No. 18-1061

In the Supreme Court of the United States

KAREN GRAVISS, PETITIONER

v.

DEPARTMENT OF DEFENSE, DOMESTIC DEPENDENT ELEMENTARY AND SECONDARY SCHOOLS

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

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 Merits Systems Protection Board or an arbitrator, 5 U.S.C. 7703(b)(1)(A); see 5 U.S.C. 7121(f), is jurisdictional and therefore not subject to forfeiture or equitable tolling.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–8a) is reported at 898 F.3d 1222. The decision of the arbitrator is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2018. A petition for rehearing was denied on December 3, 2018. (Pet. App. 32a.) The petition for a writ of certiorari was filed on February 11, 2019. 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) (quoting *Garcia* v. *Department of Homeland Sec.*, 437 F.3d 1322, 1327 (Fed. Cir. 2006) (en banc)) (brackets omitted).

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).

If the administrative judge's initial decision is adverse, the employee may seek review by the full Board. 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. An employee who is a member of a collective-bargaining unit has an additional option for review of an adverse personnel action. Rather than appeal the action to the Board, the employee may opt to challenge it through arbitration, as provided in the relevant collective bargaining agreement. 5 U.S.C. 7121(e); see Pet. App. 3a-4a; *Cornelius* v. *Nutt*, 472 U.S. 648, 651-652 (1985). The arbitrator must apply the same substantive law as the Board. *Nutt*, 472 U.S. at 652. Like an appeal before the Board, arbitration is adversarial in nature. See, *e.g.*, 841 F.3d 1362, 1364-1365 (describing arbitration proceedings in this case, which included discovery and a two-day hearing); *id.* at 1373 (Plager, J., dissenting) (referring to the arbitration as including a "full and fair hearing"); C.A. App. 1-507 (hearing transcript reflecting parties' representation by counsel, examination and cross-examination of witnesses, and introduction of exhibits).

c. 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). Where an employee elects to challenge an adverse personnel action via arbitration rather than an appeal to the Board, "section 7703 of [Title 5] pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board." 5 U.S.C. 7121(f).

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).[1]

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 F.2d 1335, 1336 (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 (2005).

2. Beginning in 2008, petitioner worked as a preschool teacher for special needs students employed by the Department of Defense Domestic Dependent Elementary and Secondary Schools. Pet. App. 2a-3a; C.A. App. 811. In 2010, she was removed from federal service after twice restraining a four-year-old student in an inappropriate manner, conduct for which she had been previously reprimanded. C.A. App. 797.

Petitioner sought review by an arbitrator, as permitted by Section 7121(e) and her collective bargaining agreement. Pet. App. 3a. The arbitrator sustained the

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[1] 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 (citation omitted). In that situation, "the district court is the proper forum for judicial review." *Perry*, 137 S. Ct. at 1988. Pursuant to Section 7703(b)(2), an employee bringing a mixed case must file a case in the district court within 30 days of the Board's final order. Section 7703(b)(2) is not at issue here.

finding of misconduct and the removal, and rejected petitioner's argument that an email between the deciding official and that official's first-line supervisor violated her due process rights. *Ibid.*; see C.A. App. 803-890. The arbitrator's decision was dated April 20, 2015 and was mailed to petitioner the following day. Pet. App. 3a.

3. Petitioner sought review in the Federal Circuit. A panel of the court initially reversed the arbitrator's decision, determining that the ex parte email between the deciding official and that official's supervisor violated petitioner's due process rights. 841 F.3d at 1370.

The court of appeals then granted the Department of Defense's petition for rehearing en banc and vacated the panel decision. Pet. App. 25a. Before oral argument, the court directed the parties to "be prepared to address" the "timeliness of the petition for review" and thus the court's jurisdiction under 5 U.S.C. 7703(b)(1). Pet. App. 6a, 12a; 3/6/18 Letter. Following oral argument before the en banc court, the court ordered supplemental briefing on timeliness. 3/13/18 Order. After the parties filed their supplemental briefs, the en banc court was dissolved, and the matter was referred back to the original panel. Pet. App. 28a-29a.

The court of appeals dismissed the appeal as untimely. Pet. App. 1a-8a. The majority explained that an arbitrator "issues notice" of his decision for purposes of Section 7703(b)(1) when the arbitrator "sends the parties the final decision, whether electronically, by regular mail, or by other means." *Id.* at 6a (quoting 5 U.S.C. 7703(b)(1)(A)). Here, the arbitrator issued notice of the decision on April 21, 2015, and petitioner had 60 days from that date to file a petition for review in the Federal Circuit. *Ibid.* Because the 60-day deadline fell on Saturday, June 20, 2015, the petition for review was due

Monday, June 22, 2015. *Ibid.* But the Federal Circuit had received petitioner's petition for review one day late, on June 23, 2015. *Ibid.*

The court of appeals rejected petitioner's argument that "her delay in filing is subject to equitable tolling." Pet. App. 6a. Relying on 30 years of Federal Circuit precedent, the majority explained that "timeliness of the petition for review is a jurisdictional issue." *Ibid.* (citing *Fedora* v. *MSPB*, 848 F.3d 1013, 1014-1016 (Fed. Cir. 2017), cert. denied, 138 S. Ct. 755 (2018); *Oja*, 405 F.3d at 1360; *Monzo*, 735 F.2d at 1336).

The court of appeals rejected the proposition that this Court's decision in *Hamer* v. *Neighborhood Housing Services*, 138 S. Ct. 13 (2017), had "effectively overrule[d]" the court of appeals' prior decisions. Pet. App. 6a. The court explained that *Hamer* addressed "an appeal from one Article III court to another, and found that the time limit [at issue there] was not jurisdictional because it was not in a statute." *Ibid.* While *Hamer* stated in a footnote that in other types of cases, the Court had applied a "clear-statement rule" to determine whether a given deadline is jurisdictional, the court of appeals determined that any such clear-statement rule was satisfied here. *Id.* at 7a (citation omitted). In particular, 28 U.S.C. 1295, entitled "Jurisdiction of the United States Court of Appeals for the Federal Circuit," provides the court with "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." *Ibid.* (quoting 28 U.S.C. 1295) (emphasis added). The court therefore concluded that *Hamer* "supports our earlier holding in *Fedora* that 'this court

lacks jurisdiction over petitions for review that fail to comply with the requirements of § 7703(b)(1)(A).'" *Id.* at 8a (quoting *Fedora*, 848 F.3d at 1016).

Judge Plager dissented, as he had in *Fedora*. Pet. App. 9a-23a; see *Fedora*, 848 F.3d at 1017-1026. Judge Plager would have found that the statutory time bar is nonjurisdictional. Pet. App. 16a. In particular, Judge Plager disputed that when read together, Sections 1295(a) and 7703(b)(1)(A) provide a "clear statement" that the time limitation in the latter provision is jurisdictional. *Id.* at 17a-23a.

4. Petitioner sought rehearing, which was denied. Pet. App. 32a. Judges Wallach, Newman, and O'Malley dissented from the denial of the petition for rehearing en banc, as they had done in *Fedora* v. *MSPB*, 868 F.3d 1336, 1337-1340 (Fed. Cir. 2017) (per curiam). Pet. App. 33a-43a. Judge Plager, who has senior status, dissented from the denial of the petition for panel rehearing, as he also had done in *Fedora*, 868 F.3d at 1340. Pet. App. 4a-6a.

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 or an arbitrator is jurisdictional and not subject to forfeiture or equitable tolling. The decision does not conflict with any decision of this Court or of any other court of appeals. This Court recently denied review of four petitions for writs of certiorari raising the same question, see *Jones* v. *Department of Health & Human Servs.*, 139 S. Ct. 359 (2018) (No. 17-1610); *Fedora* v. *MSPB*, 138 S. Ct. 755 (2018) (No. 17-557); *Vocke* v. *MSPB*, 138 S. Ct. 755 (2018) (No. 17-544); *Musselman* v. *Department of the Army*, 138 S. Ct. 739 (2018) (No. 17-570); see

also *Lara* v. *OPM*, 566 U.S. 974 (2012) (No. 11-915). The same result is warranted here.

1. 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 [MSPB], pursuant to sections 7703(b)(1) and 7703(d) of title 5." 28 U.S.C. 1295(a)(9). Subject to certain exceptions not relevant here, Section 7703(b)(1)(A) 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). Section 7121(f) in turn states that when a member of a collective-bargaining unit elects arbitration rather than review by the Board, "section 7703 * * * shall apply * * * in the same manner and under the same conditions as if the matter had been decided by the Board." 5 U.S.C. 7121(f). In light of the text, structure, and history of these provisions, the court of appeals correctly concluded that it lacks jurisdiction over an appeal from a decision of the Board or an arbitrator 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. *Office of Personnel Management*, 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.

Although *Lindahl* did not specifically discuss Section 7703(b)(1)(A)'s timing requirement (see Pet. 21), 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. *Id.* at 792.

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 [MSPB], *pursuant to section[] 7703(b)(1)*." 28 U.S.C. 1295(a)(9) (emphasis added); see Pet. App. 7a-8a.

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. *Monzo* v. *Department of Transp.*, 735 F.2d 1335, 1336 (1984). And while the provision has channeled review exclusively to the Federal Circuit since 1982, see Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 144, 96 Stat. 45, 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. 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* v. *Department of the Army*, 405 F.3d 1349, 1357 n.5 (Fed. Cir. 2005) (citing decisions).

Congress has left those holdings undisturbed. It did not alter the jurisdictional rule established by the

Eighth, Ninth, and District of Columbia Circuits when it channeled appeals of MSPB claims to the Federal Circuit in 1982. And 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 issuance of the MSPB decision, not its receipt. Pet. App. 5a (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 long-established 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*, 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 last Term, this Court reiterated *Bowles*' holding that "an appeal filing deadline prescribed by statute will be regarded as 'jurisdic-

tional,' meaning that late filing of the appeal notice necessitates dismissal of the appeal." *Hamer* v. *Neighborhood Hous. Servs.*, 138 S. Ct. 13, 16 (2017).

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 court-of-appeals review of the decision of an adjudicative administrative agency—there, the Board of Immigration Appeals. Specifically, the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, 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).[2] 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

[2] The INA thus altered the 60-day requirement for seeking judicial review under the Hobbs Act. See 28 U.S.C. 2344.

decisions under the Hobbs Act, 28 U.S.C. 2344, is likewise jurisdictional. *Henderson*, 562 U.S. at 437.[3]

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. As this Court held in *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134-139 (2008), the Tucker Act's filing deadline, 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 judicial 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

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[3] 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, Div. C, 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).

Congress,' has treated a similar requirement as 'jurisdictional,' we will presume that Congress intended to follow that course.") (citation omitted).

d. Finally, "[j]urisdictional treatment of" the time limit in 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; see *Hamer*, 138 S. Ct. at 17 (noting congressional power to fix a federal court's subject-matter jurisdiction). 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 will be more cumbersome for a court of appeals, as opposed to a district court, to adjudicate a litigant's claim that his is the rare case in which a deadline should be equitably tolled. Cf. *John R. Sand*, 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). A jurisdictional time limitation forecloses that inquiry.

2. Petitioner offers no persuasive reason for treating Section 7703(b)(1)(A)'s time limit as nonjurisdictional.

a. Petitioner contends that "[n]othing in [Section 7703(b)(1)(A)] speaks in jurisdictional terms" or addresses "the power of the court." Pet. 16 (citation omitted); see Pet. 14-18. But petitioner gives insufficient weight to several of the provision's most salient features. Most notably, as discussed above (see pp. 8-10, *supra*), this Court has held that Section 7703(b)(1) "confers the operative grant of jurisdiction—the 'power to adjudicate.'" *Lindahl*, 470 U.S. at 793. That grant is

necessarily limited by the deadline set forth in Section 7703(b)(1)(A).

Petitioner contends that *Lindahl* is inapposite because it did not specifically focus on Section 7703(b)(1)(A)'s time limitation and "was decided before this Court's push to 'bring some discipline' to the term 'jurisdictional.'" Pet. 21 (quoting *Henderson*, 562 U.S. at 435). But as discussed above, that decision indicates that the timing requirement is one of the "jurisdictional perimeters," *Lindahl*, 470 U.S. at 793, that defines the Federal Circuit's power or authority to adjudicate. And Congress's decision to leave *Lindahl* and the Federal Circuit precedent regarding Section 7703(b)(1)(A) in place following this Court's more recent jurisdictional decisions further confirms that Section 7703(b)(1)(A)'s time limitation is jurisdictional in nature.

b. Petitioner also asserts that "Congress placed the jurisdictional grant to the Federal Circuit to hear appeals from the MSPB 'in an entirely different title of the U.S. Code.'" Pet. 18 (quoting Pet. App. 39a (Wallach, J., dissenting from the denial of the petition for rehearing en banc)). But 28 U.S.C. 1295, to which petitioner refers, supports the conclusion that the time limit in Section 7703(b)(1)(A) is jurisdictional in nature. 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)(9) ("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. But see Pet. 19-20.

c. Relying primarily on *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), *Wong*, *Hamer*, and *Gonzalez*, petitioner contends (Pet. 14) that "most congressional time prescriptions are nonjurisdictional claim-processing rules," and that Section 7703(b)(1)(A) falls within that class. See Am. Fed'n of Gov't Emps. Amicus Br. 3; Law Professors Amicus Br. 12.

Petitioner's citations to *Irwin*, *Wong*, *Hamer*, and *Gonzalez* are misplaced. *Irwin* and *Wong* considered statutes governing the time for filing an action in 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 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)); see also *Bledsoe* v. *MSPB*, 659 F.3d 1097, 1101 (Fed. Cir. 2011) (describing the Board as an "independent, quasi-judicial federal administrative agency") (citation omitted); *Martin* v. *Office of Special Counsel*, 819 F.2d 1181, 1188 (D.C. Cir. 1987) (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.

Hamer also does not support petitioner's argument. The Court there did not consider a statutory time limit at all; it held that because "'[o]nly Congress may determine a lower federal court's subject-matter jurisdic-

tion,'" the time limit in Federal Rule of Appellate Procedure 4(a)(5)(C) is not jurisdictional. 138 S. Ct. at 17 (quoting *Kontrick* v. *Ryan*, 540 U.S. 443, 452 (2004)); see *Nutraceutical Corp.* v. *Lambert*, 139 S. Ct. 710, 714 (2019) (Because the time limitation in Federal Rule of Civil Procedure 23(f) "is found in a procedural rule, not a statute, it is properly classified as a nonjurisdictional claim-processing rule."). And *Hamer* reiterated the Court's holding in *Bowles* that "an appeal filing deadline prescribed by statute will be regarded as 'jurisdictional.'" 138 S. Ct. at 16; see also *id.* at 20.

To be sure, *Hamer* also observed that "[i]n cases not involving the timebound transfer of adjudicatory authority from one Article III court to another, [this Court] ha[s] * * * applied a clear-statement rule" to determine whether a time limitation is jurisdictional. 138 S. Ct. at 20 n.9. But even where the clear-statement rule applies, Congress need not "incant magic words in order to speak clearly," *ibid.* (citation omitted), and any "presumption" against jurisdictional treatment of time limitations is "rebuttable," *Wong*, 135 S. Ct. at 1631 ("A rebuttable presumption, of course, may be rebutted."); see *Irwin*, 498 U.S. at 96 ("Congress, of course, may [foreclose equitable tolling] if it wishes to do so."). The Court "consider[s] context, including this Court's interpretations of similar provisions in many years past, as probative of [Congress' intent]." *Hamer*, 138 S. Ct. at 20 n.9 (citation and internal quotation marks 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. As discussed above, here, this Court has previously held that Section 7703(b)(1) "confers the operative grant of jurisdiction." *Lindahl*, 470 U.S. at 793.

That holding, along with, *inter alia*, Congress's acquiescence in it, 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), and this Court's decision regarding a similar provision in *Stone*, all make clear that Section 7703(b)(1)(A)'s filing deadline is jurisdictional in nature.

Petitioner's reliance on *Gonzalez* is also misplaced. That case did not concern a time limitation at all, but instead held that the provision of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, requiring that a certificate of appealability granted to a habeas petitioner "indicate [the] specific issue" for further review was nonjurisdictional. 565 U.S. at 142-145 (emphasis omitted). Petitioner observes (Pet. 23) that this Court reached that conclusion even though the relevant provision, 28 U.S.C. 2253(c)(3), cross-referenced a jurisdictional provision, 28 U.S.C. 2253(c)(1). But the cross-reference here works in the opposite direction: Section 1295(a)(9), which petitioner asserts is the jurisdiction-conferring provision, cross-references—and thus incorporates—Section 7703(b)(1). And in any event, as just discussed, the conclusion that Section 7703(b)(1)(A)'s time limitation is jurisdictional rests not merely on the cross-reference in Section 1295(a)(9), but on the full "context" of the provision, including this Court's prior decisions and congressional acquiescence in them.[4]

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[4] Petitioner suggests (Pet. 20) that the existence of a dissent in the court of appeals demonstrates that Congress did not provide a "clear statement" as to the jurisdictional nature of the time bar in Section 7703(b)(1)(A). But this Court often holds that statutes are clear in non-unanimous opinions. See, *e.g.*, *Nielsen* v. *Preap*, No. 16-1363, 2019 WL 1245517, at *13-*14 (Mar. 19, 2019) (majority

d. Petitioner's reliance (*e.g.*, Pet. 15, 28-29) on *Henderson* and *Bowen* v. *City of New York*, 476 U.S. 467 (1986), is also misplaced. See Nat'l Veterans Legal Servs. Program et al. Amici Br. 11-14. 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 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)). *Henderson* also found that "[t]he contrast between ordinary civil litigation—which provided the context of [this 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.

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held that canon of constitutional avoidance did not apply because statute was clear); *id.* at *22-*25 (Breyer, J., dissenting) (dissent would have applied canon of constitutional avoidance because statute was "at worst" ambiguous); *Kimel* v. *Florida Bd. of Regents*, 528 U.S. 62, 73-78 (2000) (majority held that Congress had made "unmistakably clear" its intent to abrogate sovereign immunity) (citation omitted); *id.* at 99 (Thomas, J., concurring in part and dissenting in part) (disagreeing).

The framework Congress adopted for MSPB actions has far more in common with the appeals in "ordinary civil litigation," *Henderson*, 562 U.S. at 440, at issue in *Bowles*, than it does with the scheme this Court considered in *Henderson*. Proceedings before the MSPB or an arbitrator are adversarial in nature. See pp. 2-3, *supra*; 841 F.3d at 1364-1365 (describing arbitration proceedings in this case); *id.* at 1373 (Plager, J., dissenting) (referring to the arbitration as including a "full and fair hearing"); *Martin*, 819 F.2d at 1188 (holding, in the context of the Privacy Act, 5 U.S.C. 552a, 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).[5] And an appeal of the Board's or the arbitrator's decision is directly reviewed by an appellate Article III court, the Federal Circuit, rather than an Article I tribunal. Depending on whether an employee elects arbitration or review by the Board, the Federal Circuit's review is the third or fourth level of review (after the agency decision and arbitration, or the agency decision, initial review by an administrative judge, and appeal to the Board). See *Lindahl*, 470 U.S. at 797 (Federal Circuit review of MSPB decisions is an "appellate func-

[5] While one of petitioner's amici notes that veterans' claims under particular federal-employment related statutes are governed by the general filing deadline in Section 7703(b)(1)(A), Nat'l Veterans Legal Servs. Program et al. Amici Br. 7-11, that provision does not share the "unusually protective" nature of the veteran-specific scheme at issue in *Henderson*, 562 U.S. at 437 (citation omitted).

tion"); *Bledsoe*, 659 F.3d at 1101 ("The Board is an independent, quasi-judicial federal administrative agency.") (brackets and citation omitted).

Petitioner's reliance on *Bowen* (Pet. 15) 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 determined 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).[6]

3. The court of appeals' determination that Section 7703(b)(1)(A)'s time limit is jurisdictional in nature does not warrant this Court's review. Indeed, as petitioner "recognize[s]," since this Court's decision in *Hamer*, the

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[6] Petitioner only briefly mentions (Pet. 13, 19) this Court's decision in *Kloeckner* v. *Solis*, 568 U.S. 41, 52 (2012), on which the dissenting opinions below relied. See Pet. App. 19a-22a (Plager, J., dissenting); *id.* at 37a-38a, 42a (Wallach, J., dissenting from the denial of the petition for rehearing en banc). As the majority in the court of appeals explained, *Kloeckner* has no bearing on the question presented because "[i]t did not involve § 7703(b)(1), or any other provision establishing a time limit for court of appeals review, or address whether any such limit is jurisdictional." *Id.* at 8a n.2. Instead, *Kloeckner* "simply held that § 7703(b)(2)," which sets time limits for filing mixed cases in district court, "did not create an exemption from district court jurisdiction" for cases decided on procedural grounds. *Ibid.*; see 568 U.S. at 52-53.

Court has denied review of four certiorari petitions that presented the question whether Section 7703(b)(1)(A) is jurisdictional. Pet. 32-33; see Pet. 33 n.9. Nothing suggests a different result is warranted here.

a. Because Section 7703(b)(1)(A) applies "only in the Federal Circuit," Pet. 29, there is no division of authority with respect to the question presented. Petitioner and her amici nonetheless suggest that granting review in this case would "help eliminate confusion" over whether *other* statutory time limitations are jurisdictional. Pet. 31; Fed. Cir. Bar Ass'n Amicus Br. 9-10; Law Professors Amicus Br. 16-17. But because each statute must be considered in its own "context," *Hamer*, 138 S. Ct. at 20 n.9 (citation omitted), this Court's review of whether Section 7703(b)(1)(A) is jurisdictional would not decide the issue with respect to other provisions.

b. Petitioner also suggests (Pet. 33) that review is warranted here—even if it was not in other cases presenting the same question—because "the decision below rests on an entirely different rationale" from the Federal Circuit's prior decisions. That is incorrect. The majority in this case *rejected* the dissent's view that *Hamer* had "effectively overrule[d]" the court of appeals' longstanding determination that Section 7703(b)(1)(A)'s time limitation is jurisdictional in nature. Pet. App. 6a. The majority's discussion of *Hamer* and the clear-statement rule thus served to bolster, not contravene, the Federal Circuit's longstanding jurisdictional interpretation of Section 7703(b)(1)(A).

c. Nor is petitioner correct (Pet. 33-34) that this case is a better vehicle than prior petitions for writs of certiorari raising the same issue. Petitioner observes (*ibid.*) that other petitioners "sought relief on equitable-

tolling grounds," while she seeks to enforce the government's alleged forfeiture. But the government's observation in prior cases (as in this one, see p. 14, *supra*) that the court of appeals might not be well-situated to conduct equitable-tolling analysis was not a suggestion that a particular case was a poor vehicle for review. Instead, that observation demonstrates (in this case as much as in others) that Congress had good reason to impose a jurisdictional time limit for *all* appeals from the Board (or an arbitrator) to a federal court of appeals. Although petitioner now suggests the equitable-tolling issue would not arise in her case, but see Pet. App. 6a (noting petitioner's reliance on "equitable tolling"), whether Section 7703(b)(1)(A)'s timing requirement is jurisdictional cannot vary based on the particular doctrine (equitable tolling, forfeiture, etc.) a plaintiff chooses to invoke. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 381-384, 386 (2005).

d. Petitioner also suggests (Pet. 35) that leaving in place the court of appeals' decision will yield "unfairness to litigants." But the Federal Circuit has applied the same rule for over 30 years: Section 7703(b)(1)(A) is jurisdictional in nature, and therefore requires strict compliance. Thus, litigants in the Federal Circuit are on clear notice that their petitions for review must be received by the Federal Circuit within 60 days of the Board's (or the arbitrator's) issuance of the decision, and they must act accordingly to obtain review.[7]

4. Finally, petitioner acknowledges (Pet. 26-27) that her second question presented—whether the Department

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[7] The longevity of the Federal Circuit's precedent on the issue also refutes petitioner's suggestion (Pet. 30-31) that leaving the decision below in place will lead to a proliferation of Federal Circuit decisions finding other provisions to be jurisdictional in nature.

of Defense forfeited the timeliness issue—"may not be independently worthy of certiorari." This Court need not consider the forfeiture question, because the court of appeals correctly held that Section 7703(b)(1)(A)'s time limitation is jurisdictional, and jurisdictional rules may not be forfeited. See, *e.g.*, *Nutraceutical Corp.*, 139 S. Ct. at 714; *Bowles*, 551 U.S. at 213; *Mitchell* v. *Maurer*, 293 U.S. 237, 244 (1934). In any event, the fact-bound forfeiture question is not properly presented for this Court's review because the court of appeals did not address it. See Pet. App. 6a (noting that petitioner raised an equitable tolling argument, but declining to address it in light of the jurisdictional nature of Section 7703(b)(1)(A)'s time limitation); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (declining to address issues not passed upon by the court of appeals because this Court is one "of review, not of first view").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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