appeal, depending on where you are in the process.
13 You have to wait a certain amount of time if you don't
14 have a decision.
15 The statutes themselves don't --
16 JUSTICE ALITO: I don't understand why
17 you're giving this up, and I don't see -- I also don't
18 see any provision that says that -- that specifies what
19 the standard of review in the district court is for a
20 nondiscrimination claim.
21 (C) sets out the standard of review in the
22 Federal Circuit for a nondiscrimination claim, but it
23 pointedly says nothing about the district court.
24 Doesn't that suggest that that claim doesn't go to the
25 district court?

1 MR. SCHNAPPER: Your Honor, that question,
2 of course, isn't here because we haven't asserted a CSRA
3 claim. And if you have doubts about it, I think I would
4 reserve that for another case. But, we think the -- the
5 courts have treated this as -- the statute doesn't say
6 claims of discrimination subject to 7702. It says
7 "cases of discrimination."
8 And if you look at section 7702, which is
9 set out at page 8(a) of the Government's brief, it
10 describes the cases involved as cases which contain
11 these two elements. They are treated as one case in the
12 administrative process. And it would be highly peculiar
13 for the Government -- for the statute to take one
14 administrative proceeding and then split it in half.
15 JUSTICE SCALIA: Suppose -- suppose the
16 Civil Service Reform Act had said nothing at all about
17 -- about suits under the Civil Rights Act, under the Age
18 Discrimination and Employment Act and so forth. What
19 would the situation be? Wouldn't you have a right to go
20 to district court?
21 MR. SCHNAPPER: Yes. Title VII and all the
22 statutes authorize that.
23 JUSTICE SCALIA: So, to prevent you from
24 going to district court under those statutes, you have
25 to find a repealer contained somewhere --

1 MR. SCHNAPPER: In that --

2 JUSTICE SCALIA: -- in the Civil Service

3 Reform Act, correct?

4 MR. SCHNAPPER: That's exactly right. And

5 we think this is a classic example of -- for application

6 of the rule that implied repeals are disfavored. This

7 -- this statute is quite precise when -- when it's

8 changing something, it's very specific. The second

9 section, section 7703(b)(2), begins with the words

10 "notwithstanding," because it is changing the statute of

11 limitations that would otherwise apply. It's changing

12 it from 90 days in Title VII to 30 days.

13 So when Congress wanted to change something,

14 it was very specific. But the whole thrust of this

15 statute is to leave in place, except where very

16 specifically it does otherwise, the regime that existed

17 under Title VII in the ADEA.

18 JUSTICE KAGAN: Could I make sure I

19 understand something that you said, Mr. Schnapper. When

20 you talk about the affirmative defenses that the

21 Government can raise, that -- those are exhaustion

22 defense under the applicable anti-discrimination

23 statute, right? It's whatever exhaustion requirements

24 Title VII sets out or whatever exhaustion requirements

25 the ADEA sets out; is that correct?

1 MR. SCHNAPPER: Not -- that's not entirely
2 correct, Your Honor. There are -- there are exhaustion
3 premises in the statute, but these statutes do not
4 contain a time period within which a charge or a
5 complaint must be filed with the agency, and they don't
6 contain a time period within which an appeal must be
7 taken. Those time periods are in the regulations.
8 The lower courts have taken the position
9 that those time periods also have to be complied with,
10 and we think that's correct.
11 In the case of --
12 JUSTICE KAGAN: Those time periods relevant
13 to the MSPB?
14 MR. SCHNAPPER: And there are also time
15 periods relevant to filing a -- complaint at the agency
16 level. It's an -- in the case of a private
17 discrimination claim, that time period is specified by
18 Title VII.
19 But Section 717 about Federal employees is
20 simply silent. Congress didn't deal with it. But it
21 did authorize the EEOC and the MSPB to write
22 regulations. They have both written regulations that --
23 with regard to the agency, it is the EEOC regulations
24 which set up the time period within which a complaint
25 must be filed. With regard to appeals to the MSPB, both

1 the EEOC and the MSPB have regulations which are the
2 same.
3 JUSTICE SCALIA: Well, why isn't that a
4 repealer of what would otherwise be the law under all
5 these civil rights statutes? Why isn't that a repealer
6 of what would otherwise be their right to go to district
7 court?
8 You are saying, no, you can't go to district
9 court because of these time limits, not even established
10 by statute, but, for Pete's sake, established by
11 regulation. You think that that's -- that's an
12 effective repealer of the right to go to district court?
13 MR. SCHNAPPER: We don't -- we think not,
14 Your Honor.
15 Again, this doesn't go to subject matter
16 jurisdiction, which is specified in the statute. The
17 statute creates a regime. It doesn't set up time
18 periods.
19 We think Congress -- the statute should be
20 read to -- to mean that the authority of the Government,
21 of the agencies to write regulations, includes
22 regulations setting up time periods. It's just
23 inconceivable that --
24 JUSTICE KAGAN: And would that --
25 MR. SCHNAPPER: -- Congress contemplated you

1 would have forever to do these things.

2 JUSTICE KAGAN: And would that put the

3 employee who has a mixed case in the same position as an

4 employee who has a straight anti-discrimination case?

5 MR. SCHNAPPER: Non-mixed case. Yes. Yes.

6 There are regulations governing both.

7 The non-mixed case claim would only be

8 governed by the EEOC regulation. The mixed case claim

9 is governed as well by the time limit in the MSPB

10 regulation, but that is the same as the time limit in

11 the EEOC regulation.

12 JUSTICE KENNEDY: I've probably led a

13 charmed life, but I've never heard of mixed case until

14 this matter came before us. And I was -- I suppose you

15 have to adopt the phrase, but the statute 7703 just say

16 "cases," "cases of discrimination," which is what this

17 is.

18 We don't usually think of cases that we call

19 a discrimination case based on whether or not it

20 contains other issues. It's a case.

21 MR. SCHNAPPER: Well, Your Honor, the -- you

22 have led a charmed life.

23 JUSTICE KENNEDY: I mean, I think that helps

24 you.

25 MR. SCHNAPPER: I'm not sure how that

1 affects it. The phrase mixed case is in the
2 regulations, both of the EEOC. It also was in currency
3 prior to 1978. When Congress was working on this
4 problem, it was already calling these kinds of cases
5 mixed cases.
6 And, of course, we haven't touched on this.
7 A mixed case is a case which involves -- has two
8 elements. First, it involves what's called, under the
9 Civil Service Reform Act, an appealable issue. That is
10 an issue which can be appealed to the MSPB, not --
11 JUSTICE ALITO: Can't an employee take a
12 mixed case appeal to the Federal circuit?
13 MR. SCHNAPPER: You could not take that case
14 to the Federal circuit without waiving your
15 antidiscrimination claim. That is what the -- that's
16 the way we read the law and that is the way the MSPB
17 reads the law. The MSPB regulation expressly provides
18 that if you want to go to the Federal circuit you must
19 waiver that right.
20 JUSTICE GINSBURG: Mr. Schnapper, can you
21 explain something about the MSPB's role? That is, once
22 you have a final decision from the agency, you could go
23 right to court. You don't -- on the discrimination
24 claim, right? You don't need to go to the MSPB. You
25 don't have to exhaust anything before the MSPB to get

1 your discrimination claim. So, how does the M -- the
2 possibility of going to the MSPB make the discrimination
3 claim any less ripe for judicial review than it would be
4 if you stopped at the agency level?
5 MR. SCHNAPPER: Well, it's our view that
6 once you appeal to the MSPB, and putting aside the
7 unusual situation of people who withdraw the appeal, you
8 then must wait, under the statute, 120 days or until you
9 have a decision. So you are ready, all set, and you
10 could go to court after the district court decision, but
11 if you appeal to the MSPB, you then have to wait until
12 120 days have passed or you have a decision.
13 JUSTICE GINSBURG: What are -- what are your
14 advantages? You are deciding -- you have the final
15 agency decision, you could go right to court on the
16 discrimination claim. What do you gain by invoking the
17 MSPB authority?
18 MR. SCHNAPPER: What you gain are the rights
19 in Section 7701(c), which are set out on page 3(a) of
20 the Government's brief. In the appeal to the MSPB with
21 regard to the Civil -- the CSRA claim, the burden is on
22 the Government to establish by a preponderance of the
23 evidence that its decision was correct. If you bypass
24 the MSPB and go to district court, then your claim is
25 only a claim under section 7703(c), which requires the

1 plaintiff to establish that there wasn't even
2 substantial evidence to support the decision. So,
3 plaintiff --
4 CHIEF JUSTICE ROBERTS: Suppose -- I'm
5 sorry.
6 MR. SCHNAPPER: The CSRA claim is much more
7 valuable at the MSPB. In terms of discrimination claim,
8 in the real world that's probably not why people go to
9 the MSPB. The MSPB, according to the only study I've
10 been able to find, out of 2,000 mixed cases the MSPB
11 actually only found discrimination in four. But a much
12 higher percentage of CSRA claims are successful there.
13 So that's why people go there.
14 CHIEF JUSTICE ROBERTS: So I suppose if you
15 say, I was fired on the basis of race, and the agency
16 says, no, you were fired because you were incompetent,
17 you could take the incompetence claim to the MSPB, and
18 if you win, saying, no, you were perfectly competent,
19 they shouldn't have fired you, you get that relief and
20 you don't need to proceed with the discrimination --
21 MR. SCHNAPPER: Sure. And that's why people
22 go there. That's why people go there.
23 JUSTICE SOTOMAYOR: You argued that you were
24 exceeding the dismissals on the basis of jurisdiction
25 should go to the Federal circuit, but that you were only

1 invoking the exception that procedural dismissals should
2 be permitted to go to the district court or authorized
3 to go. Are you still standing by that distinction?
4 MR. SCHNAPPER: No, no, that was not our
5 distinction. That was the distinction that I think in
6 the Tenth Circuit --
7 JUSTICE SOTOMAYOR: Yes, but when you argued
8 it below you argued the exception, you didn't argue the
9 jurisdictional rule. Are you abandoning that
10 distinction?
11 MR. SCHNAPPER: Yes. Our view is that all
12 mixed cases go to the district court. That is the view
13 of the MSPB and of the EEOC and the regulations --
14 JUSTICE SOTOMAYOR: But it's not the view of
15 the circuit courts, even the courts --
16 MR. SCHNAPPER: It's not the view of the
17 circuit courts.
18 JUSTICE SOTOMAYOR: Even the courts whose
19 exception you --
20 MR. SCHNAPPER: That is not their view and
21 we think --
22 JUSTICE SOTOMAYOR: Every circuit court
23 unanimously holds that jurisdictional rule dismissals
24 should go only to the Federal circuit.
25 MR. SCHNAPPER: Right. We think that that's

1 wrong and --

2 JUSTICE SOTOMAYOR: And you --

3 JUSTICE KAGAN: I'm sorry -- go ahead. I'm

4 sorry.

5 JUSTICE SOTOMAYOR: Should you be arguing

6 this before us?

7 MR. SCHNAPPER: Well, you don't --

8 JUSTICE SOTOMAYOR: Is this a distinction

9 you should abandon here?

10 MR. SCHNAPPER: No, Your Honor.

11 JUSTICE SOTOMAYOR: Or at least ask us not

12 to address?

13 MR. SCHNAPPER: You don't need to address

14 it, but we think those decisions are wrong. The

15 statutory arguments that we're making treat -- draw no

16 distinction between procedural and jurisdictional --

17 JUSTICE SOTOMAYOR: Actually the 7512

18 argument has more legs, I think. The point is that

19 you're only permitted to go to district court on issues

20 of discrimination that are within the Board's

21 jurisdiction. So if --

22 MR. SCHNAPPER: It's somewhat stronger, but

23 there are a couple of reasons why we think this

24 distinction doesn't make sense. The first one is if

25 jurisdictional issues went to the Federal circuit you

1 would have an -- a really bizarre problem of -- of
2 splitting the claim, and here's why: If, under the EEOC
3 regulations which the Government has referred to, if the
4 MSPB holds that it didn't have jurisdiction in a mixed
5 case, the discrimination claim doesn't die. Under the
6 regulations it goes back to the agency, which then
7 processes it as a non-mixed case. But the plaintiff is
8 still free to challenge the decision of the MSPB that it
9 had no jurisdiction. In the Government's view, that
10 would go to the Federal circuit. So the case would then
11 be pending in two different places. And if the
12 plaintiff came to the end of the line in the -- at the
13 agency level and lost, the plaintiff clearly would go to
14 district court. So the case would then be pending in
15 two different places. On our view, everything goes to
16 the district court.
17 JUSTICE KAGAN: Mr. Schnapper, if I disagree
18 with everything that you just said, I can still rule for
19 you in this case, right?
20 MR. SCHNAPPER: You can, and you don't need
21 to address what I just said.
22 JUSTICE KAGAN: Because there does seem to
23 be a good deal of difference between the question, what
24 happens to something that is clearly a mixed case, and
25 alternatively, the question of whether something is a

1 mixed case; that is, whether it includes a claim about
2 an action which the employee may appeal to the MSPB.
3 And one could think that questions about what can be
4 appealed to the MSPB ought to go to the Federal circuit
5 under this statutory language in a way that questions
6 that are involved in this case do not.
7 MR. SCHNAPPER: Your Honor, you don't need
8 to rule for that -- me on that, but if I could identify
9 another problem before my time runs out. There is --
10 and it comes up in two ways. Sometimes whether a case
11 is appealable depends on whether there was
12 discrimination. There is a district court decision in
13 Barrow v. Louisiana in which that problem arose. I will
14 spare you --
15 JUSTICE KAGAN: Well, that just makes the
16 next case very complicated but it has nothing to do with
17 this case; is that correct?
18 MR. SCHNAPPER: Right. But that's why I
19 think if you have doubts about it, you should stay away
20 from it because that's very bad. In addition, in a
21 constructive discharge case based on sexual harassment,
22 whether there's jurisdiction, the MSPB in deciding
23 whether there is jurisdiction has to decide whether
24 there was sexual harassment. It seems to me you would
25 not want that going to the Federal circuit.

1 I would like to reserve the balance of my
2 time.
3 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
4 Ms. Harrington.
5 ORAL ARGUMENT OF SARAH E. HARRINGTON
6 ON BEHALF OF THE PETITIONER
7 MS. HARRINGTON: Mr. Chief Justice, and may
8 it please the Court:
9 I would like to start if I could with
10 Justice Scalia's -- I'm sorry.
11 JUSTICE SOTOMAYOR: Are you abandoning the
12 jurisdictional procedural distinction as you did in your
13 brief? Are you telling us to rule either completely for
14 you or against you?
15 MS. HARRINGTON: That's always been our
16 position, Justice Sotomayor. Our position has
17 consistently been that the only decisions of the MSPB
18 that can get review in a district court are decisions on
19 the issue of discrimination.
20 JUSTICE SOTOMAYOR: So you are prepared on
21 behalf of the Government to say that if we rule that
22 procedural dismissals can go to the district court, then
23 you -- then the Government will concede that
24 jurisdictional dismissal should as well?
25 MS. HARRINGTON: No, Your Honor.

1 JUSTICE SOTOMAYOR: Under 7512.

2 MS. HARRINGTON: Again, we don't think any

3 of them should and --

4 JUSTICE SOTOMAYOR: We don't have to reach

5 that question in this case, but your brief seemed to

6 make the argument that there was no basis for the

7 distinction between procedural and jurisdictional.

8 MS. HARRINGTON: I agree that there is no

9 basis for the distinction and part of that is because,

10 as my friend Mr. Schnapper pointed out, there is an EEOC

11 regulation providing that when the board dismisses a

12 case on jurisdictional grounds the case can go back to

13 the agency, the agency can essentially reissue its final

14 decision, and then the plaintiff goes in to district

15 court. So if the whole point is to find a way for an

16 employee to get into district court on her

17 discrimination claim, we've already had that taken care

18 of in jurisdictional dismissal cases. So the action

19 really here is with procedural dismissals.

20 And if -- I would like to start with

21 Justice Scalia's line of questions about whether there

22 has been a repeal of the right to go to district court

23 on discrimination claims. And I think our starting

24 point is in the Federal Courts Improvement Act which is

25 28 USC 1295(a)(9), which provides that review of MSPB

1 decisions is exclusively in the Federal circuit. This
2 court is recently -- most recently in Elgin, but in
3 various cases over of the last 25 years has seen that
4 that is an exclusive grant of judicial review of
5 jurisdiction in the Federal circuit over MSPB final
6 decisions, and as the Court pointed out in Elgin the
7 only exception to that is for the subset of final board
8 decisions that are covered in 7703(b)(2). And if you
9 look at 7703(b)(2) the only reference to a final board
10 decision is at the top of page 17(a) of the Government's
11 brief is to judicially reviewable actions under section
12 7702. Now we put a lot of emphasis on the phrase
13 judicially reviewable action and the reason we do that
14 is because throughout the entire U.S. Code that phrase
15 is only ever used either in or in reference to section
16 7702.
17 CHIEF JUSTICE ROBERTS: Now, does that mean
18 that it is not a judicially reviewable action if it is
19 thrown out on a procedural ground.
20 MS. HARRINGTON: It means that it's not a
21 judicially reviewable action under 7702.
22 CHIEF JUSTICE ROBERTS: Why is that? I
23 mean, we think of a -- we review cases on procedural
24 objections all the time and we think of those as
25 judicially reviewable. It's -- it's a real stretch to

1 say simply because it says "judicially reviewable" it
2 means judicially reviewable on the merits.
3 MS. HARRINGTON: Well, in our view, again,
4 because it uses the phrase "judicially reviewable
5 action" under 7702 and that phrase "judicially
6 reviewable action" in the whole U.S. Code is only ever
7 used when you are talking about 7702, that -- in our
8 view that's the signal that that's a term of art in this
9 context.
10 So although dismissal on procedural grounds
11 is a board action subject to judicial review, in our
12 view it's not a judicially reviewable action under 7702.
13 And so you need to look at 7702 to see how --
14 CHIEF JUSTICE ROBERTS: Could you say that
15 again?
16 MS. HARRINGTON: Yes.
17 CHIEF JUSTICE ROBERTS: A little more
18 slowly.
19 MS. HARRINGTON: Yes. A procedural
20 dismissal by the board is a final board action that's
21 subject to judicial review in the Federal Circuit.
22 CHIEF JUSTICE ROBERTS: Okay. It's subject
23 to judicial review.
24 MS. HARRINGTON: Yes.
25 CHIEF JUSTICE ROBERTS: Now, the next --

1 MS. HARRINGTON: But it does not fall within
2 the term of art "judicially reviewable action" under
3 7702.
4 CHIEF JUSTICE ROBERTS: Okay. So I thought
5 that your argument in the brief reduced to the question
6 that an action subject to judicial review in one section
7 is not judicially reviewable in another. That's right?
8 MS. HARRINGTON: Say it again? I'm sorry?
9 (Laughter.)
10 MS. HARRINGTON: This is going to happen a
11 lot.
12 CHIEF JUSTICE ROBERTS: More slowly.
13 (Laughter.)
14 CHIEF JUSTICE ROBERTS: I thought -- I
15 thought I heard you to say, and this is what I
16 understood your brief to say, that an action that is
17 subject to judicial review is not judicially reviewable
18 under 7703(b)(2).
19 MS. HARRINGTON: That's right. It does not
20 fall within --
21 CHIEF JUSTICE ROBERTS: Okay.
22 MS. HARRINGTON: -- the exception to
23 exclusive --
24 CHIEF JUSTICE ROBERTS: It's a tough
25 argument.

1 MS. HARRINGTON: -- review.
2 It's a tough statute. In our view, our
3 argument is the best reading of the overall statute.
4 And again, because we think "judicially reviewable
5 action" under 7702 is sort of the linchpin phrase in
6 7703(b)(2), we want to look to 7702 to how the phrase
7 "judicially reviewable action" is used by Congress in
8 that statute, and the relevant pages here are page 8a
9 and 9a in the statutory appendix to the Government's
10 brief.
11 JUSTICE SOTOMAYOR: Can I ask you a couple
12 questions?
13 MS. HARRINGTON: Yes.
14 JUSTICE SOTOMAYOR: When the Federal Circuit
15 was created, this language preexisted its creation,
16 correct?
17 MS. HARRINGTON: Yes.
18 JUSTICE SOTOMAYOR: So could you tell me how
19 when Congress was writing 7702 it was creating the
20 system that you are advocating when it had no idea that
21 it would ever create the Federal Circuit?
22 MS. HARRINGTON: Well, I have two answers.
23 The first is that in the last 25 years in all the cases
24 where this Court has looked as section 7703, in Lindahl
25 and Fausto and most recently in Elgin, the Court has

1 interpreted the statute as it exists today, which as it
2 exists today directs review of board decisions to the
3 Federal Circuit.
4 But the second answer is, even for that
5 brief window after the CSRA was enacted before the
6 Federal Circuit was created, Congress still had taken
7 away jurisdiction from district courts over board
8 decisions and had directed them to the courts of
9 appeals. And this Court recognized in Fausto that that
10 -- Congress specifically had that intent when it enacted
11 the CSRA. It was tired of this concurrent jurisdiction
12 in all the district courts throughout the country over
13 Federal employment actions and it wanted to reduce a
14 layer of review and direct them to fewer courts. Now --
15 JUSTICE SOTOMAYOR: That still doesn't
16 answer my question, which is: Assuming there is no
17 Federal Circuit, I have to read the language that exists
18 in 7702 and 7703, and I see judicial review, appealable
19 judicial review, used not in the manner that you're
20 describing.
21 MS. HARRINGTON: I disagree, Your Honor. I
22 mean -- and there is nothing in 7702 or 7703 that would
23 indicate that Congress wanted, even in 1978 to have MSPB
24 final decisions reviewed in district court. And again,
25 we don't need to assume that the Federal Circuit doesn't

1 exist today because it does, and that's how this Court
2 has construed the statute for the last 25 years, ever
3 since the --
4 JUSTICE KAGAN: But, Ms. Harrington, go back
5 to the question that the Chief Justice asked you,
6 because the question was: Should we read "judicially
7 reviewable action" as something different from action
8 subject to judicial review, which is how you would
9 normally read that language, as something different from
10 just final agency action that you can take to a court.
11 Not saying which court, that you can just take to a
12 court.
13 And you're asking us -- you said it's a term
14 of art. So I guess the next question is: How do you
15 get the definition of the term of art that you say
16 exists in this statute?
17 MS. HARRINGTON: Well, you look at 7702, and
18 let me just say, even if you disagree with us that it's
19 a term of art, it's hard to disagree with the fact that
20 it has to be a judicially reviewable action under 7702.
21 That's in the text of 7703(b)(2).
22 JUSTICE KAGAN: Yes, it has to be an action
23 that -- you know, the MSPB is done and now you have a
24 certain number of days to take it to a court. So that's
25 the normal way you would read that language.

1 MS. HARRINGTON: But --

2 JUSTICE KAGAN: But you say no, it really,

3 you know, it includes some kinds of decisions and not

4 other kinds of decisions and the effect of that is that

5 it's really a switch as to which court you get to take

6 the action to, which is a very counterintuitive way to

7 read this language.

8 So I guess I'm asking you: Where do you

9 find the definition of the term of art? And I think

10 what your answer is going to be is this notion the board

11 shall decide the issue of discrimination and the

12 applicable action; is that correct.

13 MS. HARRINGTON: Yes. Can I just take you

14 back one sentence and say, the point is not just that

15 the board is done, the point is that the board is done

16 under 7702; that it has issued a decision under 7702,

17 and so then, as you suggest, we look at 7702 and in that

18 provision Congress specifies various points at which a

19 final board decision under 7702 becomes a judicially

20 reviewable action.

21 The one that's relevant in this case is in

22 subsection (a)(3), which is on page 9a in the middle of

23 the page there. It says: "Any decision of the board

24 under paragraph (1)" -- so that's 7702(a)(1) -- "of this

25 subsection shall be a judicially reviewable action,

1 either when it's issued if the employee doesn't seek
2 EEOC review or when the EEOC declines to hear the case."
3 So in our view there are two indications in
4 (a)(3) that tell you that it has to be a decision on the
5 issue of discrimination in order to be a judicially
6 reviewable action -- action under section 7702.
7 JUSTICE ALITO: Why doesn't the language
8 that Justice Kagan referred to, the requirement that the
9 board within 120 days decide both the issue of
10 discrimination and the appealable action, mean that the
11 board has to dispose of both the issue of discrimination
12 and the appealable action, not that it must actually
13 adjudicate those two issues?
14 What if you have a threshold, you have a
15 threshold timeliness issue that is completely
16 dispositive? You're saying that this language means the
17 board nevertheless has to decide the merits of the
18 discrimination issue?
19 MS. HARRINGTON: No. I'm glad you asked
20 that question. The directive in section -- that you're
21 referring to is at the bottom of page 8a. The directive
22 is that the board shall decide both the issue of
23 discrimination and the appealable action in accordance
24 with the board's appellate procedures.
25 In this case the board complied with that

1 directive by not deciding the issue of discrimination
2 because the appeal was untimely. And I know that sounds
3 a little strange when I first say it, so let me give you
4 an analogous example. Imagine a State law that directed
5 the DMV to issue a driver's license to any applicant in
6 accordance -- in accordance with the procedures
7 governing such applications. If the DMV required that
8 driver's license applicants either pay a fee or submit
9 to an eye exam, you wouldn't expect that they would have
10 to issue a license to someone who refused to comply with
11 those requirements. In that case the DMV would comply
12 with the directive that it issue a license in accordance
13 with its procedures by not issuing a license at all.
14 And it's the same thing here. Here the
15 board complied with the directive that it decide the
16 issue of discrimination in accordance with its appellate
17 procedures by not deciding the issue of discrimination
18 and therefore not issuing a decision under 7703.
19 JUSTICE BREYER: You don't have to read it
20 that way, do you? I mean, look, it says in (a), it
21 says, let's take an employee who is affected adversely,
22 and then it says "alleges that the basis for the action
23 was discrimination," okay. In that case the board shall
24 within 120 days decide both the issue of discrimination
25 and the appealable action. So they decided it. They

1 decided it was out of time. They decided it was barred.
2 They decided da, da, da.
3 I mean, there are a lot of decisions on an
4 issue that a person raises in court and we don't
5 normally say they didn't decide the issue, the court.
6 It decided it. It decided it was untimely.
7 MS. HARRINGTON: But I think normally when a
8 court dismisses a case based on timeliness you don't
9 think of it as deciding the issue.
10 JUSTICE BREYER: Oh, well, I see. The
11 issue. They shall decide the issue of discrimination.
12 I mean, you can read it as saying they have to decide
13 the merits or you could read it as saying, there could
14 be several claims that went on below. Heard them,
15 decide the discrimination one. Now, you decide the
16 discrimination one. And I agree they used the word
17 "issue" instead of saying decide the discrimination
18 claim, that it says here, he alleges. They could have
19 said, decide the allegation. They could have said,
20 decide that part of the case.
21 But, I mean, why do we want to jump over 14
22 hurdles to give this narrow interpretation to that word
23 issue when all that's going to happen is we'll have a
24 new jurisprudence arising.
25 Is the dismissal on the ground that it was an

1 allegation of discrimination, that it wasn't enough to
2 really make out discrimination? It was partial summary
3 judgment. It was a dismissal on the basis of the
4 statement in the complaint. It was -- I mean, we can
5 think of 40 different things, perhaps, that are going to
6 be hard to distinguish as to whether they're procedural,
7 jurisdictional or on the merits.
8 And why do we want to get courts into that, when
9 the simplest thing is the person says, I allege
10 discrimination. There it is right in paragraph 1(b) of
11 his paper. The MSPB says, you lose for any reason on
12 that particular one, and now we go to the district
13 court. That's just so simple.
14 MS. HARRINGTON: That would certainly be
15 simpler. And if it were up to us to make up the rules,
16 maybe that's what we would decide.
17 JUSTICE BREYER: Oh, no, no. All we're
18 doing is interpreting what you've said is the word
19 issue, not to be quite so technical as to mean decide on
20 the merits, which it doesn't mean normally, but we're
21 interpreting it to mean decide the allegation that he
22 has raised that he was discriminated against.
23 MS. HARRINGTON: But what we're trying to do
24 is figure out how much of an exception Congress wanted
25 to create to the exclusive -- to the Federal circuit's

1 exclusive jurisdiction to review MSPB decisions.

2 In our view, its choice of the word issue is

3 important, because it's not just deciding the case that

4 alleges discrimination. It's the issue of

5 discrimination.

6 JUSTICE KAGAN: I'm sorry.

7 MS. HARRINGTON: I'm sorry. Go ahead.

8 There's another hint in paragraph (a)(3),

9 and let me know if you want to jump in, but not just the

10 direction to look at (a)(1), but paragraph (a)(3),

11 another hint that Congress was really talking about

12 cases where the board decides the issue of

13 discrimination.

14 In paragraph (a)(3), again, on (9)(a),

15 Congress provides that a judicially reviewable action

16 becomes -- becomes a judicially reviewable action when

17 the employee decides not to seek review from the EEOC or

18 when the EEOC decides not to take the case.

19 Now, the only types of decisions from the

20 board that the EEOC can review are decisions that reach

21 an issue of discrimination. And so it would be strange

22 to be talking about decisions under (a)(1) that the EEOC

23 could review if you're talking about decisions that

24 don't involve the issue of discrimination.

25 JUSTICE GINSBURG: Ms. Harrington, may I

1 just clarify that if -- if the case goes to the MSPB,
2 and the MS -- the Federal circuit, the Federal circuit
3 agrees with the MSPB that this was untimely filed,
4 that's the end of the case, the discrimination claims
5 would never be heard then.
6 MS. HARRINGTON: I mean, the plaintiffs
7 could then file a suit in district court and seek
8 equitable tolling for having missed the deadline to file
9 from the date of the final agency decision.
10 And, in fact, that was one of the
11 alternative bases for jurisdiction that was asserted in
12 the district court below in this case.
13 JUSTICE GINSBURG: So if the Plaintiff then
14 goes to the district court, then what position does the
15 Government take?
16 MS. HARRINGTON: It depends on the case. In
17 this case, we argued against equitable tolling because,
18 in our view, she had missed the deadlines through her
19 own fault. But if there was some reason to think that
20 it wasn't really her fault for missing the deadlines for
21 appealing and -- so that even though her appeal to the
22 MSPB was, in fact, untimely, it wasn't really her fault,
23 then we might not resist equitable tolling.
24 JUSTICE GINSBURG: Mr. Schnapper told us in
25 his brief, and he repeated it this morning, that the

1 MSPB and the EEOC disagree with your reading of the
2 statute, that they think that the so-called mixed case
3 goes to the district court.
4 MS. HARRINGTON: I don't think that's
5 correct. I didn't hear him say that; but, if he said
6 that, I don't think -- I mean, I know it's not correct
7 that the EEOC and MSPB disagree with --
8 JUSTICE GINSBURG: Well, didn't -- in the
9 Ballentine case, didn't the MSPB take the position that
10 it didn't go to the Federal circuit?
11 MS. HARRINGTON: That was our position, you
12 know, I think it was 30 years ago now. And since the
13 Ballentine decision, the Government has had the other --
14 has had the position that we're asserting today, which
15 is that the only --
16 JUSTICE GINSBURG: And so you -- are you --
17 are you telling us that the position you're representing
18 on behalf of the Government is the position that the
19 MSPB would take today, is the position that the EEOC
20 would take today?
21 MS. HARRINGTON: Yes. Yes. Our brief is
22 filed on behalf of all the agencies in the United States
23 that are affected by this.
24 CHIEF JUSTICE ROBERTS: Counsel, getting
25 back to judicially reviewable --

1 MS. HARRINGTON: Yes. Excellent.

2 CHIEF JUSTICE ROBERTS: -- even if I accept

3 your argument that that's not the same as subject to

4 judicial review, isn't it an odd backhanded way to get

5 to your position?

6 This is not something about -- a provision

7 about what's judicially reviewable and what's not. It's

8 a notice provision. It says these actions have to be

9 filed within 30 days after notice of judicial review.

10 MS. HARRINGTON: Well, but some --

11 CHIEF JUSTICE ROBERTS: And then you say

12 that judicial reviewability is the key linchpin that

13 bases your argument, when it's really just in a sentence

14 about notice.

15 MS. HARRINGTON: But it's in a provision

16 that's describing the exception to the general rule

17 that's set out in 7703.

18 So the general rule in 7703 is that when

19 you're talking about final board decisions, judicial

20 review of those decisions is in the Federal circuit.

21 And this is at 16(a) and 17(a) in the Government's

22 brief. It says, except as provided in paragraph (b)(2).

23 So when you're looking to (b)(2), you're

24 wondering -- you're asking what subset of final board

25 actions -- that's -- final order or decision -- that's

1 their language used in (a)(1) -- what subset of final
2 orders or decisions of the Merit Systems Protection
3 Board fall within (b)(2).
4 Now, in (b)(2), the only types of final
5 orders that are described there is at the end of the
6 section, judicially reviewable action under section
7 7702.
8 CHIEF JUSTICE ROBERTS: Well, yes, that's
9 where the phrase comes in, but it does seem an odd way
10 to establish that that is the critical element that
11 tells you which provisions you can take forward when it
12 just says your time is 30 days after you get notice of
13 judicial review.
14 MS. HARRINGTON: Under --
15 CHIEF JUSTICE ROBERTS: And here the
16 Government says, aha, judicial review, we think that
17 does not mean subject to judicial review. Judicially
18 reviewable doesn't mean subject to judicial review.
19 MS. HARRINGTON: So even if you throw out
20 the term of art --
21 CHIEF JUSTICE ROBERTS: Yes.
22 MS. HARRINGTON: -- our argument, and all
23 you look at is the last two words of that sentence,
24 which is Section 7702, you still have to look at 7702
25 and figure out when Congress told you that a final board

1 decision could be subject to judicial review.

2 And the relevant place for this case where

3 it did that is in section (a)(3), which is on page 9a.

4 And there again, it points at (a)(1), which directs that

5 the Board decide the issue of discrimination. So it

6 says a decision under (a)(1) is -- is judicially

7 reviewable. If a decision does not reach the issue of

8 discrimination, it is not --

9 CHIEF JUSTICE ROBERTS: As of. See, it

10 shall be reviewable action as of. Again, it's just

11 going to the timeliness.

12 MS. HARRINGTON: Right. But again -- but

13 the two time triggers would only come into play if a

14 decision reached an issue of discrimination, because the

15 EEOC can't review issues -- can't review dismissals on

16 jurisdictional or procedural grounds. It can only --

17 the EEOC's review of the board's -- of a board decision

18 is limited to its review of the board's interpretation

19 of an anti-discrimination law or its application of

20 those laws to a particular case.

21 JUSTICE KAGAN: Ms. Harrington, would you

22 agree that this is a remarkably strange way of Congress

23 trying to accomplish this objective? I mean, if

24 Congress were really saying we don't want procedural

25 determinations to go to the district court, that's a

1 very easy thing to say. Congress does not need to send
2 you -- you know, involve six different cross-references
3 and unnatural reading of statutory language.
4 And, you know, in the end, your argument
5 just is based on this notion that Congress used the word
6 decide rather than dispose of in this single provision.
7 The argument would completely collapse if that were not
8 the case. It just seems like if Congress wanted what
9 you say it wanted, Congress would not have done it in
10 this extremely complicated and backhanded way.
11 MS. HARRINGTON: I mean, I'm not going to
12 resist the idea that the CSRA is very complicated. I
13 mean, every case this Court has had about the CSRA, they
14 have remarked about how it is a complex statutory
15 scheme.
16 But I think Congress did accomplish in a
17 pretty simple way what you suggest, which is directing
18 that procedural rules should be reviewed in the Federal
19 circuit, and it did that by making that the background
20 rule.
21 In 7703(a) and (b)(1), it says, final
22 decisions of the board are reviewed in the Federal
23 circuit, full stop only, except as provided in (b)(2).
24 And then the question is, well, which of those decisions
25 fall within (b)(2).

1 In our view, you should not read that
2 exception more broadly than necessary to accommodate
3 employees' rights to have their discrimination claims
4 determined de novo in district court.
5 Here, the board decision, it decided two
6 things. First, was Petitioner's appeal to the board
7 timely; and, second, was there good cause to excuse her
8 untimeliness. There is no reason to think that Congress
9 would have wanted that Board decision to be reviewed
10 anywhere other than the Federal circuit. The whole
11 point of having the Federal circuit is to have a unified
12 body of law governing certain things in the country that
13 Congress really thought should be directed to one place,
14 and that included board decisions.
15 JUSTICE KAGAN: But you're not -- the
16 Federal circuit didn't exist at the time that these
17 statutes were written, so what -- you know, really, it
18 would have been taken to the various courts of appeals,
19 and you wouldn't have gotten that uniformity anyway.
20 MS. HARRINGTON: Right, but you would have
21 had more uniformity than you would have had if the cases
22 had continued to go to the district court, which is
23 what -- which is what was happening before the CSRA, and
24 Congress specifically wanted to stop that process.
25 JUSTICE SOTOMAYOR: You don't have a quarrel

1 with your opposing counsel's position that once the
2 Board decides the CSRA claim and the discrimination
3 claim, the district court reviews both?
4 MS. HARRINGTON: Yes.
5 JUSTICE SOTOMAYOR: Justice Alito was
6 questioning that, but you don't quarrel with that.
7 MS. HARRINGTON: We don't quarrel with it.
8 JUSTICE SOTOMAYOR: So the lack of
9 uniformity is inherent in this structure. You just want
10 to carve out one piece of it that --
11 MS. HARRINGTON: No --
12 JUSTICE SOTOMAYOR: -- that you say deserves
13 more uniformity.
14 MS. HARRINGTON: It is -- it is true that a
15 small range of procedural issues governing the board's
16 procedures might be heard in district court, but it is
17 truly a very small universe of issues bordering on
18 non-existent, and let me explain why. As suggested
19 here, the only reason -- the only way it would come up
20 is as part of an affirmative defense by the agency, a
21 defense of exhaustion. But then generally speaking it
22 would have to be a procedural issue that the Government,
23 that the agency raised before the board and the board
24 rejected.
25 Now, the board's own regulations allow the

1 board to waive any of its -- any of its regulatory
2 requirements, including timeliness, for good cause. And
3 so the Government would have to argue in the district
4 court that essentially the board abused its discretion
5 by not waiving a procedural objection, and that's a very
6 high hurdle and I think it's really hard to imagine very
7 many cases in which that's going to come up, where the
8 Government's going to make that kind of argument. So
9 although there's -- there's potential, there's a
10 potential for a tiny bit of erosion of uniformity under
11 our view, it is really a small universe of issues that
12 could go to district court.
13 JUSTICE BREYER: Is there anything you want
14 to say on the question of which is worse? That is to
15 say, I get your point on the word "issue," and I think
16 you can read the word "issue" to say there is a
17 contested point as to whether there was discrimination
18 or to say there is a contested point between the parties
19 as to whether the MSPB -- whether the plaintiff has a --
20 has a legal right before the MSPB to get the lower --
21 the agency reversed on the issue of discrimination.
22 The latter way favors your opponent, the
23 former favors you; okay. So we could do either, I
24 guess.
25 The one way, if you win, there will be a

1 body of law about what counts as procedural and what
2 doesn't. That sounds confusing to me. If you lose, I
3 quite agree with you that there will then be different
4 courts deciding different procedural matters, where
5 you'd get more uniformity out of the Federal Circuit.
6 Okay. Do you have anything to say about which of those
7 two evils is worse? Is there any reason --
8 MS. HARRINGTON: Absolutely.
9 JUSTICE BREYER: Have we any way of knowing?
10 MS. HARRINGTON: I mean, I think Congress
11 made the determination.
12 JUSTICE BREYER: -- going back to the
13 language, and so far, in my hypothetical anyway, I think
14 the language at best might be read, that word "issue,"
15 the way you say, but need not be.
16 MS. HARRINGTON: But I think you can resolve
17 the ambiguity in the use of the word "issue" by looking
18 at the rest of (a)(3), which again ties the decision
19 under (a)(1) to reviewability by the EEOC. I don't
20 think there is any dispute that the EEOC can only review
21 board decisions that involve an issue of discrimination,
22 either an interpretation of an antidiscrimination law or
23 an application of such a law to the facts of the case.
24 JUSTICE SOTOMAYOR: I have a problem,
25 because to accept your reading is to say that judicially

1 reviewable action differs between 7702 and the escape
2 hatch, because the only way the escape hatch can work,
3 it, too, cross-references 7702 in the same way that the
4 provisions you are relying on do. Under your reading
5 both should be given identical meaning, because they
6 both cross-reference 7702; and yet your brief says, no,
7 we shouldn't have that absurd result.
8 MS. HARRINGTON: But not because --
9 JUSTICE SOTOMAYOR: It seems to me that if
10 you concede that there is an absurd result in applying
11 your interpretation to the escape hatch, by definition,
12 your meaning can't be ascribable to that phrase.
13 MS. HARRINGTON: Well, so just to be clear,
14 we think the phrase "judicially reviewable action"
15 should be given the same meaning in section (e) that it
16 is given elsewhere in 7702.
17 JUSTICE SOTOMAYOR: So if the board --
18 MS. HARRINGTON: Our view is --
19 JUSTICE SOTOMAYOR: So when does the time
20 frames of the escape hatch commence --
21 MS. HARRINGTON: So --
22 JUSTICE SOTOMAYOR: -- if the board hasn't
23 rendered any decision on anything?
24 MS. HARRINGTON: Exactly. If the -- if the
25 appeal is still pending before the board, that's when

1 the escape hatch of (e) comes in, because it's just
2 intended to prevent employees from being held hostage by
3 board inaction.
4 JUSTICE KAGAN: Right, but Justice Sotomayor
5 is right, that when you define "judicially reviewable
6 action" in your way, then 7702(e)(1)(B) becomes
7 nonsensical and you have to save it by inserting
8 additional language, by saying, you know, "and other" --
9 "and other kinds of action."
10 MS. HARRINGTON: No, it only becomes
11 nonsensical if you think it should apply to cases that
12 are no longer pending before the board under section
13 7702. In our view, once the board issued a decision --
14 the decision in this case, it issued a decision under
15 section 7701 which is the general provision governing
16 board decisions, and then the case was no longer pending
17 under section 7702. And so it wouldn't make sense to
18 apply the escape hatch to cases in that situation.
19 JUSTICE KAGAN: Well, it wouldn't make
20 sense, but it's what the language would command if
21 "judicially reviewable action" means what you say
22 "judicially reviewable action" means.
23 MS. HARRINGTON: It is true that our
24 commonsense gloss on the statute is not found in the
25 text of the statute. But I think once the -- once the

1 cases has been decided under section 7701 on procedural
2 grounds, it's no longer a 7702 case before the board.
3 And so there is just no reason to think that subsection
4 (e) would apply in the -- in that situation.
5 JUSTICE SOTOMAYOR: You still have an
6 exhaustion argument to raise if we were to send this to
7 the district court?
8 MS. HARRINGTON: Well, we raised an
9 exhaustion argument as an alternative ground before the
10 district court. The district court construed this case
11 as seeking review of the board's decision, not seeking
12 review of the agency's decision. Petitioner did not
13 challenge that district court holding before the circuit
14 in her opening brief. She didn't flag that as issue in
15 the cert petition papers, and so I think, although now
16 she's suggested in the merits briefing that this case --
17 this Court maybe should really just decide whether she's
18 seeking review of the agency decision instead of the
19 board decision, in our view that's not really a question
20 that is presented in -- in the case any longer. In our
21 view she is seeking review over the board decision, the
22 board decision decided that her appeal was untimely,
23 that there wasn't good cause to excuse the untimeliness.
24 There is indication anywhere in the statute that
25 Congress would have wanted that kind of board decision

1 to be reviewed anywhere other than the Federal Circuit.
2 And so in our view it does not fall within -- in the
3 exception to exclusive Federal Circuit jurisdiction
4 provided in (b)(2) because it does not decide the issue
5 of discrimination.
6 If there are no further questions?
7 CHIEF JUSTICE ROBERTS: Thank you, Ms.
8 Harrington.
9 Mr. Schnapper you have 4 minutes left.
10 REBUTTAL ARGUMENT OF ERIC SCHNAPPER
11 ON BEHALF OF THE PETITIONER
12 MR. SCHNAPPER: Mr. Chief Justice, and may
13 it please the Court:
14 I would like to answer the question that the
15 Chief Justice asked yesterday morning in Lozman. You --
16 CHIEF JUSTICE ROBERTS: You better remind
17 me.
18 (Laughter).
19 MR. SCHNAPPER: I -- I am happy to do so,
20 Your Honor. You pointed out that -- that where subject
21 matter jurisdiction is concerned, is it important that
22 rules be clear? And you asked counsel for Respondent,
23 why was Respondent's rule clearer than the Petitioner's
24 rule?
25 In this case our rule is demonstrably

1 clearer. The question is which mixed-cases go to the
2 district court? Our answer is all. The Government's
3 answer, the rule that is derived from Ballentine, has
4 confounded the lower courts since Ballentine and those
5 problems are reflected in the divergent accounts of the
6 rule in the Government's brief. There are more than
7 half a dozen of these problems.
8 First, the courts are divided below, as is
9 the Government's brief, about whether the Government's
10 rule applies to all procedural issues or only to
11 procedural issues that arise before the court reaches
12 the merits. For example, in -- in Hopkins v. MSPB,
13 after the court had resolved the merits, there was a
14 dispute about counsel fees and an argument that the
15 counsel fee application was untimely. The Government
16 took the position that that timeliness issue belonged in
17 the district court.
18 Secondly, the lower courts are divided as is
19 the Government's brief about whether a procedural issue
20 that is related to or intertwined with the merits goes
21 to the district court or the court of appeals. There is
22 a line of cases holding that a -- a -- when the MSPB
23 holds there is no jurisdiction because the
24 discrimination claim is frivolous, that's a procedural
25 jurisdiction issue, it's not a merits issue. And if you

1 look at the opinion in Hill v. Department of the Air
2 Force, you see a lengthy description of Title VII law,
3 in McDonnell Douglas v. Green, in the course of a
4 decision by the Federal Circuit holding there is no
5 jurisdiction.
6 Third, it is unclear what constitutes the
7 line between a merits decision and a procedural decision
8 issue. Some things are really neither. For example,
9 there are recurring disputes about whether a settlement
10 was voluntary. Well, it's not the merits of the
11 discrimination case, but it's not procedural in any
12 normal sense of the word.
13 Fourth, there are cases which involve
14 several claims resolved on several different bases. We
15 noted some of them in our reply brief. One -- one claim
16 was rejected on jurisdictional grounds; one claim was
17 rejected on res judicata and one claim was decided by
18 the board on the merits. It's unclear how that would
19 go.
20 There are also situations in which two cases
21 get filed, one of which -- and they are related cases,
22 and they go to the same judge, and one -- one involved
23 an MSPB decision on procedural grounds, one on the
24 merits. The court in that case just thought it ought to
25 just keep them both. It's not clear how that comes out.

1 Fourth -- some, sorry, fifth.
2 CHIEF JUSTICE ROBERTS: Fifth.
3 MR. SCHNAPPER: Sometimes within the MSPB --
4 you have the point. I don't mean to belabor. Thank
5 you, Your Honor.
6 CHIEF JUSTICE ROBERTS: No, no. I -- I just
7 --
8 MR. SCHNAPPER: Oh, that was -- I didn't
9 mean --
10 JUSTICE SCALIA: He was just keeping score.
11 (Laughter.)
12 MR. SCHNAPPER: Oh, okay. I'm sorry. I
13 think -- I think we are at six.
14 JUSTICE SCALIA: Checking them off.
15 MR. SCHNAPPER: The MS -- the --
16 CHIEF JUSTICE ROBERTS: You are on number
17 five.
18 MR. SCHNAPPER: Okay. The -- the -- an
19 MSPB, ALJ, or the board itself could resolve a claim on
20 alternative grounds, as judges do all the time, and say,
21 well, we think this is time barred, but we also find
22 that it lacks the merits. I know where that goes.
23 There is also a problem, which the briefs
24 address, about factual disputes that arise with regard
25 to jurisdiction or procedure. The -- 7703(c) says,

1 "Questions of fact get decided de novo." What does that
2 mean?
3 If there -- let's take, for example, a case
4 in which the claim is that a charge wasn't filed on time
5 with the agency. That's a question of fact. The agency
6 might find that it was timely -- there could be a
7 dispute of fact about when the violation occurred which
8 triggers the limitation period. The agency would make a
9 finding of fact. The MSPB might affirm that finding.
10 The Government tells us they would affirm whatever the
11 agency did. The statute seems to say that's got to be
12 decided de novo, but Federal circuit can't do that.
13 Thank you.
14 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
15 The case is submitted.
16 (Whereupon, at 11:00 a.m., the case in the
17 above-entitled matter was submitted.)
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