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5 v. :

7 Respondent. :

9 Washington, D.C.

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15      APPEARANCES:

18 BRIAN H. FLETCHER, ESQ., Assistant to the Solicitor

20 on behalf of the Respondent.

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

2 (10:03 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument  
4 first this morning in Case 16-399, Perry v. The Merit  
5 Systems Protection Board.

6 Mr. Landau.

7 ORAL ARGUMENT OF CHRISTOPHER LANDAU

8 ON BEHALF OF THE PETITIONER

9 MR. LANDAU: Thank you, Mr. Chief Justice,  
10 and may it please the Court:

11 The parties here agree that a Federal  
12 employee has a mixed case when he alleges that he was  
13 affected by an appealable civil service action and  
14 discrimination. The parties dispute whether the case  
15 ceases to be a mixed case if and when the Board decides  
16 that the employee hasn't proven that he was affected by  
17 an appealable civil service action. The answer to that  
18 question is no.

19 Whenever the Board rejects an employee's  
20 allegations that he was affected by an appealable civil  
21 service action, the Board is making a substantive  
22 decision on the merits of the employee's civil service  
23 claim. That point has nothing to do with the Board's  
24 jurisdiction and, therefore, nothing to do with whether  
25 the employee has brought a mixed case reviewable in

1 district court as opposed to the Federal Circuit.  
2 Here, as in so many cases, the root of the problem is  
3 the word "jurisdiction." Whenever the Board rejects an  
4 employee's allegations that he was affected by an  
5 appealable civil service action, the Board labels its  
6 decision "jurisdictional." That label is incorrect.  
7 The Board's conclusion that the employee's civil service  
8 claim fails on the merits doesn't retroactively strip  
9 the Board of jurisdiction, just as the failure of an  
10 alleged Federal question on the merits doesn't  
11 retroactively strip a Federal court of jurisdiction.

12 JUSTICE SOTOMAYOR: I'm sorry --

13 JUSTICE KENNEDY: Just -- just as an  
14 introductory question, Mr. Landau -- it's really  
15 probably more for the government than for you -- but if  
16 the government were to review, this same case could  
17 potentially go from the Board to the Federal Circuit,  
18 back to the Board, then to the district court.

19 Is there any other scheme like that? Is  
20 there anything that the government might point to that  
21 is an analogous scheme?

22 MR. LANDAU: I don't think they will be able  
23 to, Your Honor. And certainly that detour to the  
24 Federal Circuit for a decision, where ultimately the  
25 Federal Circuit can't resolve the case is unprecedented,

1 in my experience.

2 JUSTICE KENNEDY: Certainly --

3 JUSTICE GINSBURG: But the district court  
4 couldn't resolve the case at this point either because  
5 the internal revenues weren't exhausted. So if the  
6 appealability -- the civil service appealability goes to  
7 the district court, then it has to go back to MSPB, and  
8 it gets to the district court only if -- if the EEO  
9 remedy has been exhausted; isn't that so?

10 MR. LANDAU: Well, you raise an interesting  
11 question, Your Honor, about exhaustion. Exhaustion is a  
12 defense. If the government -- if you're in the district  
13 court and the court rejects the -- the Board -- excuse  
14 me -- the court affirms the Board on the civil service  
15 claim -- again, that's really a merits determination  
16 that the Board has made, notwithstanding its label --  
17 then there would certainly be a question, Your Honor, as  
18 to whether or not the discrimination case has been  
19 exhausted. For a period --

20 JUSTICE GINSBURG: The government -- the  
21 government takes the position that it hasn't been in  
22 exhaustion as a requirement. You can't get to the  
23 district court on a discrimination claim without  
24 exhausting your internal remedy.

25 MR. LANDAU: It could take that position,

1 Your Honor. And, arguably, they did -- there certainly  
2 could be a fight about exhaustion at that point, whether  
3 or not having presented the case to the MSPB in the  
4 first instance was exhaustion. But, if not, Your Honor,  
5 even under -- under the government's own scenario,  
6 district courts deal with unexhausted claims every day  
7 and have mechanisms for dealing with that.

8 The district court could hold the case in  
9 abeyance, for instance, and send the case -- and -- and  
10 require the employee to exhaust in the agency, but that  
11 doesn't mean that the case doesn't belong in the  
12 district court in the first place. That's really a --  
13 kind of a remedial point. Once you wind up in the  
14 district court, our whole point here is that this is a  
15 mixed case, so you should be in district court in the  
16 first place as opposed to the Federal Circuit.

17 CHIEF JUSTICE ROBERTS: Can I -- you could  
18 go to the district court right away simply by skipping  
19 the MSPB; right?

20 MR. LANDAU: Absolutely. And that's one of  
21 the problems with their argument, Your Honor, because  
22 under -- under that point, one of their main arguments  
23 is that the scheme is set up to create a uniform system  
24 of -- uniform jurisprudence of civil service  
25 appealability decisions. But that argument doesn't work

1 on its face precisely because, as Your Honor just  
2 stated, you don't have to go the MSPB route to do this.

3 CHIEF JUSTICE ROBERTS: Well, I think -- I  
4 think you're right that it -- it's a problem. I  
5 just can't figure out who it's a problem for. The --  
6 the -- I mean, if you're concerned about the  
7 consequences of what the MSPB might do, you can skip it  
8 altogether and go -- go to district court right away;  
9 right?

10 MR. LANDAU: Yes, but you certainly don't --

11 JUSTICE GINSBURG: You -- you would have to  
12 exhaust before you go to the district court. You  
13 couldn't just go from the decision.

14 MR. LANDAU: Correct, Your Honor. No, I  
15 think that's correct. But there's two --

16 CHIEF JUSTICE ROBERTS: But that -- that --  
17 that takes place -- I just want to make sure I've got  
18 the flow here right. That takes place before you get to  
19 that fork in the road; right? If this -- this is a  
20 mixed case in which you file your complaint with the  
21 agency --

22 MR. LANDAU: Yes.

23 CHIEF JUSTICE ROBERTS: -- and then you can  
24 go either to the district court or to the MSPB.

25 MR. LANDAU: Correct. You can --

1 CHIEF JUSTICE ROBERTS: Now, before you can  
2 do that, you have to exhaust; right?

3 MR. LANDAU: No. The -- the -- filing your  
4 complaint in the agency EEO is the exhaustion mechanism  
5 in the agency. The alternative exhaustion mechanism is  
6 to go to the MSPB. So you have the two paths there.

7 The point that I was making earlier, Your  
8 Honor, just to be clear, is that you can have a  
9 situation where you go straight from exhausting in the  
10 agency EEO your mixed case. So the mixed case also can  
11 be exhausted in the agency EEO.

12 That -- and in that determination -- this is  
13 7702(a)(2) -- the EEO -- the agency EEO also has to make  
14 a determination under (a)(2)(1) about the Board's  
15 jurisdiction. So there has to be an appealability  
16 determination made by the agency EEO, but we know that  
17 the agency EEO decisions always go straight to district  
18 court. They never go to the Federal Circuit. So it  
19 can't possibly be that there's this desire for a  
20 uniformity of a -- a law of appealability in the Federal  
21 Circuit if one of the two avenues -- the -- the agency  
22 EEO avenue never sends you near the Federal Circuit.

23 JUSTICE ALITO: If you had chosen to go  
24 directly to the district court, if you had bypassed the  
25 Merit System Protection Board, would you be able to



1 raise in the district court the question whether the  
2 alleged removal was proper under 7 -- 7513, whether it  
3 was -- would promote the efficiency of the service, or  
4 would you have at that point only the discrimination  
5 claim?

6 MR. LANDAU: Well, Your Honor, just to be  
7 clear, you -- in any of these mixed cases, you have to  
8 exhaust somewhere, either in the MSPB or in the agency  
9 EEO. So in -- in either scenario, you -- we can see  
10 that you have to exist -- excuse me -- you have to  
11 exhaust.

12 JUSTICE KAGAN: But say -- say you exhaust  
13 in the agency EEO.

14 MR. LANDAU: Yep.

15 JUSTICE KAGAN: Do you still have your civil  
16 service claims that you can bring in district court?

17 MR. LANDAU: Absolutely. That's the  
18 mechanism. I would --

19 JUSTICE KAGAN: The government says not, but  
20 it doesn't cite anything when it says not.

21 MR. LANDAU: And we'd point out a footnote  
22 in our reply brief that we find that a very surprising  
23 assertion in the government's brief, because that's  
24 clearly wrong. You don't lose your civil service claim.  
25 The statute very clearly, 7702(a)(2), sets forth the

1 agency EEO as an alternative to the MSPB for exhausting  
2 mixed claims.

3 And so I -- I don't know where that idea  
4 came up, but we --

5 JUSTICE GORSUCH: Mr. --

6 MR. LANDAU: -- firmly disagree with that.

7 JUSTICE GORSUCH: Mr. Landau, that -- that  
8 raises a question I have for you. Seem -- seems to me  
9 that both sides agree on the premise that mixed cases  
10 can go to the district court, so the district court can  
11 adjudicate some civil service disputes.

12 MR. LANDAU: Correct.

13 JUSTICE GORSUCH: Where in the statute is  
14 that provided? I look at 7703(b)(2), and it speaks of  
15 cases of discrimination filed under Federal  
16 discrimination laws go to district court.

17 MR. LANDAU: That's a -- right.

18 JUSTICE GORSUCH: And then I look at the  
19 standards of review. And the standard of review for the  
20 Federal Circuit talks about normal agency, APA-type  
21 review, in (c) --

22 MR. LANDAU: Right.

23 JUSTICE GORSUCH: -- which makes sense for  
24 civil service claims.

25 MR. LANDAU: Right.

1 JUSTICE GORSUCH: The only standard of  
2 review mentioned for district courts is de novo --

3 MR. LANDAU: Right.

4 JUSTICE GORSUCH: -- which makes sense for  
5 discrimination claims, but not for civil service claims  
6 that might tag along in district court.

7 MR. LANDAU: Right.

8 JUSTICE GORSUCH: So but -- by what -- what  
9 authority does a district court ever have the power to  
10 hear a civil service claim?

11 MR. LANDAU: Just to -- just to start with  
12 the latter part of your question, Your Honor, the -- the  
13 statute, as is often the case, is not the most carefully  
14 drafted. There is no question -- in fact, the direct  
15 holding of this Court in Kloeckner is that mixed cases  
16 go to the MSPB.

17 JUSTICE GORSUCH: But putting aside  
18 Kloeckner --

19 MR. LANDAU: Right.

20 JUSTICE GORSUCH: -- looking at the plain  
21 language --

22 MR. LANDAU: Right.

23 JUSTICE GORSUCH: -- of the statute --

24 MR. LANDAU: Right.

25 JUSTICE GORSUCH: -- if you could just help

1 me with that.

2 MR. LANDAU: Sure, sure.

3 Well, I -- the -- there is no question, even  
4 before Kloeckner, that the statute sends cases of  
5 discrimination -- basically, cases go from --

6 JUSTICE GORSUCH: I would have thought cases  
7 of discrimination under Federal discrimination statutes  
8 are cases of discrimination under Federal discrimination  
9 statutes --

10 MR. LANDAU: Right.

11 JUSTICE GORSUCH: -- and not civil service  
12 disputes.

13 MR. LANDAU: Right. They call them that.  
14 You are absolutely right. The case -- it calls them  
15 that in the statute. But if you look, then, at the  
16 title of 7702, Your Honor, it has -- I'm looking here --  
17 it's called Actions Involving Discrimination.

18 So 7703, which I think is what you are  
19 referring to, 70 -- the exact language in 7703(b)(2),  
20 cases of discrimination subject to the provisions, I  
21 believe that's the language you just read --

22 JUSTICE GORSUCH: Shall be filed under --

23 MR. LANDAU: Shall be filed, right.

24 And then it sends you, though, shall be  
25 filed -- you know, subject to the provisions of 7702

1 shall be filed under -- and -- and what that is really  
2 saying is you file those cases as a standalone  
3 complaint; in other words, you are not seeking review of  
4 agency action at that point. When you have one of these  
5 cases of discrimination -- and, again, when you go to  
6 the title of 7702, it's called Actions involving  
7 discrimination.

8 JUSTICE GORSUCH: Right.

9 MR. LANDAU: So 70 --

10 JUSTICE GORSUCH: But why -- I'm sorry for  
11 taking up so much time, I apologize.

12 My last question: Why does "subject to"  
13 mean it has to meet the standards of 7702 rather than  
14 it's a claim that's subject to the test of 7702?

15 MR. LANDAU: Well, it is. I guess it -- it  
16 all sends you to the same place, though, that you all --  
17 I think the point is that when you have a discrimination  
18 claim, you wind up in district court. I think the text  
19 of the statute -- 7703(b)(2) sends you to 7702(a)(1) --  
20 or 7702, and those are the actions involving  
21 discrimination.

22 JUSTICE GORSUCH: But it's always only  
23 actions of discrimination filed under Federal  
24 discrimination statutes.

25 MR. LANDAU: But what we're talk -- right,

1     because you have a claim on that. But we're talking  
2     about such cases -- such claims within the contour of a  
3     mixed case, which is also a case that involves a civil  
4     service claim.

5                     It seems to me there could have been two  
6     ways to set up this regime. You could have had a regime  
7     where all the civil service claims go to the Federal  
8     Circuit, and all the discrimination cases go straight to  
9     district court. But the Congress decided that it wanted  
10    to event -- prevent claim splitting. So it wanted  
11    employees -- because they often come -- often employees  
12    have the same -- have both of these, and it wanted to  
13    create a regime, a sensible, efficient regime that would  
14    allow employees to bring them together.

15                    JUSTICE ALITO: Can I ask you a question  
16    about the language of 7702(a)(1)(A) and (B), which is  
17    the provision that specifies the jurisdiction of the  
18    MSPB.

19                    So, subparagraph A says: --

20                    MR. LANDAU: Yes, sir.

21                    JUSTICE ALITO: -- "Has been affected by  
22    action."

23                    MR. LANDAU: Right.

24                    JUSTICE ALITO: And subparagraph B says,  
25    "Alleges that a basis for the action."

1 So what should I read into the different language used  
2 in those provisions? The second one, B, certainly  
3 concerns allegations, but it -- A doesn't say alleges  
4 that he has been affected by. It says, has been maybe  
5 affected -- in fact, affected by.

6 MR. LANDAU: Your Honor, you are exactly  
7 right. The government says that you should draw a  
8 negative inference from the absence of the word  
9 "alleges" in A, and, you know, I think that, in truth,  
10 is their strongest textual argument.

11 But --

12 JUSTICE ALITO: What's -- what's wrong with  
13 it?

14 MR. LANDAU: But what's wrong with it is, as  
15 this Court reiterated as recently as SW General last  
16 month, whenever you're talking about this kind of  
17 negative implication, it has to be a sensible one, and  
18 you have to ensure, as a Court, that Congress really  
19 wanted to say no to the other one. And I think here,  
20 the text and structure of the statute tell us that --  
21 that the A has to refer to allegations.  
22 As we said in our brief, there's another provision,  
23 7513(d), that says -- and it -- excuse me. 7513(d) says  
24 an employee against whom an action is taken under this  
25 section is entitled to appeal to the Board. That,

1 again, has to be an allegation. And -- and that is, of  
2 course, the way our law generally works. As we pointed  
3 out in our brief, the Federal question statute doesn't  
4 say alleges. It just says if you have a Federal  
5 question.

6 Our proposition is very much that Congress  
7 legislates against the backdrop of what I'll call the  
8 Bell v. Hood principle, that when -- that the  
9 jurisdiction of an adjudicatory body is triggered by  
10 allegations, and the ultimate failure of those  
11 allegations on the merits doesn't retroactively strip  
12 that body of jurisdiction. And the negative inference  
13 to which you've alluded and to which the government  
14 makes the point is not enough to say to Congress to  
15 throw that all out the window and to create a scheme  
16 where it sends you -- going back to Justice Kennedy's  
17 first question -- on this kind of needless frolic and  
18 detour to the Federal Circuit --

19 JUSTICE GINSBURG: I don't -- I don't see  
20 the -- the needless frolic. This question of  
21 appealability has to go someplace. You say it goes to  
22 the district court. The other side says it goes to the  
23 Federal Circuit. But in -- in this case, you -- your  
24 discrimination claim is fully protected, isn't it, even  
25 if you have to go to the -- to the Federal Circuit on



1 the civil service claim? You can still go to the  
2 district court with your discrimination claim.

3 MR. LANDAU: Absolutely, Your Honor. That  
4 is true. But that is not a reason to say that we should  
5 take a detour to the Federal Circuit. You -- it -- it  
6 is true, and the government is correct, that they're not  
7 saying we lose -- everybody agrees that we have the  
8 ultimate right, we will ultimately wind up in district  
9 court on the discrimination claim.

10 So the real question is, did Congress create  
11 a regime where, on the way to the district court, you  
12 have to go way up to the Federal Circuit to adjudicate  
13 just this one appealability question. And the answer to  
14 that, we think, in light of the text is no.

15 JUSTICE KAGAN: You -- you're being generous  
16 to the government, Mr. Landau. The government says that  
17 it's only by regulation that they will toll the  
18 discrimination claim and that they could get rid of that  
19 regulation tomorrow. And then the discrimination claim  
20 would not be tolled, and you could run out of time on  
21 it; isn't that right?

22 MR. LANDAU: I think even you are being  
23 generous to the government, Justice Kagan, because I  
24 think they say that some of these regulations don't even  
25 necessarily apply, and they even invoke equitable

1 tolling in one of the footnotes to their brief. Because  
2 I think some of the regulations in -- refer to 7702, and  
3 their whole theory says that 7702 never comes into play  
4 at all if the MSPB ultimately concludes that the suit --  
5 the civil service action fails on the merits, if you  
6 don't have the appealable civil service action.

7 JUSTICE GORSUCH: Mr. Landau, does that not  
8 suggest that this detour to the Federal Circuit may not  
9 be what's prescribed by the statute and that, again,  
10 bifurcation should take place and discrimination claims  
11 should go to the district court in the first instance --

12 MR. LANDAU: We -- well --

13 JUSTICE GORSUCH: -- rather than hang around  
14 waiting in the Federal Circuit? Hopefully -- hopefully,  
15 with a regulation that might or might not say that those  
16 are tolled?

17 MR. LANDAU: But, Your Honor, I -- I think  
18 the point is bifurcation -- you are absolutely correct  
19 that the statute -- or -- or let me make clear -- the  
20 statute wants to avoid bifurcation by allowing employees  
21 to bring these claims together. In other words, that --  
22 that is one of the --

23 JUSTICE GORSUCH: My question is just where.

24 MR. LANDAU: Oh. Oh. Well, I think the  
25 question is, if you look at 7703(b)(1), it says --

1   it's -- it's call -- 7703 is judicial review of  
2   decisions of the MSPB. And then it says, except as  
3   provided in subparagraph (B) and paragraph (2) of this  
4   subsection, they go to the Federal Circuit.

5                   So the background rule is that all appeals  
6   from MSPB decisions go to the Federal Circuit, but  
7   the -- the exception is what's important here. And the  
8   exception is cases of discrimination, so that's  
9   suggesting that you have cases of discrimination that  
10  are before the MSPB.

11                  JUSTICE GORSUCH: Cases of discrimination?

12                  MR. LANDAU: Discrimination, subject to all  
13  this, are cases that can still be --

14                  JUSTICE GORSUCH: Keep going. Keep going.

15                  MR. LANDAU: -- subject to the provisions of  
16  section 7702 of this title, shall be filed under section  
17  717(c).

18                  JUSTICE GORSUCH: Right.

19                  MR. LANDAU: Right. But -- but the -- so  
20  you have to look, what is a case of discrimination  
21  subject to the provisions of Section 7702 of this title?

22                  JUSTICE GORSUCH: You also have to ask what  
23  are cases of discrimination filed under 717, right?

24                  MR. LANDAU: Correct.

25                  JUSTICE GORSUCH: And those are classic

1 discrimination claims that are filed in Federal district  
2 court.

3 MR. LANDAU: Correct. Correct. And so  
4 that -- I -- I think I am maybe emphatically agreeing  
5 with you and --

6 JUSTICE GORSUCH: I hope so.

7 MR. LANDAU: Okay. Good. I hope so, too.

8 (Laughter.)

9 JUSTICE GORSUCH: I'm not really sure.

10 MR. LANDAU: I -- I -- I think I am. I  
11 think -- again, I think everybody agrees that when you  
12 have a case of discrimination, it has to go to wind up  
13 in district court. I think, you know, the -- the  
14 question here really is that the government insists that  
15 under --

16 JUSTICE GORSUCH: The question is where is  
17 the detour to the Federal Circuit that you also  
18 anticipate and seem to agree can happen.

19 MR. LANDAU: No, we don't. I'm -- I'm  
20 sorry.

21 JUSTICE GORSUCH: Well, but you say -- the  
22 question is whether it's tolled while it's sitting in  
23 the Federal Circuit.

24 MR. LANDAU: No, no, no. I -- I do -- I was  
25 asked a question whether or not the tolling was enough

1 to -- the government's position basically is that the  
2 tolling is enough to say that you shouldn't worry about  
3 going to the Federal Circuit because the discrimination  
4 claim will be tolled.

5 Our point is, okay. The -- that somewhat  
6 solves the government problem, but you shouldn't have to  
7 go to the Federal Circuit at all. We're not the ones  
8 pushing the tolling by any means. I'm sorry if I was  
9 not clear on that. That's the government's theory.  
10 Because the government, instead of having a case, what  
11 they want to do is have two disembodied claims that are  
12 somehow floating around together, and they concede that  
13 the Federal Circuit can only address the civil service  
14 claim.

15 But our point is, this isn't individual  
16 claims. These are cases -- these are mixed cases that  
17 Congress has joined and they are trying to rend them  
18 asunder, and to have these disembodied things going to  
19 separate places, and -- and that, I think, is the -- the  
20 heart of it here.

21 Again, I think that the critical -- the  
22 critical point here is that the word "jurisdiction" is  
23 being misused. I don't think anybody would disagree  
24 that if the -- if there weren't even allegations on the  
25 face of the complaint, that that would be a -- that that

1 would give rise to a serious civil -- civil service  
2 action. That is a jurisdictional problem.

3 I think the problem here is that the Board is making  
4 a -- the classic kind of mistake that this Court has for  
5 20 years been trying to correct, of the profligate use  
6 of the word "jurisdiction." And it is saying, when we  
7 decide on the merits -- for instance, in this case, they  
8 decided the settlement here was voluntary, so you gave  
9 up all your claims. That is a substantive determination  
10 of the merits. The Board is labeling that determination  
11 jurisdictional. That's what's getting us into this  
12 whole mess, that the Board is calling these decisions  
13 that are actually substantive, jurisdictional.

14 JUSTICE SOTOMAYOR: I'm sorry. Does that  
15 mean that a finding that this suspension or furlough  
16 wasn't of the required number of days, is that  
17 jurisdictional? Are you -- or are you just arguing that  
18 this situation involving a settlement agreement is not  
19 actually jurisdictional?

20 MR. LANDAU: Well, we're saying that --

21 JUSTICE SOTOMAYOR: Or that any ruling where  
22 the Board says we don't have power to hear this case --

23 MR. LANDAU: Well. We're saying that --

24 JUSTICE SOTOMAYOR: -- is not  
25 jurisdictional?

1                   MR. LANDAU: It is not -- when the Board  
2 decides -- if you -- as long as the complainant alleges  
3 something that is one of the serious civil service  
4 actions, if the -- if the Board rejects --

5                   JUSTICE SOTOMAYOR: First, let's -- let's go  
6 to the suspension.

7                   MR. LANDAU: Okay.

8                   JUSTICE SOTOMAYOR: You need to have a  
9 suspension of a certain number of --

10                  MR. LANDAU: 14 days, Your Honor.

11                  JUSTICE SOTOMAYOR: All right. And let's  
12 assume that the person only was suspended for 13 days.

13                  MR. LANDAU: Correct. Okay.

14                  JUSTICE SOTOMAYOR: In fact, the extra two  
15 days that they thought they served was taken off of  
16 medical leave.

17                  MR. LANDAU: Uh-huh.

18                  JUSTICE SOTOMAYOR: For some reason it  
19 didn't fall. Is that a jurisdictional?

20                  MR. LANDAU: No. No. Because they --  
21 it could --

22                  JUSTICE SOTOMAYOR: You think that any  
23 dismissal, whatever the basis --

24                  MR. LANDAU: As long as it has been alleged,  
25 that's enough to trigger the Board's jurisdiction, but

1 it --

2 JUSTICE SOTOMAYOR: But as long as the  
3 person thinks the Board can hear this?

4 MR. LANDAU: Well, as long as the person  
5 alleges that, just as you can -- in Bell v. Hood, a  
6 person brought what turned out to be a Bivens claim in  
7 1946, and this Court said there is jurisdiction over  
8 that claim. The fact that the claim fails on the  
9 merits, which it did in 1946, is not a reason to say  
10 that there was not jurisdiction.

11 JUSTICE SOTOMAYOR: It's a strange use of  
12 the word "merits," because generally, merits is an  
13 adjudication of the actual claim, i.e., I was  
14 discriminated against or I was furloughed improperly,  
15 not that a Board doesn't have the power to hear  
16 something. That's generally considered a merits --

17 MR. LANDAU: But, see, I think the Board did  
18 have the power to -- to hear that.

19 Well, look, it is --

20 JUSTICE SOTOMAYOR: You're absolutely right.  
21 Every court has -- or every entity has the power to  
22 determine their own jurisdiction, so there is a circular  
23 problem to this argument.

24 MR. LANDAU: And your point is --that you  
25 started with, Your Honor, is particularly powerful here,



1 in a case of constructive discharge, where there is a  
2 complete and total overlap between the merits of his  
3 claims and what they're calling a jurisdictional  
4 determination. Because they're saying, hey, you gave up  
5 all your claims in a settlement agreement. This is all  
6 voluntary action.

7 That is the whole ball of wax, both for his  
8 civil service claim and, frankly, for his --

9 JUSTICE SOTOMAYOR: Can I ask --

10 MR. LANDAU: -- discrimination claim.

11 JUSTICE SOTOMAYOR: Can I just ask a simple  
12 question? What happens if you had gone to the district  
13 court first? If you were permitted to, as you did.

14 MR. LANDAU: Well, yeah, we would have to  
15 exhaust, either in the agency EEO or through the MSPB,  
16 and then what we would ask the court to do --

17 JUSTICE SOTOMAYOR: Let's assume you went to  
18 the agency.

19 MR. LANDAU: Okay.

20 JUSTICE SOTOMAYOR: And you then went to --  
21 back to the district court.

22 MR. LANDAU: Okay.

23 JUSTICE SOTOMAYOR: What happens to the  
24 Board's finding that the settlement was voluntary?

25 MR. LANDAU: Well --

1 JUSTICE SOTOMAYOR: How does that get  
2 reviewed and by whom?

3 MR. LANDAU: It gets reviewed in district  
4 court. And I think this goes back to a question that  
5 Justice Gorsuch asked earlier, that the standards of  
6 review is oddly written in 7703 -- I can't remember if  
7 it was (c).

8 JUSTICE GORSUCH: (c).

9 MR. LANDAU: Because it doesn't refer to the  
10 district court's standard review of the civil service  
11 claim. But, of course, just to be clear, that is true  
12 for cases where mixed cases involve substantive civil  
13 service issues and procedural civil service issues, and  
14 everybody agrees that those go to district court.  
15 So we're not asking this Court to break any new ground.  
16 It's --

17 JUSTICE GORSUCH: No, just to continue to  
18 make it up.

19 MR. LANDAU: Well, no. I mean, just -- Your  
20 Honor, again, I think the fact that it's not there just  
21 doesn't -- doesn't mean that it's not supposed to,  
22 because the statutory scheme --

23 JUSTICE GORSUCH: Just because it's not  
24 there doesn't mean it shouldn't be there. I agree with  
25 you, but it's not there.

1 MR. LANDAU: It's not there.

2 JUSTICE GORSUCH: All right.

3 MR. LANDAU: But then the part -- again, you  
4 face a textual imperative cutting both ways, because the  
5 text clearly does send some of the -- send these mixed  
6 cases to district court in cases involving  
7 discrimination claims.

8 So the question, then, is, what standard of  
9 review should apply to the civil service component of  
10 the mixed case when it arrives in district court. I  
11 believe that was Justice Sotomayor's question.

12 And -- and the answer to that is all the  
13 courts that have addressed the issue, have held that it  
14 is the same arbitrary and capricious standard of review  
15 that applies to agency action, generally, and that the  
16 Federal Circuit would apply to this, because -- because  
17 you are reviewing agency action.

18 With respect to the civil service claim, the adjudicator  
19 is -- the main adjudicator is that the -- the Board  
20 and -- you're just getting agency review of that. With  
21 the civil -- with a discrimination claim, the main  
22 adjudicator is, in fact, the district court, and you're  
23 just exhausting on your way there.

24 I see that my light is on, and I'd like to reserve the  
25 balance of my time

1 CHIEF JUSTICE ROBERTS: Thank you, counsel.

2 MR. LANDAU: Thank you.

3 CHIEF JUSTICE ROBERTS: Mr. Fletcher.

4 ORAL ARGUMENT OF BRIAN H. FLETCHER

5 ON BEHALF OF THE RESPONDENT

6 MR. FLETCHER: Thank you, Mr. Chief Justice,  
7 and may it please the Court:

8 The Federal Circuit generally has exclusive  
9 jurisdiction to review the MSPB's decisions. But  
10 Section 7703(b) (2) carves out an exception that sends  
11 mixed cases to the district court.

12 That exception doesn't apply here, because  
13 the Board concluded the Petitioner does not have a mixed  
14 case, and then dismissed without deciding anything else.  
15 As a result, Petitioner, unlike the plaintiff in  
16 Kloeckner, is not seeking to bring a mixed case into the  
17 Federal courts. Instead, he's seeking --

18 JUSTICE KAGAN: Well, that's what --

19 CHIEF JUSTICE ROBERTS: Go ahead.

20 JUSTICE KAGAN: That's what the -- the Board  
21 says, but we don't know that, right? Isn't it for the  
22 district court to make exactly that determination?

23 MR. FLETCHER: Well, I think what the Board  
24 said is that he doesn't have a mixed case, and that has  
25 shaped what he is asking the courts to decide. So he is

1 not seeking further processing on his mixed case. He  
2 wants a Federal court, either the district court or the  
3 Federal Circuit.

4 JUSTICE KAGAN: He still -- he still thinks  
5 he has civil service claims, in addition to  
6 discrimination claims.

7 MR. FLETCHER: And the only thing he wants  
8 the court to do, and I think this is clearest on page 18  
9 of the reply brief, he wants whichever court it is,  
10 either the reviewing court or the district court or the  
11 Federal Circuit, to decide to reverse the Board's  
12 decision that he didn't suffer an appealable action and  
13 send the matter back down to the Board for further  
14 proceedings on both his discrimination claims and his  
15 civil service claims.

16 JUSTICE KAGAN: Well, that's because the  
17 Board didn't -- said that it was not reviewing the  
18 merits of his civil service claims. But he still thinks  
19 he has civil service claims and discrimination claims,  
20 and so he is rejecting the idea that the Board -- the  
21 Board has said it's not a mixed case, but he think it's  
22 still a mixed case.

23 And the question is, who decides that?  
24 Because if it is a mixed case -- yes.

25 MR. FLETCHER: If it is a mixed case, it's

1 going to go back to the MSPB --

2 JUSTICE KAGAN: It's going to go back to  
3 the -- to the district court, eventually.

4 MR. FLETCHER: Exactly. It's going to be  
5 processed by the MSPB as a mixed case. If he doesn't  
6 win there, he's going --

7 JUSTICE KAGAN: So I don't see that,  
8 Mr. Fletcher, as addressed by this statutory language  
9 that you talk about. You know, you talk about 7702, and  
10 as Justice Alito said, you said (a) says, "has been  
11 affected," and (b) says -- alleges that a basis for the  
12 action was discrimination. But all 7702 does, is it  
13 defines a category of cases, these mixed cases, and  
14 that's what defines them, that it -- that the employee  
15 has been affected by a certain kind of action and makes  
16 a certain kind of allegation and it says, well, the  
17 Board decides that. And then 7703 says that,  
18 afterwards, it goes to the district court.

19 But what is left completely unaddressed in  
20 this is the question of who decides whether this is a  
21 mixed case as defined by 7702. 7702 doesn't tell you  
22 that. It's a -- it's a -- so -- so where in the statute  
23 do you think it tells you who decides whether something  
24 is a mixed case as defined by 7702?

25 MR. FLETCHER: Well, for purposes -- that

1 question could come up at different points. The  
2 question for which it's relevant here is the question,  
3 does this appeal go to the Federal Circuit, or does it  
4 go to the district court? And for that purposes, I  
5 think there are basically three options for who decides.  
6 One option that no one has advocated --

7 JUSTICE KAGAN: I'm just asking you -- you  
8 know, you point to this language. This language doesn't  
9 get you there. I'm just asking whether you have other  
10 language to point to that suggests that the "who  
11 decides" question ought to be in the Federal Circuit.

12 MR. FLETCHER: Well, let me first take a run  
13 at you on this language, because I think what it does  
14 say, as Justice Alito pointed out, is that the  
15 employee's allegation is sufficient as to the  
16 discrimination content --

17 JUSTICE KAGAN: No, it obviously --

18 MR. FLETCHER: -- but not as to the other.

19 JUSTICE KAGAN: No, it obviously makes a  
20 distinction between allegations and -- and being  
21 affected by an action, but only -- all that this  
22 provision does is it defines what a mixed case is, and  
23 says the -- the Merit System Protection Board will  
24 decide that mixed case.

25 And the definition of a mixed case has one

1 element, which is an actual thing, and another element,  
2 which is an allegation.

3 MR. FLETCHER: Yes.

4 JUSTICE KAGAN: But this is only the  
5 statement that the Board will address mixed cases.

6 It doesn't say anything about what happens  
7 if there's a dispute as to whether there is a mixed  
8 case, who gets to decide that question.

9 MR. FLETCHER: And the only point I'm trying  
10 to make is that I think -- it may not answer that  
11 question definitively, in your view, but I think the  
12 fact -- it cuts against my friend's answer, which is  
13 that we should take the employee's word for it; that if  
14 the employee alleges he has a mixed case, it ought to be  
15 treated as such for purposes of these questions, because  
16 the statute makes an allegation sufficient only as to  
17 one of two elements.

18 JUSTICE KAGAN: But that's --

19 CHIEF JUSTICE ROBERTS: But that's the  
20 way -- that's the way the system works, generally. I  
21 mean, there are all sorts of statutory programs where  
22 there are prerequisites to a proceeding. You know, the  
23 Clean Water Act, you know, you can only proceed if  
24 they -- the company is discharging water into navigable  
25 waters, but the system always works by the fact -- it



1 has to start with an allegation.

2 That's the -- you know, the -- the one  
3 provision does say "alleges" and the other doesn't, but  
4 it's hard to see how -- the -- the system doesn't turn  
5 on preexisting facts. The way it -- you answer facts is  
6 you have an allegation, and then you have a response and  
7 all that.

8 So I don't think the fact that it -- A did  
9 not use the word "alleges" can really be that  
10 significant.

11 MR. FLETCHER: Well, I think our system does  
12 work that if you have a provision that a tribunal, a  
13 court, an agency, whatever, can hear a certain kind of  
14 case, by necessity, when someone comes in and claims to  
15 have that sort of case, you have to take their word for  
16 it; at least insofar as you have to hold proceedings to  
17 figure out if they're right.

18 I think our point, though, is that when you  
19 have jurisdictional allegations like, say, diversity  
20 jurisdiction, or any other number of other  
21 jurisdictional elements and you then have factual  
22 proceedings or legal proceedings to test the sufficiency  
23 of those jurisdictional allegations, if they're found  
24 lacking, then the result is that the case is dismissed  
25 for lack of jurisdiction.

1 CHIEF JUSTICE ROBERTS: And -- and that --  
2 and, normally, that you can appeal that, and -- and have  
3 a choice to seek a review of it. And you're talking  
4 about matters that are, I think in a majority of the  
5 cases, brought pro se.

6 MR. FLETCHER: That's right.

7 CHIEF JUSTICE ROBERTS: And we've -- we have  
8 had -- I won't say difficulty, but we've had a lot of  
9 cases trying to decide whether something is  
10 jurisdictional or procedural. And it's not always an  
11 easy question. And to suggest that people, you know,  
12 filing these things pro se will be able to understand,  
13 well, that's jurisdictional, but it may actually be  
14 jurisdictional in the sense of being a claims processing  
15 rule as opposed to substantive jurisdiction. I -- I  
16 think you're putting a huge burden on the -- on the  
17 system.

18 MR. FLETCHER: And so let me say a couple of  
19 things about that. The first is that this is the sort  
20 of jurisdiction in the abstract. Our rule turns on the  
21 language that this Court focused on in Kloeckner, which  
22 says you have a mixed case if you've been subject to the  
23 sort of action which you can appeal to the Board.  
24 That's all we mean by "jurisdictional."

25 And the second point, I take your point that

1 many of the employees who proceed through this process  
2 are pro se, and that's why the process takes steps to  
3 protect their rights.

4 At the end of every Board decision is an  
5 advisory about appeal rights. And when, as in this  
6 case, the Board concludes that it doesn't have a  
7 jurisdiction because the action wasn't appealable, it  
8 advises the employee that their right to seek review is  
9 in the Federal Circuit.

10 So I take the point that this is a rule that  
11 employees may have to handle on their own. But the  
12 system helps them through that.

13 JUSTICE KAGAN: But the whole point of this  
14 scheme, generally -- and we have said this, and it  
15 appears on the face of the statute -- is to make sure  
16 that the employee doesn't have to claim-split.

17 And so we've said when the Board dismisses  
18 your claim on the merits, you can take it to the  
19 district court. And we have said that when it dismisses  
20 your case on procedure, you can take it to the district  
21 court. You can do everything in the district court, you  
22 don't have to split it up, do one thing in the Federal  
23 Circuit and one thing in the district court.

24 And now, for this one category of thing,  
25 which you call "jurisdictional," Mr. Landau says in this

1 case it looks an awful lot like a merits determination,  
2 but anyway, for this one category of thing, we're going  
3 to treat it differently, we're going to insist that you  
4 split your claims and -- and not bring the  
5 discrimination claim in the Federal Circuit because you  
6 can't bring it there, but instead you have to go to the  
7 Federal Circuit on your CSRA claim.

8 MR. FLETCHER: Justice Kagan, I disagree  
9 that this is claim-splitting. We are not taking just  
10 part of the case. He is not taking just the civil  
11 service claims to the Federal Circuit again.

12 I -- I point to reply brief page 18 where he  
13 explains that if the reviewing court, be it the Federal  
14 Circuit or the district court, concludes that the Board  
15 was wrong on the appealability question, both parts of  
16 the case are going to go back down to the Board for  
17 further processing. So this isn't the --

18 JUSTICE KAGAN: Well, the claim -- it's  
19 temporary claims-splitting. It's -- you know, you have  
20 to put your -- your discrimination claim on the back  
21 burner and proceed with respect only to your civil  
22 service claim and decide, you know, whether the -- the  
23 board can -- can review that or not.

24 MR. FLETCHER: Right. And --

25 JUSTICE KAGAN: That's a kind of

1 claim-splitting. I mean, you can say eventually it will  
2 all get into the same place, but eventually can be can  
3 be a long time. And as I said before, your  
4 discrimination claim may have lapsed by then, and you  
5 don't guarantee that it will survive. And so that seems  
6 to me something which is -- is -- you know, really cuts  
7 against the way this scheme works in the vast majority  
8 of cases, and the way we have said it should.

9 MR. FLETCHER: But I think the only thing --  
10 none of that is unique to our rule. I think, even under  
11 Petitioner's rule, you're going to have a threshold  
12 dispute about was this an action appealable to the  
13 board. Under Petitioner's rule, that threshold dispute,  
14 there's going to be a detour to the district court to  
15 decide that threshold dispute. And if the district  
16 court concludes that the employee did not have an  
17 appealable action, then the employee is going to need  
18 some sort of tolling rule or something to forgive the --  
19 the missing of a regulatory deadline, because that  
20 employee has not properly exhausted a pure  
21 discrimination claim.

22 So I think I --

23 JUSTICE SOTOMAYOR: All right. May I ask  
24 you that question. I -- I was following your argument  
25 in your brief until I got to footnote 3 on page 23. You

1 know which one I'm referring to?

2 MR. FLETCHER: I do.

3 JUSTICE SOTOMAYOR: So there is -- you're  
4 saying that the regulations that provide, essentially,  
5 for tolling, that there's no statutory basis for them.

6 Are you saying -- or at least not --

7 MR. FLETCHER: Not 7702(f), yes.

8 JUSTICE SOTOMAYOR: Are you saying that  
9 there isn't another one, or that this regulation is open  
10 to challenge, and if it is, then nothing gets tolled?

11 MR. FLETCHER: No, certainly not. I think  
12 the general rule -- the EEOC has general rule-making  
13 authority for the processing of federal employment  
14 discrimination claims, including mixed cases through the  
15 administrative process.

16 It's general rule, even apart from the  
17 particular one that we're relying on here, is that  
18 deadlines are subject to tolling and waiver and other  
19 sorts of provisions. And so I think, even apart from  
20 the specific authority in 7702(f), there would be room  
21 for a tolling rule like this one.

22 I think the Ninth Circuit's decision in  
23 Sloan v. West, which is one of the early pre-Kloeckner  
24 cases that looked at this question, concluded that this  
25 sort of tolling would be required as a matter of

1 equitable tolling.

2           So again, on the tolling issue, I think  
3 either side is going to need some sort of tolling rule,  
4 and I think there's plenty of room to make that sort of  
5 tolling rule once it gets sorted out, which forum the  
6 employee --

7           CHIEF JUSTICE ROBERTS: It is odd, though.  
8 It is odd that the only category of cases that you say  
9 has to go to the Federal Circuit through the MSPB are  
10 the cases in which the MSPB thinks they don't have  
11 jurisdiction.

12           MR. FLETCHER: Well --

13           CHIEF JUSTICE ROBERTS: You have two cases  
14 here, and one was come together, and the one they say,  
15 no, no, that's got to go to the MSPB and the -- I mean,  
16 that's got to go to the Federal Circuit because we need  
17 uniformity are the cases where they don't think there is  
18 a claim under the Civil Service Act.

19           MR. FLETCHER: I -- I actually think I  
20 understand that that may seem logical from -- from one  
21 angle. I actually think it makes a lot of sense when  
22 you think about why Congress made the exception for  
23 mixed cases to begin with.

24           Generally, all board decisions go to the  
25 Federal Circuit because we want uniformity, we want the

1 efficiency of just a single layer of judicial review.  
2 We carve out mixed cases because those cases include  
3 claims of discrimination. Employees have a right to  
4 trial de novo on their discrimination claims, and you  
5 obviously can't get that in the Federal Circuit.

6 But here -- and again, I go back to the  
7 nature of the question that the employee is presenting  
8 to the Court: It is not a discrimination claim on which  
9 there will be a trial de novo. It is just the discrete  
10 question: Is this an appealable action?

11 Everyone agrees that that question is just a  
12 matter of Federal Civil Service law, of the sort that  
13 the Federal Circuit answers every day in non-mixed  
14 cases, and that district courts rarely, if ever, answer.

15 JUSTICE KAGAN: Then why --

16 JUSTICE GINSBURG: So that label,  
17 jurisdictional -- I mean, as I see it, the -- and the  
18 employee says, these adverse actions were taken against  
19 me, I was suspended, and then I was forced into early  
20 retirement. Those are adverse actions.

21 And then the MSPB said, but you surrendered  
22 those claims. That's ordinarily like a release. It's  
23 like a defense. I don't see how it gets to be  
24 jurisdictional.

25 MR. FLETCHER: I think this is most clearly



1   laid out on page 4A of the Petitioner Appendix in the  
2   D.C. Circuit's opinion. It explains that the board's  
3   general view, which has been upheld by the Federal  
4   Circuit, is that a voluntarily-accepted action is not an  
5   adverse action that's subject to the Board's  
6   jurisdiction.

7                   So here, take the resignation. Petitioner  
8   facially resigned or retired his employment. The board  
9   only has jurisdiction over removal. And so the board  
10   has said, ordinarily, obviously, we wouldn't have  
11   jurisdiction over retirement, but if you can show that  
12   you were coerced into retiring, we'll treat that like a  
13   constructive removal, within our authority to hear;  
14   we'll treat that like an appealable action.

15                   And I think the -- the rule that's at issue  
16   here -- and I just want to point out, even if you don't  
17   agree with me on this, that's not really the question  
18   presented in this case. The case comes to the Court on  
19   the premise that this was decided on appealability  
20   grounds.

21                   And even if you disagree that this  
22   particular ground is, in fact, an appealability ground,  
23   lots of them are. Lots of them may be the cases, like  
24   Justice Sotomayor pointed out, where there's a question  
25   about was this a suspension of more than 14 days or not,

1 or is this an employee who is entitled to civil service  
2 protections or not.

3 So the --

4 JUSTICE ALITO: Mr. Fletcher, the -- the one  
5 thing about this case that seems perfectly clear to me  
6 is that nobody who is not a lawyer, and no ordinary  
7 lawyer could read these statutes and figure out what  
8 they are supposed to do.

9 (Laughter.)

10 JUSTICE ALITO: And this isn't -- this isn't  
11 your fault.

12 Now we'll decide this case, and that will  
13 make things clearer. There still will be all sorts of  
14 questions.

15 Can't something -- can't something be done about this?

16 (Laughter.)

17 JUSTICE ALITO: This is a case that's about,  
18 at bottom, not very much substantively, right? No  
19 matter which side wins, Mr. Perry will, in the end, get  
20 a decision if he wants it in the district court on both  
21 of the questions.

22 MR. FLETCHER: Yes.

23 JUSTICE ALITO: So what can be done to clear  
24 up this? This is unbelievably complicated.

25 MR. FLETCHER: I'm not going to fight your

1 point that this is a complicated statutory scheme, or  
2 your point that it's going to remain so whatever the  
3 Court does with this case. I think the agencies are  
4 doing the best that they can by providing Notices of  
5 Appeal rights.

6 And here, you know, Petitioner was advised  
7 your appeal right lies in the Federal Circuit, here's  
8 how to file that appeal, here's the deadline for filing  
9 that appeal, here's information about how to file that  
10 appeal.

11 JUSTICE ALITO: Who wrote -- who wrote this  
12 statute? Somebody who --

13 (Laughter.)

14 JUSTICE ALITO: -- takes pleasure out of  
15 pulling the wings off flies?

16 (Laughter.)

17 MR. FLETCHER: I think Congress was trying  
18 to balance and mesh together two systems, the Civil  
19 Service system and the anti -- and the federal  
20 discrimination laws. And it will find --

21 CHIEF JUSTICE ROBERTS: Well, but the way --  
22 the way you end up, though, is a situation where,  
23 peculiarly, the MSPB has jurisdiction because uniformity  
24 is desirable in a particular area. Even though it  
25 doesn't have -- it can't enforce uniformity as a matter

1 of substantive law, and we held in Kloeckner it can't  
2 enforce uniformity as a matter of procedural laws.

3 And you made these arguments in Kloeckner  
4 and lost on procedure, and now you're saying, well,  
5 jurisdiction is different so we can make the same  
6 arguments there.

7 In terms of accessibility of the statute,  
8 and simplicity, it would seem wiser to prevent that type  
9 of, you know, splitting the -- well, whatever.

10 MR. FLETCHER: Well, I -- I don't think --  
11 the Court did reject those arguments in Kloeckner. I  
12 think it rejected them, though -- I'm not going to tell  
13 the Court what it meant in Kloeckner. As I read  
14 footnote 4 of the opinion, it doesn't say -- it doesn't  
15 deny that Congress was interested in uniformity and an  
16 efficiency judicial review, it just says that the text  
17 foreclosed the argument we were making in Kloeckner.  
18 We --

19 JUSTICE SOTOMAYOR: Could you please tell  
20 me, besides this voluntary settlement issue, what else  
21 is jurisdictional? What else besides something that  
22 doesn't match 7512, the furlough and suspension?

23 MR. FLETCHER: Right.

24 JUSTICE SOTOMAYOR: So if we go down your  
25 route, and I'm writing that opinion -- which I hope not,

1 but if I were --

2 (Laughter.)

3 JUSTICE SOTOMAYOR: What -- what would I  
4 tell the practicing bar about what the board labels as  
5 jurisdictional really counts as jurisdictional?

6 MR. FLETCHER: I think you would tell them  
7 that it's yolked to the text that this focused on in  
8 Kloeckner, which is Section 7702(a)(1), which says that  
9 to be a mixed case, you have to have been affected by an  
10 action which you can appeal to the board.

11 And in Elgin, this Court explained that the  
12 actions that you can appeal to the board generally are  
13 determined by the kind of action which you've suffered,  
14 a removal or suspension and so forth, and the kind of  
15 employee that you are: Are you a -- a civil servant?  
16 Are you preference-eligible? Are you otherwise in a  
17 category that's entitled to these protections and given  
18 rights to appeal to the board. That's what's --

19 JUSTICE SOTOMAYOR: So there's --

20 MR. FLETCHER: -- mean by --

21 JUSTICE SOTOMAYOR: -- a whole lot of cases  
22 besides what I thought, 7512. There's also cases having  
23 to do with whether you're a defined employee or not.

24 MR. FLETCHER: That -- that's right. I  
25 think 7512 only applied to certain categories of

1 employee. And I think that gets to the point of why it  
2 is that Congress might have wanted to keep these  
3 questions in the Federal Circuit.

4 And this gets back to your question,  
5 Mr. Chief Justice. It's absolutely right that in some  
6 cases Congress sacrificed that interest in uniformity  
7 because it wanted to pursue other values, because it  
8 wanted to protect employees' rights to trial de novo.

9 And the -- the point that I want to get to  
10 here is that the particular type of dispute at issue  
11 here, an appealability dispute, doesn't implicate those  
12 reasons that caused Congress to sacrifice uniformity in  
13 other contexts.

14 JUSTICE GORSUCH: Mr. Fletcher, when we're  
15 talking about folks knowing where to go and making it  
16 easier on them, can you help me with the same question I  
17 had for Mr. Landau? Which is (b) (2), as I read it,  
18 talks about cases of discrimination filed under Federal  
19 discrimination laws go to district court, and everything  
20 else goes to the Federal Circuit.

21 Now, that would be a nice clean rule; right?  
22 Individuals would know that their civil service disputes  
23 go to the Federal Circuit and discrimination claims go  
24 to district court. We have to add a lot of words to the  
25 statute on standards of review for the district court if

1 they're going to be reviewing administrative actions.  
2 We have to ignore the standard of review that is  
3 prescribed by the statute for the district court de novo  
4 when it comes to certain claims that would come before  
5 them. We have to worry about all this equitable tolling  
6 as well, and a regulation that may or may not say what  
7 the government says it says.

8                   Wouldn't it be a lot easier if we just  
9 followed the -- the plain text of the statute? What am  
10 I missing?

11                   MR. FLETCHER: So I -- I think it might be a  
12 simpler system, but it would be a system that would  
13 require the sort of claim-splitting that Justice Kagan  
14 referred to earlier in a much more serious way.

15                   I think also I agree with you that the  
16 statute doesn't expressly provide for district courts to  
17 decide civil service claims. I think it's fairly  
18 read -- it's not elegantly drafted -- but I think it's  
19 fairly read to allow that. And let me give you a couple  
20 of reasons --

21                   JUSTICE GORSUCH: Where?

22                   MR. FLETCHER: Let me give you a couple  
23 reasons --

24                   JUSTICE GORSUCH: Where?

25                   MR. FLETCHER: Yes.

1 JUSTICE GORSUCH: Not reasons. Where in the  
2 language?

3 MR. FLETCHER: Absolutely.

4 So we start with the general rule that says  
5 you -- in Section 7703(b)(1) that says, "Except as  
6 provided in paragraph 2, a petition to review a final  
7 order or a final decision of the Board shall be filed in  
8 the Federal Circuit."

9 The provision that we've been talking about  
10 that says you can bring a discrimination case in  
11 district court is an exception to that rule, which  
12 suggests to me that what you're doing is seeking a  
13 review of the Board's decision, which, of course,  
14 included civil service claims.

15 JUSTICE GORSUCH: It doesn't say that. It  
16 says -- the except clause says, "Cases of discrimination  
17 filed under Federal discrimination laws." That's what  
18 it says.

19 MR. FLETCHER: But let me -- let me just  
20 quote the language. It says, "Cases of discrimination  
21 subject to the provisions of Section 7702 of this title  
22 shall be filed under the applicable antidiscrimination  
23 laws."

24 A case of discrimination subject to 7702 is  
25 defined as a mixed case that includes both



1 discrimination and other components.

2 JUSTICE GORSUCH: Where?

3 MR. FLETCHER: In Section 7702 itself, where  
4 it says a case of discrimination subject to --

5 JUSTICE GORSUCH: But that -- that just  
6 raises the question what "subject to" means, right?  
7 And -- and you're equating "subject to" with "meeting  
8 the test of." But "subject to" can also mean subject  
9 to. It can be tested under. Not that it meets the  
10 test, but it can be tested under, right? That's often  
11 how Congress uses that phrase.

12 MR. FLETCHER: I -- I understand. I -- I  
13 may not be grasping in that sense. I understand that  
14 you might use it to say this is true, subject to some  
15 other provision that might qualify it.

16 JUSTICE GORSUCH: Right.

17 MR. FLETCHER: I don't think that's how  
18 Congress used it here.

19 JUSTICE GORSUCH: It may or may not qualify,  
20 not that it does qualify.

21 MR. FLETCHER: I guess --

22 JUSTICE GORSUCH: Often, it's used in that  
23 sense, right?

24 MR. FLETCHER: I -- I'm not sure that it --  
25 I -- I can agree with that.

1 JUSTICE GORSUCH: Really? Why not? You  
2 just gave me a good example.

3 MR. FLETCHER: Then I think maybe I'm  
4 misunderstanding the question. I -- I agree sometimes  
5 Congress says the rule is you go to district court,  
6 subject to, in this case, you can go to some other  
7 tribunal. So it's describing an exception.

8 I think that that's not what it's doing  
9 here. Here, it's using that as a description --

10 JUSTICE GORSUCH: Do you have any authority  
11 for that proposition?

12 MR. FLETCHER: Kloeckner, which I think  
13 says, you know, this is a --

14 JUSTICE GORSUCH: Besides Kloeckner.  
15 Anything else?

16 JUSTICE KAGAN: Well, Kloeckner certainly  
17 says it, but beyond Kloeckner, I mean, merits cases  
18 that -- that have been -- have been going to district  
19 court for years prior to Kloeckner; isn't that right?

20 MR. FLETCHER: That's right. Kloeckner, in  
21 footnote 4, said that in the Federal Circuit's decision  
22 in Williams in 1983, which is sort of the first that  
23 decided this. And every court that I'm aware of since  
24 then has followed it.

25 JUSTICE KAGAN: Right. This would be a kind

1 of revolution, I mean, in -- in -- to the extent that  
2 you can have a revolution in this kind of case.

3 (Laughter.)

4 MR. FLETCHER: It would be a big change,  
5 yes.

6 JUSTICE BREYER: So when it goes to the  
7 district court -- well, here, first, you could go to the  
8 district court at the beginning. You can treat it as  
9 discrimination, but then you can't bring the civil  
10 service part.

11 So now we want to bring both. And we go to  
12 the MSPB. And then we -- okay. Now, again, we -- we  
13 take an appeal and we go -- we have to go to the Federal  
14 Circuit --

15 MR. FLETCHER: Uh-huh.

16 JUSTICE BREYER: -- and in -- in the MSPB.  
17 We then can -- if they kept it for 120 days more, we go  
18 right to the district court. Remember that. Then, by  
19 the way, if they decide against us, we go right to the  
20 district court. Remember that.

21 Now, in the two cases I said to remember,  
22 when the district court has them, does the district  
23 court decide both the discrimination issue and does it  
24 review the civil service issue?

25 MR. FLETCHER: So in our view, the answer to

1     that question has to be yes.

2                   JUSTICE BREYER:  Otherwise, you're going to  
3     bounce, bounce, bounce.

4                   MR. FLETCHER:  I don't think that's right.  
5     I think those are -- those are provisions that you've  
6     described that give the employees options to  
7     short-circuit the administrative process in the district  
8     court.

9                   JUSTICE BREYER:  Well, no.  I -- no, you're  
10    not following me.  I think I'm agreeing with you.  I'm  
11    saying your answer has to be right, because, otherwise,  
12    you again get the civil service part -- I mean, the  
13    discrimination part done.  Then it would be back over at  
14    the Board again and it would never end.  And this poor  
15    employee, who is already hungry and thirsty and been  
16    going on for quite a while, would just have another  
17    loop-around to go.  Am I right?

18                  MR. FLETCHER:  I -- I think so.  Let me just  
19    articulate it to make sure we're on the same page.

20                  JUSTICE BREYER:  Yes.

21                  MR. FLETCHER:  Our view -- and this is  
22    not -- certainly not all the courts of appeals have  
23    agreed.  But our view is that if an employee invokes the  
24    provisions of Section 7702(e) --

25                  JUSTICE BREYER:  Yes.

1 MR. FLETCHER: -- and doesn't wait for a  
2 final decision and instead goes straight to court --

3 JUSTICE BREYER: Yes.

4 MR. FLETCHER: -- what he can bring to court  
5 are his discrimination claims. He is giving up his  
6 civil service claim.

7 JUSTICE BREYER: Oh, really? Now suppose  
8 they decide it in the MPSB --

9 MR. FLETCHER: Yes.

10 JUSTICE BREYER: -- and then he goes to  
11 district court.

12 MR. FLETCHER: Yes.

13 JUSTICE BREYER: Does he get review of the  
14 civil service claim in district court?

15 MR. FLETCHER: Absolutely, yes.

16 JUSTICE BREYER: All right. And so  
17 sometimes he does and sometimes he doesn't. Okay.

18 JUSTICE KAGAN: So but --

19 JUSTICE BREYER: I see where you're going  
20 there. And my question --

21 JUSTICE KAGAN: -- the question,  
22 Mr. Fletcher, is a contested one.

23 MR. FLETCHER: Absolutely. I wanted to make  
24 that clear. Yeah. It's a contested one that we've lost  
25 in a number of circuits. I -- I think it's a contest --

1     that our position follows from the reading of the  
2     statute, which -- and this is 7702(e).  It's on page 20A  
3     of the appendix to our brief.  And it says that if an  
4     employee invokes one of these 120-day rules, he is  
5     entitled to file a civil action to the same extent and  
6     in the same manner as provided in the list of --

7                 JUSTICE BREYER:  So just as a matter of pure  
8     simplicity, if we could get there, why, if they're going  
9     to decide in the district court, I guess, under an  
10    ordinary AD-law set of standards, they're going to  
11    decide in the district court the civil service claim as  
12    well, and you will have nonuniformity in a whole bunch  
13    of cases where the MPSB decided no, why not bring this  
14    one in too?  Because this one in too would give you the  
15    added uniform -- it -- it -- there's no more  
16    disuniformity than there is in any of the other cases.  
17    And all that you have here are just what he said on  
18    jurisdiction.

19                What this case is really about is whether  
20    there was a voluntary departure from the -- from the  
21    civil service or whether he was really fired.

22                MR. FLETCHER:  Well, I think, Justice  
23    Breyer, taking this sort of decision, this appealability  
24    determination is going to take and introduce  
25    disuniformity into a whole nother category of issues,

1     like those I was discussing with Justice Sotomayor, and  
2     it's going to do it for no good reason. Because those  
3     are issues that are going to be -- they're pure civil  
4     service issues. They're going to be adjudicated on the  
5     record before the MSPB with no de novo fact-finding --

6                 Yeah, JUSTICE BREYER: Yeah. I see that.  
7     But it isn't no good reason. The reason is you're  
8     cutting out the extra loop, the very reason that you  
9     have the district court make the AD-law decision in the  
10    cases where the MPSB decided against the employee.

11                So the reasoning is the same. It is -- it  
12    is, I grant you, that much more, but that much more is  
13    not a distinction of principle.

14                MR. FLETCHER: But I -- I think it is,  
15    Justice Breyer. When the MSPB has decided the case,  
16    it's decided the civil service claims; it's decided the  
17    discrimination claims. It makes sense to say some of  
18    those are going to have to be decided in district court,  
19    so take all of them to district court, even though there  
20    is some loss of uniformity.

21                It doesn't make sense, whereas here, you  
22    have this threshold appealability question that comes up  
23    before the MSPB addresses the merits of either of the  
24    questions. And some court is going to have to decide  
25    that question. Some court -- there's going to have to

1 be a detour to some court at that threshold of the  
2 administrative process to decide if the MSPB was right  
3 not to let it proceed further.

4 And in our view, it makes a lot more sense  
5 to send that to the Federal Circuit, which decides those  
6 questions all the time and which can do it in one layer  
7 of judicial review. Because, otherwise --

8 CHIEF JUSTICE ROBERTS: I'm sorry. Might  
9 want to -- ahead.

10 MR. FLETCHER: I was just going to finish  
11 out the thought that under my friend's view, at that  
12 threshold point, you go to the district court. And if  
13 the employee doesn't like what the district court does  
14 or the government doesn't like what the district court  
15 does, you potentially have another layer of review in  
16 the regional circuit before you can even get to a  
17 conclusion about whether or not this was a matter that  
18 was properly before the MSPB.

19 In our view, it goes to the court that has a  
20 body of law that decides this all the time, and it can  
21 put it on the right track administratively much faster.

22 CHIEF JUSTICE ROBERTS: You said there has  
23 to be a detour either way. I understand there's a  
24 detour in the MSPB to the Federal Circuit under your  
25 view.



1 MR. FLETCHER: Yes.

2 CHIEF JUSTICE ROBERTS: But where is the  
3 other detour? I thought the other route was straight to  
4 the district court.

5 MR. FLETCHER: It's straight to the district  
6 court, but keep in mind -- and, again, this is page 18  
7 of Petitioner's reply brief -- what he's asking the  
8 district court to do. He's saying: District court,  
9 please review the MSPB's decision that I didn't suffer  
10 an appealable action --

11 CHIEF JUSTICE ROBERTS: Right.

12 MR. FLETCHER: -- reverse it, and send it  
13 back to the MSPB for further proceedings.

14 JUSTICE KAGAN: Do you think he has to ask  
15 that? Suppose he asked something else. Suppose he  
16 said, I'd like the district court just to decide this.  
17 Could he do that?

18 MR. FLETCHER: I don't think he could. I  
19 certainly don't think he could for the civil service  
20 claims, because those are claims that have to be decided  
21 by the board in the first instance. They're subject to  
22 Chenery-type standards. So the administrative review --

23 JUSTICE KAGAN: There are times where the  
24 district court does it without the Board's doing it  
25 first, right? When the Board -- when the time period

1     lapses?

2                   MR. FLETCHER:  It's not in our view, but  
3     that's the contested issue, where some -- some courts do  
4     allow that to happen, but in -- but in our view, it --  
5     it ought not happen.

6                   And I think, in addition, you know, to -- to  
7     -- to make the point, I think, my friend has suggested  
8     that some of the efficiency, from his view, actually  
9     happens when the employee is wrong, when you go to the  
10    district court and the district court says, no, the MSPB  
11    was correct, this is not an appealable action, what you  
12    have is a pure discrimination case.  And I take my --

13                  JUSTICE SOTOMAYOR:  What happens if he went  
14    to the district court and said, I don't care about the  
15    Board deciding this issue, voluntary or not voluntary, I  
16    just want to pursue the -- the discrimination claim?

17                  MR. FLETCHER:  I think if that's what he --  
18    if that's what he wants, he should not seek review of  
19    the Board's decision at all, because the regulation that  
20    we talked about earlier, 1614.302(b) positions him.  If  
21    he just acquiesces in the Board's decision to go exhaust  
22    his administrative -- his discrimination claim through  
23    the ordinary administrative process, through the agency  
24    EEO, and then through the EEOC, if he wants it.  And  
25    then he can go straight to district court.  So if that's

1     what he wants, he doesn't have to do this at all. But  
2     we're here because what he wants is MSPB review of his  
3     claim.

4                   CHIEF JUSTICE ROBERTS: So under your  
5     theory, the problem is that if you don't go to the MS --  
6     if you don't go to the Federal Circuit, the district  
7     court, it will all get mucked up in the CSRA business  
8     because they can't go ahead and decide it, you have to  
9     wait, and it has to go back later because of Chenery  
10    issues and the like.

11                   And the other side is, well, if -- if you go  
12    to the -- if you have to go your route, it's the  
13    discrimination claim that gets all mucked up, because it  
14    may have -- you may need to toll the complaints, the  
15    exhaustion issue may be complicated. So it's a problem  
16    either way, right?

17                   MR. FLETCHER: I think, though -- I think he  
18    has our problem, too. We -- we solve the problem that  
19    you have with his, but he has --

20                   CHIEF JUSTICE ROBERTS: By -- by the tolling  
21    and allowing them to start over again?

22                   MR. FLETCHER: Yes, because -- but you need  
23    that, too, even if you send these cases to the district  
24    court. Because if the district court agrees with the  
25    MSPB, and says, you didn't have an appealable action,

1 first of all, the government is going to have a very  
2 strong argument that he hasn't exhausted his  
3 administrative remedies because he hasn't.

4 And, second of all, in those circumstances,  
5 the employee may not want to proceed in district court.  
6 Very often federal employees who have discrimination  
7 claims want to get reviewed before an administrative  
8 body, like the MSPB or the EEOC, because it's easier to  
9 litigate there.

10 And so here, if -- if he goes to district  
11 court, and the district court says, the MSPB was right,  
12 you don't have an appealable action, you're not entitled  
13 to further proceedings in the MSPB, many employees in  
14 that circumstance might decide that they don't want to  
15 pursue further proceedings in the district court. They  
16 might decide, I want to go back and avail myself of my  
17 administrative remedies.

18 And what our rule does is it gets you a  
19 quick decision from the Federal Circuit on that question  
20 that puts the employees in a position to go back and  
21 make that election. Do I want to continue to pursue  
22 administrative remedies through the EEOC, or do I want  
23 to go ahead and get a final decision from the agency  
24 EEO, and proceed directly to district court on a pure  
25 discrimination claim?

1           That's the circumstance he would have been  
2     in, if he had just accepted the MSPB's decision. That's  
3     what the regulations provide, if he hadn't appealed.  
4     And we think that's the same position that he ought to  
5     be in if he goes to a court and seeks review, but is  
6     unsuccessful.

7           We -- we actually think it's sort of odd to  
8     let an employee who seeks review of the MSPB's decision,  
9     and loses, somehow skips some steps of the  
10    administrative process, or ends up in a different  
11    position than he would have been in if he had just  
12    accepted the MSPB's position in the first place.

13           Thank you.

14           CHIEF JUSTICE ROBERTS: Thank you, counsel.

15           Mr. Landau, four minutes.

16           REBUTTAL ARGUMENT OF CHRISTOPHER LANDAU

17           ON BEHALF OF THE PETITIONER

18           MR. LANDAU: Thank you, Your Honor.

19           Just very briefly, I would like to make two  
20    points. First, our interpretation of the statute is not  
21    just our interpretation of the statute, it's actually  
22    the relevant agency's interpretation of the statute as  
23    well. And I omitted in my opening presentation to refer  
24    to the regulations, both from the EEOC and from the  
25    MSPB, that actually say that the -- interpret the

1 statute just the way we do, that the jurisdiction over a  
2 mixed question turns on the allegations and not just the  
3 outcome of the -- of the civil service action.

4 For the EEOC regulation, it's 29 C.F.R. 16  
5 point -- 1614.302(a)(2), and from the MSPB perspective,  
6 it's 5 C.F.R. 1201.151(a)(1). So this is the  
7 government -- the agencies themselves actually interpret  
8 the statute just exactly the way we do.

9 The second point I'd like to make is that  
10 there was some allusion to this in the questioning of my  
11 friend. The -- the procedural substantive  
12 jurisdictional lines are among the most elusive in the  
13 law. And asking pro se litigants to make these  
14 decisions is a fool's errand.

15 And there will be -- unless you're to say,  
16 as the government seems to suggest, that the MSPB's  
17 views on what is jurisdictional is conclusive, and  
18 cannot be reviewed, if they say it's jurisdictional, it  
19 is jurisdictional, then this Court, presumably, and --  
20 will be drowning for years in cases regarding whether or  
21 not a particular MSPB action was, in fact, properly  
22 characterized as procedural, substantive, or  
23 jurisdictional.

24 I think our view has the simplicity of  
25 saying, if you made the allegations, regardless of the

1 civil service action, regardless of whether or not the  
2 agency accepts those allegations, you have a mixed case,  
3 that goes to the district court just like procedural  
4 dismissals and just like substantive issues, and the  
5 district courts handle it. That's a simple regime for  
6 agents -- for affected government employees and agencies  
7 and courts to handle.

8 And, finally, as this Court said, actually  
9 in announcing Kloeckner, the government's position in  
10 this case is just too complicated to be right.

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 The case is submitted.

14 (Whereupon, at 11:01 a.m., the case in the  
15 above-entitled matter was submitted.)

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