

No. 17-570

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In the Supreme Court of the United States

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JEFFREY S. MUSSelman, PETITIONER

*v.*

DEPARTMENT OF THE ARMY

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

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BRIEF FOR THE RESPONDENT IN OPPOSITION

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**QUESTION PRESENTED**

Whether the 60-day time limit for seeking Federal Circuit review of an order or decision of the Merit Systems Protection Board, 5 U.S.C. 7703(b)(1)(A), is jurisdictional and therefore not subject to equitable tolling.

(I)

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## BRIEF FOR THE RESPONDENT IN OPPOSITION

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### OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-3a) is unreported. The order of the court of appeals denying initial hearing en banc (Pet. App. 22a-23a) is reported at 868 F.3d 1341. The final order of the Merit Systems Protection Board is not published in the Merit Systems Protection Board Reporter, but is available at 2016 WL 3365977. The initial decision of the administrative judge (C.A. App. 18-52)<sup>1</sup> is unreported.

### JURISDICTION

A petition for initial hearing en banc was denied on July 20, 2017 (Pet. App. 22a-23a). The judgment of the court of appeals was entered on October 13, 2017. The petition for a writ of certiorari was filed on October 16,

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<sup>1</sup> “C.A. App.” refers to the appendix to the respondent’s response to the court of appeals’ order to show cause (filed Sept. 29, 2016).

2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

#### STATEMENT

1. a. “A federal employee subjected to an adverse personnel action such as a discharge or demotion may appeal her agency’s decision to the Merit Systems Protection Board (MSPB or Board).” *Kloeckner v. Solis*, 568 U.S. 41, 43 (2012); see 5 U.S.C. 7701(a). “The Board is an independent, quasi-judicial federal administrative agency.” *Bledsoe v. MSPB*, 659 F.3d 1097, 1101 (Fed. Cir. 2011) (citing *Garcia v. Department of Homeland Sec.*, 437 F.3d 1322, 1327 (Fed. Cir. 2006) (en banc)).

MSPB proceedings are “adversarial” in nature. *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1188 (D.C. Cir. 1987); see also *Willingham v. Ashcroft*, 228 F.R.D. 1, 5 (D.D.C. 2005); *Bers v. United States Gov’t*, 666 F. Supp. 1, 1 (D.D.C. 1987). Employees proceeding before the Board have a statutory right “to a hearing for which a transcript will be kept,” as well as “to be represented by an attorney or other representative.” 5 U.S.C. 7701(a)(1)-(2). The Board’s administrative judges possess the authority to conduct such hearings. 5 C.F.R. 1201.41. Following the opportunity for a hearing, the administrative judge must “prepare an initial decision” containing, *inter alia*, “[f]indings of fact and conclusions of law,” “[t]he reasons or bases for those findings and conclusions,” and “[a]n order” providing for “appropriate relief.” 5 C.F.R. 1201.111(a) and (b)(1)-(3).

A federal employee may seek the full Board’s review of an administrative judge’s adverse initial decision. 5 C.F.R. 1201.114. The full Board reviews the initial decision for “erroneous findings of material fact,” legal error, or an abuse of discretion, 5 C.F.R.

1201.115(a)-(c), in a role consistent with that of an appellate review panel. See 5 C.F.R. 1201.117(a) (providing the Board with authority to, *inter alia*, hear oral arguments, require the submission of briefs, and remand the case to the administrative judge). If appropriate, the full Board issues a final order, which may be either precedential or nonprecedential. 5 C.F.R. 1201.117(c).

b. A federal employee aggrieved by the Board's final order may seek review in the United States Court of Appeals for the Federal Circuit, which has "exclusive jurisdiction" over such "appeal[s] \* \* \* pursuant to sections 7703(b)(1) and 7703(d) of title 5." 28 U.S.C. 1295(a)(9); see *Perry v. MSPB*, 137 S. Ct. 1975, 1979 (2017). As relevant here, Section 7703(b)(1)(A) provides:

[A] petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

5 U.S.C. 7703(b)(1)(A).<sup>2</sup>

For more than 30 years, the Federal Circuit has held that the timing requirement of Section 7703(b)(1)(A) is "jurisdictional," *Monzo v. Department of Transp.*, 735

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<sup>2</sup> A different rule applies if the federal employee is pursuing a "mixed case," *i.e.*, "a personnel action serious enough to appeal to the MSPB" as well as an allegation that "the action was based on discrimination." *Kloeckner*, 568 U.S. at 44. In that situation, "the district court is the proper forum for judicial review." *Perry*, 137 S. Ct. at 1988. Pursuant to 5 U.S.C. 7703(b)(2), an employee bringing a mixed case must file a case in the district court within 30 days of the employee's receipt of the Board's final order. Section 7703(b)(2) is not at issue here.

F.2d 1335, 1336 (Fed. Cir. 1984), and that “[c]ompliance with the filing deadline of 5 U.S.C. § 7703(b)(1) is a prerequisite to [the court of appeals’] exercise of jurisdiction,” *Oja v. Department of the Army*, 405 F.3d 1349, 1360 (Fed. Cir. 2005).

2. Petitioner, a veteran of the United States Air Force, was employed as a civilian by the United States Army (Army) beginning in 2001. Pet. 5; see C.A. App. 19. Most recently, petitioner was a Senior Unexploded Ordnance Supervisor, assigned to the Pine Bluff Arsenal in Arkansas. C.A. App. 19. In 2013, after the Program Manager for appellant’s unit submitted notice of his retirement, petitioner began serving as the “acting” Program Manager, and he was told that “he would be temporarily promoted from a GS-13 to GS-14 Program Manager position” for a period of 120 days. *Ibid.* Petitioner contends that, “after making several protected whistleblower disclosures to senior management, [he] was removed from his role as acting program manager and his promotion was never finalized.” Pet. 5-6; see C.A. App. 20.

Petitioner filed a complaint with the Office of Special Counsel (OSC). C.A. App. 19-20. After OSC issued a closure letter terminating its investigation, petitioner sought relief from the Board. Pet. 6; see generally C.A. App. 18-52. An administrative judge held a hearing and found that several of petitioner’s disclosures were not protected; that one disclosure was protected but was not a contributing factor to a personnel action; and that another disclosure was protected and a contributing factor, but the Army had proven by clear and convincing evidence that it would have taken the personnel action in the absence of the disclosure. Pet. App. 6a-7a; see C.A. App. 26-47.

Petitioner sought the Board's review, and the Board issued its final order on June 17, 2016. Pet. App. 4a-17a. The Board affirmed the administrative judge's decision as modified to find that petitioner "engaged in additional protected activity but nonetheless failed to prove that it was a contributing factor to any personnel action." *Id.* at 5a.

After concluding that it found "no other basis for disturbing the initial decision," Pet. App. 15a, the Board's order including a heading, in bold capital letters: "Notice to the Appellant Regarding Your Further Review Rights." *Ibid.* (capitalization and emphasis altered). The notice stated in relevant part:

You have the right to request review of this final decision by the U.S. Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See 5 U.S.C. § 7703(b)(1)(A)* (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1154 (Fed. Cir. 1991). \*\*\*

If you need further information about your right to appeal this decision to court, you should refer to the Federal law that gives you this right. It is found in title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code, at our website, <http://www.mspb.gov/appeals/uscode.htm>. Additional information about

the United States Court of Appeals for the Federal Circuit is available at the court’s website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court’s “Guide for Pro Se Petitioners and Appellants,” which is contained within the court’s Rules of Practice, and Forms 5, 6, and 11.

*Id.* at 15a-17a.

3. a. Following issuance of the Board’s decision on June 17, 2016, petitioner had 60 days—until August 16, 2016—to file a petition for review in the Federal Circuit. See 5 U.S.C. 7703(b)(1)(A); Pet. App. 2a; Pet. 6. Petitioner mailed his petition for review on August 3, 2016, Pet. 6, but the court of appeals did not receive it until August 19, 2016, three days after the filing deadline, Pet. App. 2a.

The court issued an order to show cause why petitioner’s untimely petition for review should not be dismissed, and petitioner responded that his late filing reflected a “substantial delay” on the part of the United States Postal Service. Pet. App. 19a. The court then ordered the parties to “address in their briefs whether § 7703(b)(1)’s filing deadline is jurisdictional or whether it can be extended or tolled under these circumstances.”

*Id.* at 20a.

b. Before the parties submitted their briefs, another panel of the court of appeals issued a precedential decision in *Fedora v. MSPB*, 848 F.3d 1013 (Fed. Cir. 2017), petition for cert. pending, No. 17-557 (filed Oct. 6, 2017), holding that Section 7703(b)(1)’s time limitation is jurisdictional and cannot be equitably tolled. The *Fedora* majority noted that for more than 30 years, the Federal Circuit had held that “[c]ompliance with” the statute’s 60-day filing deadline “is a prerequisite to [the court’s] exercise of jurisdiction.” *Fedora* Pet. App. 4a (quoting

*Oja*, 405 F.3d at 1360) (first set of brackets in original). The majority acknowledged that “in recent years” this Court “has recognized that not all statutory time limits are properly characterized as jurisdictional.” *Ibid.* But it stated that many of this Court’s cases involved “claims-processing rules” rather than “[a]ppeal periods to Article III courts,” which this Court had addressed in *Bowles v. Russell*, 551 U.S. 205 (2007). *Fedora* Pet. App. 4a. As the court of appeals explained, that decision held that the Court’s recent cases did not “call[] into question [the Court’s] longstanding treatment of statutory time limits for taking an appeal as jurisdictional.” *Id.* at 5a (quoting *Bowles*, 551 U.S. at 210) (second set of brackets in original); see *ibid.* (discussing *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010)).

The *Fedora* majority also addressed *Henderson v. Shinseki*, 562 U.S. 428 (2011), which held that the time for appealing from the Board of Veterans’ Appeals to the Court of Appeals for Veterans Claims was subject to equitable tolling. *Fedora* Pet. App. 6a. The majority found *Henderson* inapposite because the appeal there was to an Article I tribunal, rather than an Article III court, and the case involved a “unique administrative scheme” that was “unusually protective of claimants.” *Ibid.* (quoting *Henderson*, 562 U.S. at 437-438). Moreover, the majority noted, *Henderson* distinguished *Stone v. INS*, 514 U.S. 386, 405 (1995), in which this Court held that an appeal period from an administrative agency—the Board of Immigration Appeals—to an Article III court under the Hobbs Administrative Orders Review Act of 1950 (Hobbs Act), 28 U.S.C. 2341 *et seq.*, and the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, was jurisdictional. *Fedora* Pet. App. 6a; see *ibid.* (noting *Henderson*’s discussion of the

fact that “lower courts uniformly treat the time limit for review of certain final agency decisions under the Hobbs Act as jurisdictional”). The *Fedora* majority thus found that *Bowles* was more relevant than *Henderson* in assessing whether Section 7703(b)(1)(A) is jurisdictional in nature. *Id.* at 6a-7a. The *Fedora* majority further explained that because Section 7703(b)(1)(A)’s 60-day filing deadline is jurisdictional, it is not subject to equitable tolling. *Id.* at 7a-9a.

Judge Plager dissented in *Fedora*. *Fedora* Pet. App. 10a-31a. In his view, the majority’s analysis did “not do justice to the complexities of the issue [petitioner] presents” and “probably result[ed] in a wrong conclusion.” *Id.* at 10a. Judge Plager did not, however, determine that Section 7703(b)(1)(A)’s 60-day filing deadline is not jurisdictional. *Id.* at 30a. Instead, he urged the court of appeals to consider the case en banc. *Ibid.*

c. In light of the binding panel decision in *Fedora*, petitioner in this case sought initial hearing en banc after filing his opening brief. See Pet. 8. On July 20, 2017, the court of appeals denied rehearing en banc in *Fedora*, *Fedora* Pet. App. 32a-44a, as well as in another case raising the same issue. See *Vocke v. MSPB*, 680 Fed. Appx. 944 (Fed. Cir. 2017) (panel decision), reh’g denied, 868 F.3d 1341 (Fed. Cir. 2017) (per curiam), petition for cert. pending, No. 17-544 (filed Oct. 6, 2017). That same day, the court denied petitioner’s request for initial hearing en banc. Pet. App. 22a-23a.

Four judges dissented from the denial of rehearing en banc in *Fedora*: Judge Stoll did so without opinion, while Judge Wallach issued a dissenting opinion in which Judges Newman and O’Malley joined. *Fedora* Pet. App. 33a. The dissenting opinion criticized the majority for “analy[zing] the question presented using an

incomplete framework,” but, like Judge Plager, it did not conclude that the majority’s decision was necessarily incorrect. *Id.* at 40a (capitalization altered). Instead, the dissent stated that the full court “should review the nature of the filing deadline in § 7703(b)(1)(A)” in light of this Court’s more recent decisions. *Id.* at 42a.<sup>3</sup> The same four judges dissented from petitioner’s request for initial hearing en banc in this case. Pet. App. 22a-23a. Judges Wallach, Newman, and O’Malley dissented “for the reasons stated” in Judge Wallach’s dissent in *Fedora*, while Judge Stoll again dissented without opinion. *Ibid.*

d. Because petitioner’s petition for review was untimely under *Fedora*, petitioner filed an unopposed motion for judgment of dismissal. Pet. C.A. Mot. for Dismissal. On October 13, 2017, the court of appeals dismissed the petition for review, explaining that Section 7703(b)(1)(A)’s 60-day filing deadline is “jurisdictional” and “not subject to equitable tolling.” Pet. App. 1a-3a.

#### ARGUMENT

The court of appeals correctly held that Section 7703(b)(1)(A)’s 60-day deadline for seeking Federal Circuit review of an order or decision of the Board is jurisdictional and not subject to equitable tolling. The decision does not conflict with any decision of this Court or of any other court of appeals. This Court has previously denied review of a petition for a writ of certiorari raising the same question, see *Lara v. OPM*, 566 U.S. 974

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<sup>3</sup> Judge Plager, whose senior status rendered him ineligible to vote on the petition for rehearing en banc in *Fedora*, see Fed. R. App. P. 35(a), dissented from the denial of panel rehearing “for the reasons expressed in [his] dissent to the panel majority opinion,” as well as those “expressed in Judge Wallach’s dissent from the denial of the petition for rehearing en banc.” *Fedora* Pet. App. 44a.

(2012) (No. 11-915), and the same result is warranted here.

1. a. Section 1295(a) of Title 28 of the United States Code provides that “[t]he United States Court of Appeals for the Federal Circuit shall have *exclusive jurisdiction* \*\*\* (9) of an appeal from a final order or final decision of the Merit Systems Protection Board, *pursuant to sections 7703(b)(1) and 7703(d) of title 5.*” 28 U.S.C. 1295(a)(9) (emphases added). Subject to certain exceptions not relevant here, Section 7703(b)(1)(A) in turn states:

[A] petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

5 U.S.C. 7703(b)(1)(A). In light of the text, structure, and history of these provisions, the court of appeals correctly concluded that it lacks jurisdiction to review a petition that fails to comply with Section 7703(b)(1)(A)’s timing requirement.

a. This Court has previously recognized that Section 7703(b)(1) is jurisdictional in nature. In *Lindahl v. OPM*, 470 U.S. 768, 792 (1985), the Court explained that “Sections 1295(a)(9) and 7703(b)(1) together \*\*\* provide for exclusive jurisdiction over MSPB decisions in the Federal Circuit.” And the Court continued: “Section 7703(b)(1) confers the operative grant of *jurisdiction—the ‘power to adjudicate.’*” *Id.* at 793 (emphasis added); see also, e.g., *Bowles v. Russell*, 551 U.S. 205, 213 (2007) (“[T]he notion of subject matter jurisdiction obviously extends to classes of cases falling within a court’s adjudicatory authority.”) (citation, ellipses, and

internal quotation marks omitted). *Lindahl* expressly rejected the argument that Section 7703(b)(1) was “nothing more than a venue provision” with no “relat[ion] to the power of a court.” 470 U.S. at 792, 793 n.30 (citation omitted). Instead, the Court emphasized that Section 7703(b)(1) is what gives the Federal Circuit the “power to adjudicate” cases that “fall within [the Section’s] jurisdictional perimeters.” *Id.* at 793 (citation omitted).

Although *Lindahl* did not specifically discuss Section 7703(b)(1)(A)’s timing requirement, that condition is necessarily one of the “jurisdictional perimeters,” 470 U.S. at 793, that defines the Federal Circuit’s power or authority to adjudicate. Congress’s inclusion of that condition within Section 7703(b)(1)’s “jurisdictional grant” demonstrates that Congress intended it as a limitation on the scope of that grant. Indeed, in considering other provisions to be nonjurisdictional, this Court has relied on the fact that the statutes separately addressed jurisdiction and timeliness, without “condition[ing] the jurisdictional grant on the limitations periods, or otherwise link[ing] those separate provisions.” *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1633 (2015); see, e.g., *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012) (requirement was nonjurisdictional where Congress “set off” the jurisdictional and nonjurisdictional requirements in “distinct paragraphs”); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 164-165 (2010) (requirement was nonjurisdictional where it was “located in a provision ‘separate’ from those granting federal courts subject-matter jurisdiction,” and those provisions did not “condition[] [their] jurisdictional grant[s] on whether copyright holders have registered their works before suing for infringement”). By contrast, here, this Court

has held that Section 7703(b)(1) *itself* is jurisdictional. And if there were any doubt, the time bar and jurisdictional grant are located in the same provision (Section 7703(b)(1)), which is in turn “link[ed]” by an express cross-reference to Section 7703(b)(1) in Section 1295(a)(9), which provides the Federal Circuit with “exclusive jurisdiction” over “an appeal from a final order or final decision of the Merit Systems Protection Board, *pursuant to section[] 7703(b)(1).*” 28 U.S.C. 1295(a)(9) (emphasis added).

Every court of appeals to consider the question has held that Section 7703(b)(1)’s time bar is jurisdictional. The Federal Circuit has so held for more than 30 years. See Pet. App. 3a-4a (citing *Oja v. Department of the Army*, 405 F.3d 1349, 1360 (2005); *Monzo v. Department of Transp.*, 735 F.2d 1335, 1336 (Fed. Cir. 1984)). And while the provision has channeled review exclusively to the Federal Circuit since 1982, the original 1978 version provided for review in the regional courts of appeals. See Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, Tit. II, § 205, 92 Stat. 1143-1144; Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, Tit. II, § 144, 96 Stat. 45. During that initial period, the courts of appeals for the Eighth, Ninth, and District of Columbia Circuits also recognized the jurisdictional nature of the statute’s time limitation. *Oja*, 405 F.3d at 1357 n.5 (citing decisions).

Congress has left those holdings undisturbed. Most recently, in 2012, Congress passed the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, Tit. I, § 108(a), 126 Stat. 1469, which clarified that the commencement of the appeal period is the date of the MSPB decision, not its receipt. *Fedora* Pet.

App. 7a (citing WPEA § 108(a), 126 Stat. 1469). In imposing a less petitioner-friendly triggering date for the 60-day appeal period in Section 7703(b)(1)(A), Congress did nothing to alter the jurisdictional nature of the filing deadline.

b. The conclusion that Section 7703(b)(1)(A)'s time limit is jurisdictional accords with this Court's precedents addressing analogous time limits for seeking judicial review in the federal courts of appeals. See *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011) ("When 'a long line of this Court's decisions left undisturbed by Congress,' \*\*\* has treated a similar requirement as 'jurisdictional,' we will presume that Congress intended to follow that course.") (citation omitted). In *Bowles*, *supra*, this Court held that the statutory time limit for filing a notice of appeal in a civil case is jurisdictional. As the Court explained, "[a]lthough several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional." 551 U.S. at 210. Just this Term, the Court reiterated *Bowles*' holding that "an appeal filing deadline prescribed by statute will be regarded as 'jurisdictional,' meaning that late filing of the appeal notice necessitates dismissal of the appeal." *Hamer v. Neighborhood Hous. Servs.*, No. 16-658 (Nov. 8, 2017), slip op. 1; see *id.* at 2 ("[A] provision governing the time to appeal in a civil action qualifies as jurisdictional only if Congress sets the time.").

*Stone v. INS*, 514 U.S. 386 (1995), further supports the decision below. The timing provision at issue there was materially similar to Section 7703(b)(1)(A), in that it set a deadline for seeking the court of appeals' review

of the decision of an adjudicative administrative agency (there, the Board of Immigration Appeals). Specifically, the INA provided that “[t]he procedure prescribed by, and all the provisions of chapter 158 of title 28”—the Hobbs Act—“shall be the sole and exclusive procedure for the judicial review of all final orders of deportation.” 8 U.S.C. 1105a(a) (1988 & Supp. V 1993). The INA’s judicial review section then further provided that “a petition for review [of a final deportation order] may be filed not later than 90 days after the date of the issuance of the final deportation order, or, in the case of an alien convicted of an aggravated felony, not later than 30 days after the issuance of such order.” *Stone*, 514 U.S. at 390 (quoting 8 U.S.C. 1105a(a)(1) (1988 & Supp. V 1993)) (brackets in original).<sup>4</sup> The Court concluded in *Stone* that this statutory time limit was not subject to tolling because it was “jurisdictional in nature” and therefore “must be construed with strict fidelity to [its] terms.” *Id.* at 405. And consistent with *Stone*, the courts of appeals have uniformly concluded that the 60-day time limit for court-of-appeals review of certain agency decisions under the Hobbs Act, 28 U.S.C. 2344, is likewise jurisdictional. *Henderson*, 562 U.S. at 437.<sup>5</sup>

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<sup>4</sup> The INA thus altered the 60-day requirement for seeking judicial review under the Hobbs Act. See 28 U.S.C. 2344 (1988 & 2012).

<sup>5</sup> The INA’s judicial-review provisions were revised in 1996 by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546. See 8 U.S.C. 1252. That provision continues to incorporate the review provisions in the Hobbs Act, see 8 U.S.C. 1252(a)(1), but subject to specific exceptions and other provisions in Section 1252, including a requirement that a petition for review now must be filed within 30 days, see 8 U.S.C. 1252(b)(1).

c. The origins of Section 7703(b)(1)(A) further support the conclusion that its time limitation is jurisdictional. Before the CSRA's enactment, federal employees could seek review of employment-related actions in the Court of Claims pursuant to the Tucker Act, 28 U.S.C. 1491. See, e.g., *Lindahl*, 470 U.S. at 780-781 & n. 14. As this Court held in *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 134-139 (2008), the filing deadline for such suits, 28 U.S.C. 2501, is jurisdictional in nature. The CSRA established the MSPB and directed that "jurisdiction over 'a final order or final decision of the Board' would be in the Court of Claims, pursuant to the Tucker Act, or in the regional courts of appeals, pursuant to 28 U.S.C. 2342," the Hobbs Act's review provision. *Lindahl*, 470 U.S. at 774 (quoting CSRA § 205, 92 Stat. 1143-1144). As the courts of appeals agree, the Hobbs Act's time bar, like the Tucker Act's, is jurisdictional. See *Henderson*, 562 U.S. at 437. Thus, Section 7703(b)(1) replaced judicial-review provisions for which the applicable time bar has been held to be jurisdictional in nature. This history further supports the conclusion that Section 7703(b)(1)(A)'s filing deadline, too, is jurisdictional. See *id.* at 436 ("When 'a long line of this Court's decisions left undisturbed by Congress,' \* \* \* has treated a similar requirement as 'jurisdictional,' we will presume that Congress intended to follow that course.") (citation omitted).<sup>6</sup>

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<sup>6</sup> The Federal Rules of Appellate Procedure also support treating the time limit in Section 7703(b)(1)(A) as jurisdictional. Rule 26(b)(2) states that a court of appeals "may not extend the time to file \* \* \* a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law." Fed. R. App. P. 26(b)(2). See

d. Finally, “[j]urisdictional treatment of” Section 7703(b)(1)(A) “makes good sense.” *Bowles*, 551 U.S. at 212. “Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.” *Id.* at 212-213. And Congress has good practical reason to enact jurisdictional time limitations where, as here, a claimant seeks direct review in the court of appeals. As a general matter, it would be more cumbersome for a court of appeals, as opposed to a district court, to adjudicate the facts underlying a litigant’s claim that his is the rare case in which a deadline should be equitably tolled. Cf. *John R. Sand & Gravel Co.*, 552 U.S. at 133 (listing “facilitating the administration of claims” and “promoting judicial efficiency” among the reasons why a statute might contain a jurisdictional time limit).

2. Petitioner offers no persuasive reason for treating Section 7703(b)(1)(A)’s time limit as nonjurisdictional. He points out (Pet. 2, 10-12) that the Court’s recent cases have sought to establish clearer rules about

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also Fed. R. App. P. 15(a)(1) (“Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order.”). The Rules thus expressly contemplate that limitations like Section 7703(b)(1)’s cannot be tolled by a court—a signature feature of a jurisdictional time limit. See *John R. Sand & Gravel Co.*, 552 U.S. at 134. Although Rule 26(b)(2) did not originate in Congress, it was presented to Congress before going into effect, see 28 U.S.C. 2074; its materially identical predecessor was in effect when Congress first enacted Section 7703(b)(1) in 1978 (see 28 U.S.C. App. at 367 (1976)); and that predecessor version was part of the background against which Congress drafted Section 7703(b)(1) (and has amended it without material alteration, see pp. 12-13, *supra*).

what statutory requirements will be considered jurisdictional, and he faults the Federal Circuit for purportedly failing to apply that framework. But in *Fedora*, which petitioner agreed (Pet. 8) governed the court of appeals' decision here, the court of appeals acknowledged this Court's more recent cases and persuasively distinguished them. See *Fedora* Pet. App. 4a-6a.

a. Petitioner first contends that Section 7703(b)(1)(A) "reads like an ordinary, run-of-the-mill statute of limitations." Pet. 12 (citation omitted). But petitioner ignores several of the provision's most salient features. Most notably, as discussed above (see pp. 12-14, *supra*), this Court has held that Section 7703(b)(1) "confers the operative grant of jurisdiction." *Lindahl*, 470 U.S. at 793. That grant is necessarily limited by the deadline set forth in the very same subsection.

Moreover, while petitioner contends that "[t]he Federal Circuit's authority to hear appeals from the MSPB comes from a different" provision, 28 U.S.C. 1295(a)(9), that provision favors the government's view. It expressly conditions the grant of jurisdiction on Section 7703(b)(1), which includes Section 7703(b)(1)(A)'s timing provision. See 28 U.S.C. 1295(a) ("The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction \* \* \* of an appeal from a final order or final decision of the [MSPB], pursuant to sections 7703(b)(1) and 7703(d) of title 5."). Thus, even accepting petitioner's view (contrary to *Lindahl*) that Section 1295(a)(9) provides the exclusive grant of jurisdiction, this is not a case in which "[n]othing conditions the jurisdictional grant on the limitations periods, or otherwise links those separate provisions." *Wong*, 135 S. Ct. at 1633.

Petitioner also fails to heed this Court’s oft-repeated statement—most recently in *Hamer*—that even where *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), applies, Congress need not “incant magic words” to demonstrate that a particular provision is jurisdictional. *Hamer*, slip op. 8 n.9. Instead, this Court “consider[s] context, including this Court’s interpretation of similar provisions in many years past, as probative of [Congress’ intent].” *Ibid.* (citation and internal quotation mark omitted) (second set of brackets in original); see also *Wong*, 135 S. Ct. at 1632-1633; *Gonzalez*, 565 U.S. at 142 n.3; *Henderson*, 562 U.S. at 436; *Reed Elsevier, Inc.*, 559 U.S. at 168.

Here, this Court has not merely interpreted a “similar provision” to be jurisdictional, *Hamer*, slip op. 8 n.9—it has held that Section 7703(b)(1) *itself* “confers the operative grant of jurisdiction.” *Lindahl*, 470 U.S. at 793. That decision, as well as the Court’s decisions in *Bowles* and *Stone*, strongly supports the conclusion that Section 7703(b)(1)’s 60-day deadline for seeking review in the Federal Circuit is jurisdictional. See pp. 10-14, *supra*.

b. Petitioner also is incorrect in asserting (Pet. 18-19) that *Henderson*, *supra*, and *Bowen v. City of New York*, 476 U.S. 467 (1986), provide a “better analogue” for this case than *Bowles*. Neither of those cases controls the interpretation of statutory time limits for seeking direct review in a court of appeals of an agency decision in general, or the interpretation of Section 7703(b)(1) in particular. *Henderson* held that the deadline to appeal a decision of the Board of Veterans’ Appeals to the Veterans Court—an “Article I tribunal”—was not jurisdictional; in reaching that conclusion, *Henderson* expressly distinguished cases, like *Bowles*, that

“involved review by Article III courts.” 562 U.S. at 437-438. Moreover, *Henderson* considered a “unique administrative scheme,” *id.* at 438, and it found “most telling \*\*\* the singular characteristics” of that system: it was “‘unusually protective’ of claimants,” “nonadversarial” in nature, and “plainly reflected” Congress’s “long standing” “solicitude \*\*\* for veterans.” *Id.* at 437, 440 (quoting *Heckler v. Day*, 467 U.S. 104, 106-107 (1984), and *United States v. Oregon*, 366 U.S. 643, 647 (1961)). In fact, *Henderson* found that “[t]he contrast between ordinary civil litigation—which provided the context of [the Court’s] decision in *Bowles*—and the system that Congress created for the adjudication of veterans’ benefits claims could hardly be more dramatic.” *Id.* at 440.

The framework Congress adopted for MSPB actions has far more in common with appeals in “ordinary civil litigation,” *Henderson*, 562 U.S. at 440, at issue in *Bowles*, than it does with the scheme considered in *Henderson*. Proceedings before the MSPB are adversarial. See p. 2, *supra*; *Martin v. Office of Special Counsel*, 819 F.2d 1181, 1188 (D.C. Cir. 1987) (holding, in the context of the Privacy Act, that there is no “functional reason to distinguish between documents prepared in anticipation of a district court action and those prepared in anticipation of proceedings before MSPB”); *Willingham v. Ashcroft*, 228 F.R.D. 1, 5 (D.D.C. 2005) (describing an MSPB proceeding as “adversarial”); *Bers v. United States Gov’t*, 666 F. Supp. 1, 1 (D.D.C. 1987) (same). And an appeal of the Board’s decision—which is *itself* the third level of review after an agency decision and an initial decision by an administrative judge—is directly reviewed by an Article III court, the Federal Circuit, rather than an Article I tribunal. See *Fedora Pet.* App.

6a-7a; *Lindahl*, 470 U.S. at 797 (Federal Circuit review of MSPB decisions is an “appellate function”); *Bledsoe v. MSPB*, 659 F.3d 1097, 1101 (Fed. Cir. 2011) (“[T]he Board is an independent, quasi-judicial federal administrative agency.”) (citation omitted).<sup>7</sup>

Petitioner’s reliance on *Bowen* (Pet. 18-19) is similarly misplaced. The Court there held that a district court could toll the deadline for obtaining review of the denial of Social Security benefits. See 476 U.S. at 479-482. Significantly, however, the statute at issue in *Bowen* did not involve direct review in a court of appeals, and it already explicitly permitted tolling by the Secretary of Health and Human Services; Congress had thus expressed a “clear intention to allow tolling in some cases,” and this Court simply made clear that courts also could toll the period when the agency did not. *Id.* at 480. In addition, like the provision at issue in *Henderson*, the time limit in *Bowen* was “contained in a statute that Congress designed to be ‘unusually protective’ of claimants.” *Ibid.* (quoting *Heckler*, 467 U.S. at 106).

c. Petitioner’s citations (Pet. 10, 15) to *Wong, supra*, and *Irwin, supra*, fare no better. Those cases considered statutes governing the time for filing an action in

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<sup>7</sup> As petitioner notes (Pet. 18), *Henderson* stated that *Bowles* “did not hold categorically that every deadline for seeking judicial review in civil litigation is jurisdictional. Rather, it concerned an appeal from one court to another court.” *Ibid.* (quoting 562 U.S. at 436); see also *Hamer*, slip op. 8 n.9 (noting that “[i]n cases not involving the timebound transfer of adjudicatory authority from one Article III court to another, we have additionally applied a clear-statement rule”). The government’s argument here, however, is not that *Bowles* renders *all* statutory time bars, or all time bars in civil litigation, jurisdictional. It is instead that Section 7703(b)(1)(A), which governs an appeal from a quasi-judicial agency to the court of appeals, is jurisdictional.

district court, rather than for appealing a quasi-judicial independent agency’s decision to the court of appeals. See *Wong*, 135 S. Ct. at 1631-1633 (holding that provision setting deadline for filing claims under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*, in federal district court, 28 U.S.C. 2401(b), is not jurisdictional); *Irwin*, 498 U.S. at 95-96 (same for provision governing time to file civil action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(c)); *Bledsoe*, 659 F.3d at 1101 (describing the Board as an “independent, quasi-judicial federal administrative agency”) (citation omitted); *Martin*, 819 F.2d at 1188 (similar). As discussed above, and as *Bowles* and *Stone* suggest, there are good reasons for Congress to treat the two types of time bars differently, including that courts of appeals lack the factfinding capacity necessary to make equitable tolling determinations in the first instance. More generally, both *Irwin* and *Wong* recognize that the presumption in favor of equitable tolling they applied is “rebuttable.” *Wong*, 135 S. Ct. at 1631 (“A rebuttable presumption, of course, may be rebutted.”); *Irwin*, 498 U.S. at 96 (“Congress, of course, may [foreclose equitable tolling] if it wishes to do so.”). Here, any such presumption is rebutted by, *inter alia*, Section 7703(b)(1)(A)’s combination of a jurisdiction-granting provision and a time bar in one subparagraph; the provision’s express textual link to Section 1295(a)(9); this Court’s decision in *Lindahl*, which recognized that Section 7703(b)(1) is jurisdictional; Congress’s acquiescence in that judgment; and this Court’s decision regarding a similar provision in *Stone*.

3. The decision below does not warrant this Court’s review.

a. Because the Federal Circuit has exclusive jurisdiction over cases subject to Section 7303(b)(1)(A), there is no division of authority with respect to the question presented. See Pet. 19. Instead, petitioner contends (Pet. 21-22) that “[t]he decision below cannot be reconciled” with decisions holding that a *different* provision—Section 7703(b)(2)—“is *not* jurisdictional and *is* subject to equitable tolling.”<sup>8</sup>

Petitioner is incorrect. Section 7703(b)(2) governs “mixed cases,” which “fall[] within the compass” of the Board’s jurisdiction but also allege discrimination by the agency. *Perry v. MSPB*, 137 S. Ct. 1975, 1979, 1988 (2017). Section 7703(b)(2) states:

Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and

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<sup>8</sup> Petitioner states (Pet. 21) that “the courts of appeals” to consider the issue “[p]ost-*Irwin*” have uniformly concluded that Section 7703(b)(2)’s filing deadline is not jurisdictional. But as petitioner acknowledges in a footnote (Pet. 21 n.5), the Sixth Circuit reached the opposite decision in *Dean v. Veterans Admin. Regional Office*, 943 F.2d 667, 669 (1991). While that decision was vacated on other grounds by this Court, 503 U.S. 902 (1992), the court of appeals has continued to apply *Dean*’s holding that Section 7703(b)(2)’s time bar is jurisdictional in nature. See *Johnson v. United States Postal Serv.*, 64 F.3d 233, 237-238 (6th Cir. 1995); *Glarner v. United States Dep’t of Veterans Admin.*, 30 F.3d 697, 701 (6th Cir. 1994). And although petitioner asserts (Pet. 21 n.5) that those discussions are dicta, they suggest that *Dean* remains good law. Moreover, the court of appeals applied *Dean* to support what is unquestionably the holding in *Felder v. Runyon*, 230 F.3d 1358 (6th Cir. 2000) (Tbl.): the court there held that the suit was time-barred under Section 7703(b)(2), without any alternative suggestion that equitable tolling would be unwarranted even if it were permitted.

section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

5 U.S.C. 7703(b)(2).

Although Sections 7703(b)(1)(A) and (b)(2) are neighboring provisions, they differ in important ways. Unlike Section 7703(b)(1)(A), which provides that “a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit,” 5 U.S.C. 7703(b)(1)(A), Section 7703(b)(2) does not provide jurisdiction in that court; it instead channels mixed cases to the district courts via other statutory provisions. See *Kloeckner v. Solis*, 568 U.S. 41, 46 (2012) (“The enforcement provisions of the antidiscrimination statutes listed in [Section 7703(b)(2)] all authorize suit in federal district court.”). Section 7703(b)(2) thus does not follow the structure of Section 7703(b)(1)(A), which combines an express, self-contained jurisdictional grant to the court of appeals with a time limitation. Section 7703(b)(2) also is not cross-referenced in Section 1295(a), which expressly provides an “exclusive” grant of “jurisdiction” to the Federal Circuit “pursuant to” Section 7703(b)(1). 28 U.S.C. 1295(a). And this Court’s decision in *Lindahl*—which held that Section 7703(b)(1) “confers the operative grant of jurisdiction”—did not address Section 7703(b)(2). 470 U.S. at 793.

That Section 7703(b)(2) steers cases to the district courts, rather than the court of appeals, is significant in other respects as well. As noted above, the district

courts are better-equipped to address the fact-intensive inquiries that equitable tolling requires. See p. 16, *supra*. And the specific provisions cross-referenced in Section 7703(b)(2) affected the jurisdictional analysis in the cases petitioner cites. For example, in holding that Section 7703(b)(2)'s filing deadline is subject to equitable tolling, *Nunnally v. MacCausland*, 996 F.2d 1 (1st Cir. 1993) (per curiam), explained that the provision "is not only similar to, but intersects with, the \*\*\* provision directly addressed in *Irwin*," 42 U.S.C. 2000e-16(c). 996 F.2d at 3. Given the link between the two provisions, the court was unwilling to treat the deadline the plaintiff faced in that case differently (*i.e.*, as jurisdictional) because of the particular procedural route she had chosen to take. *Ibid.*; see *Oja*, 405 F.3d at 1358.<sup>9</sup> Thus, the courts' treatment of Section 7703(b)(2) does not warrant review of the court of appeals' treatment of Section 7703(b)(1).

b. Petitioner also notes (Pet. 2) that this Court has often granted certiorari to assess whether particular statutory provisions are jurisdictional in nature. But petitioner's observation that this Court has frequently addressed similar questions merely underscores that the Court has established principles that apply to a variety of statutory provisions. Indeed, this Court applied those principles just last month in *Hamer*, *supra*. Even

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<sup>9</sup> Congress's actions also reflect that it views Sections 7703(b)(1) and (b)(2) as independent from one another. Since *Irwin*, Congress has twice amended Section 7703(b)(1): in 1998, when it changed the number of days for an appeal from 30 to 60; and in 2012, when it made the date of the decision the trigger for the Section 7703(b)(1)(A) appeal period, while leaving Section 7703(b)(2) unchanged. See WPEA § 108, 126 Stat. 1469; Federal Employees Life Insurance Improvement Act, Pub. L. No. 105-311, § 10(a), 112 Stat. 2954. See also Pet. 20-21 (acknowledging these differences).

if review were otherwise warranted, it would be premature because the courts of appeals have not yet had the opportunity to interpret and apply that decision.

c. Nor is petitioner correct (Pet. 23-24) that his case presents a particularly good vehicle for review because his petition for review was untimely filed through “no fault” of his own. As this Court has recognized, “[i]f rigorous rules like the one applied [below] are thought to be inequitable, Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits.” *Bowles*, 551 U.S. at 214; see *id.* at 207 (noting that petitioner missed the deadline for appealing the denial of his application for a writ of habeas corpus because the district court “inexplicably gave him [an extension of] 17 days” to file his notice of appeal—three more than the statute and governing rule allowed).

#### CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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