No. 17-544

In the Supreme Court of the United States

ROBERT D. VOCKE, JR., PETITIONER

v.

MERIT SYSTEMS PROTECTION BOARD

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 Merit Systems Protection Board, 5 U.S.C. 7703(b)(1)(A), is jurisdictional and therefore not subject to equitable tolling.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulations, and rules:

Statutes, regulations, and rules—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is not published in the Federal Reporter, but is available at 680 Fed. Appx. 944. The final order of the Merit Systems Protection Board (C.A. App. 9-18)[1] is not published in the Merit Systems Protection Board Reporter, but is available at 2016 WL 1742994. The initial decision of the administrative judge (C.A. App. 1-8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2017. A petition for rehearing en banc was denied on July 20, 2017 (Pet. App. 7a-9a). The petition for a writ of certiorari was filed on October 6, 2017. The

[1] "C.A. App." refers to the appendix that the Merit Systems Protection Board filed in the court of appeals. See Doc. 17 (Oct. 27, 2017); Pet. 3 n.1.

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)).

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).[2]

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 (Fed. Cir. 1984), and that "[c]ompliance

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[2] 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 Board's final order. Section 7703(b)(2) is not at issue here.

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 is a Physical Scientist at the National Institute of Standards and Technology, which is part of the United States Department of Commerce (the Agency). Pet. App. 2a. In the summer of 2012, petitioner "sent emails to his supervisors and up his chain of command" alleging that "certain managers were receiving significantly higher compensation than [their] performance ratings warranted." *Ibid.* On August 15, 2012, petitioner's second-level supervisor sent him a "Letter of Counseling" stating that petitioner had "fail[ed] to communicate with [his] supervisors appropriately," and "clarify[ing the supervisor's] expectations for [petitioner's] conduct in the future." *Ibid.* While the letter stated that it was "only a counseling" and would "not be included in [petitioner's] Official Personnel Folder," it warned that "any future misconduct may result in disciplinary action up to and including removal from the Federal Service." *Id.* at 3a.

Petitioner filed a complaint with the Office of Special Counsel (OSC), alleging that the Agency's letter was an act of retaliation against him for lawful whistleblowing disclosures pursuant to 5 U.S.C. 2302(b)(8). Pet. App. 3a. On May 30, 2013, OSC informed petitioner that it had terminated its inquiry into his allegations. *Ibid.*

Petitioner sought relief from the Board, and an administrative judge dismissed his case for lack of jurisdiction. Pet. App. 4a. The administrative judge concluded (1) the "Letter of Counseling" did not amount to a "personnel action" under Section 2302(b)(8), and (2) the contents of petitioner's disclosures "concerned,

at best, debatable expenditures rather than illegal or grossly wasteful spending," and therefore were not protected under the same provision. *Ibid.*

Petitioner sought the Board's review. On May 2, 2016, the Board denied the petition. Pet. App. 4a. The Board affirmed the administrative judge's finding that the Letter of Counseling did not constitute a personnel action, and it vacated the administrative judge's alternative finding that petitioner's disclosures were not protected. *Ibid.*; see C.A. App. 9-17.

After concluding that "the administrative judge properly dismissed the appeal for lack of jurisdiction," C.A. App. 15, the order included 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 U.S. Court of Appeals for the Federal Circuit is available at the court's website, 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 15-16.

3. Following issuance of the Board's decision on May 2, 2016, petitioner had 60 days—until July 1, 2016—to file a petition for review in the Federal Circuit. See 5 U.S.C. 7703(b)(1)(A). But the court of appeals did not receive the petition until July 7, 2016, six days after the filing deadline. Pet. App. 4a; see Doc. 9, at 1 (Aug. 31, 2016). The clerk initially returned the document to petitioner because it was untimely. Doc. 9, at 2. Following petitioner's request for reconsideration, however, the clerk docketed the petition for review. *Ibid.*

In a per curiam decision, the court of appeals dismissed petitioner's untimely petition for lack of jurisdiction. Pet. App. 2a, 5a-6a. The court first rejected petitioner's contention that the time to file a petition for review runs from when a litigant receives the Board's decision, rather than the date on which the decision is issued. *Id.* at 5a. The court observed that although a prior iteration of Section 7703(b)(1)(A) keyed the filing deadline to the claimant's receipt of the Board's decision, Congress amended that language in 2012 to read that petitions "shall be filed within 60 days after the Board *issues notice* of the final order or decision." *Id.* at 5a-6a (citation omitted). The court was not "persuaded * * * that the new statutory language should,

counterintuitively, be interpreted identically to the old." *Id.* at 6a.

The court also rejected petitioner's argument that the 60-day period should be subject to equitable tolling. Citing its precedent, the court explained that "Congress has limited this court's review of final decisions of the Board to those petitions 'filed within 60 days after the Board issues notice of the final order or decision of the Board,'" and "[f]ailure to comply with that statutory deadline prevents jurisdiction in this court." Pet. App. 5a (quoting 5 U.S.C. 7703(b)(1)(A) and citing *Oja*, 405 F.3d at 1360; *Monzo*, 735 F.2d at 1336); see *id.* at 6a ("This panel is bound * * * by our prior precedent.").

The court further noted that, just the day before, another panel had reaffirmed that the 60-day appeal period in Section 7703 was jurisdictional and could not be equitably tolled. *Fedora* v. *MSPB*, 848 F.3d 1013 (Fed. Cir. 2017), petition for cert. pending, No. 17-557 (filed Oct. 6, 2017). Like the court in this case, the *Fedora* majority relied on the Federal Circuit's prior decisions holding that "[c]ompliance with" Section 7703(b)(1)(A)'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. *Fedora*

Pet. App. 7a-9a. The petitioner in *Fedora* (like petitioner here) thus could not excuse the untimeliness of his petition by pointing to his reliance on the court of appeals' *Guide for Pro Se Litigants* (*Guide*), http://www.cafc.uscourts.gov/sites/default/files/rules-of-practice/Pro_Se_Guide.pdf. Pet. App. 8a. Although it was updated in December 2016, see *Fedora* Pet. 8 n.3, the *Guide* previously reflected the prior version of Section 7703(b)(1)(A), which required a petition for review to be filed within 60 days of *receipt* of the Board's decision. Pet. App. 6a; *Fedora* Pet. App. 7a-8a; see Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, § 108(a), 126 Stat. 1469 (amending the statute to require that a petition for review be filed within 60 days of *issuance* of the Board's decision). In any event, the *Fedora* court noted, "the Board's final order" in that case (like this one) had "specifically stated that the 60-day [appeal] period would begin on the date the final order was issued," and it cautioned Mr. Fedora "to 'be very careful to file on time' since the 'court must receive [the] request for review no later than 60 calendar days after the date of [the] order.'" *Fedora* Pet. App. 8a-9a (citation omitted; second and third sets of brackets in original); see *id.* at 9a (pointing out that order specifically cited the statute and "not[ed] the revision effective December 27, 2012."); pp. 5-6, *supra*.

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 petitioner was necessarily correct 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.*

4. Petitioners in both *Fedora* and this case obtained counsel and sought rehearing en banc.

On July 20, 2017, the court of appeals denied rehearing en banc in *Fedora*. *Fedora* Pet. App. 32a-44a. Four judges dissented from that decision: Judge Stoll did so without opinion, while Judge Wallach issued a dissenting opinion in which Judges Newman and O'Malley joined. *Id.* at 33a. The dissent 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); see *id.* at 43a.[3]

That same day, the court of appeals issued a per curium order denying petitioner's request for rehearing en banc in this case. Pet. App. 7a-9a. Judges Wallach, Newman, and O'Malley dissented "for the reasons stated" in Judge Wallach's dissent in *Fedora*. *Id.* at 8a. Judge Stoll again dissented without opinion. *Ibid.*[4]

ARGUMENT

The court of appeals correctly held that Section 7703(b)(1)(A)'s 60-day deadline for seeking Federal Cir-

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[3] 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.

[4] The court of appeals also relied on *Fedora* in *Musselman* v. *Department of Army*, 868 F.3d 1341 (per curiam), petition for cert. pending, No. 17-570 (filed Oct. 16, 2017).

cuit 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 (2012) (No. 11-915), and 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 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.

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 period, 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, 135 (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. 5a (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, ch. 77, 92 Stat. 1143-1144; Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 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 WPEA, which clarified that the commencement of the appeal period is the date of the MSPB decision, not its receipt. 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).[5] 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.[6]

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[5] The INA thus altered the 60-day requirement for seeking judicial review under the Hobbs Act. See 28 U.S.C. 2344 (1988 & 2012).

[6] 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

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 sought 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 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).[7]

Hobbs Act, see 28 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 28 U.S.C. 1252(b)(1).

[7] 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,

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 will be more cumbersome for a court of appeals, as opposed to a district court, to adjudicate a litigant's claim that a deadline should be equitably tolled in a particular case. Here, for example, petitioner maintains that he relied on the court of appeals' *Guide*, which reflected the prior version of Section 7703(b)(1)(A); at the same time, the Board's Order correctly stated that the time to file ran from issuance of its decision (rather than petitioner's receipt of it), and it warned petitioner of the importance of timely filing

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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 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 provided the background against which Congress drafted Section 7703(b)(1) (and has amended it without material alteration, see pp. 13-14, *supra*).

while pointing him to the text of the statute itself. See C.A. App. 16. The Federal Circuit would not be well-situated to perform the adjudicatory factfinding that might be necessary to evaluate and weigh these competing factors in the equitable-tolling analysis. Although it could, if necessary, remand to the MSPB to develop the facts, Congress could reasonably have concluded that, on the whole, the cost of such remands outweighs any potential benefit of trying to identify the rare case in which equitable tolling might in fact be warranted. 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).

2. Petitioner offers no persuasive reason for treating Section 7703(b)(1)(A)'s time limit as nonjurisdictional. He points out (Pet. 1, 15-16) that the Court's recent cases have sought to establish clearer rules about what statutory requirements will be considered jurisdictional, and he faults the Federal Circuit for purportedly failing to apply that "framework." But the court of appeals acknowledged this Court's more recent cases and distinguished them. See *Fedora* Pet. App. 4a-6a. Whether considered under *Bowles* and *Stone* or *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), and its progeny, Section 7703(b)(1)(A)'s time limit is jurisdictional and precludes equitable tolling.

a. Petitioner contends (Pet. 15-19) that *Irwin* governs this case. But as explained above, *Bowles* and *Stone* are the more relevant precedents here. In any event, even where *Irwin* applies, this Court has made clear that 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's intent].'" *Ibid.* (citations 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 support the conclusion that Section 7703(b)(1)'s 60-day deadline for seeking review in the Federal Circuit is jurisdictional. See pp. 11-15, *supra*.

b. Petitioner also is incorrect in asserting (Pet. 15-19) that the decision below "conflicts with" *Henderson*, *supra*, and *Bowen* v. *City of New York*, 476 U.S. 467 (1986). 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 our 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 the 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 *Bledsoe* v. *MSPB*, 659 F.3d 1097, 1101 (Fed. Cir. 2011) ("[T]he Board is an independent, quasi-judicial federal administrative agency.") (citation omitted).[8]

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[8] As petitioner notes (Pet. 17), *Henderson* stated that "*Bowles* did not hold categorically that every deadline for seeking judicial review

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 to this Court's other time-bar cases fare no better. Relying on *Wong*, *supra*, and *Irwin*, *supra*, petitioner contends (Pet. 19) that "equitable tolling [is] available for a timing provision that—like § 7703(b)(1)(A)—establishes the period for filing in an Article III court after an administrative agency rejects a claim." But that assertion (like petitioner's submission more generally) simply ignores *Stone*, which held that such a provision is in fact jurisdictional. See 514 U.S. at 390.

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in civil litigation is jurisdictional[; i]nstead, *Bowles* concerned an appeal from one court to another court." 562 U.S. at 436; see also *Hamer*, slip op. 8 n.9 (noting that "[i]n cases not involving the time-bound 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.

In any event, *Wong* and *Irwin* each considered a statute 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 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 decisions regarding similar provisions in *Bowles* and *Stone*.

d. Indeed, petitioner is wrong to contend (Pet. 20) that the time limitation in Section 7703(b)(1) has no connection to any provision governing subject-matter jurisdiction. As explained above (see pp. 11-13, *supra*), this Court has held to the contrary, recognizing that Section 7703(b)(1) *itself* functions as a "jurisdictional grant" of authority for the Federal Circuit to review MSPB decisions. *Lindahl*, 470 U.S. at 792. And while petitioner contends that "[i]t is 28 U.S.C. § 1295(a)(9), not § 7703, that gives the Federal Circuit '*subject-matter jurisdiction*,'" Pet. 20 (quoting *Fedora* Pet. App. 12a (Plager, J., dissenting)), 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)(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, in contrast to *Wong*, 135 S. Ct. at 1633, this is not a case in which "[n]othing conditions the jurisdictional grant on the limitations periods, or otherwise links those separate provisions."

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. Instead, petitioner contends (Pet. 25-33) that the courts of appeals are "intractably divided" regarding whether certain *other* time limits are jurisdictional. But this case does not implicate those other disagreements. And in any event, this Court has estab-

lished principles to resolve the varied scenarios petitioner notes, and it applied those principles just last month in *Hamer*, *supra*. Thus, even 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.

i. Petitioner maintains that there are "three acknowledged circuit splits about" the jurisdictional status of "particular timing provisions." Pet. 30 (emphasis omitted).

First, petitioner contends (Pet. 31) that the courts of appeals are divided regarding whether the time limit in 5 U.S.C. 7703(b)(2) is jurisdictional. He claims (Pet. 31) that the decisions of the four courts of appeals that have held it is not are "in serious tension—if not direct conflict—with the decision below."

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 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 (2016) ("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 pp. 17-18, *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.[9]

Petitioner's other purported divisions of authority are even less relevant. He alleges (Pet. 32-33) that there is a 4-4 disagreement among the courts of appeals "concerning the proper treatment of the time limit" governing a suit against the government in district court under 28 U.S.C. 2401(a), as well as a 2-1 split as to whether the Clean Water Act's time limit for filing a petition for review, 42 U.S.C. 7607(b), is jurisdictional. But even if this Court's review of those *other* statutory provisions were warranted, petitioner provides no reason why this case—which does not involve either one—would provide a suitable vehicle for addressing any disagreement.

ii. Petitioner's attempt (Pet. 25-30) to suggest a more theoretical division among the courts of appeals fares no better. He contends (Pet. 26-28) that the Federal Circuit has "join[ed] three other courts of appeals" which hold that, "under *Bowles*, time limits for seeking Article III review of agency action are, as a category,

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[9] 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.

jurisdictional," while four other circuits "reject[] the view that *Bowles* articulates a categorical rule."

Petitioner's argument fails because the cases he cites address different statutes, and their analysis depends on the particular provision at issue in each case. For example, the First and Second Circuit cases petitioner cites consider the statutory time limit for seeking review of a Board of Immigrations Appeal removal order, 8 U.S.C. 1252(b)(1). See *Ruiz-Martinez* v. *Mukasey*, 516 F.3d 102, 118 (2d Cir. 2008); *Guedes* v. *Mukasey*, 317 Fed. Appx. 16, 17 (1st Cir. 2008) (per curiam) (adopting *Ruiz-Martinez*'s reasoning); *Luna* v. *Holder*, 637 F.3d 85, 92 (2d Cir. 2011) (following *Ruiz-Martinez*). Those decisions do not adopt the *per se* rule petitioner claims; rather, *Ruiz-Martinez* simply reaffirms a pre-*Bowles* decision holding the particular time limit jurisdictional, and it notes that *Bowles* provides "[s]upport" for that prior holding. 516 F.3d at 118; see also *Guedes*, 317 Fed. Appx. at 27 (relying on the court of appeals' pre-*Bowles* decision in *Zhang* v. *INS*, 348 F.3d 289, 292 (1st Cir. 2003)).

Petitioner also points (Pet. 27-29) to decisions of the Tenth and D.C. Circuits holding that the time limit for filing a petition for review under the Clean Air Act is jurisdictional, and he notes that those decisions reach a different result than the Seventh Circuit did in *Clean Water Action Council of Northeast Wisconsin, Inc.* v. *EPA*, 765 F.3d 749, 751-752 (2014). But the D.C. and Tenth Circuits' cases do not depend on the categorical reading of *Bowles* that petitioner claims. Like the First and Second Circuits' decisions, the D.C. Circuit's cases merely adopt pre-*Bowles* precedent to hold that a particular statutory deadline is jurisdictional. See *Oklahoma Dep't of Envtl. Quality* v. *EPA*, 740 F.3d 185, 191

(2014) (relying on *Medical Waste Inst. & Energy Recovery Council* v. *EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011), which in turn relies on *Motor & Equip. Mfrs. Ass'n* v. *Nichols*, 142 F.3d 449, 460 (D.C. Cir. 1998)). And as petitioner must concede (Pet. 30), the Tenth Circuit has not adopted a bright-line rule that *Bowles* renders all appeal deadlines jurisdictional: to the contrary, in the decision petitioner cites, the court stated that a clear statement rule applied, but found that the Clean Air Act "exhibited the requisite statement of clear congressional intent to foreclose tolling." See *Utah Dep't of Envtl. Quality* v. *EPA*, 765 F.3d 1257, 1258-1261 (10th Cir. 2014) (denying rehearing en banc).

Petitioner's final two cases (Pet. 29-30) also do not demonstrate a division of authority. They involve the deadline for bringing a readjustment petition in the United States Tax Court, *A.I.M. Controls, L.L.C.* v. *Commissioner*, 672 F.3d 390 (5th Cir. 2012), and the time to file suit against the government in district court under the default statute of limitations in 28 U.S.C. 2401(a), *Herr* v. *United States Forest Serv.*, 803 F.3d 809 (6th Cir. 2015). These statute-specific dispositions shed no light on the proper interpretation of Section 7703(b)(1)(A), and they do not support the claim of a wider disagreement warranting this Court's review. Indeed, *A.I.M. Controls* distinguishes *Henderson* in much the same way as did *Fedora*—by considering "[c]ongressional intent," as evidenced by the text and structure of each statutory scheme. 672 F.3d at 394. Compare *id.* at 393-394, with *Fedora* Pet. App. 6a-7a.

b. Petitioner also notes (Pet. 22) that this Court has "repeatedly * * * granted review to assess whether particular statutory provisions are 'jurisdictional' in nature," and he contends (Pet. 24) that failure to do so

here will "deprive countless federal employees of their only opportunity for Article III judicial review of" the MSPB's decisions. But the Federal Circuit has applied the same rule for over 30 years: Section 7303(b)(1)(A)'s 60-day filing requirement is jurisdictional, and—as the Board warned petitioner here—claimants must therefore "be very careful to file on time." C.A. App. 16; see Pet. App. 9a. Moreover, the court of appeals has now revised its *Guide* to make clear that "[w]hen the Board issues a decision, you may file a petition for review in this court within *60 days* after the date on which the Board issued notice of that decision." *Guide* 2. Thus, litigants in the Federal Circuit—including those proceeding pro se, see Pet. 22-23—are on clear notice that their petitions for review must be filed within 60 days of the Board's issuance of the decision, and may act accordingly.

c. Finally, petitioner suggests (Pet. 33-34) that this Court should grant certiorari and hold that equitable tolling applies because the facts of his case are sympathetic. As this Court has recognized, however, "[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). Moreover, it is far from clear that petitioner's reliance on the *Guide* would entitle him to equitable tolling even if it were available. The Board's order made clear, in a variety of ways, that petitioner in fact needed to file his

petition within 60 days of issuance of the order. See pp. 5-6, 9, *supra*; *Irwin*, 498 U.S. at 96 (stating that "[f]ederal courts have typically extended equitable relief only sparingly," including "where the complainant has been induced or tricked by his adversary's misconduct," and declining to toll the statutory time limit for a "garden variety claim of excusable neglect").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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