No. 16-742

In the Supreme Court of the United States

LESLIE A. KERR, PETITIONER

v.

KEVIN HAUGRUD, ACTING SECRETARY OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the district court lacked jurisdiction over petitioner's claim that she was removed from federal employment in retaliation for whistleblowing activity, where petitioner failed to channel that claim through the Merit Systems Protection Board.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 836 F.3d 1048. The opinion of the district court (Pet. App. 29a-34a) is unreported but is available at 2014 WL 3564767, and its opinion denying reconsideration (Pet. App. 24a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 2016. The petition for a writ of certiorari was filed on December 2, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. 1101 *et seq.*, creates a comprehensive "framework for evaluating adverse personnel actions against federal employees." *United States* v. *Fausto*,

484 U.S. 439, 443 (1988) (brackets omitted) (quoting *Lindahl* v. *OPM*, 470 U.S. 768, 774 (1985)). "It prescribes in great detail the protections and remedies applicable to such action, including the availability of administrative and judicial review." *Ibid.* Two portions of the CSRA are relevant here.

a. The first is the CSRA's general prohibition against personnel actions taken in retaliation for certain whistleblowing activity—*e.g.*, in reprisal for an employee's "disclosure of information" about "gross mismanagement" by the agency. 5 U.S.C. 2302(b)(8)(A). The CSRA, as amended by the Whistleblower Protection Act of 1989 (WPA), Pub. L. No. 101-12, 103 Stat. 16, sets forth specific procedures for resolving a claim that a particular personnel action was a reprisal for whistleblowing activity. Those procedures allow an employee to bring any such claim to the Office of Special Counsel, which may then investigate and, if warranted, pursue corrective action on the employee's behalf. See 5 U.S.C. 1214. If the Special Counsel decides not to pursue corrective action (*e.g.*, based on a determination that no whistleblower reprisal occurred), or does not address the claim in a timely fashion, the employee may seek relief from the Merit Systems Protection Board (MSPB or Board), "an independent Government agency that operates like a court," 5 C.F.R. 1200.1. See 5 U.S.C. 1214(a)(3), 1221(a).

In certain circumstances, an employee "has the right to appeal directly" to the Board, in which case a whistleblower-reprisal claim need not first be presented to the Special Counsel. 5 U.S.C. 1214(a)(3). "The jurisdiction of the [B]oard is not plenary but is limited to those actions which are made appealable to

it by law, rule, or regulation." *Synan* v. *MSPB*, 765 F.2d 1099, 1100 (Fed. Cir. 1985); see 5 U.S.C. 1214(a)(3), 7701(a). One such immediately appealable action is the removal of a certain type of employee. See 5 U.S.C. 7511(a)(1), 7512(1), 7513(d). In the event of such a removal, the employee may appeal immediately to the Board and raise both a whistleblower-reprisal claim and other types of claims that may be available. See *Elgin* v. *Department of the Treasury*, 132 S. Ct. 2126, 2134 (2012) (appeal to MSPB includes all grounds for challenging appealable action).

If the Board does not grant the requested relief, the employee may seek judicial review of the Board's decision. See 5 U.S.C. 1214(c), 7703. In general, judicial review of "a final order or final decision" of the Board falls within the "exclusive jurisdiction" of the Federal Circuit. 28 U.S.C. 1295(a)(9); see 5 U.S.C. 7703(b)(1)(A) and (d). A temporary exception to that general rule permits cases that involve only whistleblower-reprisal claims to be reviewed in "any court of appeals of competent jurisdiction." 5 U.S.C. 7703(b)(1)(B) (2012 & Supp. II 2014).

b. The second set of CSRA procedures relevant here are the CSRA's special procedures for handling what are known as "mixed" cases (*e.g.*, 29 C.F.R. 1614.302)—namely, cases in which an employee has been affected by an action that is appealable to the Board and also "alleges that a basis for the action was discrimination prohibited by" one of several listed antidiscrimination statutes. 5 U.S.C. 7702(a)(1)(A)-(B); see, *e.g.*, *Ballentine* v. *MSPB*, 738 F.2d 1244, 1245 (Fed. Cir. 1984). The mixed-case procedures, which are primarily set forth in 5 U.S.C. 7702, allow the employee to elect among various administrative-

review options that can lead to a final "judicially reviewable action." 5 U.S.C. 7702(a)(2). Both the Equal Employment Opportunity Commission (EEOC) and the MSPB have promulgated regulations that apply to mixed cases. See 29 C.F.R. 1614.302 (EEOC regulations); 5 C.F.R. 1201.151 (MSPB regulations).

An employee may initiate a mixed case in one of two ways. 5 U.S.C. 7702(a)(1)-(2); see *Kloeckner* v. *Solis*, 133 S. Ct. 596, 601 (2012); see also 29 C.F.R. 1614.302(b); 5 C.F.R. 1201.154(a). First, she can proceed (at least initially) along essentially the same path that the antidiscrimination laws and their implementing regulations provide for any discrimination claim (including those challenging prohibited personnel practices that are not appealable to the MSPB) by filing a formal equal employment opportunity (EEO) complaint with the employing agency. See 29 C.F.R. 1614.302(b); see also 5 U.S.C. 7702(a)(2); 5 C.F.R. 1201.154(a). That is called a "mixed case complaint." 29 C.F.R. 1614.302(a)(1). Second, she can forgo the EEO complaint process and simply appeal the employing agency's action directly to the MSPB, alleging that the adverse employment action was motivated by discrimination. 5 U.S.C. 7702(a)(1); 5 C.F.R. 1201.154(a); 29 C.F.R. 1614.302(b). That is called a "mixed case appeal." 29 C.F.R. 1614.302(a)(2). The employee must initially elect to pursue one, but not both, of those two remedies. The regulations provide that a mixed-case complainant "may not initially file both a mixed case complaint and an appeal on the same matter," and specify that "whichever is filed first" (*i.e.*, either an EEO complaint with the agency or an appeal to the Board) "shall be considered

an election to proceed in that forum." 29 C.F.R. 1614.302(b).

If the employee files a mixed case complaint, the agency "shall resolve [the] matter within 120 days." 5 U.S.C. 7702(a)(2)(A)-(B); see 29 C.F.R. 1614.302(d)(1)(i). "The decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board." 5 U.S.C. 7702(a)(2); see 29 C.F.R. 1614.302(d)(1)(ii). If the employee appeals the matter to the Board, the appeal follows the same procedural path (described in the following paragraph) as would an initial mixed case appeal. 5 U.S.C. 7702(a)(2); 5 C.F.R. 1201.151, 1201.153-1201.154.

If the employee files a mixed case appeal (either instead of filing a mixed case complaint or from a final agency decision on a mixed case complaint), the Board "shall, within 120 days of the filing of the appeal, decide both the issue of discrimination and the appealable action in accordance with [its] appellate procedures under [5 U.S.C. 7701 and 7702]." 5 U.S.C. 7702(a)(1); see 5 C.F.R. 1201.156(a). The Board's decision then becomes "judicially reviewable action," unless the employee seeks additional administrative process from the EEOC. See 5 U.S.C. 7702(a)(3) and (b); 5 C.F.R. 1201.161; 29 C.F.R. 1614.303.

An employee with a "judicially reviewable action" (following either agency, Board, or EEOC review) may proceed to court. See *Kloeckner*, 133 S. Ct. at 601. Under an exception to the general rule that Board decisions are reviewed in the Federal Circuit, the CSRA provides that judicial review in mixed cases should be sought by filing a suit in district court

under the relevant antidiscrimination law. 5 U.S.C. 7703(b)(2).

2. Petitioner is a former employee of the United States Fish and Wildlife Service, a component of the Department of the Interior. Pet. App. 1a. The Service rated her performance as only minimally satisfactory, sent her a warning letter about inappropriate interaction with a former employee, and assigned her to a 60-day temporary detail in Anchorage. *Id.* at 3a. When petitioner subsequently refused a permanent reassignment to Anchorage, the Service decided to remove her, and she retired in lieu of that removal on the date it was scheduled to happen. *Ibid.*

During the course of those events, petitioner filed a formal complaint with the Service's EEO office, alleging that she had suffered sex discrimination, religious discrimination, and retaliation. Pet. App. 4a, 37a. When initially filed, that complaint did not challenge the Service's decision to remove her, but instead focused on the performance review, warning letter, temporary detail, and other things. *Ibid.* After the agency decided to remove her, petitioner alleged that the removal was the product of both discrimination and whistleblower reprisal (for communications she had made to the Department's Inspector General and others about alleged gross mismanagement) and sought to challenge it in two ways: (1) appealing to the MSPB, and (2) amending her formal EEO complaint to include the removal. *Ibid.*

The Service's EEO office accepted all of petitioner's claims for investigation, with the exception of the challenge to her removal. Pet. App. 5a. The EEO office explained that because petitioner had "fil[ed] with the MSPB first," she had "elected to pursue [the

removal] with them," and could not also pursue it with the EEO office. *Ibid.* Subsequently, however, the Board itself determined that petitioner had not received adequate notice that an appeal to the Board would preclude the EEO office from addressing the removal. *Id.* at 36a-37a. The Board sought to remedy that deficiency by ensuring that petitioner was able to make a deliberate election of remedies. *Id.* at 37a-40a.

The Board explained to petitioner that her challenge to her removal, which included claims of discrimination, presented a mixed case. Pet. App. 36a. The Board presented her with two options, one of which corresponded to the procedures for a mixed case complaint, and the other of which corresponded to the procedures for a mixed case appeal. See *id.* at 5a-6a, 37a-38a. If she selected the first option (the mixed-case-complaint option), she would be allowed to withdraw her Board appeal, submit the removal to the Service's EEO office along with the rest of her EEO complaint, and then (if unsuccessful at the agency level) file a new appeal to the Board. *Ibid.* If she selected the second option (the mixed-case-appeal option), she would continue to pursue her already-filed Board appeal and deliberately forgo any EEO-office review of the removal. *Ibid.*

Petitioner selected the mixed-case-complaint option, informing the Board that she intended to avail herself of the agency's EEO procedures "before filing a new appeal with the Board concerning her removal." Pet. App. 6a, 39a. The Board accordingly dismissed her appeal "as premature, without prejudice to the underlying claims." *Id.* at 6a, 40a. The Service's EEO office, in turn, then accepted the removal for investigation. *Id.* at 6a. The EEO office's review of the

removal, however, was limited to petitioner's claims that the removal was motivated by discrimination. *Id.* at 7a. Although the separate allegation of whistleblower reprisal remained reviewable in any subsequent Board appeal, the Service's EEO office understood—and petitioner does not dispute—the scope of its own review to be limited to the discrimination issues. *Id.* at 7a & n.2. The agency's EEO office ultimately issued a final decision rejecting petitioner's allegations of discrimination and leaving the removal action in place. *Id.* at 7a.

3. Upon receiving that decision, petitioner "did not file an appeal with the MSPB, as she had previously indicated she would do." Pet. App. 7a. Instead, she sought to challenge her removal through a suit in federal district court. *Ibid.* Her complaint included both a claim invoking Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, in which she raised the allegations of discrimination that had been adjudicated by the Service's EEO office, and a claim invoking 5 U.S.C. 2302, in which she raised allegations of whistleblower reprisal that had not been adjudicated by any administrative body. Pet. App. 29a & n.1.

The district court initially granted summary judgment to the government on the merits. See Pet. App. 24a-25a. The court of appeals, however, identified errors in the merits determination, and it accordingly vacated and remanded. 549 Fed. Appx. 635. On remand, the government argued for the first time that due to petitioner's failure to seek administrative consideration of her whistleblower-reprisal claim in the MSPB, the district court lacked jurisdiction to review it. Pet. App. 8a. The district court agreed and dismissed that claim. *Ibid.*; see *id.* at 29a-34a. Petition-

er's Title VII claim was tried to a jury, which found in favor of the government. *Ibid.*

4. The court of appeals affirmed the dismissal of petitioner's whistleblower-reprisal claim. Pet. App. 1a-23a.

The court of appeals recognized that, under 5 U.S.C. 7702(a)(2), a "decision of the agency" in a mixed case that has been presented to the agency's EEO office becomes a "judicially reviewable action." Pet. App. 14a (quoting 5 U.S.C. 7702(a)(2)). It reasoned, however, that "where, as here, an agency's EEO office refuses to consider [a whistleblower-reprisal] claim on the merits," the "'*decision* of the agency'" does not include any determination of the whistleblower-reprisal claim "for the court to review." *Id.* at 18a (quoting 5 U.S.C. 7702(a)(2)) (emphasis added by court).

The court of appeals also reasoned that district-court adjudication of an unreviewed whistleblower-reprisal claim would be inconsistent with the "comprehensive system of administrative review" that Congress had established for such claims. Pet. App. 17a. First, "under no circumstances does the [statute] grant the District Court jurisdiction to entertain a whistleblower cause of action brought directly before it in the first instance." *Id.* at 17a-18a (brackets omitted) (quoting *Stella* v. *Mineta*, 284 F.3d 135, 142 (D.C. Cir. 2002)). Second, "judicial review of agency decisions on [whistleblower-reprisal] claims is deferential," and "[w]hen an employee bypasses the MSPB, there is no administrative record to review, and no decision to which a court may defer." *Id.* at 18a.

The court of appeals found petitioner's reliance on the Tenth Circuit's interpretation of Section 7702(a)(2)

in *Wells* v. *Shalala*, 228 F.3d 1137 (2000), to be misplaced. The court observed, *inter alia*, that the decision in *Wells* did not address, or clearly involve, a situation in which "the employee winds up presenting an *entirely unreviewed* [whistleblower-reprisal] claim to the district court," because "the EEO office declines to exercise jurisdiction over" a whistleblower-reprisal claim and "the employee elects to bypass the MSPB." Pet. App. 16a; see *id.* at 15a n.5.

The court of appeals also rejected petitioner's alternative argument that her failure to present her whistleblower-reprisal claim to the MSPB was a non-jurisdictional defect that the government could not raise belatedly. Pet. App. 19a-20a. The court observed that this Court's decision in *Elgin* v. *Department of the Treasury*, *supra*, had held that the CSRA "preclude[s] district court jurisdiction" over claims that the CSRA requires to be channeled through the MSPB. Pet. App. 20a. "Because Congress intended the MSPB to have exclusive original jurisdiction over her [whistleblower-reprisal] claim," the court of appeals explained, "the district court properly dismissed the claim for lack of jurisdiction." *Id.* at 21a.

The court of appeals observed, however, that petitioner might still have an opportunity to follow the statutory procedures necessary to invoke district-court jurisdiction over her whistleblower-reprisal claim. Pet. App. 22a. Although the time limit for seeking MSPB review of that claim had expired, the court noted that "equitable tolling * * * may be warranted here." *Ibid.* It viewed that issue as one that "should be addressed in the first instance by the MSPB." *Ibid.*

ARGUMENT

The court of appeals correctly held that the district court lacked jurisdiction over her whistleblower-reprisal claim because she had failed to present that claim to the MSPB. Further review is not warranted.

1. a. As the court of appeals correctly recognized, nothing in the CSRA "grant[s] the District Court jurisdiction to entertain a whistleblower cause of action brought directly before it in the first instance." Pet. App. 17a-18a (quoting *Stella* v. *Mineta*, 284 F.3d 135, 142 (D.C. Cir. 2002)). The provisions for judicial review of whistleblower-reprisal claims instead provide that all such claims are channeled through the MSPB. See pp. 2-3, *supra*. As a general matter, an employee must present such a claim first to the Special Counsel; then to the MSPB (if still aggrieved); and only then to a court, in a petition for judicial review from an adverse MSPB decision. See 5 U.S.C. 1214(a)(1), (3), and (c), 1221(a), 7703(b). In cases like this one, where the employee has an independent right to go directly to the MSPB, she can skip the Special Counsel step, but still must present the claim to the MSPB and may seek judicial review only if unsuccessful there. See 5 U.S.C. 1214(a)(3); 7511(a)(1), 7512(1), 7513(d); *Elgin* v. *Department of the Treasury*, 132 S. Ct. 2126, 2134 (2012) (holding that all challenges to appealable action must be presented to MSPB).

Were an employee to file a whistleblower-reprisal claim directly in district court, without channeling that claim through the MSPB in the manner prescribed by the CSRA, the court would lack jurisdiction over that claim. As this Court recognized in *Elgin* v. *Department of the Treasury*, *supra*, "the CSRA's

'elaborate' framework * * * indicates that extra-statutory review is not available to those employees to whom the CSRA grants administrative and judicial review." 132 S. Ct. at 2133 (emphasis and citation omitted). "Given the painstaking detail with which the CSRA sets out the method for covered employees to obtain review of adverse employment actions"—such as the removal action that petitioner challenges here—"it is fairly discernible that Congress intended to deny such employees an additional avenue of review in district court." *Id.* at 2134; see 5 U.S.C. 7511(a)(1), 7512(1), 7513(d). As a result, the CSRA "preclude[s] district court jurisdiction" when an employee bypasses Board review that the CSRA requires and instead presents her claim to a court in the first instance. *Elgin*, 132 S. Ct. at 2140; see, *e.g.*, *id.* at 2133-2134.

b. An employee cannot manufacture district-court jurisdiction over a whistleblower-reprisal claim that was not presented to the MSPB by piggybacking it onto a mixed case.

An employee with a mixed case has multiple ways to present her case to the MSPB and seek its review, and then judicial review, of any whistleblower-reprisal claim that she may have. The employee may bring the whistleblower-reprisal claim before the Board either by pursuing a mixed case appeal, which routes the matter straight to the MSPB, or pursue a mixed case complaint followed by an MSPB appeal. See *Kloeckner* v. *Solis*, 133 S. Ct. 596, 601 (2013); pp. 4-5, *supra*. Once the whistleblower-reprisal claim has been presented to the MSPB, it can be included in any petition for judicial review. The CSRA's procedures for judicial review of whistleblower-reprisal claims incorporate by reference the procedures for judicial review of

mixed cases (as well as non-mixed cases), thereby allowing judicial review of all properly presented claims in a single judicial proceeding. See 5 U.S.C. 1214(c)(2) (specifying that petition for judicial review of Board's resolution of whistleblower-reprisal claim "shall be filed with such court, and within such time, as provided for under section 7703(b)"), 7703(b)(2) (specifying procedures for judicial review of mixed cases).

An employee with a mixed case also has a path to court that does not go through the MSPB, namely, by filing a mixed case complaint with her employing agency's EEO office and then proceeding immediately to court if she is unsatisfied with the result. See *Kloeckner*, 133 S. Ct. at 601; pp. 4-5, *supra*. That path, however, does not include any provision for judicial review of a whistleblower-reprisal claim. The right to proceed immediately to court following resolution of the EEO complaint arises from the statutory directive that in "any matter before an agency" that meets the definition of a mixed case, the "decision of the agency in any such matter shall be a judicially reviewable action unless the employee appeals the matter to the Board." 5 U.S.C. 7702(a)(2). What that provision allows an employee to bring immediately to court is not the whole "matter" that could be appealed to the MSPB, but instead only the "*decision of the agency in* * * * such matter." *Ibid.* (emphasis added); see *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (declining to conclude that instances of "differing language" have the "same meaning"); see also *Kloeckner*, 133 S. Ct. at 605 (explaining that in "normal legal parlance," something that "is not 'judicially reviewable' * * * cannot be taken to a court"). And

as the court of appeals recognized (Pet. App. 18a), the "decision of the agency" cannot include a whistleblower-reprisal claim, as it is undisputed (*id.* at 7a n.1) that an agency's EEO office lacks authority to decide such a claim.

As the court of appeals also recognized (Pet. App. 17a-18a), review of a whistleblower-reprisal claim in the first instance in district court would be inconsistent with the statutory scheme in other respects as well. Under the statutory procedures that the CSRA prescribes for whistleblower-reprisal claims, courts review the administrative resolution of such claims under a deferential standard, even when they are presented in the context of a mixed case. See 5 U.S.C. 7703(c) (providing that discrimination claims brought in district court are the only types of claims that receive de novo consideration); see, *e.g.*, *Kelliher* v. *Veneman*, 313 F.3d 1270, 1275 (11th Cir. 2002) ("Courts that have addressed the issue uniformly apply the de novo standard of review only to the discrimination claims while other claims adjudicated before the MSPB are reviewed on the record."); see also Pet. 8 (not disputing this point). "When an employee bypasses the MSPB," however, "there is no administrative record to review and no decision to which a court may defer." Pet. App. 18a. And no provision of the CSRA—including the antidiscrimination laws under which an employee with a mixed case files suit, see 5 U.S.C. 7702(a)(1)(B); 29 C.F.R. 1614.302(d)(1)(i), 1614.310—includes a provision for district-court review of allegations of whistleblower reprisal. See Pet. App. 17a-18a.

c. Petitioner presents no sound reason why the district court was authorized to consider her whistle-

blower-reprisal claim notwithstanding her failure to channel it through the MSPB. She asserts (Pet. 7-9) that the "plain language" of Section 7702(a)(2) provides such authorization, but offers no explanation for how a claim that the agency EEO office lacked authority to decide can be encompassed within the "decision of the agency" that Section 7702(a)(2) identifies as "judicially reviewable."

Petitioner likewise offers no meaningful explanation for why, notwithstanding *Elgin*'s treatment of the failure to properly channel a claim through the MSPB as "preclud[ing] district court jurisdiction," see, *e.g.*, 132 S. Ct. at 2131, her failure to do so here could be treated as a nonjurisdictional error. She views as "critical" (Pet. 10) the Court's observation in *Elgin* that an employee with a mixed case can file suit in district court under the federal antidiscrimination laws. But, as discussed above, the filing of an antidiscrimination suit does not vest the district court with jurisdiction to hear a separate claim of whistleblower reprisal, as to which judicial review is available solely through the procedures specified in the CSRA.

2. Petitioner contends (Pet. 5-6) that the decision below conflicts with the Tenth Circuit's decision in *Wells* v. *Shalala*, 228 F.3d 1137 (2000). In *Wells*, the Tenth Circuit rejected an argument that a district court lacked jurisdiction over a whistleblower-reprisal claim that had not been presented to the MSPB. *Id.* at 1142-1143. The court of appeals observed that the employee was challenging an appealable adverse action on both whistleblower-reprisal and disability-discrimination grounds; noted that the allegations of disability discrimination gave rise to a mixed case; and stated that "following an adverse agency decision, the

employee has the option in a 'mixed case' complaint of filing a civil action in the district court rather than appealing to the MSPB." *Id.* at 1143.

Although the discussion in *Wells* is in tension with the reasoning of the decision below, the circumstances of that case did not necessarily match the circumstances of this one. As the court of appeals in this case observed (Pet. App. 15a-16a & n.5), it is not clear that *Wells* involved a situation, like the situation here, in which an agency EEO office expressly declined to resolve an employee's whistleblower-reprisal claim. Rather, the opinion in *Wells* suggests that the whistleblower-reprisal claim there was submitted to the agency's EEO office and explains that the EEO office "issued a thorough seventeen page single-spaced decision denying [the employee's] claims." 228 F.3d at 1142. Thus, the EEO office may well have purported to resolve the whistleblower-reprisal claim, even if it did not actually have authority to do so. A future Tenth Circuit panel might therefore view *Wells* not to be binding authority in a case like this one, where "the employee winds up presenting an *entirely unreviewed* [whistleblower-reprisal] claim to the district court," Pet. App. 16a.[*]

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[*] The government's brief in the court of appeals noted that three circuits "have held that under Section 7702(e)(1)(A) of the CSRA, the district court has jurisdiction to decide an employee's discrimination and non-discrimination CSRA claims in a mixed case in which the employee filed suit in district court after the [EEO office of] the employing agency *did not issue* a decision within 120 days," even though the non-discrimination claims have not been presented to the MSPB. Gov't C.A. Br. 37 n.5 (emphasis added). The government further noted that only one of those decisions, *Bonds* v. *Leavitt*, 629 F.3d 369 (4th Cir.), cert. denied, 132 S. Ct. 398 (2011), specifically involved a whistleblower-reprisal claim, and

In any event, any potential conflict between the decision below and flawed reasoning in *Wells* does not warrant this Court's review. Petitioner provides no reason to believe that the question presented arises with any frequency. It is generally to an employee's advantage to present a whistleblower-reprisal claim to the MSPB, because it provides the employee with an additional forum in which she might prevail. The scarcity of circuit decisions addressing the question presented suggests that employees in petitioner's position most often elect to do so. And if, in fact, a significant number of such employees were to choose to skip that step, this Court will have future opportunities to review the question presented as other circuits are called upon to address it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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even that decision did not directly address the CSRA provisions particular to such a claim. See *id.* at 378-380; Gov't C.A. Br. 37 n.5. The court of appeals' decision in this case mentions *Bonds*, which it views as addressing "different circumstances," in a footnote. Pet. App. 16a n.6. Petitioner neither cites *Bonds* nor claims that it conflicts with the decision below.