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In The  
**Supreme Court of the United States**

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CAROLYN M. KLOECKNER,

*Petitioner,*

v.

HILDAL SOLIS,  
Secretary of Labor,

*Respondent.*

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**On Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eighth Circuit**

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**REPLY BRIEF FOR PETITIONER**

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## I. This Case Presents an Important and Acknowledged Circuit Conflict

The government candidly acknowledges that “the question presented is the subject of disagreement in the courts of appeals.” (Br.Opp. 8; see Br.Opp. 13 (“the courts of appeals have taken different approaches to the question presented”), 16 (noting “the disagreement among the courts of appeals”)).<sup>1</sup> The Court previously has recognized that the question of whether an MSPB decision is to be appealed to a district court or, alternatively, to the Federal Court is a matter of “substantial importance.” *Lindahl v. Office of Personnel Mgmt.*, 470 U.S. 768, 771 (1985).

The government suggests that the importance of this circuit conflict may be reduced because although the Second and Tenth Circuits have held that district courts have jurisdiction to hear mixed cases rejected by the MSPB on procedural grounds (like this case), those circuits have also ruled that only the Federal Circuit can hear a mixed case dismissed by the MSPB on jurisdictional grounds. (Br.Opp. 13-14). But dismissals by the Board on non-jurisdictional procedural grounds are more common, and it is precisely

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<sup>1</sup> See Br.Opp. 7 (“The court of appeals noted that the Second Circuit had reached a different conclusion in *Downey v. Runyon*, 160 F.3d 139 (1998)”; “The court of appeals rejected [the Second Circuit’s] approach”), 8 (“The court’s conclusion ... is consistent with the decisions of a majority of courts of appeals to address this issue”), 13 (“In *Downey* ... the Second Circuit disagreed with *Ballentine v. MSPB*, 738 F.2d 1244 (Fed.Cir. 1984)”).

disputes about MSPB procedure that the government itself insists ought to be heard only in the Federal Circuit.

The government acknowledges that the significance of this distinction is far from clear, because determining whether an MSPB ruling was procedural or jurisdictional can be "difficult and unpredictable." Br.Opp. 15; see also *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237, 1243 (2010) (noting that the distinction between jurisdictional conditions and procedural claim-processing rules can be "confusing"). For example, if the MSPB concluded that a claimant had failed to establish a prima facie case of discrimination, the Board and the Federal Circuit would apparently regard that failure as meaning the Board had no jurisdiction over the claim. See *Burzynski v. Cohen*, 264 F.3d 611, 620-21 (6th Cir. 2001); *Hill v. Dep't of the Air Force*, 796 F.2d 1468, 1471 (majority opinion), 1472-73 (Newman, J. concurring) (Fed. Cir. 1986).

A number of the leading cases regarding federal court jurisdiction over mixed claims involved cases in which the MSPB had rejected an appeal on procedural, non-jurisdictional grounds. The Solicitor General does not suggest that mixed cases involving disputes about the Board's jurisdiction are common. The government correctly recognizes that disputes about the timeliness of appeals to the MSPB are not jurisdictional. (Br.Opp. 13-14). The deadlines for such appeals are established by the MSPB regulations, and are claim-processing rules rather than jurisdictional limitations. See 5 C.F.R. § 1201.22(b). The MSPB has

no authority to adopt regulations limiting the jurisdiction created by statute. See *Union Pac. R. Co. v. Bhd. of Locomotive Eng'rs*, 130 S.Ct. 584, 597 (2009) (“Congress gave the [National Railroad Adjustment] Board no authority to adopt rules of constitutional dimension.”); see 5 U.S.C. § 1204(h).

The government notes that the Second Circuit in *Downey v. Runyon*, 160 F.3d 139 (2d Cir. 1998), held only that district courts could hear mixed cases dismissed by the MSPB on non-jurisdictional grounds. (Br.Opp. 13). Yet despite exclusion of MSPB jurisdictional dismissals from the holding in *Downey*, the United States in *Downey* filed (and the Solicitor General authorized) a petition for rehearing en banc, persuasively arguing that the panel’s decision was a matter of considerable public importance. (Pet. 22). That issue remains as important today as it was when the government sought rehearing in *Downey*.

The United States defends the rule in *Ballentine* on the ground that there is a pressing need for a “unified” body of law “concerning matters of MSPB ... procedure.” (Br.Opp. 10). If the lower courts failed to follow the decision in *Ballentine*, the government warns, there would be “a waste of time and resources” as well as “a lack of uniformity” among the district courts. (Br.Opp. 10) (*quoting Ballentine*, 738 F.2d at 1247). The assertedly mistaken decision in *Downey*, the Solicitor General contends, “could allow employees with jurisdictionally deficient CSRA claims to proceed to district court by filing an untimely MSPB appeal.” (Br.Opp. 15-16). The government’s own arguments

regarding the merits of the question presented are persuasive evidence of its importance.

The circuit conflict poses an administrative problem for the Federal Circuit, which attempts to provide guidance to pro se litigants regarding whether a challenge to an MSPB decision should be filed in that circuit or in a district court. When the MSPB has decided a mixed case on grounds other than the merits, the correct court in which a pro se litigant should proceed currently depends on the governing law of the circuit where the litigant works or worked. The Federal Circuit's "Guide for Pro Se Petitioners and Appellants" contains the following explanation:

This court does not have jurisdiction to review cases involving bona fide claims of discrimination ... that were raised before and considered by the Merit Systems Protection Board. If your case involves such claims and you are unwilling to abandon them forever, you must proceed in a district court (which will hear all your claims, both discrimination and nondiscrimination) or before the Equal Employment Opportunity Commission (which will hear your discrimination claims only). You may waive your discrimination claims on the ... form sent to you by the clerk. If you fail to complete and return the form within

14 days after the date of docketing, the clerk will dismiss your petition.<sup>2</sup>

A litigant in a case such as this would reasonably conclude from this explanation that he or she should sue in district court, which is the right answer in two circuits, the wrong answer in five circuits, and an answer of unknown correctness in five other circuits.

The Federal Circuit's mandatory Form 10,<sup>3</sup> entitled "Statement Concerning Discrimination," requires litigants to check one of several statements, the first two of which are "[n]o claim of discrimination ... has been or will be made in this case" and "[a]ny claim of discrimination ... has been abandoned and will not be raised or continued in this or any other court." The form also offers the option of checking "[t]he petition seeks review only of the Board's dismissal of the case for lack of jurisdiction or for untimeliness," but with no specific explanation of how that alternative relates to the others. The Federal Circuit's Guide and Form 10 illustrate the intractable practical problems created by *Ballentine* and the conflict of which it is a part. See *Otiji v. Heyman*, 47 F.Supp.2d 6, 6 (D.D.C. 1998) (dismissing discrimination action because plaintiff had signed Form 10).

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<sup>2</sup> <http://www.cafc.uscourts.gov/images/stories/rules-of-practice/pro%20se.pdf> (visited December 26, 2011). The quoted material is at p. 167 (emphasis in original).

<sup>3</sup> <http://www.cafc.uscourts.gov/images/stories/rules-of-practice/forms/form10.pdf> (visited December 26, 2011).

## II. The Decision of the Court of Appeals Is Incorrect

The government's proffered justifications for the decision of the Eighth Circuit illustrate the unsoundness of that decision and of the opinion in *Ballentine* on which it was based.

The class of discrimination claims that can be filed in federal court is delineated in section 7703(b)(2). The government argues that a case is covered by section 7703(b)(2) only if the MSPB has decided the merits of the discrimination claim:

[T]he judicially reviewable action by the MSPB which makes an appeal a "case of discrimination" under § 7703(b)(2) that can be filed in district court is that the MSPB has decided "both the issue of discrimination and the appealable action[.]"

(Br.Opp. 9) (quoting *Ballentine*, 738 F.2d at 1246 (quoting 5 U.S.C. §§ 7702(a)(1) and 7703(b)(2))). But section 7703(b)(2) does not define the cases to be filed in district court by reference to the section 7702(a)(1) requirement that the Board in mixed cases must decide within 120 days "both the issue of discrimination and the appealable action." Rather, section 7703(b)(2) provides that actions are to be filed in district court if they are "[c]ases of discrimination *subject to* the provisions of section 7702." (Emphasis added). A case is "subject to" the various requirements of section 7702 so long as it both involves otherwise appealable adverse actions (§ 7702(a)(1)(A)) and "*alleges* that a

basis of the action was discrimination prohibited by [certain listed statutes]." (5 U.S.C. § 7702(a)(1)(B) (emphasis added)). A mixed case containing such allegations is "subject to" section 7702 regardless of how the MSPB resolves it. The provision of section 7702(a)(1) directing the Board to "decide both the issue of discrimination and the appealable action" does not delineate the cases "subject to ... section 7702." Rather, that clause sets out one of the statutory directives applicable to the cases that are delineated in sections 7702(a)(1)(A) and 7702(a)(1)(B) and that thus are "subject to" the various commands of section 7702.

"There is nothing in any of [the relevant] sections of the CSRA that suggests that ... a matter becomes a 'case of discrimination' under subsection (b)(2) of section 7703 only *after* a merits decision." *Downey*, 160 F.3d at 145 (emphasis added). It would make no sense to say that a claim is a "case[]" of discrimination subject to the provisions of section 7702" only if (and thus after) the MSPB has decided it on the merits. The very purpose of section 7702(a) is to regulate how and when the Board is to address an appeal that "alleg[es]" discrimination.

The government also relies on section 7702(a)(3)(A):

[An] employee may ... seek review of "[a]ny decision of the Board under [Section 7702(a)(1)]" – that is, the decision on "both

the issue of discrimination and the appealable action,” 5 U.S.C. 7702(a)(1) – in federal district court. 5 U.S.C. 7703(a)(3)(A)[sic].<sup>4</sup>

(Br.Opp. 9). But section 7702(a)(3) does not delineate which cases are to be heard in district court; rather, section 7702(a)(3) designates the point in time *when* a Board decision is reviewable, and contains no provision regarding which court is to review the Board’s action. Section 7702(a)(3) clearly does not mean that a decision of the Board in a mixed case is only judicially reviewable if it resolved on the merits both the issue of discrimination and the appealable action; were that the case it would bar review by any court, including the Federal Circuit, of an MSPB decision rejecting an appeal on purely procedural grounds. To the contrary, section 7702(a)(3) controls the time at which judicial review is authorized for “[a]ny decision of the Board,” and applies equally to MSPB decisions in mixed cases that are reviewable by any court. As the government has repeatedly pointed out, most recently in *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (2011), “the word ‘any’ has an ‘expansive meaning.’” (Brief for the United States as Amicus Curiae Supporting Petitioner, p. 11 (quoting *Republic of Iraq v. Beatty*, 129 S.Ct. 2183,

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<sup>4</sup> The government’s brief inadvertently refers to section 7703(a)(3)(A) rather than section 7702(a)(3)(A). There is no such subsection in section 7703.

2189 (2009) (quoting *United States v. Gonzalez*, 520 U.S. 1, 7 (1997))).

Moreover, if as the government contends an MSPB decision that failed to resolve the merits of a discrimination claim were not a “judicially reviewable action” under section 7702(a)(3), then section 7702(e) would authorize a civil action in district court.

Notwithstanding any other provision of law,  
if at any time after –

\* \* \*

(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

\* \* \*

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 ... [or] section 15(c) of the Age Discrimination in Employment Act of 1967.

The interpretation of sections 7702 and 7703 advanced by the government in the instant case is contrary to the position the government took in *Ballentine*. In that case the MSPB had dismissed the petitioner’s claim on the ground that it was premature. The government argued that a challenge to the Board’s action should be heard in a district court, not in the Federal Circuit:

This case is governed by 5 U.S.C. §§ 7702 and 7703 which provide that when issues of racial discrimination and reprisal are raised in an action appealable to the Board (a "mixed case"), a petition for judicial review ... may be filed in an appropriate district court.... [A] decision of the Board in a mixed case may be heard only in an appropriate district court.... [E]ven a question of the Board's jurisdiction to hear an attempted mixed case appeal must be addressed by a district court.... [T]he Board's interpretation of [the regulation] regarding the time for filing a petition for appeal with the Board in a mixed case should be addressed by a district court, as this regulation was promulgated pursuant to 5 U.S.C. § 7702.

(Motion to Transfer to District Court, *Ballentine v. Merit Systems Protection Bd.*, No. 84-907 (Fed. Cir.), pp. 1-2) (footnote omitted). The government's original position on this issue was the correct one.

### **III. This Case Is an Excellent Vehicle for Deciding the Question Presented**

This case presents an ideal vehicle for resolving the circuit conflict. The decision of the court of appeals below was based solely on its view that federal district courts lack jurisdiction over a mixed case following an MSPB decision if the MSPB has not determined the merits of the discrimination claim. The MSPB decision in this case was not based on any asserted lack of jurisdiction. Thus had this case been

filed in any district court in the Second or Tenth Circuits, there would, under *Downey* or *Harms v. Internal Revenue Service*, 321 F.3d 1001 (10th Cir. 2003), have been jurisdiction over petitioner's age, gender and retaliation claims. There are no disputed issues of fact relevant to existence of federal jurisdiction.

The government argues that, even if this Court were to grant review and hold that the district court has jurisdiction in this case, the United States on remand would ultimately prevail on other grounds. The brief in opposition predicts<sup>5</sup> that, were this case returned to the lower courts for further proceedings, those courts would eventually conclude that the

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<sup>5</sup> The government's prediction that it would prevail on exhaustion is wrong. This defense is based principally on *Harms v. Internal Revenue Service*, 321 F.3d 1001 (10th Cir. 2003), a case that is distinguishable from the instant case. *Harms* concerned a claimant who could have refiled his MSPB appeal in August, 1997, but had failed to do so until November of that year. The district court dismissed his claim for failure to exhaust because *Harms* had not presented "any evidence to justify his delay." 321 F.3d at 1010.

The instant case is distinguishable from *Harms* on at least two grounds. First, in January 2007, when the administrative law judge's filing deadline expired, Kloeckner was still in the process of pursuing discovery before the EEOC. There was not yet an agency decision from which any appeal could have been taken. Second, on October 23, 2007, the agency issued a new Final Decision rejecting Kloeckner's claim. Kloeckner filed a timely appeal within 30 days of that October 2007 decision. Regardless of whether plaintiff in the fall of 2007 had a right to reopen her earlier MSPB appeal regarding the agency's 2006 decision, the applicable regulations clearly permitted a new appeal from the later 2007 agency decision.

complaint should be dismissed because Kloeckner failed to exhaust administrative remedies. The United States thus reasons that “review of the question presented would not alter the outcome of this case.” (Br.Opp. 17).

This contention is not an appropriate basis for denying review. The lower courts in the instant case never addressed the government’s exhaustion argument. The government’s brief in the Eighth Circuit did not even raise this issue.<sup>6</sup> It is often true that where a case has been dismissed on one ground, other issues remain on which the defendant might subsequently prevail. Because federal courts at least ordinarily are obligated to address jurisdictional matters before considering any other issue, it will usually be the case that an appeal regarding the existence of federal jurisdiction will occur in a case in which the defendant has other, unaddressed defenses. That has not been regarded as a reason to deny review. See *Henderson v. Shinseki*, 131 S.Ct. 1197, 1206 (2011) (reversing jurisdictional dismissal and remanding for consideration of whether appellate deadline was subject to equitable tolling).



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<sup>6</sup> Brief for Appellee, No. 10-2048 (8th Cir.), pp. 12-26.

**CONCLUSION**

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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