IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - x

CAROLYN M. KLOECKNER, :

Petitioner : No. 11-184

v. :

HILDA L. SOLIS, SECRETARY OF LABOR:

- - - - - - - - - - - - - - - - - - x

Washington, D.C.

Tuesday, October 2, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

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

SARAH E. HARRINGTON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

C O N T E N T S

ORAL ARGUMENT OF PAGE

ERIC SCHNAPPER, ESQ.

On behalf of the Petitioner 3

ORAL ARGUMENT OF

SARAH E. HARRINGTON, ESQ.

On behalf of the Respondent 25

REBUTTAL ARGUMENT OF

ERIC SCHNAPPER, ESQ.

On behalf of the Petitioner 52

P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 11-184, Kloeckner v. Solis.

Mr. Schnapper.

ORAL ARGUMENT OF ERIC SCHNAPPER

ON BEHALF OF THE PETITIONER

MR. SCHNAPPER: Mr. Chief Justice, and may it please the Court:

The first sentence of Section 7703(b)(2) provides that district courts have jurisdiction over all mixed cases, and that provision is largely dispositive here.

The second section of 7703(b)(2) on which the government relies is a statute of limitations, and it doesn't limit the jurisdiction of Federal courts.

That subsection is set out at pages 16a to 17a of the government's brief. The first sentence provides that for a described category of cases, they are to be, quote, "filed under one of the listed federal antidiscrimination statutes."

As this Court pointed out in Elgin, all of those are statutes which authorize jurisdiction in claims in district courts. Indeed, in Title VII and the ADEA, that is the only Federal court which is

authorized to hear the cases.

JUSTICE GINSBURG: Mr. Schnapper, could you clarify what the district court, as you see it, does? Does it deal only with the discrimination claim, or does it deal with the MSPB's procedural ruling?

MR. SCHNAPPER: With regard to the -- when the case gets to district court, there may be two substantive claims, a discrimination claim and a CSRA claim. Your question, I take it, is about the former.

Our view is that the claim is filed and pled, as indeed it was pled in this case, as a discrimination case; in this case, under several different statutes. And the complaint here reads very much like an ordinary discrimination complaint.

The government may raise the -- that sort of procedural issue as an affirmative defense, and it would be free to do so here. And that -- that happens on a number of occasions.

For example, if there were a case in which the Plaintiff had not, as required by the regulations, appealed to the MSPB within 30 days of the -- of receipt of the agency decision, the government could move to dismiss that claim on what the lower courts call exhaustion grounds. And the lower courts have repeatedly sustained those motions --

CHIEF JUSTICE ROBERTS: Mr. Schnapper --

MR. SCHNAPPER: -- but that's a determinative defense.

CHIEF JUSTICE ROBERTS: But the critical point, I gather, is what standard of review the district court will apply to that exhaustion question, or the bottom question, right?

I assume you think that the standard review in the district court is going to be more favorable to your client than the standard -- the arbitrary and capricious standard that would be applicable in the Federal circuit?

I guess --

MR. SCHNAPPER: When it's come up, Your Honor, it has generally been a question of law, like whether the 30-day rule had applied. If you had something that was -- if it were a factual issue, our contention is then those Section 7703(c) factual issues have to be decided de novo.

JUSTICE GINSBURG: Why don't we take this -- this very case, where the MSPB said that -- that the claim was time barred, so the government would raise it as an affirmative defense.

MR. SCHNAPPER: And the first question would be whether it's an affirmative defense at all, and our

position would be that it is not. Not everything that could go awry in the internal procedure is an affirmative defense.

One of the central principles of the 1972 amendments to Title VII was to create an exhaustion regime which is precise, simple and short. And if --

JUSTICE SOTOMAYOR: Counselor, can I back you up a minute to join the two questions that my colleague posed to you?

Let's assume there's a merits-based decision on the CSRA and one on the discrimination. In the normal course, assuming you are not barred by being untimely, you could go to the district court, and the district court presumably would have jurisdiction, if one is a discrimination-based decision, to decide both questions.

What's the standard of review that a court would apply to each of those claims independently or together? I mean --

MR. SCHNAPPER: They're there --

JUSTICE SOTOMAYOR: -- that that's --

MR. SCHNAPPER: -- it's -- yeah, I totally understand the question.

JUSTICE SOTOMAYOR: We can then fight about whether the factual issue regarding the timeliness and

exhaustion should be subject to one or the other standard of review, but what are the standards of review?

MR. SCHNAPPER: They -- they are different.

JUSTICE SOTOMAYOR: All right.

MR. SCHNAPPER: The -- the discrimination claim is dealt with de novo. The intent of Congress was that it would generally be treated like a private discrimination claim.

However, the CSRA claim is dealt with under the same standard that would apply in the Federal circuit. And that's --

JUSTICE ALITO: Well, could you tell me what --

MR. SCHNAPPER: -- well established.

JUSTICE ALITO: I'm sorry. I didn't mean to interrupt you.

MR. SCHNAPPER: That's what the lower courts have been doing. And we don't -- we think that's correct.

JUSTICE SCALIA: Could you finish your prior answer? You -- you started to say --

MR. SCHNAPPER: I doubt it.

JUSTICE SCALIA: -- you started to say that the Civil Service Reform Act made some fundamental

change?

MR. SCHNAPPER: No, Your Honor. I was talking about the amendments to the 19 -- to Title VII in 1972.

JUSTICE SCALIA: Yes.

MR. SCHNAPPER: Prior to that, courts were applying the judicially fashioned exhaustion requirements. And the -- Congress made a decision to replace that.

As this Court noted in Chandler and in Brown v. GSA, Congress concluded, I think correctly, and the Court's opinion suggests that, that the steps necessary to exhaust were not clear.

So the regime established by Section 717 of Title VII, which was adopted in 1972, sets up an exhaustion requirement which is clear, simple and limited in time. It requires the plaintiff to file a complaint, wait at that point 180 days, and at that point, the plaintiff was done and could go to district court.

Plaintiff also had the option at that point of going to the Civil Service Commission, waiting 180 days. But as long as a timely complaint was filed, that was all that was required of the plaintiff. And that was a fundamental change in the way this had been

dealt with.

The ADEA regime, which was adopted in 1974, was actually even simpler, although it's been changed a little bit since. The plaintiff to exhaust had to do only one of two things, either file a complaint with the EEOC, period, or give the EEOC notice that the plaintiff was going to sue and wait 30 days.

As the government pointed out in its brief in Stevens, the exhaustion regime under the ADEA hadn't -- didn't in any way address what happened after the complaint was filed. It simply said, file the complaint.

That is the fundamental principle that's animated the Title VII exhaustion requirement in Title VII and the ADEA, and we don't think the CSRA was written to change that.

Indeed, to the contrary, the CSRA has -- it doesn't do so expressly -- it incorporates by reference those statutes; it expressly reiterates the de novo exhaustion requirement. It actually shortened the period of time that plaintiff has to wait for these cases.

JUSTICE GINSBURG: That's -- you're talking about the discrimination claim. In your view, could the plaintiffs now in the district court say, I'll forget

the CSRA remedy; district court, you have authority to hear the Title VII case, the ADEA case, and that's all I need? And so I'm not -- I'm abandoning my CSRA.

MR. SCHNAPPER: Yes, Your Honor. Plaintiff can do that.

JUSTICE GINSBURG: And then that would take care of the whole thing you discussed before about the affirmative defense and the Government. It would be the plaintiff's choice, I want my Title VII case and that's it.

MR. SCHNAPPER: No, Your Honor. The affirmative defenses could still be raised. It's just that the CSRA claim under Section 7703(c) would be abandoned. And that's --

JUSTICE ALITO: Well, what provision --

MR. SCHNAPPER: -- that's what happened here. It's not uncommon.

The CSRA claim involves a right that is much more valuable to the plaintiff in the administrative process.

JUSTICE ALITO: What provision authorizes the filing of anything other than a discrimination claim in district court? I don't see it.

MR. SCHNAPPER: The statute says "Cases of discrimination subject to" --

JUSTICE ALITO: "Cases of discrimination" --

MR. SCHNAPPER: "Cases of discrimination subject to 7702." And 7702 --

JUSTICE ALITO: Yes. It says, "shall be filed under Title VII."

So you are saying that a nondiscrimination claim can be filed under Title VII?

MR. SCHNAPPER: No. The way the courts have read this, and I think correctly, is this: If -- so this is just one case. It's a little bit like supplemental jurisdiction. So long as the plaintiff is asserting a discrimination claim, the CSRA claim comes along with it.

If the plaintiff were to abandon the discrimination claim, then the case would have to go to the Federal Circuit. That's the way the courts have interpreted that.

JUSTICE ALITO: Well, I understand that a lot of courts have read it that way. I find it difficult to see how it fits in the statutory language. And in particular, since the second sentence of subsection (2) there has its own filing deadline, it seems strange to have a district court review the timeliness of the filing before the MSPB.

MR. SCHNAPPER: Well, the second point you

make is really separate from the first, because even if only a discrimination claim is filed, the Government can insert an affirmative defense, and one possible affirmative defense which the Government has repeated asserted successfully is that the appeal to the MSPB was untimely. So that happens either way.

CHIEF JUSTICE ROBERTS: Even if you give up your CSRA claim, they can assert that defense?

MR. SCHNAPPER: Yes. Yes. It's because -- because the discrimination statutes themselves have two requirements. You have to have filed the complaint or an appeal, depending on where you are in the process. You have to wait a certain amount of time if you don't have a decision.

The statutes themselves don't --

JUSTICE ALITO: I don't understand why you're giving this up, and I don't see -- I also don't see any provision that says that -- that specifies what the standard of review in the district court is for a nondiscrimination claim.

(C) sets out the standard of review in the Federal Circuit for a nondiscrimination claim, but it pointedly says nothing about the district court. Doesn't that suggest that that claim doesn't go to the district court?

MR. SCHNAPPER: Your Honor, that question, of course, isn't here because we haven't asserted a CSRA claim. And if you have doubts about it, I think I would reserve that for another case. But, we think the -- the courts have treated this as -- the statute doesn't say claims of discrimination subject to 7702. It says "cases of discrimination."

And if you look at section 7702, which is set out at page 8a of the Government's brief, it describes the cases involved as cases which contain these two elements. They are treated as one case in the administrative process. And it would be highly peculiar for the Government -- for the statute to take one administrative proceeding and then split it in half.

JUSTICE SCALIA: Suppose -- suppose the Civil Service Reform Act had said nothing at all about suits under the Civil Rights Act, under the Age Discrimination and Employment Act and so forth. What would the situation be? Wouldn't you have a right to go to district court?

MR. SCHNAPPER: Yes. Title VII and all the statutes authorize that.

JUSTICE SCALIA: So, to prevent you from going to district court under those statutes, you have to find a repealer contained somewhere --

MR. SCHNAPPER: In that --

JUSTICE SCALIA: -- in the Civil Service Reform Act, correct?

MR. SCHNAPPER: That's exactly right. And we think this is a classic example for application of the rule that implied repeals are disfavored. This statute is quite precise when -- when it's changing something, it's very specific. The second section, section 7703(b)(2), begins with the words "notwithstanding," because it is changing the statute of limitations that would otherwise apply. It's changing it from 90 days in Title VII to 30 days.

So when Congress wanted to change something, it was very specific. But the whole thrust of this statute is to leave in place, except where very specifically it does otherwise, the regime that existed under Title VII in the ADEA.

JUSTICE KAGAN: Could I make sure I understand something that you said, Mr. Schnapper. When you talk about the affirmative defenses that the Government can raise, those are exhaustion defense under the applicable anti-discrimination statute, right? It's whatever exhaustion requirements Title VII sets out or whatever exhaustion requirements the ADEA sets out; is that correct?

MR. SCHNAPPER: Not -- that's not entirely correct, Your Honor. There are exhaustion premises in the statute, but these statutes do not contain a time period within which a charge or a complaint must be filed with the agency, and they don't contain a time period within which an appeal must be taken. Those time periods are in the regulations.

The lower courts have taken the position that those time periods also have to be complied with, and we think that's correct.

In the case of --

JUSTICE KAGAN: Those time periods relevant to the MSPB?

MR. SCHNAPPER: And there are also time periods relevant to filing a complaint at the agency level. It's an -- in the case of a private discrimination claim, that time period is specified by Title VII.

But Section 717 about Federal employees is simply silent. Congress didn't deal with it. But it did authorize the EEOC and the MSPB to write regulations. They have both written regulations that -- with regard to the agency, it is the EEOC regulations which set up the time period within which a complaint must be filed. With regard to appeals to the MSPB, both

the EEOC and the MSPB have regulations which are the same.

JUSTICE SCALIA: Well, why isn't that a repealer of what would otherwise be the law under all these civil rights statutes? Why isn't that a repealer of what would otherwise be their right to go to district court?

You are saying, no, you can't go to district court because of these time limits, not even established by statute, but, for Pete's sake, established by regulation. You think that that's -- that's an effective repealer of the right to go to district court?

MR. SCHNAPPER: We don't -- we think not, Your Honor.

Again, this doesn't go to subject matter jurisdiction, which is specified in the statute. The statute creates a regime. It doesn't set up time periods.

We think the statute should be read to -- to mean that the authority of the Government, of the agencies to write regulations, includes regulations setting up time periods. It's just inconceivable that --

JUSTICE KAGAN: And would that --

MR. SCHNAPPER: -- Congress contemplated you

would have forever to do these things.

JUSTICE KAGAN: And would that put the employee who has a mixed case in the same position as an employee who has a straight anti-discrimination case?

MR. SCHNAPPER: Non-mixed case. Yes. Yes. There are regulations governing both.

The non-mixed case claim would only be governed by the EEOC regulation. The mixed case claim is governed as well by the time limit in the MSPB regulation, but that is the same as the time limit in the EEOC regulation.

JUSTICE KENNEDY: I've probably led a charmed life, but I've never heard of mixed case until this matter came before us. And I was -- I suppose you have to adopt the phrase, but the statute 7703 just say "cases," "cases of discrimination," which is what this is.

We don't usually think of cases that we call a discrimination case based on whether or not it contains other issues. It's a case.

MR. SCHNAPPER: Well, Your Honor, the -- you have led a charmed life.

JUSTICE KENNEDY: I mean, I think that helps you.

MR. SCHNAPPER: I'm not sure how that

affects it. The phrase mixed case is in the regulations, both of the EEOC. It also was in currency prior to 1978. When Congress was working on this problem, it was already calling these kinds of cases mixed cases.

And, of course, we haven't touched on this. A mixed case is a case which involves -- has two elements. First, it involves what's called, under the Civil Service Reform Act, an appealable issue. That is an issue which can be appealed to the MSPB, not --

JUSTICE ALITO: Can't an employee take a mixed case appeal to the Federal circuit?

MR. SCHNAPPER: You could not take that case to the Federal circuit without waiving your antidiscrimination claim. That is what the -- that's the way we read the law and that is the way the MSPB reads the law. The MSPB regulation expressly provides that if you want to go to the Federal circuit you must waiver that right.

JUSTICE GINSBURG: Mr. Schnapper, can you explain something about the MSPB's role? That is, once you have a final decision from the agency, you could go right to court. You don't -- on the discrimination claim, right? You don't need to go to the MSPB. You don't have to exhaust anything before the MSPB to get

your discrimination claim. So, how does the M -- the possibility of going to the MSPB make the discrimination claim any less ripe for judicial review than it would be if you stopped at the agency level?

MR. SCHNAPPER: Well, it's our view that once you appeal to the MSPB, and putting aside the unusual situation of people who withdraw the appeal, you then must wait, under the statute, 120 days or until you have a decision. So you are ready, all set, and you could go to court after the district court decision, but if you appeal to the MSPB, you then have to wait until 120 days have passed or you have a decision.

JUSTICE GINSBURG: What are -- what are your advantages? You are deciding -- you have the final agency decision, you could go right to court on the discrimination claim. What do you gain by invoking the MSPB authority?

MR. SCHNAPPER: What you gain are the rights in Section 7701(c) which are set out on page 3a of the Government's brief. In the appeal to the MSPB with regard to the Civil -- the CSRA claim, the burden is on the Government to establish by a preponderance of the evidence that its decision was correct. If you bypass the MSPB and go to district court, then your claim is only a claim under section 7703(c), which requires the

plaintiff to establish that there wasn't even substantial evidence to support the decision. So, plaintiff --

CHIEF JUSTICE ROBERTS: Suppose -- I'm sorry.

MR. SCHNAPPER: The CSRA claim is much more valuable at the MSPB. In terms of discrimination claim, in the real world that's probably not why people go to the MSPB. The MSPB, according to the only study I've been able to find, out of 2,000 mixed cases the MSPB actually only found discrimination in four. But a much higher percentage of CSRA claims are successful there. So that's why people go there.

CHIEF JUSTICE ROBERTS: So I suppose if you say, I was fired on the basis of race, and the agency says, No, you were fired because you were incompetent, you could take the incompetence claim to the MSPB, and if you win, saying, No, you were perfectly competent, they shouldn't have fired you, you get that relief and you don't need to proceed with the discrimination --

MR. SCHNAPPER: Sure. And that's why people go there. That's why people go there.

JUSTICE SOTOMAYOR: You argued that you were exceeding the dismissals on the basis of jurisdiction should go to the Federal circuit, but that you were only

invoking the exception that procedural dismissals should be permitted to go to the district court or authorized to go. Are you still standing by that distinction?

MR. SCHNAPPER: No, no, that was not our distinction. That was the distinction that I think in the Tenth Circuit --

JUSTICE SOTOMAYOR: Yes, but when you argued it below you argued the exception, you didn't argue the jurisdictional rule. Are you abandoning that distinction?

MR. SCHNAPPER: Yes. Our view is that all mixed cases go to the district court. That is the view of the MSPB and of the EEOC and the regulations --

JUSTICE SOTOMAYOR: But it's not the view of the circuit courts, even the courts --

MR. SCHNAPPER: It's not the view of the circuit courts.

JUSTICE SOTOMAYOR: Even the courts whose exception you --

MR. SCHNAPPER: That is not their view and we think --

JUSTICE SOTOMAYOR: Every circuit court unanimously holds that jurisdictional rule dismissals should go only to the Federal circuit.

MR. SCHNAPPER: Right. We think that that's

wrong and --

JUSTICE SOTOMAYOR: And you --

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

JUSTICE SOTOMAYOR: Should you be arguing this before us?

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

JUSTICE SOTOMAYOR: Is this a distinction you should abandon here?

MR. SCHNAPPER: No, Your Honor.

JUSTICE SOTOMAYOR: Or at least ask us not to address?

MR. SCHNAPPER: You don't need to address it, but we think those decisions are wrong. The statutory arguments that we're making treat -- draw no distinction between procedural and jurisdictional --

JUSTICE SOTOMAYOR: Actually the 7512 argument has more legs, I think. The point is that you're only permitted to go to district court on issues of discrimination that are within the Board's jurisdiction. So if --

MR. SCHNAPPER: It's somewhat stronger, but there are a couple of reasons why we think this distinction doesn't make sense. The first one is if jurisdictional issues went to the Federal circuit you

would have an -- a really bizarre problem of -- of splitting the claim, and here's why: If, under the EEOC regulations which the government has referred to, if the MSPB holds that it didn't have jurisdiction in a mixed case, the discrimination claim doesn't die. Under the regulations it goes back to the agency which then processes it as a non-mixed case. But the plaintiff is still free to challenge the decision of the MSPB that it had no jurisdiction. In the Government's view, that would go to the Federal circuit. So the case would then be pending in two different places. And if the plaintiff came to the end of the line in the -- at the agency level and lost, the plaintiff clearly would go to district court. So the case would then be pending in two different places. On our view, everything goes to the district court.

JUSTICE KAGAN: Mr. Schnapper, if I disagree with everything that you just said, I can still rule for you in this case, right?

MR. SCHNAPPER: You can, and you don't need to address what I just said.

JUSTICE KAGAN: Because there does seem to be a good deal of difference between the question, what happens to something that is clearly a mixed case, and alternatively, the question of whether something is a

mixed case; that is, whether it includes a claim about an action which the employee may appeal to the MSPB. And one could think that questions about what can be appealed to the MSPB ought to go to the Federal circuit under this statutory language in a way that questions that are involved in this case do not.

MR. SCHNAPPER: Your Honor, you don't need to rule for that -- me on that, but if I could identify another problem before my time runs out. There is -- and it comes up in two ways. Sometimes whether a case is appealable depends on whether there was discrimination. There is a district court decision in Barel v. Louisiana in which that problem arose. I will spare you --

JUSTICE KAGAN: Well, that just makes the next case very complicated but it has nothing to do with this case; is that correct?

MR. SCHNAPPER: Right. But that's why I think if you have doubts about it, you should stay away from it because that's very bad. In addition, in a constructive discharge case based on sexual harassment, whether there's jurisdiction, the MSPB in deciding whether there is jurisdiction has to decide whether there was sexual harassment. It seems to me you would not want that going to the Federal circuit.

I would like to reserve the balance of my time.

CHIEF JUSTICE ROBERTS: Thank you, Counsel.

Ms. Harrington.

ORAL ARGUMENT OF SARAH E. HARRINGTON

ON BEHALF OF THE PETITIONER

MS. HARRINGTON: Mr. Chief Justice, and may it please the Court:

I would like to start if I could with Justice Scalia's -- I'm sorry.

JUSTICE SOTOMAYOR: Are you abandoning the jurisdictional procedural distinction as you did in your brief? Are you telling us to rule either completely for you or against you?

MS. HARRINGTON: That's always been our position, Justice Sotomayor. Our position has consistently been that the only decisions of the MSPB that can get review in a district court are decisions on the issue of discrimination.

JUSTICE SOTOMAYOR: So you are prepared on behalf of the Government to say that if we rule that procedural dismissals can go to the district court, then you -- then the Government will concede that jurisdictional dismissal should as well?

MS. HARRINGTON: No, Your Honor.

JUSTICE SOTOMAYOR: Under 7512.

MS. HARRINGTON: Again, we don't think any of them should and --

JUSTICE SOTOMAYOR: We don't have to reach that question in this case, but your brief seemed to make the argument that there was no basis for the distinction between procedural and jurisdictional.

MS. HARRINGTON: I agree that there is no basis for the distinction and part of that is because, as my friend Mr. Schnapper pointed out, there is an EEOC regulation providing that when the board dismisses a case on jurisdictional grounds the case can go back to the agency, the agency can essentially reissue its final decision, and then the plaintiff goes in to district court. So if the whole point is to find a way for an employee to get into district court on her discrimination claim, we've already had that taken care of in jurisdictional dismissal cases. So the action really here is with procedural dismissals.

And I would like to start with Justice Scalia's line of questions about whether there has been a repeal of the right to go to district court on discrimination claims. And I think our starting point is in the Federal Courts Improvement Act which is 28 USC 1295(a)(9) which provides that review of MSPB

decisions is exclusively in the Federal circuit. This court most recently in Elgin but in various cases over of the last 25 years has seen that that is an exclusive grant of judicial review of jurisdiction in the Federal circuit over MSPB final decisions, and as the Court pointed out in Elgin the only exception to that is for the subset of final board decisions that are covered in 7703(b)(2). And if you look at 7703(b)(2) the only reference to a final board decision is at the top of page 17a of the Government's brief is to judicially reviewable actions under section 7702. Now we put a lot of emphasis on the phrase judicially reviewable action and the reason we do that is because throughout the entire U.S. Code that phrase is only ever used either in or in reference to section 7702.

CHIEF JUSTICE ROBERTS: Now, does that mean that it is not a judicially reviewable action if it is thrown out on a procedural ground.

MS. HARRINGTON: It means that it's not a judicially reviewable action under 7702.

CHIEF JUSTICE ROBERTS: Why is that? I mean, we think of a -- we review cases on procedural objections all the time and we think of those as judicially reviewable. It's -- it's a real stretch to say simply because it says "judicially reviewable" it

means judicially reviewable on the merits.

MS. HARRINGTON: Well, in our view, again, because it uses the phrase "judicially reviewable action" under 7702 and that phrase "judicially reviewable action" in the whole U.S. Code is only ever used when you are talking about 7702, that -- in our view that's the signal that that's a term of art in this context.

So although dismissal on procedural grounds is a board action subject to judicial review, in our view it's not a judicially reviewable action under 7702. And so you need to look at 7702 to see how --

CHIEF JUSTICE ROBERTS: Could you say that again?

MS. HARRINGTON: Yes.

CHIEF JUSTICE ROBERTS: A little more slowly.

MS. HARRINGTON: Yes. A procedural dismissal by the board is a final board action that's subject to judicial review in the Federal Circuit.

CHIEF JUSTICE ROBERTS: Okay. It's subject to judicial review.

MS. HARRINGTON: Yes.

CHIEF JUSTICE ROBERTS: Now, the next --

MS. HARRINGTON: But it does not fall within

the term of art "judicially reviewable action" under 7702.

CHIEF JUSTICE ROBERTS: Okay. So I thought that your argument in the brief reduced to the question that an action subject to judicial review in one section is not judicially reviewable in another. That's right?

MS. HARRINGTON: Say it again? I'm sorry?

(Laughter.)

MS. HARRINGTON: This is going to happen a lot.

CHIEF JUSTICE ROBERTS: More slowly.

(Laughter.)

CHIEF JUSTICE ROBERTS: I thought -- I thought I heard you to say, and this is what I understood your brief to say, that an action that is subject to judicial review is not judicially reviewable under 7703(b)(2).

MS. HARRINGTON: That's right. It does not fall within --

CHIEF JUSTICE ROBERTS: Okay.

MS. HARRINGTON: -- the exception to exclusive --

CHIEF JUSTICE ROBERTS: It's a tough argument.

MS. HARRINGTON: -- review.

It's a tough statute. In our view, our argument is the best reading of the overall statute. And again, because we think "judicially reviewable action" under 7702 is sort of the linchpin phrase in 7703(b)(b), we want to look to 7702 to how the phrase "judicially reviewable action" is used by Congress in that statute, and the relevant pages here are page 8a and 9a in the statutory appendix to the Government's brief.

JUSTICE SOTOMAYOR: Can I ask you a couple questions?

MS. HARRINGTON: Yes.

JUSTICE SOTOMAYOR: When the Federal Circuit was created, this language preexisted its creation, correct?

MS. HARRINGTON: Yes.

JUSTICE SOTOMAYOR: So could you tell me how when Congress was writing 7702 it was creating the system that you are advocating when it had no idea that it would ever create the Federal Circuit?

MS. HARRINGTON: Well, I have two answers. The first is that in the last 25 years in all the cases where this Court has looked as section 7703, in Lindahl and Fausto and most recently in Elgin, the Court has interpreted the statute as it exists today, which as it

exists today directs review of board decisions to the Federal Circuit.

But the second answer is, even for that brief window after the CSRA was enacted before the Federal Circuit was created, Congress still had taken away jurisdiction from district courts over board decisions and had directed them to the courts of appeals. And this Court recognized in Fausto that that -- Congress specifically had that intent when it enacted the CSRA. It was tired of this concurrent jurisdiction in all the district courts throughout the country over Federal employment actions and it wanted to reduce a layer of review and direct them to fewer courts. Now --

JUSTICE SOTOMAYOR: That still doesn't answer my question, which is: Assuming there is no Federal Circuit, I have to read the language that exists in 7702 and 7703, and I see judicial review, appealable judicial review, used not in the manner that you're describing.

MS. HARRINGTON: I disagree, Your Honor. And there is nothing in 7702 or 7703 that would indicate that Congress wanted, even in 1978 to have MSPB final decisions reviewed in district court. And again, we don't need to assume that the Federal Circuit doesn't exist today because it does, and that's how this Court

has construed the statute for the last 25 years, ever since the --

JUSTICE KAGAN: But, Ms. Harrington, go back to the question that the Chief Justice asked you, because the question was: Should we read "judicially reviewable action" as something different from action subject to judicial review, which is how you would normally read that language, as something different from just final agency action that you can take to a court. Not saying which court, that you can just take to a court.

And you're asking us -- you said it's a term of art. So I guess the next question is: How do you get the definition of the term of art that you say exists in this statute?

MS. HARRINGTON: Well, you look at 7702, and let me just say, even if you disagree with us that it's a term of art, it's hard to disagree with the fact that it has to be a judicially reviewable action under 7702. That's in the text of 7703(b)(2).

JUSTICE KAGAN: Yes, it has to be an action that -- you know, the MSPB is done and now you have a certain number of days to take it to a court. So that's the normal way you would read that language.

MS. HARRINGTON: But --

JUSTICE KAGAN: But you say no, it really, you know, it includes some kinds of decisions and not other kinds of decisions and the effect of that is that it's really a switch as to which court you get to take the action to, which is a very counterintuitive way to read this language.

So I guess I'm asking you: Where do you find the definition of the term of art? And I think what your answer is going to be is this notion the board shall decide the issue of discrimination and the applicable action; is that correct.

MS. HARRINGTON: Yes. Can I just take you back one sentence and say, the point is not just that the board is done, the point is that the board is done under 7702; that it has issued a decision under 7702, and so then, as you suggest, we look at 7702 and in that provision Congress specifies various points at which a final board decision under 7702 becomes a judicially reviewable action.

The one that's relevant in this case is in subsection (a)(3), which is on page 9a in the middle of the page there. It says: "Any decision of the board under paragraph (1)" -- so that's 7702(a)(1) -- "of this subsection shall be a judicially reviewable action, either when it's issued if the employee doesn't seek

EEOC review or when the EEOC declines to hear the case."

So in our view there are two indications in (a)(3) that tell you that it has to be a decision on the issue of discrimination in order to be a judicially reviewable action -- action under section 7702.

JUSTICE ALITO: Why doesn't the language that Justice Kagan referred to, the requirement that the board within 120 days decide both the issue of discrimination and the appealable action, mean that the board has to dispose of both the issue of discrimination and the appealable action, not that it must actually adjudicate those two issues?

What if you have a threshold, you have a threshold timeliness issue that is completely dispositive? You're saying that this language means the board nevertheless has to decide the merits of the discrimination issue?

MS. HARRINGTON: No. I'm glad you asked that question. The directive in section -- that you're referring to is at the bottom of page 8a. The directive is that the board shall decide both the issue of discrimination and the appealable action in accordance with the board's appellate procedures.

In this case the board complied with that directive by not deciding the issue of discrimination

because the appeal was untimely. And I know that sounds a little strange when I first say it, so let me give you an analogous example. Imagine a State law that directed the DMV to issue a driver's license to any applicant in accordance -- in accordance with the procedures governing such applications. If the DMV required that driver's license applicants either pay a fee or submit to an eye exam, you wouldn't expect that they would have to issue a license to someone who refused to comply with those requirements. In that case the DMV would comply with the directive that it issue a license in accordance with its procedures by not issuing a license at all.

And it's the same thing here. Here the board complied with the directive that it decide the issue of discrimination in accordance with its appellate procedures by not deciding the issue of discrimination and therefore not issuing a decision under 7703.

JUSTICE BREYER: You don't have to read it that way, do you? I mean, look, it says in (a), it says, let's take an employee who is affected adversely, and then it says "alleges that the basis for the action was discrimination," okay. In that case the board shall within 120 days decide both the issue of discrimination and the appealable action. So they decided it. They decided it was out of time. They decided it was barred.

They decided da, da, da.

I mean, there are a lot of decisions on an issue that a person raises in court and we don't normally say they didn't decide the issue, the court. It decided it. It decided it was untimely.

MS. HARRINGTON: But I think normally when a court dismisses a case based on timeliness you don't think of it as deciding the issue.

JUSTICE BREYER: Oh, well, I see. The issue. They shall decide the issue of discrimination. I mean, you can read it as saying they have to decide the merits or you could read it as saying, there could be several claims that went on below. Heard them, decide the discrimination one. Now, you decide the discrimination one. And I agree they used the word "issue" instead of saying decide the discrimination claim, that it says here, he alleges. They could have said, decide the allegation. They could have said, decide that part of the case.

But, I mean, why do we want to jump over 14 hurdles to give this narrow interpretation to that word issue when all that's going to happen is we'll have a new jurisprudence arising.

Is the dismissal on the ground that it was an allegation of discrimination, that it wasn't enough to

really make out discrimination? It was partial summary judgment. It was a dismissal on the basis of the statement in the complaint. It was -- I mean, we can think of 40 different things, perhaps, that are going to be hard to distinguish as to whether they're procedural, jurisdictional or on the merits.

And why do we want to get courts into that, when the simplest thing is the person says, I allege discrimination. There it is right in paragraph 1(b) of his paper. The MSPB says, you lose for any reason on that particular one, and now we go to the district court. That's just so simple.

MS. HARRINGTON: That would certainly be simpler. And if it were up to us to make up the rules, maybe that's what we would decide.

JUSTICE BREYER: Oh, no, no. All we're doing is interpreting what you've said is the word issue, not to be quite so technical as to mean decide on the merits, which it doesn't mean normally, but we're interpreting it to mean decide the allegation that he has raised that he was discriminated against.

MS. HARRINGTON: But what we're trying to do is figure out how much of an exception Congress wanted to create to the exclusive -- to the Federal circuit's exclusive jurisdiction to review MSPB decisions.

In our view, its choice of the word issue is important, because it's not just deciding the case that alleges discrimination. It's the issue of discrimination.

JUSTICE KAGAN: I'm sorry.

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

There's another hint in paragraph (a)(3), and let me know if you want to jump in, but not just the direction to look at (a)(1), but paragraph (a)(3), another hint that Congress was really talking about cases where the board decides the issue of discrimination.

In paragraph (a)(3), again, on (9)(a), Congress provides that a judicially reviewable action becomes -- becomes a judicially reviewable action when the employee decides not to seek review from the EEOC or when the EEOC decides not to take the case.

Now, the only types of decisions from the board that the EEOC can review are decisions that reach an issue of discrimination. And so it would be strange to be talking about decisions under (a)(1) that the EEOC could review if you're talking about decisions that don't involve the issue of discrimination.

JUSTICE GINSBURG: Ms. Harrington, may I just clarify that if -- if the case goes to the MSPB,

and the MS -- the Federal circuit, the Federal circuit agrees with the MSPB that this was untimely filed, that's the end of the case, the discrimination claims would never be heard then.

MS. HARRINGTON: I mean, the plaintiffs could then file a suit in district court and seek equitable tolling for having missed the deadline to file from the date of the final agency decision.

And, in fact, that was one of the alternative bases for jurisdiction that was asserted in the district court below in this case.

JUSTICE GINSBURG: So if the Plaintiff then goes to the district court, then what position does the government take?

MS. HARRINGTON: It depends on the case. In this case, we argued against equitable tolling because, in our view, she had missed the deadlines through her own fault. But if there was some reason to think that it wasn't really her fault for missing the deadlines for appealing and -- so that even though her appeal to the MSPB was, in fact, untimely, it wasn't really her fault, then we might not resist equitable tolling.

JUSTICE GINSBURG: Mr. Schnapper told us in his brief, and he repeated it this morning, that the MSPB and the EEOC disagree with your reading of the

statute, that they think that the so-called mixed case goes to the district court.

MS. HARRINGTON: I don't think that's correct. I didn't hear him say that; but, if he said that, I don't think -- I mean, I know it's not correct that the EEOC and MSPB disagree with --

JUSTICE GINSBURG: Well, didn't -- in the Ballentine case, didn't the MSPB take the position that it didn't go to the Federal circuit?

MS. HARRINGTON: That was our position, you know, I think it was 30 years ago now. And since the Ballentine decision, the government has had the other -- has had the position that we're asserting today, which is that the only --

JUSTICE GINSBURG: And so you -- are you -- are you telling us that the position you're representing on behalf of the government is the position that the MSPB would take today, is the position that the EEOC would take today?

MS. HARRINGTON: Yes. Yes. Our brief is filed on behalf of all the agencies in the United States that are affected by this.

CHIEF JUSTICE ROBERTS: Counsel, getting back to judicially reviewable --

MS. HARRINGTON: Yes.

CHIEF JUSTICE ROBERTS: -- even if I accept your argument that that's not the same as subject to judicial review, isn't it an odd backhanded way to get to your position?

This is not something about -- a provision about what's judicially reviewable and what's not. It's a notice provision. It says these actions have to be filed within 30 days after notice of judicial review.

MS. HARRINGTON: Well, but some --

CHIEF JUSTICE ROBERTS: And then you say that judicial reviewability is the key linchpin that bases your argument, when it's really just in a sentence about notice.

MS. HARRINGTON: But it's in a provision that's describing the exception to the general rule that's set out in 7703.

So the general rule in 7703 is that when you're talking about final board decisions, judicial review of those decisions is in the Federal circuit. And this is at 16(a) and 17(a) in the government's brief. It says, except as provided in paragraph (b)(2).

So when you're looking to (b)(2), you're asking what subset of final board actions -- that's -- final order or decision -- that's their language used in (a)(1) -- what subset of final orders or decisions of

the Merit Systems Protection Board fall within (b)(2).

Now, in (b)(2), the only types of final orders that are described there is at the end of the section, judicially reviewable action under section 7702.

CHIEF JUSTICE ROBERTS: Well, yes, that's where the phrase comes in, but it does seem an odd way to establish that that is the critical element that tells you which provisions you can take forward when it just says your time is 30 days after you get notice of judicial review.

MS. HARRINGTON: Under --

CHIEF JUSTICE ROBERTS: And here the government says, aha, judicial review, we think that does not mean subject to judicial review. Judicially reviewable doesn't mean subject to judicial review.

MS. HARRINGTON: So even if you throw out the term of art --

CHIEF JUSTICE ROBERTS: Yes.

MS. HARRINGTON: -- per our argument, and all you look at is the last two words of that sentence, which is Section 7702, you still have to look at 7702 and figure out when Congress told you that a final board decision could be subject to judicial review.

And the relevant place for this case where

it did that is in section (a)(3), which is on page 9a. And there again, it points at (a)(1), which directs that the Board decide the issue of discrimination. So it says a decision under (a)(1) is -- is judicially reviewable. If a decision does not reach the issue of discrimination, it is not --

CHIEF JUSTICE ROBERTS: As of. See, it shall be reviewable action as of. Again, it's just going to the timeliness.

MS. HARRINGTON: Right. But again -- but the two time triggers would only come into play if a decision reached an issue of discrimination, because the EEOC can't review issues -- can't review dismissals on jurisdictional or procedural grounds. It can only -- the EEOC's review of the board's -- of a board decision is limited to its review of the board's interpretation of an antidiscrimination law or its application of those laws to a particular case.

JUSTICE KAGAN: Ms. Harrington, would you agree that this is a remarkably strange way of Congress trying to accomplish this objective? I mean, if Congress were really saying we don't want procedural determinations to go to the district court, that's a very easy thing to say. Congress does not need to send you -- you know, involve six different cross -references

and unnatural reading of statutory language.

And, you know, in the end, your argument just is based on this notion that Congress used the word decide rather than dispose of in this single provision. The argument would completely collapse if that were not the case. It just seems like if Congress wanted what you say it wanted, Congress would not have done it in this extremely complicated and backhanded way.

MS. HARRINGTON: I mean, I'm not going to resist the idea that the CSRA is very complicated. I mean, every case this Court has had about the CSRA, they have remarked about how it is a complex statutory scheme.

But I think Congress did accomplish in a pretty simple way what you suggest, which is directing that procedural rules should be reviewed in the Federal circuit, and it did that by making that the background rule.

In 7703(a) and (b)(1), it says, final decisions of the board are reviewed in the Federal circuit, full stop only, except as provided in (b)(2). And then the question is, well, which of those decisions fall within (b)(2).

In our view, you should not read that exception more broadly than necessary to accommodate

employees' rights to have their discrimination claims determined de novo in district court.

Here, the board decision, it decided two things. First, was Petitioner's appeal to the board timely; and, second, was there good cause to excuse her untimeliness. There is no reason to think that Congress would have wanted that Board decision to be reviewed anywhere other than the Federal circuit. The whole point of having the Federal circuit is to have a unified body of law governing certain things in the country that Congress really thought should be directed to one place, and that included board decisions.

JUSTICE KAGAN: But you're not -- the Federal circuit didn't exist at the time that these statutes were written, so what -- you know, really, it would have been taken to the various courts of appeals, and you wouldn't have gotten that uniformity anyway.

MS. HARRINGTON: Right, but you would have had more uniformity than you would have had if the cases had continued to go to the district court, which is what -- which is what was happening before the CSRA, and Congress specifically wanted to stop that process.

JUSTICE SOTOMAYOR: You don't have a quarrel with your opposing counsel's position that once the Board decides the CSRA claim and the discrimination

claim, the district court reviews both?

MS. HARRINGTON: Yes.

JUSTICE SOTOMAYOR: Justice Alito was questioning that, but you don't quarrel with that.

MS. HARRINGTON: We don't quarrel with it.

JUSTICE SOTOMAYOR: So the lack of uniformity is inherent in this structure. You just want to carve out one piece of it that --

MS. HARRINGTON: No --

JUSTICE SOTOMAYOR: -- that you say deserves more uniformity.

MS. HARRINGTON: It is true that a small range of procedural issues governing the board's procedures might be heard in district court, but it is truly a very small universe of issues bordering on non-existent, and let me explain why. As suggested here, the only reason -- the only way it would come up is as part of an affirmative defense by the agency, a defense of exhaustion. But then generally speaking it would have to be a procedural issue that the Government, that the agency raised before the board and the board rejected.

Now, the board's own regulations allow the board to waive any of its -- any of its regulatory requirements, including timeliness, for good cause. And

so the Government would have to argue in the district court that essentially the board abused its discretion by not waiving a procedural objection, and that's a very high hurdle and I think it's really hard to imagine very many cases in which that's going to come up, where the Government's going to make that kind of argument. So although there's -- there's potential, there's a potential for a tiny bit of erosion of uniformity under our view, it is really a small universe of issues that could go to --

JUSTICE BREYER: Is there anything you want to say on the question of which is worse? That is to say, I get your point on the word "issue," and I think you can read the word "issue" to say there is a contested point as to whether there was discrimination or to say there is a contested point between the parties as to whether the MSPB -- whether the plaintiff has a -- has a legal right before the MSPB to get the lower -- the agency reversed on the issue of discrimination.

The latter way favors your opponent, the former favors you; okay. So we could do either, I guess.

The one way, if you win, there will be a body of law about what counts as procedural and what doesn't. That sounds confusing to me. If you lose, I

quite agree with you that there will then be different courts deciding different procedural matters, where you'd get more uniformity out of the Federal Circuit. Okay. Do you have anything to say about which of those two evils is worse? Is there any reason --

MS. HARRINGTON: Absolutely.

JUSTICE BREYER: Have we any way of knowing?

MS. HARRINGTON: I mean, I think Congress made the determination.

JUSTICE BREYER: -- going back to the language, and so far, in my hypothetical anyway, I think the language at best might be read, that word "issue," the way you say, but need not be.

MS. HARRINGTON: But I think you can resolve the ambiguity in the use of the word "issue" by looking at the rest of (a)(3), which again ties the decision under (a)(1) to reviewability by the EEOC. I don't think there is any dispute that the EEOC can only review board decisions that involve an issue of discrimination, either an interpretation of an antidiscrimination law or an application of such a law to the facts of the case.

JUSTICE SOTOMAYOR: I have a problem, because to accept your reading is to say that judicially reviewable action differs between 770 -- differs between 7702 and the escape hatch, because the only way the

escape hatch can work, it, too, cross-references 7702 in the same way that the provisions you are relying on do. Under your reading both should be given identical meaning, because they both cross-reference 7702; and yet your brief says, no, we shouldn't have that absurd result.

MS. HARRINGTON: But not because --

JUSTICE SOTOMAYOR: It seems to me that if you concede that there is an absurd result in applying your interpretation to the escape hatch, by definition, your meaning can't be ascribable to that phrase.

MS. HARRINGTON: Well, so just to be clear, we think the phrase "judicially reviewable action" should be given the same meaning in section (e) that it is given elsewhere in 7702.

JUSTICE SOTOMAYOR: So if the board --

MS. HARRINGTON: Our view is --

JUSTICE SOTOMAYOR: So when does the time frames of the escape hatch commence --

MS. HARRINGTON: So --

JUSTICE SOTOMAYOR: -- if the board hasn't rendered any decision on anything?

MS. HARRINGTON: Exactly. If the -- if the appeal is still pending before the board, that's when the escape hatch of (e) comes in, because it's just

intended to prevent employees from being held hostage by board inaction.

JUSTICE KAGAN: Right, but Justice Sotomayor is right, that when you define "judicially reviewable action" in your way, then 7702(e)(1)(B) becomes nonsensical and you have to save it by inserting additional language, by saying, you know, "and other" -- "and other kinds of action."

MS. HARRINGTON: No, it only becomes nonsensical if you think it should apply to cases that are no longer pending before the board under section 7702. In our view, once the board issued a decision -- the decision in this case, it issued a decision under section 7701 which is the general provision governing board decisions, and then the case was no longer pending under section 7702. And so it wouldn't make sense to apply the escape hatch to cases in that situation.

JUSTICE KAGAN: Well, it wouldn't make sense, but it's what the language would command if "judicially reviewable action" means what you say "judicially reviewable means."

MS. HARRINGTON: It is true that our commonsense gloss on the statute is not found in the text of the statute. But I think once the -- once the cases has been decided under section 7701 on procedural

grounds, it's no longer a 7702 case before the board. And so there is just no reason to think that subsection (e) would apply in the -- in that situation.

JUSTICE SOTOMAYOR: You still have an exhaustion argument to raise if we were to send this to the district court?

MS. HARRINGTON: Well, we raised an exhaustion argument as an alternative ground before the district court. The district court construed this case as seeking review of the board's decision, not seeking review of the agency's decision. Petitioner did not challenge that district court holding before the circuit in her opening brief. She didn't flag that as issue in the cert petition papers, and so I think, although now she's suggested in the merits briefing that this case -- this Court maybe should really just decide whether she's seeking review of the agency decision instead of the board decision, in our view that's not really a question that is presented in -- in the case any longer. In our view she is seeking review over the board decision, the board decision decided that her appeal was untimely, that there wasn't good cause to excuse the untimeliness. There is indication anywhere in the statute that Congress would have wanted that kind of board decision to be reviewed anywhere other than the Federal Circuit.

And so in our view it does not fall within -- in the exception to exclusive Federal Circuit jurisdiction provided in (b)(2) because it does not decide the issue of discrimination.

If there are no further questions?

CHIEF JUSTICE ROBERTS: Thank you, Ms. Harrington.

Mr. Schnapper you have 4 minutes left.

REBUTTAL ARGUMENT OF ERIC SCHNAPPER,

ON BEHALF OF THE PETITIONER

MR. SCHNAPPER: Mr. Chief Justice, and may it please the Court:

I would like to answer the question that the Chief Justice asked yesterday morning in Lozman. You --

CHIEF JUSTICE ROBERTS: You better remind me.

(Laughter).

MR. SCHNAPPER: I -- I am happy to do so, Your Honor. You pointed out that -- that where subject matter jurisdiction is concerned, is it important that rules be clear? And you asked counsel for Respondent, why was Respondent's rule clearer than the Petitioner's rule?

In this case our rule is demonstrably clearer. The question is which mixed cases go to the

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

Force, you see a lengthy description of Title VII law, in McDonnell Douglas v. Green, in the course of a decision by the Federal Circuit holding there is no jurisdiction.

Third, it is unclear what constitutes the line between a merits decision and a procedural decision issue. Some things are really neither. For example, there are recurring disputes about whether a settlement was voluntary. Well, it's not the merits of the discrimination case, but it's not procedural in any normal sense of the word.

Fourth, there are cases which involve several claims resolved on several different bases. We noted some of them in our reply brief. One -- one claim was rejected on jurisdictional grounds; one claim was rejected on res judicata and one claim was decided by the board on the merits. Unclear how that would go.

There are also situations in which two cases get filed, one of which -- and they are related cases, and they go to the same judge, and one -- one involved an MSPB decision on procedural grounds, one on the merits. The court in that case just thought it ought to just keep them both. It's not clear how that comes out.

Fourth -- some, sorry, fifth.

CHIEF JUSTICE ROBERTS: Fifth.

MR. SCHNAPPER: Sometimes within the MSPB -- you have the point. I don't mean to belabor. Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: No, no. I -- I just --

MR. SCHNAPPER: Oh, that was -- I didn't mean --

JUSTICE SCALIA: He was just keeping score.

(Laughter.)

MR. SCHNAPPER: Oh, okay. I'm sorry. I think -- I think we are at six.

JUSTICE SCALIA: Checking them off.

MR. SCHNAPPER: The MS -- the --

CHIEF JUSTICE ROBERTS: You are on number five.

MR. SCHNAPPER: Okay. The -- an MSPB, ALJ, or the board itself could resolve a claim on alternative grounds, as judges do all the time, and say, well, we think this is time barred, but we also find that it lacks the merits. I know where that goes.

There is also a problem, which the briefs address, about factual disputes that arise with regard to jurisdiction or procedure. The -- 7703(c) says, "Questions of fact get decided de novo." What does that mean?

If there -- let's take, for example, a case in which the claim is that a charge wasn't filed on time with the agency. That's a question of fact. The agency might find that it was timely -- there could be a dispute of fact about when the violation occurred which triggers the limitation period. The agency would make a finding of fact. The MSPB might affirm that finding. The government tells us they would affirm whatever the agency did. The statute seems to say that's got to be decided de novo, but Federal circuit can't do that.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, Counsel. The case is submitted.

(Whereupon, at 11:00 a.m., the case in the above-entitled matter was submitted.)

A

abandon 11:14 22:9
abandoned 10:14
abandoning 10:3 21:9 25:11
able 20:10
above-entitled 1:11 56:15
Absolutely 48:6
absurd 49:5,9
abused 47:2
accept 41:1 48:23
accommodate 44:25
accomplish 43:21 44:14
accounts 53:4
Act 7:25 13:16,17 13:18 14:3 18:9 26:24
action 24:2 26:18 27:12,17,20 28:4,5 28:10,11,19 29:1,5 29:15 30:4,6 32:6 32:6,9,19,21 33:5 33:11,19,24 34:5,5 34:9,11,22 35:21 35:24 38:14,15 42:4 43:8 48:24 49:13 50:5,8,20
actions 27:11 31:12 41:7,23
addition 24:20
additional 50:7
address 9:10 22:12 22:13 23:21 55:22
ADEA 3:25 9:2,9,15 10:2 14:17,24
adjudicate 34:12
administrative 10:19 13:12,14
adopt 17:15
adopted 8:15 9:2
advantages 19:14
adversely 35:20
advocating 30:19
affirm 56:7,8
affirmative 4:16 5:23,25 6:3 10:8 10:12 12:3,4 14:20 46:18
Age 13:17
agencies 16:21 40:21
agency 4:22 15:5,15 15:23 18:22 19:4 19:15 20:15 23:6 23:13 26:13,13 32:9 39:8 46:18,21 47:19 51:17 56:3,3 56:6,9
agency's 51:11
ago 40:11
agree 26:8 36:15 43:20 48:1
agrees 39:2
aha 42:14
ahead 22:3 38:6
Air 53:25
Alito 7:13,16 10:15 10:21 11:1,4,18 12:16 18:11 34:6 46:3
ALJ 55:16
allegation 36:18,25 37:20
allege 37:8
alleges 35:21 36:17 38:3
allow 46:23
alternative 39:10 51:8 55:17
alternatively 23:25
ambiguity 48:15
amendments 6:5 8:3
amount 12:13
analogous 35:3
animated 9:14
answer 7:22 31:3,15 33:9 52:13 53:1,2
answers 30:21
antidiscrimination 3:21 18:15 43:17 48:20
anti-discrimination 14:22 17:4
anyway 45:17 48:11
appeal 12:5,12 15:6 18:12 19:6,7,11,20 24:2 35:1 39:20 45:4 49:24 51:21
appealable 18:9 24:11 31:17 34:9 34:11,22 35:24
appealed 4:21 18:10 24:4
appealing 39:20
appeals 15:25 31:8 45:16 53:20
APPEARANCES 1:14
appellate 34:23 35:15
appendix 30:8
applicable 5:11 14:22 33:11
applicant 35:4
applicants 35:7
application 14:5 43:17 48:21 53:14
applications 35:6
applied 5:16
applies 53:9
apply 5:6 6:18 7:11 14:11 50:10,17 51:3
applying 8:7 49:9
arbitrary 5:10
argue 21:8 47:1
argued 20:23 21:7,8 39:16
arguing 22:5
argument 1:12 2:2,5 2:8 3:3,6 22:18 25:5 26:6 29:4,24 30:2 41:2,12 42:20 44:2,5 47:6 51:5,8 52:9 53:13
arguments 22:15
arising 36:23
arose 24:13
art 28:7 29:1 32:13 32:14,18 33:8 42:18
ascribable 49:11
aside 19:6
asked 32:4 34:18 52:14,21
asking 32:12 33:7 41:23
assert 12:8
asserted 12:5 13:2 39:10
asserting 11:12 40:13
Assistant 1:17
assume 5:8 6:10 31:24
assuming 6:12 31:15
authority 10:1 16:20 19:17
authorize 3:23 13:22 15:21
authorized 4:1 21:2
authorizes 10:21
awry 6:2
a.m 1:13 3:2 56:14

B

b 41:21,22 42:1,2 44:19,21,23 52:3
back 6:7 23:6 26:12 32:3 33:13 40:24 48:10
background 44:17
backhanded 41:3 44:8
bad 24:20
balance 25:1
Ballentine 40:8,12 53:2,3
Barel 24:13
barred 5:22 6:12 35:25 55:19
based 17:19 24:21 36:7 44:3
bases 39:10 41:12 54:13
basis 20:15,24 26:6 26:9 35:21 37:2
begins 14:9
behalf 1:15,19 2:4,7 2:10 3:7 25:6,21 40:17,21 52:10
belabor 55:2
belonged 53:15
best 30:2 48:12
better 52:15
bit 9:4 11:10 47:8
bizarre 23:1
board 26:11 27:7,9 28:10,19,19 31:1,6 33:9,14,14,18,22 34:8,10,16,21,24 35:14,22 38:11,19 41:18,23 42:1,23 43:3,15 44:20 45:3 45:4,7,12,25 46:21 46:21,24 47:2 48:19 49:16,21,24 50:2,11,12,15 51:1 51:18,20,21,24 54:17 55:17
board's 22:20 34:23 43:15,16 46:13,23 51:10
body 45:10 47:24
bordering 46:15
bottom 5:7 34:20
BREYER 35:18

36:9 37:16 47:11 48:7,10
brief 3:18 9:8 13:9 19:20 25:13 26:5 27:10 29:4,15 30:9 31:4 39:24 40:20 41:21 49:5 51:13 53:5,8,18 54:14
briefing 51:15
briefs 55:21
broadly 44:25
Brown 8:10
burden 19:21
bypass 19:23

C

C 2:1 3:1 12:21
call 4:23 17:18
called 18:8
calling 18:4
capricious 5:11
care 10:7 26:17
CAROLYN 1:3
carve 46:8
case 3:4 4:7,11,12 4:12,19 5:21 10:2 10:2,9 11:10,15 13:4,11 15:11,16 17:3,4,5,7,8,13,19 17:20 18:1,7,7,12 18:13 23:5,7,10,14 23:19,24 24:1,6,10 24:16,17,21 26:5 26:12,12 33:20 34:1,24 35:10,22 36:7,19 38:2,17,25 39:3,11,15,16 40:1 40:8 42:25 43:18 44:6,11 48:21 50:13,15 51:1,9,15 51:19 52:24 54:10 54:22 56:1,13,14
cases 3:12,19 4:1 9:22 10:24 11:1,2 13:7,10,10 17:16 17:16,18 18:4,5 20:10 21:12 26:18 27:2,22 30:22 38:11 45:19 47:5 50:10,17,25 52:25 53:21 54:12,18,19
category 3:19
cause 45:5 46:25 51:22
central 6:4
cert 51:14
certain 12:13 32:23 45:10
certainly 37:13
challenge 23:8 51:12
Chandler 8:10
change 8:1,25 9:16 14:13
changed 9:3
changing 14:7,10,11
charge 15:4 56:2
charmed 17:13,22
Checking 55:12
Chief 3:3,8 5:1,4 12:7 20:4,14 25:3 25:7 27:16,21 28:13,16,21,24 29:3,11,13,20,23 32:4 40:23 41:1,10 42:6,13,19 43:7 52:6,11,14,15 54:25 55:4,14 56:12
choice 10:9 38:1
circuit 5:12 7:12 11:16 12:22 18:12 18:14,18 20:25 21:6,15,17,22,24 22:25 23:10 24:4 24:25 27:1,5 28:20 30:13,20 31:2,5,16 31:24 39:1,1 40:9 41:19 44:17,21 45:8,9,14 48:3 51:12,25 52:2 54:3 56:10
circuit's 37:24
civil 7:25 8:22 13:16 13:17 14:2 16:5 18:9 19:21
claim 4:4,8,9,10,23 5:22 7:7,9,10 9:24 10:13,18,22 11:7 11:12,12,15 12:2,8 12:20,22,24 13:3 15:17 17:7,8 18:15 18:24 19:1,3,16,21 19:24,25 20:6,7,17 23:2,5 24:1 26:17 36:17 45:25 46:1 53:23 54:14,15,16 55:17 56:2
claims 3:24 4:8 6:18 13:6 20:12 26:23 36:13 39:3 45:1 54:13
clarify 4:3 38:25
classic 14:5
clear 8:13,16 49:12 52:21 54:23
clearer 52:22,25
clearly 23:13,24
client 5:10
Code 27:14 28:5
collapse 44:5
colleague 6:9
come 5:14 43:11 46:17 47:5
comes 11:12 24:10 42:7 49:25 54:23
command 50:19
commence 49:19
Commission 8:22
commonsense 50:23
competent 20:18
complaint 4:13,14 8:18,23 9:5,11,12 12:11 15:4,15,24 37:3
completely 25:13 34:14 44:5
complex 44:12
complicated 24:16 44:8,10
complied 15:9 34:24 35:14
comply 35:9,10
concede 25:23 49:9
concerned 52:20
concluded 8:11
concurrent 31:10
confounded 53:3
confusing 47:25
Congress 7:7 8:8,11 14:13 15:20 16:25 18:3 30:6,18 31:5 31:9,22 33:17 37:23 38:10,14 42:23 43:20,22,24 44:3,6,7,14 45:6 45:11,22 48:8 51:24
consistently 25:17
constitutes 54:5
constructive 24:21
construed 32:1 51:9
contain 13:10 15:3,5
contained 13:25
contains 17:20
contemplated 16:25
contention 5:18
contested 47:15,16
context 28:8
continued 45:20
contrary 9:17
correct 7:20 14:3,25 15:2,10 19:23 24:17 30:15 33:11 40:4,5
correctly 8:11 11:9
counsel 25:3 40:23 52:21 53:13,14 56:12
Counselor 6:7
counsel's 45:24
counterintuitive 33:5
country 31:11 45:10
counts 47:24
couple 22:23 30:10
course 6:12 13:2 18:6 54:2
court 1:1,12 3:9,22 3:25 4:3,7 5:6,9 6:13,14,17 8:10,20 9:25 10:1,23 11:23 12:19,23,25 13:20 13:24 16:7,9,12 18:23 19:10,10,15 19:24 21:2,12,22 22:19 23:14,16 24:12 25:8,18,22 26:15,16,22 27:2,5 30:23,24 31:8,23 31:25 32:9,10,11 32:23 33:4 36:3,4 36:7 37:12 39:6,11 39:13 40:2 43:23 44:11 45:2,20 46:1 46:14 47:2 51:6,9 51:9,12,16 52:12 53:1,10,12,16,20 53:20 54:22
courts 3:11,16,24 4:23,24 7:18 8:6 11:8,16,19 13:5 15:8 21:15,15,17 21:18 26:24 31:6,7 31:11,13 37:7 45:16 48:2 53:3,7 53:17
Court's 8:12
covered 27:7

create 6:5 30:20 37:24
created 30:14 31:5
creates 16:17
creating 30:18
creation 30:14
critical 5:4 42:8
cross 43:25
cross-reference 49:4
cross-references 49:1
CSRA 4:8 6:11 7:10 9:15,17 10:1,3,13 10:18 11:12 12:8 13:2 19:21 20:6,12 31:4,10 44:10,11 45:21,25
currency 18:2

D

D 3:1
da 36:1,1,1
date 39:8
days 4:21 8:18,23 9:7 14:12,12 19:8 19:12 32:23 34:8 35:23 41:8 42:10
de 5:19 7:7 9:19 45:2 55:24 56:10
deadline 11:22 39:7
deadlines 39:17,19
deal 4:4,5 15:20 23:23
dealt 7:7,10 9:1
decide 6:15 24:23 33:10 34:8,16,21 35:14,23 36:4,10 36:11,14,14,16,18 36:19 37:15,18,20 43:3 44:4 51:16 52:3
decided 5:19 35:24 35:25,25 36:1,5,5 45:3 50:25 51:21 54:16 55:24 56:10
decides 38:11,16,17 45:25
deciding 19:14 24:22 34:25 35:16 36:8 38:2 48:2
decision 4:22 6:10 6:15 8:8 12:14 18:22 19:9,10,12 19:15,23 20:2 23:8 24:12 26:14 27:9 33:15,18,22 34:3 35:17 39:8 40:12 41:24 42:24 43:4,5 43:12,15 45:3,7 48:16 49:22 50:12 50:13,13 51:10,11 51:17,18,20,21,24 54:3,6,6,21
decisions 22:14 25:17,18 27:1,5,7 31:1,7,23 33:2,3 36:2 37:25 38:18 38:19,21,22 41:18 41:19,25 44:20,22 45:12 48:19 50:15
declines 34:1
defense 4:16 5:3,23 5:25 6:3 10:8 12:3 12:4,8 14:21 46:18 46:19
defenses 10:12 14:20
define 50:4
definition 32:14 33:8 49:10
demonstrably 52:24
Department 1:18 53:25
depending 12:12
depends 24:11 39:15
derived 53:2
described 3:19 42:3
describes 13:10
describing 31:19 41:15
description 54:1
deserves 46:10
determination 48:9
determinations 43:23
determinative 5:3
determined 45:2
die 23:5
difference 23:23
different 4:13 7:4 23:11,15 32:6,8 37:4 43:25 48:1,2 54:13
differs 48:24,24
difficult 11:20
direct 31:13
directed 31:7 35:3 45:11
directing 44:15
direction 38:9
directive 34:19,20 34:25 35:11,14
directs 31:1 43:2
disagree 23:17 31:20 32:17,18 39:25 40:6
discharge 24:21
discretion 47:2
discriminated 37:21
discrimination 4:4,8 4:12,14 6:11 7:6,9 9:24 10:22,25 11:1 11:2,12,15 12:2,10 13:6,7,18 15:17 17:16,19 18:23 19:1,2,16 20:7,11 20:20 22:20 23:5 24:12 25:19 26:17 26:23 33:10 34:4,9 34:10,17,22,25 35:15,16,22,23 36:10,14,15,16,25 37:1,9 38:3,4,12 38:20,23 39:3 43:3 43:6,12 45:1,25 47:15,19 48:19 52:4 53:23 54:10
discrimination-ba... 6:15
discussed 10:7
disfavored 14:6
dismiss 4:23
dismissal 25:24 26:18 28:9,19 36:24 37:2
dismissals 20:24 21:1,23 25:22 26:19 43:13
dismisses 26:11 36:7
dispose 34:10 44:4
dispositive 3:12 34:15 `
dispute 48:18 53:13 56:5
disputes 54:8 55:22
distinction 21:3,5,5 21:10 22:8,16,24 25:12 26:7,9
distinguish 37:5
district 3:11,24 4:3 4:7 5:5,9 6:13,14 8:19 9:25 10:1,23 11:23 12:19,23,25 13:20,24 16:6,8,12 19:10,24 21:2,12 22:19 23:14,16 24:12 25:18,22 26:14,16,22 31:6 31:11,23 37:11 39:6,11,13 40:2 43:23 45:2,20 46:1 46:14 47:1 51:6,9 51:9,12 53:1,16,20
divergent 53:4
divided 53:7,17
DMV 35:4,6,10
doing 7:19 37:17
doubt 7:23
doubts 13:3 24:19
Douglas 54:2
dozen 53:6
draw 22:15
driver's 35:4,7
D.C 1:8,18

E

e 1:17 2:1,6 3:1,1 25:5 49:14,25 51:3
easy 43:24
EEOC 9:6,6 15:21 15:23 16:1 17:8,11 18:2 21:13 23:2 26:10 34:1,1 38:16 38:17,19,21 39:25 40:6,18 43:13 48:17,18
EEOC's 43:15
effect 33:3
effective 16:12
either 9:5 12:6 25:13 27:14 33:25 35:7 47:21 48:20
element 42:8
elements 13:11 18:8
Elgin 3:22 27:2,6 30:24
emphasis 27:12
employee 17:3,4 18:11 24:2 26:16 33:25 35:20 38:16
employees 15:19 45:1 50:1
employment 13:18 31:12
enacted 31:4,9
entire 27:14
entirely 15:1

equitable 39:7,16 39:22
ERIC 1:15 2:3,9 3:6 52:9
erosion 47:8
escape 48:25 49:1 49:10,19,25 50:17
ESQ 1:15,17 2:3,6,9
essentially 26:13 47:2
establish 19:22 20:1 42:8
established 7:15 8:14 16:9,10
evidence 19:23 20:2
evils 48:5
exactly 14:4 49:23
exam 35:8
example 4:19 14:5 35:3 53:11 54:7 56:1
exceeding 20:24
exception 21:1,8,19 27:6 29:21 37:23 41:15 44:25 52:2
exclusive 27:3 29:22 37:24,25 52:2
exclusively 27:1
excuse 45:5 51:22
exhaust 8:13 9:4 18:25
exhaustion 4:24 5:6 6:5 7:1 8:7,16 9:9 9:14,20 14:21,23 14:24 15:2 46:19 51:5,8
exist 31:25 45:14
existed 14:16
exists 30:25 31:1,16 32:15
expect 35:8
explain 18:21 46:16
expressly 9:18,19 18:17
extremely 44:8
eye 35:8

F

fact 32:18 39:9,21 55:24 56:3,5,7
facts 48:21
factual 5:17,18 6:25 55:22
fall 28:25 29:19 42:1 44:23 52:1
far 48:11
fashioned 8:7
fault 39:18,19,21
Fausto 30:24 31:8
favorable 5:9
favors 47:20,21
federal 3:16,20,25 5:12 7:11 11:16 12:22 15:19 18:12 18:14,18 20:25 21:24 22:25 23:10 24:4,25 26:24 27:1 27:4 28:20 30:13 30:20 31:2,5,12,16 31:24 37:24 39:1,1 40:9 41:19 44:16 44:20 45:8,9,14 48:3 51:25 52:2 54:3 56:10
fee 35:7 53:14
fees 53:13
fewer 31:13
fifth 54:24,25
fight 6:24
figure 37:23 42:23
file 8:17 9:5,11 39:6 39:7
filed 3:20 4:10 8:23 9:11 11:5,7 12:2 12:11 15:5,25 39:2 40:21 41:8 54:19 56:2
filing 10:22 11:22,24 15:15
final 18:22 19:14 26:13 27:5,7,9 28:19 31:22 32:9 33:18 39:8 41:18 41:23,24,25 42:2 42:23 44:19
find 11:19 13:25 20:10 26:15 33:8 55:19 56:4
finding 56:7,7
finish 7:21
fired 20:15,16,19
first 3:4,10,18 5:24 12:1 18:8 22:24 30:22 35:2 45:4 53:7
fits 11:20
five 55:15
flag 51:13
Force 54:1
forever 17:1
forget 9:25
former 4:9 47:21
forth 13:18
forward 42:9
found 20:11 50:23
four 20:11
Fourth 54:12,24
frames 49:19
free 4:17 23:8
friend 26:10
frivolous 53:23
full 44:21
fundamental 7:25 8:25 9:13
further 52:5

G

G 3:1
gain 19:16,18
gather 5:5
general 1:18 41:15 41:17 50:14
generally 5:15 7:8 46:19
getting 40:23
GINSBURG 4:2 5:20 9:23 10:6 18:20 19:13 38:24 39:12,23 40:7,15
give 9:6 12:7 35:2 36:21
given 49:3,14,15
giving 12:17
glad 34:18
gloss 50:23
go 6:2,13 8:19 11:15 12:24 13:19 16:6,8 16:12,15 18:18,22 18:24 19:10,15,24 20:8,13,22,22,25 21:2,3,12,24 22:3 22:19 23:10,13 24:4 25:22 26:12 26:22 32:3 37:11 38:6 40:9 43:23 45:20 47:10 52:25 54:17,20
goes 23:6,15 26:14 38:25 39:13 40:2 53:19 55:20
going 5:9 8:22 9:7 13:24 19:2 24:25 29:9 33:9 36:22 37:4 43:9 44:9 47:5,6 48:10
good 23:23 45:5 46:25 51:22
gotten 45:17
governed 17:8,9
governing 17:6 35:6 45:10 46:13 50:14
government 3:15 4:15,22 5:22 9:8 10:8 12:2,4 13:13 14:21 16:20 19:22 23:3 25:21,23 39:14 40:12,17 42:14 46:20 47:1 53:14 56:8
government's 3:18 13:9 19:20 23:9 27:10 30:8 41:20 47:6 53:1,5,8,8,18
grant 27:4
Green 54:2
ground 27:18 36:24 51:8
grounds 4:24 26:12 28:9 43:14 51:1 54:15,21 55:18
GSA 8:11
guess 5:13 32:13 33:7 47:22

H

half 13:14 53:6
happen 29:9 36:22
happened 9:10 10:16
happening 45:21
happens 4:17 12:6 23:24
happy 52:18
harassment 24:21 24:24
hard 32:18 37:5 47:4
Harrington 1:17 2:6 25:4,5,7,15,25 26:2,8 27:19 28:2 28:15,18,23,25 29:7,9,18,21,25 30:12,16,21 31:20 32:3,16,25 33:12 34:18 36:6 37:13 37:22 38:6,24 39:5 39:15 40:3,10,20 40:25 41:9,14 42:12,17,20 43:10 43:19 44:9 45:18

46:2,5,9,12 48:6,8 48:14 49:7,12,17 49:20,23 50:9,22 51:7 52:7
hatch 48:25 49:1,10 49:19,25 50:17
hear 3:3 4:1 10:2 34:1 40:4
heard 17:13 29:14 36:13 39:4 46:14
held 50:1
helps 17:23
high 47:4
higher 20:12
highly 13:12
HILDA 1:6
Hill 53:25
hint 38:7,10
holding 51:12 53:21 54:3
holds 21:23 23:4 53:22
Honor 5:15 8:2 10:4 10:11 13:1 15:2 16:14 17:21 22:10 24:7 25:25 31:20 52:19 55:3
Hopkins 53:11
hostage 50:1
hurdle 47:4
hurdles 36:21
hypothetical 48:11

I

idea 30:19 44:10
identical 49:3
identify 24:8
imagine 35:3 47:4
implied 14:6
important 38:2 52:20
Improvement 26:24
inaction 50:2
included 45:12
includes 16:21 24:1 33:2
including 46:25
incompetence 20:17
incompetent 20:16
inconceivable 16:22
incorporates 9:18
independently 6:18
indicate 31:21
indication 51:23
indications 34:2
inherent 46:7
insert 12:3
inserting 50:6
intended 50:1
intent 7:7 31:9
internal 6:2
interpretation 36:21 43:16 48:20 49:10
interpreted 11:17 30:25
interpreting 37:17 37:20
interrupt 7:17
intertwined 53:19
invoking 19:16 21:1
involve 38:23 43:25 48:19 54:12
involved 13:10 24:6 54:20
involves 10:18 18:7 18:8
issue 4:16 5:17 6:25 18:9,10 25:19 33:10 34:4,8,10,14 34:17,21,25 35:4,9 35:11,15,16,23 36:3,4,8,10,10,16 36:22 37:18 38:1,3 38:11,20,23 43:3,5 43:12 46:20 47:13 47:14,19 48:12,15 48:19 51:13 52:3 53:15,18,24,24 54:7
issued 33:15,25 50:12,13
issues 5:18 17:20 22:19,25 34:12 43:13 46:13,15 47:9 53:9,10
issuing 35:12,17

J

join 6:8
judge 54:20
judges 55:18
judgment 37:2
judicata 54:16
judicial 19:3 27:4 28:10,20,22 29:5 29:16 31:17,18 32:7 41:3,8,11,18 42:11,14,15,16,24
judicially 8:7 27:10 27:12,17,20,24,25 28:1,3,4,11 29:1,6 29:16 30:3,6 32:5 32:19 33:18,24 34:4 38:14,15 40:24 41:6 42:4,15 43:4 48:23 49:13 50:4,20,21
jump 36:20 38:8
jurisdiction 3:11,16 3:23 6:14 11:11 16:16 20:24 22:21 23:4,9 24:22,23 27:4 31:6,10 37:25 39:10 52:2,20 53:22,24 54:4 55:23
jurisdictional 21:9 21:23 22:16,25 25:12,24 26:7,12 26:18 37:6 43:14 54:15
jurisprudence 36:23
Justice 1:18 3:3,8 4:2 5:1,4,20 6:7,21 6:24 7:5,13,16,21 7:24 8:5 9:23 10:6 10:15,21 11:1,4,18 12:7,16 13:15,23 14:2,18 15:12 16:3 16:24 17:2,12,23 18:11,20 19:13 20:4,14,23 21:7,14 21:18,22 22:2,3,5 22:8,11,17 23:17 23:22 24:15 25:3,7 25:10,11,16,20 26:1,4,21 27:16,21 28:13,16,21,24 29:3,11,13,20,23 30:10,13,17 31:14 32:3,4,21 33:1 34:6,7 35:18 36:9 37:16 38:5,24 39:12,23 40:7,15 40:23 41:1,10 42:6 42:13,19 43:7,19 45:13,23 46:3,3,6 46:10 47:11 48:7 48:10,22 49:8,16 49:18,21 50:3,3,18 51:4 52:6,11,14,15 54:25 55:4,8,12,14 56:12

K

Kagan 14:18 15:12 16:24 17:2 22:3 23:17,22 24:15 32:3,21 33:1 34:7 38:5 43:19 45:13 50:3,18
keep 54:23
keeping 55:8
KENNEDY 17:12 17:23
key 41:11
kind 47:6 51:24
kinds 18:4 33:2,3 50:8
Kloeckner 1:3 3:4
know 32:22 33:2 35:1 38:8 40:5,11 43:25 44:2 45:15 50:7 55:20
knowing 48:7

L

L 1:6
LABOR 1:6
lack 46:6
lacks 55:20
language 11:20 24:5 30:14 31:16 32:8 32:24 33:6 34:6,15 41:24 44:1 48:11 48:12 50:7,19
largely 3:12
Laughter 29:8,12 52:17 55:9
law 5:15 16:4 18:16 18:17 35:3 43:17 45:10 47:24 48:20 48:21 54:1
laws 43:18
layer 31:13
leave 14:15
led 17:12,22
left 52:8
legal 47:18
legs 22:18
lengthy 54:1
let's 6:10 35:20 56:1
level 15:16 19:4 23:13
license 35:4,7,9,11 35:12
life 17:13,22
limit 3:16 17:9,10
limitation 56:6
limitations 3:15

14:11
limited 8:17 43:16
limits 16:9
linchpin 30:4 41:11
Lindahl 30:23
line 23:12 26:21 53:21 54:6
listed 3:20
little 9:4 11:10 28:16 35:2
long 8:23 11:11
longer 50:11,15 51:1,19
look 13:8 27:8 28:12 30:5 32:16 33:16 35:19 38:9 42:21 42:22 53:25
looked 30:23
looking 41:22 48:15
lose 37:10 47:25
lost 23:13
lot 11:19 27:11 29:10 36:2
Louisiana 24:13
lower 4:23,24 7:18 15:8 47:18 53:3,17
Lozman 52:14

M

M 1:3 19:1
making 22:15 44:17
manner 31:18
matter 1:11 16:15 17:14 52:20 56:15
matters 48:2
McDonnell 54:2
mean 6:19 7:16 16:20 17:23 27:16 27:22 34:9 35:19 36:2,11,20 37:3,18 37:19,20 39:5 40:5 42:15,16 43:21 44:9,11 48:8 55:2 55:7,25
meaning 49:4,11,14
means 27:19 28:1 34:15 50:20,21
Merit 42:1
merits 28:1 34:16 36:12 37:6,19 51:15 53:11,12,19 53:24 54:6,9,17,22 55:20
merits-based 6:10
middle 33:21
minute 6:8
minutes 52:8
missed 39:7,17
missing 39:19
mixed 3:12 17:3,8 17:13 18:1,5,7,12 20:10 21:12 23:4 23:24 24:1 40:1 52:25
morning 3:4 39:24 52:14
motions 4:25
move 4:22
MSPB 4:21 5:21 11:24 12:5 15:13 15:21,25 16:1 17:9 18:10,16,17,24,25 19:2,6,11,17,20 19:24 20:7,9,9,10 20:17 21:13 23:4,8 24:2,4,22 25:17 26:25 27:5 31:22 32:22 37:10,25 38:25 39:2,21,25 40:6,8,18 47:17,18 53:11,21 54:21 55:1,16 56:7
MSPB's 4:5 18:21

N

N 2:1,1 3:1
narrow 36:21
necessary 8:12 44:25
need 10:3 18:24 20:20 22:13 23:20 24:7 28:12 31:24 43:24 48:13
neither 54:7
never 17:13 39:4
nevertheless 34:16
new 36:23
nondiscrimination 11:6 12:20,22
nonsensical 50:6,10
non-existent 46:16
non-mixed 17:5,7 23:7
normal 6:12 32:24 54:11
normally 32:8 36:4 36:6 37:19
noted 8:10 54:14
notice 9:6 41:7,8,13 42:10
notion 33:9 44:3
notwithstanding 14:10
novo 5:19 7:7 9:19 45:2 55:24 56:10
number 4:18 32:23 55:14

O

O 2:1 3:1
objection 47:3
objections 27:23
objective 43:21
occasions 4:18
occurred 56:5
October 1:9
odd 41:3 42:7
Oh 36:9 37:16 55:6 55:10
okay 28:21 29:3,20 35:22 47:21 48:4 55:10,16
once 18:21 19:6 45:24 50:12,24,24
opening 51:13
opinion 8:12 53:25
opponent 47:20
opposing 45:24
option 8:21
oral 1:11 2:2,5 3:6 25:5
order 34:4 41:24
orders 41:25 42:3
ordinary 4:14
ought 24:4 54:22
overall 30:2

P

P 3:1
page 2:2 13:9 19:19 27:10 30:7 33:21 33:22 34:20 43:1
pages 3:17 30:7
paper 37:10
papers 51:14
paragraph 33:23 37:9 38:7,9,13 41:21
part 26:9 36:19 46:18
partial 37:1
particular 11:21 37:11 43:18
parties 47:16
passed 19:12
pay 35:7
peculiar 13:12
pending 23:11,14 49:24 50:11,15
people 19:7 20:8,13 20:21,22
percentage 20:12
perfectly 20:18
period 9:6,21 15:4,6 15:17,24 56:6
periods 15:7,9,12 15:15 16:18,22
permitted 21:2 22:19
person 36:3 37:8
Pete's 16:10
petition 51:14
Petitioner 1:4,16 2:4 2:10 3:7 25:6 51:11 52:10
Petitioner's 45:4 52:22
phrase 17:15 18:1 27:12,14 28:3,4 30:4,5 42:7 49:11 49:13
piece 46:8
place 14:15 42:25 45:11
places 23:11,15
plaintiff 4:20 8:17 8:19,21,24 9:4,6 9:21 10:4,19 11:11 11:14 20:1,3 23:7 23:12,13 26:14 39:12 47:17
plaintiffs 9:25 39:5
plaintiff's 10:9
play 43:11
please 3:9 25:8 52:12
pled 4:11,11
point 5:5 8:18,19,21 11:25 22:18 26:15 26:24 33:13,14 45:9 47:13,15,16 55:2
pointed 3:22 9:8 26:10 27:6 52:19
pointedly 12:23
points 33:17 43:2
posed 6:9
position 6:1 15:8 17:3 25:16,16 39:13 40:8,10,13

40:16,17,18 41:4 45:24 53:15
possibility 19:2
possible 12:3
potential 47:7,8
precise 6:6 14:7
preexisted 30:14
premises 15:2
prepared 25:20
preponderance 19:22
presented 51:19
presumably 6:14
pretty 44:15
prevent 13:23 50:1
principle 9:13
principles 6:4
prior 7:21 8:6 18:3
private 7:8 15:16
probably 17:12 20:8
problem 18:4 23:1 24:9,13 48:22 55:21
problems 53:4,6
procedural 4:5,16 21:1 22:16 25:12 25:22 26:7,19 27:18,22 28:9,18 37:5 43:14,22 44:16 46:13,20 47:3,24 48:2 50:25 53:9,10,18,23 54:6 54:10,21
procedure 6:2 55:23
procedures 34:23 35:5,12,16 46:14
proceed 20:20
proceeding 13:14
process 10:20 12:12 13:12 45:22
processes 23:7
Protection 42:1
provided 41:21 44:21 52:3
provides 3:11,19 18:17 26:25 38:14
providing 26:11
provision 3:12 10:15 10:21 12:18 33:17 41:5,7,14 44:4 50:14
provisions 42:9 49:2
put 17:2 27:11
putting 19:6

Q

quarrel 45:23 46:4,5
question 4:9 5:6,7 5:15,24 6:23 13:1 23:23,25 26:5 29:4 31:15 32:4,5,13 34:19 44:22 47:12 51:18 52:13,25 56:3
questioning 46:4
questions 6:8,16 24:3,5 26:21 30:11 52:5 55:24
quite 14:7 37:18 48:1
quote 3:20

R

R 3:1
race 20:15
raise 4:15 5:22 14:21 51:5
raised 10:12 37:21 46:21 51:7
raises 36:3
range 46:13
reach 26:4 38:19 43:5
reached 43:12
reaches 53:10
read 11:9,19 16:19 18:16 31:16 32:5,8 32:24 33:6 35:18 36:11,12 44:24 47:14 48:12
reading 30:2 39:25 44:1 48:23 49:3
reads 4:13 18:17
ready 19:9
real 20:8 27:24
really 12:1 23:1 26:19 33:1,4 37:1 38:10 39:19,21 41:12 43:22 45:11 45:15 47:4,9 51:16 51:18 54:7
reason 27:13 37:10 39:18 45:6 46:17 48:5 51:2
reasons 22:23
REBUTTAL 2:8 52:9
receipt 4:21
recognized 31:8
recurring 54:8
reduce 31:12
reduced 29:4
reference 9:18 27:9 27:15
references 43:25
referred 23:3 34:7
referring 34:20
reflected 53:4
Reform 7:25 13:16 14:3 18:9
refused 35:9
regard 4:6 15:23,25 19:21 55:22
regarding 6:25
regime 6:6 8:14 9:2 9:9 14:16 16:17
regulation 16:11 17:8,10,11 18:17 26:11
regulations 4:20 15:7,22,22,23 16:1 16:21,21 17:6 18:2 21:13 23:3,6 46:23
regulatory 46:24
reissue 26:13
reiterates 9:19
rejected 46:22 54:15,16
related 53:19 54:19
relevant 15:12,15 30:7 33:20 42:25
relief 20:19
relies 3:15
relying 49:2
remarkably 43:20
remarked 44:12
remedy 10:1
remind 52:15
rendered 49:22
repeal 26:22
repealer 13:25 16:4 16:5,12
repeals 14:6
repeated 12:4 39:24
repeatedly 4:25
replace 8:9
reply 54:14
representing 40:16
required 4:20 8:24 35:6
requirement 8:16 9:14,20 34:7
requirements 8:8 12:11 14:23,24 35:10 46:25
requires 8:17 19:25
res 54:16
reserve 13:4 25:1
resist 39:22 44:10
resolve 48:14 55:17
resolved 53:12 54:13
Respondent 1:19 2:7 52:21
Respondent's 52:22
rest 48:16
result 49:6,9
reversed 47:19
review 5:5,8 6:17 7:2,3 11:23 12:19 12:21 19:3 25:18 26:25 27:4,22 28:10,20,22 29:5 29:16,25 31:1,13 31:17,18 32:7 34:1 37:25 38:16,19,22 41:3,8,19 42:11,14 42:15,16,24 43:13 43:13,15,16 48:18 51:10,11,17,20
reviewability 41:11 48:17
reviewable 27:11,12 27:17,20,24,25 28:1,3,5,11 29:1,6 29:16 30:3,6 32:6 32:19 33:19,24 34:5 38:14,15 40:24 41:6 42:4,16 43:5,8 48:24 49:13 50:4,20,21
reviewed 31:23 44:16,20 45:7 51:25
reviews 46:1
right 5:7 7:5 10:18 13:19 14:4,22 16:6 16:12 18:19,23,24 19:15 21:25 23:19 24:18 26:22 29:6 29:18 37:9 43:10 45:18 47:18 50:3,4
rights 13:17 16:5 19:18 45:1
ripe 19:3
ROBERTS 3:3 5:1 5:4 12:7 20:4,14 25:3 27:16,21 28:13,16,21,24 29:3,11,13,20,23

40:23 41:1,10 42:6 42:13,19 43:7 52:6 52:15 54:25 55:4 55:14 56:12
role 18:21
rule 5:16 14:6 21:9 21:23 23:18 24:8 25:13,21 41:15,17 44:18 52:22,23,24 53:2,5,9
rules 37:14 44:16 52:21
ruling 4:5
runs 24:9

S

S 2:1 3:1
sake 16:10
SARAH 1:17 2:6 25:5
save 50:6
saying 11:6 16:8 20:18 32:10 34:15 36:11,12,16 43:22 50:7
says 10:24 11:4 12:18,23 13:6 20:16 27:25 33:22 35:19,20,21 36:17 37:8,10 41:7,21 42:10,14 43:4 44:19 49:5 55:23
SCALIA 7:21,24 8:5 13:15,23 14:2 16:3 55:8,12
Scalia's 25:10 26:21
scheme 44:13
Schnapper 1:15 2:3 2:9 3:5,6,8 4:2,6 5:1,2,14,24 6:20 6:22 7:4,6,15,18 7:23 8:2,6 10:4,11 10:16,24 11:2,8,25 12:9 13:1,21 14:1 14:4,19 15:1,14 16:13,25 17:5,21 17:25 18:13,20 19:5,18 20:6,21 21:4,11,16,20,25 22:7,10,13,22 23:17,20 24:7,18 26:10 39:23 52:8,9 52:11,18 55:1,6,10 55:13,16
score 55:8
Seattle 1:15
second 3:14 11:21 11:25 14:8 31:3 45:5
Secondly 53:17
SECRETARY 1:6
section 3:10,14 5:18 8:14 10:13 13:8 14:8,9 15:19 19:19 19:25 27:11,15 29:5 30:23 34:5,19 42:4,4,22 43:1 49:14 50:11,14,16 50:25
see 4:3 10:23 11:20 12:17,18 28:12 31:17 36:9 43:7 54:1
seek 33:25 38:16 39:6
seeking 51:10,10,17 51:20
seen 27:3
send 43:24 51:5
sense 22:24 50:16 50:19 54:11
sentence 3:10,18 11:21 33:13 41:12 42:21
separate 12:1
Service 7:25 8:22 13:16 14:2 18:9
set 3:17 13:9 15:24 16:17 19:9,19 41:16
sets 8:15 12:21 14:23,24
setting 16:22
settlement 54:8
sexual 24:21,24
short 6:6
shortened 9:20
signal 28:7
silent 15:20
simple 6:6 8:16 37:12 44:15
simpler 9:3 37:14
simplest 37:8
simply 9:11 15:20 27:25
single 44:4
situation 13:19 19:7 50:17 51:3
situations 54:18
six 43:25 55:11
slowly 28:17 29:11
small 46:12,15 47:9
Solicitor 1:17
Solis 1:6 3:4
somewhat 22:22
sorry 7:16 20:5 22:3 22:4 25:10 29:7 38:5,6 54:24 55:10
sort 4:15 30:4
Sotomayor 6:7,21 6:24 7:5 20:23 21:7,14,18,22 22:2 22:5,8,11,17 25:11 25:16,20 26:1,4 30:10,13,17 31:14 45:23 46:3,6,10 48:22 49:8,16,18 49:21 50:3 51:4
sounds 35:1 47:25
so-called 40:1
spare 24:14
speaking 46:19
specific 14:8,14
specifically 14:16 31:9 45:22
specified 15:17 16:16
specifies 12:18 33:17
split 13:14
splitting 23:2
standard 5:5,8,10 5:11 6:17 7:2,11 12:19,21
standards 7:2
standing 21:3
start 25:9 26:20
started 7:22,24
starting 26:23
State 35:3
statement 37:3
States 1:1,12 40:21
statute 3:15 10:24 13:5,13 14:7,10,15 14:22 15:3 16:10 16:16,17,19 17:15 19:8 30:1,2,7,25 32:1,15 40:1 50:23 50:24 51:23 56:9
statutes 3:21,23 4:13 9:19 12:10,15 13:22,24 15:3 16:5 45:15
statutory 11:20 22:15 24:5 30:8 44:1,12
stay 24:19
steps 8:12
Stevens 9:9
stop 44:21 45:22
stopped 19:4
straight 17:4
strange 11:23 35:2 38:20 43:20
stretch 27:24
stronger 22:22
structure 46:7
study 20:9
subject 7:1 10:25 11:3 13:6 16:15 28:10,20,21 29:5 29:16 32:7 41:2 42:15,16,24 52:19
submit 35:7
submitted 56:13,15
subsection 3:17 11:22 33:21,24 51:2
subset 27:7 41:23 41:25
substantial 20:2
substantive 4:8
successful 20:12
successfully 12:5
sue 9:7
suggest 12:24 33:16 44:15
suggested 46:16 51:15
suggests 8:12
suit 39:6
suits 13:17
summary 37:1
supplemental 11:11
support 20:2
suppose 13:15,15 17:14 20:4,14
Supreme 1:1,12
sure 14:18 17:25 20:21
sustained 4:25
switch 33:4
system 30:19
Systems 42:1

T

T 2:1,1
take 4:9 5:20 10:6 13:13 18:11,13 20:17 32:9,10,23

33:4,12 35:20 38:17 39:14 40:8 40:18,19 42:9 56:1
taken 15:6,8 26:17 31:5 45:16
talk 14:20
talking 8:3 9:23 28:6 38:10,21,22 41:18
technical 37:18
tell 7:13 30:17 34:3
telling 25:13 40:16
tells 42:9 56:8
Tenth 21:6
term 28:7 29:1 32:12,14,18 33:8 42:18
terms 20:7
text 32:20 50:24
Thank 25:3 52:6 55:2 56:11,12
thing 10:7 35:13 37:8 43:24
things 9:5 17:1 37:4 45:4,10 54:7
think 5:8 7:19 8:11 9:15 11:9 13:3,4 14:5 15:10 16:11 16:13,19 17:18,23 21:5,21,25 22:14 22:18,23 24:3,19 26:2,23 27:22,23 30:3 33:8 36:6,8 37:4 39:18 40:1,3 40:5,11 42:14 44:14 45:6 47:4,13 48:8,11,14,18 49:13 50:10,24 51:2,14 55:11,11 55:19
Third 54:5
thought 29:3,13,14 45:11 54:22
threshold 34:13,14
throw 42:17
thrown 27:18
thrust 14:14
ties 48:16
time 5:22 8:17 9:21 12:13 15:3,5,6,9 15:12,14,17,24 16:9,17,22 17:9,10 24:9 25:2 27:23 35:25 42:10 43:11 45:14 49:18 55:18 55:19 56:2
timeliness 6:25 11:24 34:14 36:7 43:9 46:25 53:15
timely 8:23 45:5 56:4
tiny 47:8
tired 31:10
Title 3:24 6:5 8:3,15 9:14,14 10:2,9 11:5,7 13:21 14:12 14:17,23 15:18 54:1
today 30:25 31:1,25 40:13,18,19
told 39:23 42:23
tolling 39:7,16,22
top 27:9
totally 6:22
touched 18:6
tough 29:23 30:1
treat 22:15
treated 7:8 13:5,11
triggers 43:11 56:6
true 46:12 50:22
truly 46:15
trying 37:22 43:21
Tuesday 1:9
two 4:7 6:8 9:5 12:10 13:11 18:7 23:11 23:15 24:10 30:21 34:2,12 42:21 43:11 45:3 48:5 54:18
types 38:18 42:2

U

unanimously 21:23
unclear 54:5,17
uncommon 10:17
understand 6:23 11:18 12:16 14:19
understood 29:15
unified 45:9
uniformity 45:17,19 46:7,11 47:8 48:3
United 1:1,12 40:21
universe 46:15 47:9
unnatural 44:1
untimeliness 45:6 51:22
untimely 6:13 12:6 35:1 36:5 39:2,21 51:21 53:14
unusual 19:7
USC 26:25
use 48:15
uses 28:3
usually 17:18
U.S 27:14 28:5

V

v 1:5 3:4 8:11 24:13 53:11,25 54:2
valuable 10:19 20:7
various 27:2 33:17 45:16
view 4:10 9:24 19:5 21:11,12,14,16,20 23:9,15 28:2,7,11 30:1 34:2 38:1 39:17 44:24 47:9 49:17 50:12 51:18 51:20 52:1
VII 3:24 6:5 8:3,15 9:14,15 10:2,9 11:5,7 13:21 14:12 14:17,23 15:18 54:1
violation 56:5
voluntary 54:9

W

wait 8:18 9:7,21 12:13 19:8,11
waiting 8:22
waive 46:24
waiver 18:19
waiving 18:14 47:3
want 10:9 18:18 24:25 30:5 36:20 37:7 38:8 43:22 46:7 47:11
wanted 14:13 31:12 31:22 37:23 44:6,7 45:7,22 51:24
Washington 1:8,15 1:18
wasn't 20:1 36:25 39:19,21 51:22 56:2
way 8:25 9:10 11:8 11:16,19 12:6 18:16,16 24:5 26:15 32:24 33:5 35:19 41:3 42:7 43:20 44:8,15 46:17 47:20,23 48:7,13,25 49:2 50:5
ways 24:10
went 22:25 36:13
we'll 3:3 36:22
we're 22:15 37:16 37:19,22 40:13
we've 26:17
win 20:18 47:23
window 31:4
withdraw 19:7
word 36:15,21 37:17 38:1 44:3 47:13,14 48:12,15 54:11
words 14:9 42:21
work 49:1
working 18:3
world 20:8
worse 47:12 48:5
wouldn't 13:19 35:8 45:17 50:16,18
write 15:21 16:21
writing 30:18
written 9:16 15:22 45:15
wrong 22:1,14

X

x 1:2,7

Y

yeah 6:22
years 27:3 30:22 32:1 40:11
yesterday 52:14

1

1 33:23 38:9,21 41:25 43:2,4 44:19 48:17
1(b) 37:9
10:02 1:13 3:2
11-184 1:4 3:4
11:00 56:14
120 19:8,12 34:8 35:23
1295(a)(9) 26:25
14 36:20
16a 3:17
16(a) 41:20
17a 3:18 27:10
17(a) 41:20
180 8:18,23
19 8:3
1972 6:5 8:4,15
1974 9:2
1978 18:3 31:22

2

2 1:9 11:22 41:21,22 42:1,2 44:21,23 52:3
2,000 20:10
2012 1:9
25 2:7 27:3 30:22 32:1
28 26:25

3

3 2:4 33:21 34:3 38:7,9,13 43:1 48:16
3a 19:19
30 4:21 9:7 14:12 40:11 41:8 42:10
30-day 5:16

4

4 52:8
40 37:4

5

52 2:10

7

717 8:14 15:19
7512 22:17 26:1
770 48:24
7701 50:14,25
7701(c) 19:19
7702 11:3,3 13:6,8 27:11,15,20 28:4,6 28:11,12 29:2 30:4 30:5,18 31:17,21 32:16,19 33:15,15 33:16,18 34:5 42:5 42:22,22 48:25 49:1,4,15 50:12,16 51:1
7702(a)(1) 33:23
7702(e)(1)(B) 50:5
7703 17:15 30:23 31:17,21 35:17 41:16,17
7703(a) 44:19
7703(b)(b) 30:5
7703(b)(2) 3:10,14 14:9 27:8,8 29:17 32:20
7703(c) 5:18 10:13 19:25 55:23

8

8a 13:9 30:7 34:20

9

9 38:13
9a 30:8 33:21 43:1
90 14:12