No. 16-742

In the
SUPREME COURT OF THE UNITED STATES

LESLIE A. KERR,
Petitioner
v.
SALLY JEWELL,
Secretary of Department of the Interior,
Respondent.

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

BRIEF OF *AMICI CURIAE* GOVERNMENT ACCOUNTABILITY PROJECT AND FELECIA REDDING IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Does the statutory scheme governing the Civil Service Reform Act and the Whistleblower Protection Act (WPA) authorize a civil servant to file her WPA retaliation claim in district court without first obtaining a ruling from the Merit System Protection Board (MSPB) where said claim is part of a "mixed case" combined with her Title VII discrimination claim?

2. Where a civil servant initially files her WPA claim with the MSPB and thereafter removes that claim to district court combining it with her Title VII claim in a mixed case, does any resulting failure of exhaustion deprive the district court of all federal question jurisdiction over the WPA claim?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

FEDERAL REGULATIONS

LEGISLATIVE HISTORY

STATEMENT OF INTEREST OF THE GOVERNMENT ACCOUNTABILITY PROJECT

The Government Accountability Project (GAP)[1] is a non-partisan, non-profit public interest law firm specializing in legal advocacy on behalf of whistleblowers – government and corporate employees who expose illegality, gross waste and mismanagement, abuse of authority, dangers to public health and safety, or other institutional misconduct undermining the public interest.

GAP believes that a professional and dedicated civil service is essential to an effective democracy. The link between the government and the public it serves, civil servants are the foundation of a responsible, law-abiding political system. However, when whistleblowers encounter retaliation, poor performance reviews, and even discharge for speaking truth to power, that link is severed. While laws written to protect federal employees from Prohibited Personnel Practices (PPPs), particularly whistleblower reprisals, are an important first step, those laws cannot fulfill their intended purpose if they remain unenforced. To protect both the independence

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[1] Pursuant to Rule 37.6, *Amici* hereby state no counsel for any party authored the brief in whole or in part and no person or entity, other than the *Amici*, its members or counsel, made any monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.2(a). Copies of the requisite consent letters have been filed with the Clerk of this Court. Undersigned requested consent on January 4, 2017 (after recovering from a short illness), and both Petitioner's counsel and the Solicitor General thereafter gave consent

of the civil service and the responsiveness of federal institutions to the citizenry, the government must operate in an open environment where truth and accountability are not only encouraged, but respected. The dedicated members of the federal civil service must not be forced to choose between their jobs and their integrity.

GAP has substantial expertise on protecting government employees' rights. GAP attorneys have testified before Congress over the last two decades concerning the effectiveness of existing statutory protection, filed numerous *amicus curiae* briefs on constitutional and statutory issues relevant to whistleblowers, co-authored the model whistleblower protection laws to implement the Inter-American Convention Against Corruption, and led legislative campaigns for a broad range of relevant federal laws, including the Whistleblower Protection Act of 1989, P.L. No. 101-12, 103 Stat. 16 (April 10, 1989) (WPA) and the subsequent 1994 and 2012 amendments, as well as the employee rights provisions in the Sarbanes-Oxley Act of 2002, 18 U.S.C. §1514A. GAP has published material concerning the WPA and its practical realities. *See*, *e.g.*, Thomas M. Devine, *The Whistleblower's Survival Guide: Courage Without Martyrdom* (1997); Thomas M. Devine *et al.*, *Whistleblowing Around the World: Law, Culture, and Practice*, "Whistleblowing and the United States: The gap between vision and lessons learned" (2004); Thomas M. Devine, *The Whistleblower Protection Act of 1989: Foundation for the Modern Law of Employment Dissent*, 51 Admin. L.R. 531 (1999); and Robert G. Vaughn, Thomas M. Devine & Keith Henderson, *The Whistleblower Statute Prepared for the Organi-*

zation of American States and the Global Legal Revolution Protecting Whistleblowers, 35 The Geo. Wash. Int'l. L. Rev. 857 (2003).

STATEMENT OF INTEREST OF FELECIA REDDING

Felecia Redding is a GG-14 Supervisory Human Resources Specialist working for the Defense Intelligence Agency. While serving as the Branch Chief of Internal Staffing in 2013, she was not selected for a GG-15 Deputy Chief, Employee Mobility, position. She filed an EEO complaint alleging race and age discrimination. Thereafter, Warner Eley, the Chief of the Pay and Benefits Division and the selecting official, announced "people have been here too long," "there are going to be some changes," and "I do not care if they go to EEO." In 2014, DIA reassigned Redding to her present non-supervisory position with duties below those of her grade.

Relying in part on 5 U.S.C. § 7702, Redding filed civil action No. 16-2149-TSC in the District Court for the District of Columbia on October 26, 2016, raising her discrimination claims and retaliation claims under both the Civil Rights Act and the WPA. If the decision below stands, or is adopted by courts adjudicating Redding's claims, then she will not be permitted to present her WPA claim. She will lose the WPA's favorable burdens of proof at 5 U.S.C. § 1221(e), and she will be subject to the Civil Rights Act's cap on compensatory damages.

SUMMARY OF ARGUMENT

The plain text of the "mixed case" statute, 5 U.S.C. § 7702(f), permits federal employees to raise both discrimination and civil service claims after exhausting through only one agency process:

> In any case in which an employee is required to file any action, appeal, or petition under this section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

This provision makes clear that Congress wants to protect all the claims of federal employees who use any one of the available administrative procedures to allow agency review of their claims. If the agency does not complete its work within 120 days, then the employee may bring all his or her claims to federal court. 5 U.S.C. § 7702(e)(1).

The decision below flies in the face of these provisions and requires victims of retaliation to exhaust at least two administrative procedures to give the district court jurisdiction of all their claims.

The public interest in protecting employees from reprisals is so strong that this Court even has imputed such protection into laws that have no words creating it. *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005) (Title IX); *CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 128 S. Ct. 1951

(2008) (42 U.S.C. § 1981); *Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (ADEA).

REASON FOR GRANTING THE PETITION

I. PROTECTING A FEDERAL EMPLOYEE'S RETALIATION CLAIMS IS NECESSARY TO ACHIEVE THE REMEDIAL PURPOSES OF THE CIVIL RIGHTS ACT AND THE WPA.

The Ninth Circuit erred in *Kerr v. Jewell*, 836 F.3d 1048, 1056 (2016), when it held that § 7702(a)(2) does not authorize Kerr to bring her claims, including her Whistleblower Protection Act (WPA) claim, directly from the EEO office to district court. The court was primarily concerned with the "practical import" of the Tenth's Circuit's interpretation of § 7702 in *Wells v. Shalala*, 228 F.3d 1137 (10th Cir. 2000). This "practical import" is a plea to use administrative process to shield the federal courts from having to decide more cases on the merits. That is docket control, and an impermissible basis upon which to decline jurisdiction granted by Congress. That desire is irrelevant to the question of jurisdiction. This Court has reaffirmed that "a federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2347 (2014) (internal quotation marks omitted); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) (same).

The mixed case statute, 5 U.S.C. § 7702(a), (e) and (f), permits federal employees with both discrimination and civil service claims to pick one administrative route, wait 120 days, and then go to federal court if they have "been affected by an action which the employee or applicant may appeal to the Merit Systems Protection Board [MSPB]." Accord, *Kloeckner v. Solis*, 133 S.Ct. 596, 601, 184 L. Ed. 2d 433 (2012).

The WPA is part of the Civil Service Reform Act (CSRA) and its claims can be appealed to the MSPB. 5 U.S.C. § 1221(a). Petition, 41a. Section 5 U.S.C. § 7702(a) does not require that the right of appeal be a right to "directly appeal" (which would limit mixed case claims to those listed in 5 U.S.C. § 7512). At 5 U.S.C. § 1221(b), Congress specifically preserved the right of employees to appeal "directly" to the MSPB if the employee "has the right to appeal directly to the Board under any law[.]" Neither 5 U.S.C. § 7702(a) nor 5 U.S.C. § 1221(a) is limited to "direct" rights of appeal. If mixed cases were limited to the five adverse actions listed in 5 U.S.C. § 7512, then it would make no sense for § 7702(a)(1)(A) to permit mixed cases to be brought by applicants for employment who could not possibly have suffered one of the adverse actions listed in § 7512.

Congress emphasized at 5 U.S.C. § 7702(e)(1) that after 120 days of agency processing the employee's right to bring a civil action is "[n]otwithstanding any other provision of law[.]" Congress declares here that there can be no other barriers to federal court jurisdiction, yet the Ninth Circuit below has erected a barrier for "practical import."

The WPA has long prohibited federal personnel decisions taken in reprisal for an employee's disclosure of a violation of law. 5 U.S.C. § 2302(b)(8). Title VII is such a law. The WPA also protects participation in proceedings. 5 U.S.C. § 2302(b)(9)(A)(i) (protecting "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation – (i) with regard to remedying a violation of paragraph (8)").

Famously, Title VII does not explicitly provide a claim for federal sector retaliation. However, the holdings in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005), and *Gomez-Perez v. Potter*, 553 U.S. 474, 487-88 (2008), make clear that such a claim is recognized. Congress did make a federal sector retaliation claim explicit at 5 U.S.C. § 2302(b). Congress made clear that this section of the WPA does apply to EEO claims, 5 U.S.C. § 2302(b)(1), and to retaliation claims, 5 U.S.C. § 2302(b)(8) and (9). It is particularly ironic, then, that the decision below allows a federal sector victim of retaliation to bring her implied cause of action, but not her explicit one.

The Ninth Circuit is holding fast to its ruling in *Sloan v. West*, 140 F.3d 1255 (9th Cir. 1998). Although the decision below recognizes that *Sloan* did not address a WPA claim, it held that, "[i]f a complainant wishes to preserve both claims, he or she must not pursue an appeal of the EEO decision with the EEOC [or the district court]. Rather, he or she must file the appeal with the MSPB, or be deemed to have waived the non-discrimination claim." *Kerr* at 1057, quoting *Sloan* at 1260. "Once the MSPB issues a decision, ... the employee may ... appeal the entire

case (including all claims) to the appropriate United States District Court." *Kerr* at 1057, again quoting *Sloan* at 1260 (citing 29 C.F.R. § 1614.310(b)). Reaffirming *Sloan,* the Ninth Circuit says the MSPB furnishes the exclusive path for obtaining judicial review of a WPA claim.

The requirement that an employee exhaust mixed-case EEO retaliation claims through the Office of Special Counsel (OSC) and MSPB is particularly ironic given that OSC will normally refuse to investigate them since claimants can exhaust their claims administratively through the agency EEO process. See 5 C.F.R. § 1810.1. Also, the MSPB has been less than consistent about applying the WPA to protect EEO concerns. Sometimes it finds protection, *Kinan v. Dep't of Def.*, 87 M.S.P.R. 561, 566 n. 2 (2001) (citing *Ellison v. Merit Systems Protection Board,* 7 F.3d 1031, 1035 (Fed.Cir.1993)), but more often the MSPB holds that EEO concerns are not protected. *Applewhite v. Equal Employment Opportunity Commission*, 94 M.S.P.R. 300 (2003).[2]

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[2] In *Applewhite*, the MSPB relied on *Spruill v. Merit Sys. Prot. Bd.*, 978 F.2d 679, 682 (Fed. Cir. 1992). *Spruill*, however, is outdated in light of the 2012 WPEA. *Spruill* relied on the pre-amendment version of 5 U.S.C. § 1221, which made only claims under 5 U.S.C. § 2302(b)(8) appealable to MSPB, and not participation claims under 5 U.S.C. § 2302(b)(9). The WPEA amended 5 U.S.C. § 1221 to address this concern and make participation claims appealable to MSPB when they arise under 5 U.S.C. § 2302(b)(9)(A)(i) (protecting "the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation – (i) with regard to remedying a violation of paragraph (8)"). Whereas the *Spruill* court relied on the absence of any right to appeal a (b)(9) claim to the MSPB,

Other circuit courts that have addressed this issue have concluded that district courts possess jurisdiction over non-discrimination claims in mixed cases when agencies fail to meet the time limit in § 7702(e)(1)(B). See *Bonds v. Leavitt*, 629 F.3d 369, 379 (4th Cir. 2011); *Ikossi v. Dep't of Navy*, 516 F.3d 1037, 1041–44 (D.C.Cir. 2008); *Seay v. TVA*, 339 F.3d 454, 471–72 (6th Cir. 2003); *Doyal v. Marsh*, 777 F.2d 1526, 1533, 1535–37 & n. 5 (11th Cir.1985). Employees may bring "mixed cases" to district court, even if the original administrative complaint did not make this theory evident. See *Bonds*, cited above. Generally, there is no requirement that a complaint set out the legal theory that permits relief for the facts alleged. *Johnson v. City of Shelby, Mississippi*, 574 U.S. ___, 135 S.Ct. 346, 347-48 (2014).

In 2012, Congress passed the Whistleblower Protection Enhancement Act (WPEA) because restrictive judicial interpretations had sapped the WPA of its effectiveness. S. REP. NO. 112-155 at 2 (WPEA was "restoring the original congressional intent of the WPA to adequately protect whistleblowers . . .."). At 4-5, the Senate Report expresses the congressional frustration with the limits courts had put on the phrase "any disclosure" in 5 U.S.C. § 2302(b)(8). "It is critical that employees know that the protection for disclosing wrongdoing is extremely broad and will not be narrowed retroactively by future MSPB or court opinions. Without that assurance, whistleblowers will hesitate to come forward." "The interest

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the WPEA now explicitly grants such a right. The original logic of *Spruill* was questionable as any appeal, complaint or grievance would itself be protected under (b)(8)(A)(i) as "any disclosure" of a violation of law.

at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." *Handy–Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 540 (6th Cir.2012), quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004).

Before *Kerr*, courts have had no difficulty holding that whistleblower provisions must be given broad scope to accomplish their remedial purposes. *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1161 (2014); *English v. General Elec. Co.*, 496 U.S. 72, 82 (1990) (to "encourage" employees to report safety violations and protect their reporting activity); *NLRB v. Scrivener*, 405 US 117, 121-26 (1972); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985)("Narrow" or "hypertechnical" interpretations are to be avoided as undermining Congressional purposes.); *Passaic Valley Sewerage Comm. v. Department of Labor*, 992 F.2d 474, 479 (3rd Cir. 1993). "Congress passed the whistleblower statute precisely because it did not trust agencies to regulate whistleblowers within their ranks." *Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 920, 190 L. Ed. 2d 771 (2015). This Court construes Title VII to further its remedial purpose. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982).

The *Kerr* holding runs counter to the administrative economy of the mixed case statute which allows whistleblowers to preserve all of their claims by using just one of the available agency proceedings. 5 U.S.C. § 7702(f). It also runs counter to the remedial purpose of the 2012 WPEA, which explicitly extends protection to "any disclosure" of violations of law, and federal employee participation in official pro-

ceedings. Finally, it places federal employees in the dilemma of having to waive all of their CSRA remedies (including their WPA remedies), just to bring their retaliation claim to district court.

II. THE CONFLICT BETWEEN THE NINTH AND TENTH CIRCUITS WILL CREATE FORUM SHOPPING AND UNCERTAINTY.

Federal sector victims of discrimination and retaliation have choices about the forum to use for their claims. The mixed-case statute permits them to choose between the agency EEO or OSC-MSPB routes. The WPEA created an option for seeking review of MSPB decisions in either the Federal Circuit or in "any court of appeals of competent jurisdiction[.]" 5 U.S.C. § 7701(b)(1)(B). The Civil Rights Act permits civil actions "in any judicial district in the State in which the unlawful employment practice is alleged to have been committed," where "the employment records" "are maintained and administered," where "the aggrieved person would have worked," or where the "respondent has his principal office." 42 U.S.C. § 2000e-5(f)(3).

If the *Kerr* decision stands, victims of retaliation and their advocates will necessarily be reviewing these options with an eye toward the venues that uphold federal jurisdiction for all available claims. In the many circuits that have not addressed the issue, they will face uncertainty about preservation of their claims, and face unwarranted dilemmas about whether to risk sacrificing some claims to advance

others. Through the mixed-case statute, Congress clearly sought to protect civil servants from such dilemmas.

CONCLUSION

The Government Accountability Project and Felecia Redding ask this Court to grant this petition and reverse the decision of the Ninth Circuit.

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