10.3.19

No. 19-470

In the Supreme Court of the United States

DARIN JONES,

Petitioner,

v.

UNITED STATES DEPARTMENT OF JUSTICE AND FEDERAL BUREAU OF INVESTIGATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

5 U.S.C. § 7702(e)(1)(B) states that an employee may file a civil action in district court 120 days after filing an appeal with the Merit Systems Protection Board (MSPB or Board) with no judicially reviewable action that involves a claim under federal anti-discrimination laws.

In *Perry v. Merit Systems Protection Board*, 137 S. Ct. 1975 (2017), this Court held that judicial review of MSPB "mixed cases" that involves a claim under federal anti-discrimination laws and are dismissed by the Board for lack of jurisdiction is in district court. Prior to *Perry*, judicial review of the jurisdictional claim and discrimination claim(s) of "mixed cases" were bifurcated between the U.S. Court of Appeals for the Federal Circuit and in district court, respectively.

The questions presented are as follows:

1. Whether the 120 day time bar of 5 U.S.C. § 7702(e)(1)(B) is nonjurisdictional.

2. After *Perry*, whether the district court can consider a Fed. R. Civ. P. 60(b) motion for relief from judgment on the jurisdictional claim of a MSPB "mixed case" that was ruled on by the Federal Circuit.

PARTIES TO THE PROCEEDING

Petitioner is Darin Jones, who was the appellant in the court of appeals. Jones is an attorney, and is representing himself, *pro se*, before this Court as he did before the D.C. Circuit and the district court.

Respondents are the United States Department of Justice and Federal Bureau of Investigation, who were the appellees in the court of appeals.

RELATED PROCEEDINGS

United States Merit Systems Protection Board:

Darin A. Jones v. Department of Justice, DC-315I-12-0847-I-1 (October 28, 2013)

United States Court of Appeals for the Federal Circuit:

Jones v. MSPB, 2014-3050 (Fed. Cir. March 18, 2015), *cert. denied* (January 11, 2016)

Jones v. MSPB, 2016-1711 (Fed. Cir. January 10, 2017), *cert. denied* (October 2, 2017)

United States District Court for the District of Columbia:

Darin Jones v. United States Department of Justice and Federal Bureau of Investigation, No. 1:13-cv-00008-RMC (July 1, 2015)

Darin Jones v. United States Department of Justice and Federal Bureau of Investigation, No. 1:13-cv-00008-RMC (May 25, 2018)

United States Court of Appeals for the District of Columbia Circuit:

Darin Jones v. United States Department of Justice and Federal Bureau of Investigation, No. 15-5246 (July 14, 2017), *reh'g denied* (September 12, 2017)

Darin Jones v. United States Department of Justice and Federal Bureau of Investigation, No. 18-5234 (March 1, 2019), *reh'g denied* (July 10, 2019)

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INTRODUCTION

Despite the clarification and coherence that this Court provided to the statutory regime governing judicial review of decisions by the Merit Systems Protection Board (MSPB or Board) in *Perry v. Merit Systems Protection Board*, 137 S. Ct. 1975 (2017) and *Kloeckner v. Solis*, 133 S. Ct. 596 (2012), the Court's job is not yet finished because there remains a threshold statutory interpretation question regarding jurisdiction with 5 U.S.C. § 7702(e)(1)(B) that must be resolved. Yes, § 7702(e)(1)(B) is mentioned in both *Perry* and *Kloeckner*; however, there is no question presented in *Perry* or *Kloeckner* on § 7702(e)(1)(B)'s 120 day time bar, and as such, there was no analysis on whether the 120 day time bar is jurisdictional. Nonetheless, in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015), an intervening case between *Kloeckner* and *Perry*, this Court held that "most time bars are nonjurisdictional," 135 S. Ct. at 1632. Here, even though *Kwai Fun Wong* is controlling on the D.C. Circuit, and even though Jones argued that *Kwai Fun Wong* would warrant a different result in his case, the court of appeals abused its discretion when it failed to consider, much less distinguish, *Kwai Fun Wong* to its precedent interpreting § 7702(e)(1)(B), *Butler v. West*, 164 F.3d 634 (D.C. Cir. 1999), and dismissed Jones's case by summarily affirming the district court's decision. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). The district court strictly followed *Butler* in its first ever decision on whether *Kwai Fun Wong* has any effect on the 120 day time bar of § 7702(e)(1)(B).

The court of appeals should have applied *Kwai Fun Wong* to overrule its *Butler* precedent from 1999 and find that Jones's prematurely filed Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, complaint ripened on review.

In a case similar to Jones's, the Federal Circuit in *Jones v. Department of Health and Human Services*, 834 F.3d 1361 (Fed. Cir. 2016) held, in specific accordance with *Kwai Fun Wong*, that a prematurely filed MSPB appeal ripened on review when the MSPB's initial decision became final, 834 F.3d at 1365-1366. The Federal Circuit analyzed *Kwai Fun Wong* to determine that the 60 day time bar in 5 U.S.C. § 7703(b)(1)(A) is nonjurisdictional. *Id.* Here, both the D.C. Circuit and the district court summarily dismissed the Federal Circuit's analysis of *Kwai Fun Wong* to § 7702(e)(1)(B) and *Butler*.

According to *Butler*, Jones's Title VII complaint was prematurely filed before 120 days had passed in violation of § 7702(e)(1)(B) and was summarily dismissed. It is undisputed that Jones's MSPB case is a "mixed case" appeal that the MSPB dismissed for lack of jurisdiction. Both of Jones's prior petitions to this Court on the Federal Circuit's errors in failing to find MSPB jurisdiction were denied: 15-670 was denied on January 11, 2016, and 16-1471 was denied on October 2, 2017. Because Jones's "mixed case" was dismissed for lack of jurisdiction, Jones cannot return to the MSPB and he has no forum on which to rebring his discrimination claims, directly contrary to Congressional intent with Title VII. It has been more than seven years since Jones brought his wrongful termination and retaliation discrimination

claims to the Board, and he still has not received any ruling whatsoever on any of his claims. With § 7702(e)(1)(B), Congress unequivocally did not intend that Jones would have to endure this exhaustingly painful and financially draining process to simply obtain a ruling on his federal anti-discrimination laws claims. The absence of review will mean that Jones will never receive a ruling on his rightful discrimination claims, and all of the countless federal employees also affected by *Perry* who happen to prematurely file in district court before 120 days will have their rightful anti-discrimination claims live in eternity as well without ever receiving a ruling.[1] Few things are more unfair than not having a forum on which to bring federal anti-discrimination laws claims for simply filing too soon. Because neither *Perry* nor *Kloeckner* addressed the jurisdictional threshold question of the 120 day time bar of § 7702(e)(1)(B), this Court should do so now.

Moreover, this case presents this Court with the opportunity to clarify that *Perry* did not "abrogate" the proper application of Rule 60(b). *See, e.g., Agostini v. Felton*, 521 U.S. 203, 238-40 (1997). It was certainly foreseeable when *Perry* was decided that a properly submitted Rule 60(b) motion on the "unlawfully bifurcated" jurisdictional claim ruling from the Federal Circuit could be submitted to a district court for review. Even though there is nothing in *Perry* that abrogates this foreseeable action, the D.C. Circuit summarily affirmed the district court's first ever decision that *Perry* provides

[1] § 7702(e)(1)(B) applies to all federal employees with MSPB "mixed cases" and not just those controlled by *Perry* where the MSPB dismissed the appeal for lack of jurisdiction.

no authority for Jones to submit his 60(b) motion on the Federal Circuit's judgment to the district court.

This Court should find that *Perry* provides that a properly submitted Rule 60(b) motion on the jurisdictional claim ruled on by the Federal Circuit can be reviewed by the district court.

Further, this Court's decision that *Perry* did not abrogate the proper application of Rule 60(b) will allow the basis of the questions presented from Jones's prior petitions – 15-670 and 16-1471 – whether MSPB jurisdiction can be established by government misconduct, *i.e.*, estoppel, to be reviewed in district court (and possibly the D.C. Circuit) under D.C. Circuit precedent. Jones has demonstrated before the D.C. Circuit that its estoppel precedent, *Keating v. FERC*, 569 F.3d 427 (D.C. Cir. 2009) and *Pierce v. SEC*, 786 F.3d 1027 (D.C. Cir. 2015), provides Board jurisdiction in his case. The absence of review will result in Jones never receiving any measure of justice on either of his "unlawfully bifurcated" "mixed case" claims, § 7702(e)(1)(B) will continue to be misinterpreted to the detriment of all federal employees with "mixed cases," the proper application of Rule 60(b) will have been abrogated in violation of *Agostini*, it appears very unlikely if or even when the questions presented will ever be resolved, and the court of appeals will continue to abuse its discretion by failing to consider this Court's precedent when it does not comply with its own. Accordingly, this Court should grant this petition and reverse the judgment.

OPINIONS BELOW[2]

The 18-5234 order of the court of appeals (App., *infra*, 1a-2a) is not reported. The 15-5246 judgment of the court of appeals (App., *infra*, 13a-16a) is not reported. The opinions of the district court (App., *infra*, 3a-12a, 17a-36a) are reported at xxx and xxx.

JURISDICTION

The 18-5234 order of the court of appeals was entered on March 1, 2019. A combined petition for rehearing and rehearing *en banc* was denied on July 10, 2019 (App., *infra*, 37a-40a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision is reproduced in the appendix to this petition. App., *infra*, 47a.

STATEMENT OF THE CASE

A. Background

Darin Jones has devoted his career to military and federal service. Before law school, Jones was an officer in the U.S. Navy's Civil Engineer Corps and was Honorably Discharged as a Lieutenant, and he worked as a GS-1102-12 Contract Specialist at the U.S. Department of Homeland Security (DHS).

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[2] Jones was unable to locate the citations for the opinions below before submitting this petition.

Following law school, Jones was hired by the U.S. General Services Administration (GSA) in September 2007 as a GS-1102-13 Contract Specialist. In less than 17 months, in February 2009, Jones was promoted to a GS-1102-14 Lead Contract Specialist at GSA. In August 2011, Jones transferred from GSA to the Federal Bureau of Investigation (FBI) without a break in service as a tenured employee to begin working as a GS-1102-15 Supervisory Contract Specialist.

During Jones's year of employment at the FBI, Jones made eight (8) whistleblower disclosures to his supervisors describing what Jones reasonably believed were violations of the Federal Acquisition Regulation (FAR), the Procurement Integrity Act, FBI Procurement Regulations, and other related procurement regulation violations.[3] After more than

[3] FBI whistleblower cases are governed by 5 U.S.C. § 2303 and 28 C.F.R. part 27. Jones was unaware of the procedures for filing a FBI whistleblower complaint until the MSPB's Final Decision on October 28, 2013. At no time did the FBI provide Jones with any notice whatsoever on the procedures for filing a FBI whistleblower complaint. On October 31, 2013, Jones filed his FBI whistleblower complaint with the U.S. Department of Justice (DoJ). On December 20, 2013, DoJ dismissed Jones's complaint for lack of jurisdiction because his disclosures were only made to his supervisors. On January 17, 2014, Jones appealed DoJ's decision to the Deputy Attorney General (DAG). After almost three years on appeal, on November 28, 2016, one day before the House unanimously passed the FBI Whistleblower Protection Enhancement Act (WPEA), the DAG's Office summarily dismissed Jones's appeal for lack of jurisdiction stating that he only made his disclosures to his supervisors. The FBI WPEA clearly states that disclosures made to supervisors are protected disclosures, and the Congressional Record for the FBI WPEA plainly states that disclosures made to supervisors were always meant to be

seven years, Jones has been unable to obtain any measure of justice in his FBI whistleblower case.[4]

At the same time Jones was offered the GS-15 position at the FBI, Jones was very fortunate to also be offered an exceptional position with a worldwide leader in construction and engineering company at higher pay than the FBI position. After careful consideration, Jones determined that the GS-15 position better aligned with his career goals, and Jones decided to take the position with the FBI. The FBI stated in writing that it would not be a problem to match in pay the offer Jones received from the private company, Jones relied on good faith on this promise, and Jones accepted the offer from the FBI. However, after Jones's employment began with the FBI, the FBI denied his pay-matching offer as well as his application for student loan repayment assistance.

On August 15, 2012, Jones filed a formal equal employment opportunity (EEO) complaint

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protected. On December 16, 2016, the same day that the FBI WPEA was signed into law, ODAG summarily dismissed Jones's motion for reconsideration of ODAG's November 28, 2016 decision. Jones is specifically mentioned in the Congressional Record for the FBI WPEA for playing a relevant part in assisting to get the legislation signed into law. Following ODAG's December 16, 2016 second dismissal of Jones's case, two separate efforts by two separate Senators to get Jones's FBI whistleblower case reopened in light of the FBI WPEA were summarily denied.

[4] The manifest injustice of Jones's FBI whistleblower case has received considerable media interest from The Washington Post, Federal News Network, Consortium News, and several blog articles. Jones has also received repeated support and assistance from three Senators, a Congressman, and the National Whistleblower Center.

alleging race, sex, and age discrimination and reprisal for the denial of Jones's pay-matching offer and his student loan repayment application.

On August 24, 2012, Jones was removed from the FBI for alleged failure to meet the suitability standards without notice and without an opportunity to respond to the allegations.

On September 20, 2012, Jones, through his prior attorney, timely filed a "mixed case" appeal to the MSPB claiming that his August 24, 2012 removal from the FBI was in retaliation for whistleblowing and in retaliation for filing the formal EEO complaint. It is undisputed that Jones's MSPB case is a "mixed case" appeal.

B. Proceedings Below

Because the questions presented involve separate and distinct claims that were active before two different court systems at the same time, the relevant proceedings below are briefly provided in chronological order for ease of reference and understanding:

On December 6, 2012, the MSPB issued its Initial Decision dismissing Jones's "mixed case" appeal for lack of jurisdiction finding that only preference eligible FBI employees have the right to appeal an adverse action to the Board under 5 U.S.C. § 7511(a)(1)(B), (b)(8).[5] It is undisputed that

[5] The relevant facts regarding Jones's employment status before his employment at the FBI, during his employment at the FBI, and approximately 60 days following his employment at the FBI are undisputed. Jones was a tenured employee at GSA, he transferred to the FBI from GSA without a break in

the MSPB did not provide "mixed case" appeal rights to Jones in its Initial Decision.[6]

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service, he did not knowingly or voluntarily waive his MSPB appeal rights upon transfer from GSA to the FBI, he was identified as a preference eligible veteran for all four years of service at GSA, he was identified as a preference eligible veteran during his employment at DHS prior to his service at GSA, the FBI vacancy announcement that he was hired under specifically stated that any veterans' entitlement would be verified by the FBI, the FBI identified him as a preference eligible veteran for his entire year of employment at the FBI, he was not provided with any due process, *i.e.*, notice and an opportunity to respond, from the FBI for his alleged failure to meet the suitability standards, and the only time the FBI stated that Jones was not a preference eligible veteran was after he appealed his wrongful termination to the MSPB. Jones's prior petitions, 15-670 and 16-1471, provide the complete background on Jones's identification as a preference eligible veteran, the questions presented on the government misconduct Jones alleged, and the answers to the questions.

[6] Per MSPB precedent, the MSPB did not provide notice of "mixed case" appeal rights with its decisions until January 28, 2013 with its decision in *Cunningham v. Department of the Army*, 119 M.S.P.R. 147, ¶¶ 10-14 (2013). However, as *Cunningham* provides, and wrongfully pursuant to the "Separate Opinion of Anne M. Wagner," the MSPB **still** did not provide notice of "mixed case" appeal rights to appellants whose "mixed cases" were dismissed for lack of jurisdiction, as was Jones's MSPB "mixed case." Jones argued to the district court and the court of appeals that if he had received proper notice of his "mixed case" appeal rights from the MSPB with its Initial Decision, then his Title VII complaint would not have been filed prematurely. There is nothing in the record to show that either the district court or the D.C. Circuit ever considered the MSPB's intentional, per *Cunningham*, failure to provide proper notice of "mixed case" appeal rights to Jones. Accordingly, Jones has been severely punished and a manifest injustice has been thrust upon Jones because of the MSPB's intentional failure to provide proper notice of his "mixed case" appeal rights. The MSPB's failure to provide proper notice of

On December 10, 2012, just four days after the MSPB issued its Initial Decision in Jones's "mixed case," this Court decided *Kloeckner*, plainly holding that judicial review of a MSPB "mixed case" belongs in federal district court.

On January 4, 2013, less than 30 days after the Initial Decision and *Kloeckner*, Jones, through his prior attorney, submitted his Title VII complaint to the district court.

On April 18, 2013, Respondents filed its answer.

"mixed case" appeal rights is egregious, directly impacts an appellant's substantive rights, warrants consideration, constitutes reversible error, violates *Perry*, and the court of appeals abused its authority to not remedy this manifest injustice where "the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Kramer v. Gates*, 481 F.3d 788, 791 (D.C. Cir. 2007) (internal citations omitted). Because the MSPB has been without a quorum since January 2017, the MSPB has not been able to issue precedent on providing notice of "mixed case" appeal rights to appellants whose "mixed cases" were dismissed for lack of jurisdiction following *Perry*; however, given Anne Wagner's Statement in *Cunningham* and in light of *Perry*, the MSPB would be in clear error if it did not provide notice of "mixed case" appeal rights to appellants whose "mixed cases" are dismissed for lack of jurisdiction, and as such, it is very persuasive in Jones's favor that the MSPB failed to properly provide him with notice of his "mixed case" appeal rights. Therefore, there can be no "mulligan," *Kramer*, 481 F.3d at 792, with Jones's premature filing when the MSPB unlawfully, per *Perry*, failed to provide notice of his "mixed case" appeal rights. Moreover, failure to provide notice of "mixed case" appeal rights is either a mistake under Rule 60(b)(1), or meets the "extraordinary circumstances" standard of 60(b)(6), both of which Jones claimed in his Rule 60(b) motion to the district court.

On October 28, 2013, the MSPB issued its Final Decision again dismissing Jones's "mixed case" appeal for lack of jurisdiction. It is undisputed that the Final Decision did not provide Jones with proper notice of his "mixed case" appeal rights, the same as with the Initial Decision.[7]

On October 10, 2014, almost a year after the Final Decision, just under a year and a half since Respondents' answer, and after more than 15 months of discovery, Respondents moved to dismiss for failure to exhaust administrative remedies.

On July 1, 2015, the district court granted Respondents' motion to dismiss for failure to exhaust administrative remedies over Jones's opposition. App., *infra*, 17a-36a.

On April 22, 2015, more than two months **before** the district court's July 1, 2015 dismissal, this Court decided *Kwai Fun Wong* holding that "most time bars are nonjurisdictional." 135 S. Ct at 1632; *see Jones v. Department of Health and Human Services*, 834 F.3d 1361, 1366 (Fed. Cir. 2016). The district court failed to consider *Kwai Fun Wong* in its July 1, 2015 dismissal.

On September 19, 2017, the court of appeals denied Jones's 15-5246 Combined Petition for Panel Rehearing and Petition for Rehearing En Banc.

During this same time, Jones's jurisdictional claim from his MSPB "mixed case" was still pending before this Court in 16-1471.

On June 23, 2017, this Court decided *Perry* holding that judicial review of MSPB "mixed cases" that are dismissed by the Board for lack of

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[7] *Supra* n.6.

jurisdiction (as Jones's was) is in district court. 137 S. Ct. at 1988.

In accordance with *Perry*, Jones's "mixed case" appeal claims properly belong in district court. Jones's "unlawfully bifurcated" MSPB jurisdictional and discrimination claims, per *Perry*, were both fractured **and** active when *Perry* was decided, *i.e.*, Jones's jurisdictional claim was before this Court and his discrimination claims were before the D.C. Circuit when *Perry* was decided.[8]

On October 9, 2017, and on December 20, 2017, Jones timely moved for reconsideration in district court of both of his "unlawfully bifurcated" discrimination claims in light of *Kwai Fun Wong* and his jurisdictional claim in light of *Perry*.

On May 28, 2018, the district court denied Jones's Rule 60(b) motion (App., *infra*, 3a-12a), and Jones's timely appeal to the D.C. Circuit, 18-5234, followed.

On December 20, 2018, Jones timely submitted his Opposition to Respondents' Motion For Summary Affirmance.

Respondents failed to reply to Jones's Opposition thereby denying the court of appeals

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[8] Jones's 16-1471 petition for a writ of certiorari was timely submitted on June 6, 2017 and denied on October 2, 2017. Jones's first D.C. Circuit appeal, 15-5246, was timely and docketed on August 31, 2015. On July 14, 2017, the court of appeals affirmed the district court's decision in 15-5246, and on September 19, 2017, the court of appeals denied Jones's 15-5246 Combined Petition For Panel Rehearing and Petition For Rehearing En Banc without an opinion. *Perry* was decided on June 23, 2017, clearly intervening for both of Jones's "unlawfully bifurcated" jurisdictional claim before this Court and his discrimination claims before the D.C. Circuit.

additional briefing on all of the first impression questions regarding *Kwai Fun Wong*, *Perry*, and *Jones* raised in Jones's Opposition.

On March 1, 2019, apparently unconcerned by Respondents' failure to reply to Jones's Opposition, the D.C. Circuit issued its conclusory Per Curiam Order granting Respondents' motion for summary affirmance. App., *infra*, 1a-2a.

On April 14, 2019, Jones timely submitted his Combined Petition For Panel Rehearing and Petition for Rehearing En Banc.

On July 10, 2019, the D.C. Circuit denied Jones's Combined Petition. App., *infra*, 37a-40a.

REASONS FOR GRANTING THE PETITION

In Jones's Rule 60(b) motion, which includes his motion and reply, Jones showed how the district court's oversight, *i.e.*, mistake, in its July 1, 2015 dismissal without prejudice in failing to apply *Kwai Fun Wong*, *Perry*, and the Federal Circuit's *Jones* decision in his MSPB "mixed case" warranted reconsideration of his federal anti-discrimination laws claims from the district court and D.C. Circuit, and reconsideration of his jurisdictional claim from the Federal Circuit. Contrary to the district court's decision and the D.C. Circuit's summary affirmance, the cases do entitle Jones to relief under Rule 60(b).

Kwai Fun Wong was issued more than two months **before** the district court's July 1, 2015 decision, but the district court failed to consider it. Jones, proceeding *pro se* then as he is now, became aware of *Kwai Fun Wong* during his D.C. Circuit 15-5246 appeal only after reviewing the Federal

Circuit's *Jones* decision. Jones argued *Jones* and *Kwai Fun Wong* to the court of appeals in 15-5246; however, the D.C. Circuit failed to consider it, perhaps because the district court made no mention of *Kwai Fun Wong* in its decision.

But that is not the case here with Jones's Rule 60(b) motion because the district court specifically held that *Kwai Fun Wong* cannot be used to find that a prematurely filed complaint under § 7702(e)(1)(B) ripened on review citing *Butler v. West*, 164 F.3d 634 (D.C. Cir. 1999). Because the district court specifically rejected *Kwai Fun Wong* to reconsider Jones's case under 60(b), the D.C. Circuit was required to review the district court's *Kwai Fun Wong* analysis, however, the court of appeals failed to do so.

The Federal Circuit's *Jones* decision where *Kwai Fun Wong* is specifically applied along with other relevant, controlling Supreme Court cases is directly contradictory to the district court's July 1, 2015 decision, the D.C. Circuit's 15-5246 judgment, the district court's May 28, 2018 decision, and the court of appeals' 18-5234 order. D.C. Circuit Rule 35(b)(1)(B) specifically states that this Federal Circuit contradiction to the court of appeals' precedent "presents a question of exceptional importance...". But the D.C. Circuit ignored 35(b)(1)(B) when it granted summary affirmance, thereby rejecting further briefing that would have significantly benefited the D.C. Circuit because Jones's brief would have addressed fully 5 U.S.C. § 7702(e)(1)(B) using *Kwai Fun Wong*'s "most time bars are nonjurisdictional", 135 S. Ct at 1632, holding combined with the other Supreme Court

cases cited in *Jones* to show that the 120 day "time bar" of § 7702(e)(1)(B) is also "nonjurisdictional." As such, Jones's prematurely filed complaint, in accordance with the *Kwai Fun Wong* analysis, lawfully ripened on review before the district court. Respondents' argument against *Kwai Fun Wong* portends, in the same manner as the district court and summarily affirmed by the D.C. Circuit, that *Kwai Fun Wong* exists solely in vacuum where it could not possibly be applied for a prematurely filed complaint/appeal under § 7702(e)(1)(B) even though *Jones* plainly holds otherwise under a very similar statute, is fatally flawed. Intentionally ignoring the Federal Circuit's well-reasoned *Kwai Fun Wong* and other Supreme Court cases analysis in *Jones* for a prematurely filed complaint/appeal to ripen on review does not make it go away. Instead, it further highlights this Court's need to resolve the conflict, especially with the Federal Circuit's specific admonishment of the D.C. Circuit's failure to comport with recent Supreme Court opinions. *See Jones*, 834 F.3d at 1365-66; *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (citing *Davis v. United States*, 417 U. S. 333, 342 (1974) (Court of Appeals erred in adhering to law of the case doctrine despite intervening Supreme Court precedent).

Jones's MSPB "mixed case" was submitted on September 20, 2012, and to date, more than seven (7) years after filing, Jones has not received any ruling whatsoever on any of his wrongful termination discrimination and retaliation claims in violation of *Perry/Kloeckner*. *See Perry*, 137 S. Ct. 1975, 1980 (2017) (citation and footnote omitted).

Pursuant with 5 U.S.C. § 7702(e)(1)(B) and *Butler*, 164 F.3d 634 (D.C. Cir. 1999), Jones is entitled to a ruling on his properly preserved wrongful termination retaliation and discrimination claims. Nonetheless, the district court's July 1, 2015 decision unlawfully denies Jones from ever receiving a ruling on his properly preserved claims. Jones's MSPB appeal was dismissed for lack of jurisdiction, Jones is thus unable to refile his appeal before the MSPB again; however, with the district court's dismissal without prejudice, the district court found that Jones is required, without exception, to return to the MSPB to exhaust his administrative remedies even though it is impossible for him to do so.

The district court's decision does not function as a dismissal without prejudice; instead, it acts as a punitive and unjust decision because it renders it impossible for Jones to ever obtain a ruling on his lawful Title VII claims, clearly in violation of Congressional intent with Title VII, § 7702(e)(1)(B), and *Butler*. Certainly, the district court could not have intended to produce this absurd result that denies Jones from ever receiving a ruling on his properly preserved wrongful termination discrimination and retaliation claims.[9]

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[9] Jones's wrongful termination was on August 24, 2012, and to date, Jones has waited more than seven years for a ruling on his wrongful termination discrimination and retaliation claims. This exhaustive and unnecessary waiting for a ruling is contrary to congressional intent. 5 U.S.C. § 7702(e)(1)(B); *Butler*, 164 F.3d at 642. Moreover, according to the D.C. Circuit in *Thompson v. District of Columbia*, 2014-7210, p. 6 (D.C. Cir. August 12, 2016), it takes on average four years to complete a trial in the court of appeals' district courts, and Jones has already went significantly beyond this four year

Further, neither the district court's July 1, 2015 decision, nor the district court's May 25, 2018 decision, nor Respondents at anytime over the last seven years, nor the D.C. Circuit with either its 15-5246 judgment or 18-5234 order, provide any argument, information, or notice whatsoever on how Jones can correct the underlying matter and refile his properly preserved wrongful termination retaliation and discrimination claims in any court or forum. App., *infra*, 13a-16a, 17a-36a, 1a-2a, 3a-12a.

In contrast to the district court's unlawful decisions, the Board has held that dismissals without prejudice "must be exercised in a manner consistent with the policies of the Board," *Selig v. Department of the Army*, 102 M.S.P.R. 189, ¶ 6 (2006) (internal citations omitted), that per Congressional mandate, Board cases "be expeditiously adjudicated" and "that a case may not go on indefinitely", *id.*, and that dismissals without prejudice should contain a specific refiling date especially where it is unclear when the matter underlying the dismissal will be resolved.

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average in a pretrial process for simply disputing an alleged failure to exhaust administrative remedies in light of *Kwai Fun Wong* that was decided more than two months **before** the district court's July 1, 2015 decision which the district court, and the D.C. Circuit on two separate instances, 15-5246 and 18-5234, failed to consider. According to *Thompson*, upon remand, Jones has to wait another four years for a ruling, for a total of at least eleven years, three years more than double the time of the average litigant, all while enduring significant, years-long litigation costs and financial ruin, to simply obtain a ruling on his properly preserved wrongful termination discrimination and retaliation claims.

Argabright v. Department of Defense, 113 M.S.P.R. 152, ¶ 6 (2010).

It is undisputed that the district court's dismissal without prejudice does not contain a specific refiling date. Indeed, the district court's decision contains no information whatsoever on how to resolve the underlying matter resulting in Jones's case going on indefinitely without a ruling, contrary to Congressional mandate per *Selig* and *Argabright*, and contrary to Congressional mandate with § 7702(e)(1)(B) and *Butler*.

Pursuant with 5 U.S.C. § 7702(e)(1)(B) and *Butler*, Jones is entitled to a ruling on his properly preserved wrongful termination discrimination and retaliation claims. The district court's decisions and the D.C. Circuit's decisions unlawfully deny Jones his entitlement because it places him in the realm of impossibility where his properly preserved wrongful termination discrimination and retaliation claims will never be reviewed by any court or forum.

In accordance with *Perry*, 137 S. Ct. at 1988, the Federal Circuit does not have jurisdiction to review "mixed cases." Because Jones's case is a "mixed case," *Perry* bars Jones from an action to reopen his jurisdictional claim before the Federal Circuit. *See id.* Therefore, Jones's lawful and only forum for reconsidering his jurisdictional claim from the Federal Circuit is the district court where Jones's "mixed case" wrongful termination retaliation and discrimination claims reside.

The district court's May 25, 2018 holding in note 5 (App., *infra*, 9a) that Jones neither "provided" nor the court found "no basis" to apply *Perry* "retroactively" is reversible error that guts the entire

purpose of a properly submitted motion for relief under 60(b).

This Court's review is warranted in light of the court of appeals' repeated and apparently intentional failure to follow this Court's binding precedent providing that most statutory time bars are nonjurisdictional. Because the right of jurisdiction is at issue as well as the proper application of Rule 60(b), all similarly situated petitioners will likewise be precluded from the access to justice without review. The petition for a writ of certiorari should be granted and the court of appeals' decisions should be reversed.

I. THIS COURT'S DECISION IN *KWAI FUN WONG* SHOWS THAT THE 120 DAY TIME BAR OF 5 U.S.C. § 7702(e)(1)(B) IS NONJURISDICTIONAL

The court of appeals erred in failing to find that this Court's analysis in *Kwai Fun Wong* shows that the 120 day time bar of 5 U.S.C. § 7702(e)(1)(B) is nonjurisdictional.

Contrary to the D.C. Circuit's order, the merits of the parties' positions are **not** so clear as to warrant summary action, *see Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam) (emphasis added), the district court did abuse its discretion in denying Jones's Rule 60(b) motion, and the case should have been calendared for presentation to a merits panel. Without the benefit of full briefing and oral argument, the Order granting summary affirmance resulted in the establishment of at least two new precedents

regarding binding precedent from this Court – *Kwai Fun Wong* and *Perry* – and split with authoritative precedent from the Federal Circuit that addressed the statutory time bar jurisdictional issue, *Jones*. All of the issues Jones raised regarding *Kwai Fun Wong*, *Perry*, and *Jones* were cases of first impression for the district court and D.C. Circuit. With its Order, the court of appeals summarily affirmed (1) the district court's first-ever interpretation and decision that *Kwai Fun Wong* has no effect whatsoever on a prematurely filed Title VII complaint under § 7702(e)(1)(B) in district court ripening on review, (2) the district court's first-ever interpretation and decision that the Federal Circuit's glaring split in *Jones* with the D.C. Circuit's *Butler* precedent on a prematurely filed complaint/appeal ripening on review provides no guidance, much less any support, for Jones, and (3) the district court's first-ever interpretation and decision that *Perry* does not allow under any circumstances for a timely Rule 60(b) motion to be submitted on a judgment from the Federal Circuit. The D.C. Circuit ignored the fact that the district court specifically interpreted and ruled on all three of these first-ever issues, and that Jones timely appealed these first-ever rulings. These issues are now that of first impression before this Court, and the now newly established D.C. Circuit precedents on *Kwai Fun Wong* and *Perry*, along with the circuit split with *Jones*, cannot be allowed to stand.[10] Further briefing from the parties and oral argument would have properly enabled the

[10] The D.C. Circuit failed to identify its first-ever rulings on these issues with *Kwai Fun Wong*, *Perry*, and *Jones* as precedential. App., infra, 1a-2a, 37a-38a, 39a-40a.

D.C. Circuit to establish its new precedents on these issues while securing and maintaining the court of appeals' decisions in line with binding precedent from this Court. Because the D.C. Circuit failed to analyze and decide these issues, this Court should do so now.

This Court held that "[a] district court by definition abuses its discretion when it makes an error of law." *Smalls v. United States*, 471 F.3d 186, 191 (D.C. Cir. 2006) (citations omitted). The district court, for the first time ever, specifically and unlawfully held that this Court's decision in *Kwai Fun Wong* that "most time bars are nonjurisdictional", 135 S. Ct at 1632, cannot be used to find that a prematurely filed Title VII complaint under § 7702(e)(1)(B) ripened on review is an abuse of discretion and cannot be allowed to stand. *See Smalls*, 471 F.3d at 191 (citations omitted).

The last occasion where the D.C. Circuit analyzed the 120 day time bar of 5 U.S.C. § 7702(e)(1)(B) was on June 14, 2016 in *Morris v. McCarthy*, 825 F.3d 658 (D.C. Cir. 2016); however, even though *Kwai Fun Wong* was decided in 2015, there is no reference to *Kwai Fun Wong* in *Morris*. And because the Federal Circuit's *Jones* decision was decided approximately two months after *Morris*, there was no opportunity for a *Jones* analysis in *Morris*. Here, even though *Kwai Fun Wong* shows that the 120 day time bar of § 7702(e)(1)(B) is nonjurisdictional, using the D.C. Circuit's non-*Kwai Fun Wong* analysis of § 7702(e)(1)(B) in *Morris*, the glaring dispositive distinction in Jones's favor between *Morris* and Jones is that the appellant's complaint in *Morris* did not ripen on review because

the appeal was not before the Board for 120 days; whereas, it is undisputed that Jones "mixed case" appeal was actively pending before the Board for more than 120 days (Jones's "mixed case" appeal was before the Board for approximately 403 days straight).

With the district court's interpretation and ruling on *Kwai Fun Wong*, *Perry*, and *Jones*, Jones's case specifically provided the D.C. Circuit with this now required post-*Morris* § 7702(e)(1)(B) analysis opportunity. But instead of calendaring for presentation to a merits panel or to the D.C. Circuit *en banc*, the court of appeals committed clear error when it summarily affirmed all of the district court's first-ever interpretations and rulings on *Kwai Fun Wong*, *Perry*, and *Jones* without any analysis whatsoever.

Given that both the Federal Circuit and the 1st Circuit follow this Court's precedent that a "stay" is equivalent to a "dismissal" in finding that a prematurely filed appeal "ripens on review," *Jones*, 834 F.3d at 1365-1366 (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983); *Craker v. Drug Enf't Admin.*, 714 F.3d 17, 25 (1st Cir. 2013)), and given the specific facts and circumstances of Jones's case, Jones's Title VII complaint under § 7702(e)(1)(B) "ripened on review" before the district court pursuant with *Kwai Fun Wong* and *Moses*.[11] Full briefing and oral argument

[11] Using the D.C. Circuit's *Morris* analysis of the 120 day time bar of § 7702(e)(1)(B), here, 120 days had long since passed when Respondents submitted its answer on April 18, 2013 as Jones's "mixed case" appeal was still before the MSPB until October 28, 2013.

before a merits panel or the D.C. Circuit *en banc* would have ensured full consideration of these first impression issues.

II. THE CIRCUIT SPLIT ON *KWAI FUN WONG* PROVIDING THAT MOST TIME BARS ARE NONJURISDICTIONAL REQUIRES REVIEW TO BRING COHERENCE AND CLARITY TO 5 U.S.C. § 7702(e)(1)(B)

Without any reference, analysis, or even a citation to the Federal Circuit's 2016 precedential decision in *Jones* where *Kwai Fun Wong* was used to find that a prematurely filed MSPB appeal ripened on review, the D.C. Circuit summarily affirmed the district court's dismissal of *Jones* in favor of its own precedent from 1999 in *Butler*, 164 F.3d 634 (D.C. Cir. 1999). Most notably, even though Jones argued in his 60(b) motion/reply that the Federal Circuit specifically admonished the D.C. Circuit for its "incomplete" analysis by failing to reconsider *Butler* in light of *Kwai Fun Wong*, the district court failed to mention in its decision both the Federal Circuit's admonishment and the Supreme Court cases in *Jones* that facially appear, without analysis, to overrule *Butler*. App., *infra*, 3a-12a. The D.C. Circuit's Order constitutes clear error because it disregards a glaring split between the Federal Circuit and the court of appeals based entirely upon analysis of Supreme Court precedent, *Kwai Fun Wong*, that until Jones's case, the D.C. Circuit had never considered. Summarily affirming the district court's first-ever interpretation and ruling on *Kwai*

Fun Wong and *Jones* does not make it go away and it cannot be allowed to stand. The D.C. Circuit should have vacated the Order and calendared this case for presentation to a merits panel or the court of appeals *en banc* to fully consider these issues and the D.C. Circuit's precedents. Because the D.C. Circuit failed to analyze and decide these issues, this Court should do so now.

III. THIS COURT'S DECISION IN *PERRY* DOES NOT ABROGATE THE PROPER APPLICATION OF RULE 60(B)

To ensure that MSPB "mixed cases" that are dismissed for lack of jurisdiction are no longer "unlawfully bifurcated" between the Federal Circuit and federal district court, this Court in *Perry* held that both the jurisdictional claim, previously before the Federal Circuit, and the discrimination claim(s), no change as they remain in district court, from MSPB "mixed cases" belong in district court. This Court in *Agostini*, 521 U.S. 203 (1997), plainly holds that the proper application of Rule 60(b) cannot be abrogated, *id.* at 238-40, and it was certainly foreseeable when *Perry* was decided that a properly submitted Rule 60(b) motion on the "unlawfully bifurcated" (per *Perry*) jurisdictional claim ruling from the Federal Circuit would be submitted to the district court for review. Indeed, there is nothing in *Perry* that abrogates a properly submitted Rule 60(b) motion. Accordingly, *Perry* bars review of any Rule 60(b) motion on an "unlawfully bifurcated" jurisdictional claim before the Federal Circuit, and establishes that any possible 60(b) motion on

jurisdiction would be before a federal district court and not the Federal Circuit. Jones's Rule 60(b) motion on his "unlawfully bifurcated" jurisdictional Federal Circuit judgment was properly submitted to the district court in accordance with *Perry*, *Agostini*, and Rule 60(b).

The D.C. Circuit's reliance on *Smalls* to summarily dismiss review or even consideration of Jones's 60(b) jurisdictional judgment under any circumstances is fatally flawed. First, the glaring distinction between *Smalls* and Jones's case is that there is no intervening, forum-shifting of claims Supreme Court precedent, *i.e.*, *Perry*, in *Smalls* as there is in Jones's case. *See Agostini v. Felton*, 521 U.S. 203, 236 (1997) (citing *Davis v. United States*, 417 U. S. 333, 342 (1974) (Court of Appeals erred in adhering to law of the case doctrine despite intervening Supreme Court precedent). Second, *Perry*, in correlation with *Agostini* and its progeny, established a limited exception to *Smalls* and 28 U.S.C. § 1254 because they enable a properly submitted Rule 60(b) motion on a *Perry*, forum-shifted claim ruling from the Federal Circuit to be reviewed in district court and the D.C. Circuit. And third, contrary to the authority provided by *Perry* and *Agostini* for review of a properly submitted 60(b) motion in district court, the D.C. Circuit's Order unlawfully strands Jones without a forum for review of his properly submitted 60(b) motion on his "unlawfully bifurcated" jurisdictional claim ruling. Just as *Perry* held that MSPB "mixed case" claims cannot be "unlawfully bifurcated" between two different forums, *Perry*, along with *Agostini*, also establishes that the proper application of Rule 60(b)

cannot "unlawfully bifurcate" a forum for the discrimination claim(s) ruling but no forum for the jurisdictional claim ruling. Moreover, even if the court of appeals or the D.C. Circuit *en banc* held that *Perry* did not establish a limited exception to *Smalls* and § 1254,[12] the court of appeals or the D.C. Circuit *en banc* can certainly consider the record before the Federal Circuit and not sit to review the Federal Circuit's decision/judgment. Indeed, the D.C. Circuit in *Smalls* did just that when it considered the record of the Federal Circuit, 471 F.3d at 192 ("The Federal Circuit directed the Hawaii district court to dismiss Mr. Smalls's claims based on the bar of the statute of limitations."), without reviewing the Federal Circuit's decision/judgment, *id.*, and the D.C. Circuit, as it did in *Smalls* and as all the other circuits do, frequently considers the record of cases from other circuits when issuing its decisions, *see, e.g.*, *Kramer*, 481 F.3d at 790, 792. Consideration of the record of Jones's jurisdictional claim before the Federal Circuit, and not reviewing the Federal Circuit's decisions/judgment on his jurisdictional claim, is all that is necessary under Jones's 60(b)(3) motion as the record before the Federal Circuit (as well as this Court in 15-670 and 16-1471 and the MSPB) is replete with Jones's well-pleaded accusations of government misconduct. Therefore, there is no violation of *Smalls* or § 1254 as the D.C. Circuit

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[12] Most notably, the Federal Circuit in *Jones* plainly violated *Smalls* and § 1254 when it reviewed and specifically admonished the D.C. Circuit's "incomplete" analysis of this Court's precedent in *Western Union* and its progeny. *See Jones*, 834 F.3d at 1366. Therefore, the D.C. Circuit's reliance on *Smalls* and § 1254 to summarily dismiss Jones's 60(b) motion is plain error and cannot be allowed to stand.

summarily concluded with its Order, and Jones's case should have been calendared for presentation to a merits panel or the court of appeals *en banc* with the resulting decision made precedential.

IV. THE QUESTIONS PRESENTED ARE IMPORTANT AND WARRANT THIS COURT'S REVIEW

According to the district court and the D.C. Circuit, the questions presented are dispositive on the threshold issue of jurisdiction. Because most claimants before the Board proceed *pro se*, *see, e.g.*, U.S. Merit Systems Protection Board, *Congressional Budget Justification FY 2017* (Feb. 2016), at 14 ("Generally, at least half or more of the appeals filed with the agency are from pro se appellants."), available at http://tinyurl.com/zcv6lxj (last visited Jun. 3, 2017), and as further evidenced by Jones proceeding before this Court *pro se* (as he did in 15-670 and 16-1471), this Court should establish that the 120 day time bar of § 7702(e)(1)(B) is nonjurisdictional to protect the due process rights of all federal executive branch employees with MSPB "mixed cases."

Following this Court's rulings in *Kloeckner* and *Perry*, it was reasonable perhaps to conclude that this Court's review would not be required again to bring coherence and clarity to the statutory regime governing judicial review of decisions by the Board; however, the questions presented here plainly show that that perception was mistaken. To prevent manifest injustice from *Perry* appellants, and all MSPB "mixed case" appellants, having their

lawful discrimination claims forfeited in perpetuity simply for premature filing, statutory interpretation of § 7702(e)(1)(B) is required. The review of § 7702(e)(1)(B) will resolve a more than three year circuit split on whether *Kwai Fun Wong*'s "most time bars are nonjurisdictional" holding provides that a premature filing ripens on review under 5 U.S.C. § 7703(b)(1)(A) in the Federal Circuit, but does not under § 7702(e)(1)(B) in district court.

And, review is required to prevent the court of appeals from abrogating the proper application of Rule 60(b) in clear violation of *Agostini*. Further, review of *Perry* and Rule 60(b) will very likely result in the district court considering the basis of the questions presented in Jones's two prior petitions, 15-670 and 16-1471: estoppel against the Government to establish MSPB jurisdiction because of affirmative misconduct. With this being Jones's third petition on what are now established as *Perry* "unlawfully bifurcated" claims, neither of which Jones has been able to proceed beyond jurisdiction, and after seven years, it is highly unlikely that another good vehicle for addressing the questions presented with equally sympathetic and extreme facts as Jones's – no forum for his rightful federal anti-discrimination laws claims simply because of premature filing and no forum for his properly submitted Rule 60(b) motion – will arise. No other petitioner should have to endure the manifest injustice that Jones has experienced and that *Kwai Fun Wong* and *Perry* specifically sought to prevent. Because of the D.C. Circuit's noticeable disregard to even consider *Kwai Fun Wong*, the circuit split on *Kwai Fun Wong*, and *Perry* to its own precedents on

the questions presented, this Court should accordingly grant certiorari now.[13]

CONCLUSION

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

Respectfully submitted,

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[13] Or in the alternative, this Court should remand to the D.C. Circuit ordering 1) review of the court of appeals' *Butler* in light of *Kwai Fun Wong*, and 2) review of Rule 60(b) on Federal Circuit judgment in light of *Perry* and *Agostini*.