No. 17-1610

In the Supreme Court of the United States

CLIFFORD W. JONES, SR., PETITIONER

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

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.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 702 Fed. Appx. 988. The final order of the Merit Systems Protection Board (Pet. App. 4a-19a) is unreported but is available at 2016 WL 7335474.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2017. A petition for rehearing was denied on February 27, 2018 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on May 29, 2018. 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)).

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. 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).[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 (Fed. Cir. 2005); see *Federal Educ. Ass'n-Stateside*

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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 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.

Region v. *Department of Def.*, No. 15-3173, 2018 WL 3716008, at *2-*3 (Fed. Cir. Aug. 6, 2018).

2. a. Petitioner worked as a supervisory Financial Management Specialist at the Indian Health Service Cass Lake Hospital from February 2008 through May 2011. Pet. App. 1a-2a. Petitioner was removed from his position for unacceptable performance in three critical elements of his position. *Id.* at 2a; see *id.* at 5a.

Following his removal, petitioner filed a complaint with the Office of Special Counsel (OSC), alleging that the agency removed him in reprisal for his purported whistleblowing. See C.A. App. 173, 177.[2] After OSC terminated its inquiry, petitioner filed a timely appeal to the Board, which was docketed as an individual right of action (IRA) appeal. *Id.* at 171; see Pet. App. 2a. The administrative judge determined that petitioner had failed to make a non-frivolous allegation that he had made a protected disclosure and dismissed the IRA appeal for lack of jurisdiction. Pet. App. 2a.

b. Petitioner sought the Board's review. C.A. App. 171-180. The Board determined that the administrative judge had correctly dismissed the IRA appeal. *Id.* at 175-177. But the Board determined that "under new Board precedent," petitioner was "entitled to review of his removal under [5 U.S.C.] chapter 43," and it referred the case to the regional office for that purpose. *Id.* at 177-178.

c. The regional office docketed petitioner's removal appeal, but petitioner requested and obtained voluntary dismissal of the case. C.A. App. 166-168. Petitioner at-

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[2] References to "C.A. App." are to the Corrected Supplemental Appendix filed by the Department of Health and Human Services in the court of appeals, C.A. Doc. 25 (Aug. 23, 2017).

tempted to re-file the case after a deadline the administrative judge had set, and the administrative judge dismissed it as untimely. *Id.* at 160-165. Petitioner again appealed to the Board, which reversed and remanded, ordering "adjudication on the merits of petitioner's removal." *Id.* at 159.

Following an in-person hearing on petitioner's removal claim, see C.A. App. 58-133, the administrative judge found that substantial evidence supported petitioner's removal for unacceptable performance, and that collateral estoppel barred him from re-litigating his whistleblower allegations. Pet. App. 2a; C.A. App. 17-57.

d. Petitioner again sought the Board's review. On December 8, 2016, the Board issued its final order, affirming the administrative judge's decision. Pet. App. 4a-19a; see C.A. App. 1.[3]

After addressing petitioner's challenges to his removal, the Board's order included a heading, in bold capital letters: "Notice to the Appellant Regarding Your Further Review Rights." Pet. App. 16a (capitalization altered; emphasis omitted). The notice stated that petitioner had "the right to request further review of this final decision," and provided "several options for further review." *Id.* at 16a-17a. With respect to federal appellate review, the notice stated:

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[3] The copy of the final order included in the appendix to the petition for a writ of certiorari is erroneously dated December 9, 2016. The petition correctly states (Pet. 7) that the Board's final order was issued on December 8, 2016. The court of appeals' opinion, the appendix filed in the court of appeals, and the Board's website all confirm that date. Pet. App. 3a; C.A. App. 1; 12/8/16 Order (https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1363575&version=1368933&application=ACROBAT).

> [Y]ou may request the U.S. Court of Appeals for the Federal Circuit * * * to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time.
>
> 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 U.S. 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 U.S. 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 18a-19a.

3. a. Following issuance of the Board's decision on December 8, 2016, petitioner had 60 days—until February 6, 2017—to file a petition for review in the Federal Circuit. See 5 U.S.C. 7703(b)(1)(A); Pet. App. 3a. Petitioner mailed his petition for review on February 3, 2017, but the court did not receive it until February 7, 2017, one day after the filing deadline. Pet. App. 3a.

The court of appeals issued an order to show cause why petitioner's untimely petition for review should not be dismissed. C.A. Doc. 6, at 2 (Feb. 28, 2017). Petitioner responded that when he took the petition for review to the post office for mailing on February 3, the clerk informed him that it "would be received" by the court on February 6, 2017. C.A. Doc. 9-1, at 2 (Mar. 28,

2017). But, petitioner asserted, a snowstorm had delayed the package's arrival. *Ibid.* The court subsequently referred the case to a merits panel. C.A. Doc. 12, at 2 (June 27, 2017).

b. The court of appeals dismissed the petition for review for lack of jurisdiction. Pet. App. 1a-3a. The court relied on its recent decision in *Fedora* v. *MSPB*, 848 F.3d 1013, 1015 (Fed. Cir. 2017), cert. denied, 138 S. Ct. 755 (2018), which held that to be timely filed under Section 7703(b)(1)(A), a petition for review from a final Board decision must be received by the court of appeals within 60 days, and that the time limitation is jurisdictional and cannot be equitably tolled. Pet. App. 2a-3a; see 848 F.3d at 1015-1017.

Fedora explained that for more than 30 years, the Federal Circuit had held that "[c]ompliance with" the statute's 60-day filing deadline "is a prerequisite to [the court's] exercise of jurisdiction." 848 F.3d at 1014-1015 (quoting *Oja*, 405 F.3d at 1360) (first set of brackets in original). *Fedora* acknowledged that "in recent years" this Court "has recognized that not all statutory time limits are properly characterized as jurisdictional." *Ibid.* But it observed 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). 848 F.3d at 1015. *Fedora* determined 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." *Ibid.* (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)). And *Fedora* further concluded

that because Section 7703(b)(1)(A)'s 60-day filing deadline is jurisdictional, it is not subject to equitable tolling. *Id.* at 1017. The court of appeals in this case applied *Fedora* and held that it lacked "the authority" to grant petitioner's request that it "equitably toll the statutory deadline in [Section] 7703(b)(1)(A)." Pet. App. 3a.

c. Petitioner sought rehearing and rehearing en banc. C.A. Doc. 43 (Dec. 22, 2017). The court of appeals denied the petition without any judge noting a dissent. Pet. App. 20a-21a.

ARGUMENT

The court of appeals correctly held that Section 7703(b)(1)(A)'s 60-day deadline for seeking Federal Circuit review of an order or decision of the Board is jurisdictional and not subject to equitable tolling. The decision does not conflict with any decision of this Court or of any other court of appeals. This Court recently denied review of three petitions for a writ of certiorari raising the same question, see *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) (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, ellipsis, and internal quotation marks omitted). *Lindahl* expressly rejected the argument that Section 7703(b)(1) was "nothing more than a venue provision" with no "relat[ion] to the power of a court." 470 U.S. at 792, 793 n.30 (citation omitted). Instead, the Court emphasized that Section 7703(b)(1) is what gives the Federal Circuit the "'power to adjudicate'" cases that "fall within [the Section's] jurisdictional perimeters." *Id.* at 793 (citation omitted).

Although *Lindahl* did not specifically discuss Section 7703(b)(1)(A)'s timing requirement, that condition is necessarily one of the "jurisdictional perimeters," 470 U.S. at 793, that defines the Federal Cir-

cuit's power or authority to adjudicate. Congress's inclusion of that condition within Section 7703(b)(1)'s "jurisdictional grant" demonstrates that Congress intended it as a limitation on the scope of that grant. Indeed, in considering other provisions to be nonjurisdictional, this Court has relied on the fact that the statutes separately addressed jurisdiction and timeliness, without "condition[ing] the jurisdictional grant on the limitations periods, or otherwise link[ing] those separate provisions." *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1633 (2015) (*Wong*); 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 *Federal Educ. Ass'n-Stateside Region* v. *Department of Def.*, No. 15-3173, 2018 WL 3716008, at *2-*3 (Fed. Cir. Aug. 6, 2018).

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).

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 the MSPB decision, not its receipt. *Fedora* v. *MSPB*, 848 F.3d 1013, 1016 (Fed. Cir. 2017) (citing WPEA § 108(a), 126 Stat. 1469), cert. denied, 138 S. Ct. 755 (2018). 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 prece-

dents 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 'jurisdictional,' meaning that late filing of the appeal notice necessitates dismissal of the appeal." *Hamer* v. *Neighborhood Hous. Servs.*, 138 S. Ct. 13, 16 (2017).[4]

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

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[4] The Court stated in *Bowles* that "[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." 551 U.S. at 214. Petitioner's account (Pet. 23-24) of the circumstances leading to the untimely receipt of his petition for review by the Federal Circuit therefore does not furnish a basis for setting aside the jurisdictional limit Congress has prescribed. See *Bowles*, 551 U.S. 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).

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).[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 other 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.

[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, 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).

c. The origins of Section 7703(b)(1)(A) further support the conclusion that its time limitation is jurisdictional. Before the CSRA's enactment, federal employees could seek review of employment-related actions in the Court of Claims pursuant to the Tucker Act, 28 U.S.C. 1491. See, *e.g.*, *Lindahl*, 470 U.S. at 780-781 & n.14. As this Court held in *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134-139 (2008), the filing deadline for such suits, 28 U.S.C. 2501, is jurisdictional in nature. The CSRA established the MSPB and directed that "jurisdiction over 'a final order or final decision of the Board' would be in the Court of Claims, pursuant to the Tucker Act, or in the regional courts of appeals, pursuant to 28 U.S.C. § 2342," the Hobbs Act's review provision. *Lindahl*, 470 U.S. at 774 (quoting CSRA § 205, 92 Stat. 1143). 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).

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 would 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).

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

a. Petitioner first contends that Section 7703(b)(1)(A) "reads like an ordinary, run-of-the-mill statute of limitations." Pet. 12 (citation omitted). But petitioner gives insufficient weight to several of the provision's most salient features. Most notably, as discussed above (see pp. 9-10, *supra*), this Court has held that Section 7703(b)(1) "confers the operative grant of jurisdiction." *Lindahl*, 470 U.S. at 793. That grant is necessarily limited by the deadline set forth in the very same subsection.

Moreover, while petitioner asserts (Pet. 14) that "[t]he Federal Circuit's authority to hear appeals from the MSPB comes from a different" provision, 28 U.S.C. 1295(a)(9), that provision 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.[7]

b. Relying on *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), and *Wong*, petitioner next contends (Pet. 11) that "statutory time limits are presumptively nonjurisdictional." Petitioner similarly relies (Pet. 18-19) on *Hamer*'s observation 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.

Petitioner's citations (Pet. 11-13, 15, 18) to *Irwin*, *Wong*, and *Hamer* are misplaced. *Irwin* and *Wong* considered statutes governing the time for filing an action

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[7] Petitioner suggests (Pet. 14 n.3) that *Wong* "rejected the notion that a time limitation becomes jurisdictional by 'cross-reference' to it in a statutory grant of 'exclusive jurisdiction.'" That is incorrect. Petitioner relies (*ibid.*) on the government's brief in *Wong*, which noted that the Federal Tort Claims Act (FTCA), ch. 753, Tit. IV, 60 Stat. 842, "as originally enacted[,] * * * conditioned its grant of 'exclusive jurisdiction' to district courts on the plaintiff's compliance with the time limitation for filing suit." Gov't Br. at 36, *Wong*, *supra* (No. 13-1074) (citing FTCA § 410(a), 60 Stat. 843-844). The government's brief went on to acknowledge, however, that "Congress later separated the FTCA's jurisdiction-granting and time-bar provisions —and eliminated the cross-reference to the latter." *Id.* at 37 n.19. Thus, *Wong* did not address a case in which the operative version of the statute that granted jurisdiction cross-referenced the time limitation.

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 FTCA, 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, including that courts of appeals lack the factfinding capacity necessary to make equitable tolling determinations in the first instance.

Hamer is also inapposite. 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 jurisdiction,'" 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, 456 (2004)). And *Hamer* reiterated the Court's holding in *Bowles*, that "an appeal filing deadline prescribed by statute will be regarded as 'jurisdictional.'" *Id.* at 16; see also *id.* at 20.

More generally, even where a presumption against jurisdictional treatment of time limitations and in favor of equitable tolling applies, this Court has made clear that such a presumption 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."). And this Court has explained that Congress need not "incant magic words" to demonstrate that a particular provision is jurisdictional. *Hamer*, 138 S. Ct. at 20 n.9 (citation omitted). Instead, the Court "consider[s] context, including this Court's interpretations of similar provisions in many years past, as probative of [Congress' intent]." *Ibid.* (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. Here, this Court has not merely interpreted a "similar provision[]" to be jurisdictional, *Hamer*, 138 S. Ct. at 20 n.9 (citation omitted)—it has held that Section 7703(b)(1) *itself* "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.

c. Petitioner also is incorrect in asserting (Pet. 4-5, 9, 18-19) that the decision below contravenes *Henderson* 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)). Moreover, *Henderson* 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.

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 are adversarial. See p. 2, *supra*; *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).[8] And an appeal

[8] Thus, while petitioner's amici note 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. 13-14, that provision does not

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 *Lindahl*, 470 U.S. at 797 (Federal Circuit review of MSPB decisions is an "appellate function"); *Bledsoe*, 659 F.3d at 1101 ("The Board is an independent, quasi-judicial federal administrative agency.") (citation omitted).[9]

Petitioner's reliance on *Bowen* (Pet. 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).

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share the "unusually protective" nature of the veteran-specific scheme at issue in *Henderson*, 562 U.S. at 437 (citation omitted).

[9] As petitioner notes (Pet. 18), *Henderson* stated that "*Bowles* did not hold categorically that every deadline for seeking judicial review in civil litigation is jurisdictional[; i]nstead, *Bowles* concerned an appeal from one court to another court." 562 U.S. at 436. 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 final decision in an agency adjudicatory proceeding directly to the court of appeals, is jurisdictional.

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

a. As petitioner recognizes (Pet. 23), this Court recently denied three petitions for a writ of certiorari raising the same issue presented here. See p. 8, *supra*. Petitioner notes, however (Pet. 23) that in its briefs in opposition in *Fedora*, *Vocke*, and *Musselman*, the government stated that "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 [*Hamer*]." *E.g.*, Br. in Opp. at 22, *Fedora*, *supra* (No. 17-557). Petitioner therefore contends (Pet. 23) that because the court of appeals denied rehearing en banc in this case after *Hamer*, certiorari should now be granted. That is incorrect. The court of appeals' decision not to rehear this case reflects its correct assessment that *Hamer* supports the Federal Circuit's longstanding holding that Section 7703(b)(1)(A) is jurisdictional, and that further review is unwarranted. See *Federal Educ. Ass'n-Stateside Region*, 2018 WL 3716008, at *3 ("The Court's decision in *Hamer* thus 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).'") (quoting *Fedora*, 848 F.3d at 1016).

b. Petitioner acknowledges (Pet. 19) that because the Federal Circuit has exclusive jurisdiction over cases subject to Section 7703(b)(1)(A), there is no division of authority with respect to the question presented. Instead, petitioner contends (Pet. 19-21) that "[t]he decision below cannot be reconciled" with decisions holding that a *different* provision—Section 7703(b)(2)—"is *not* jurisdictional and *is* subjection to equitable tolling."[10]

[10] Petitioner states (Pet. 20) that "the courts of appeals that have substantively considered the issue" "[p]ost-*Irwin*" have uniformly

That argument lacks merit. 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) channels those cases to the district courts, rather than the Federal Circuit. It 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. As noted, while Section 7703(b)(1)(A) provides that "a petition to review a final order or final decision of the

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agreed that Section 7703(b)(2)'s filing deadline is not jurisdictional. But as petitioner acknowledges (Pet. 20 n.4), the Sixth Circuit reached the opposite conclusion in *Dean* v. *Veterans Administration Regional Office*, 943 F.2d 667, 669 (1991). While that decision was vacated on other grounds by this Court, 503 U.S. 902 (1992), the court of appeals has continued to apply *Dean*'s holding that Section 7703(b)(2)'s time bar is jurisdictional in nature. See *Felder* v. *Runyon*, 230 F.3d 1358 (6th Cir. 2000) (Tbl.); *Johnson* v. *United States Postal Serv.*, 64 F.3d 233, 237-238 (6th Cir. 1995); *Glarner* v. *United States Dep't of Veterans Admin.*, 30 F.3d 697, 701 (6th Cir. 1994).

Board shall be filed in the United States Court of Appeals for the Federal Circuit," 5 U.S.C. 7703(b)(1)(A), Section 7703(b)(2) does not provide jurisdiction in that court; it instead channels mixed cases to the district courts via other statutory provisions. See *Kloeckner* v. *Solis*, 568 U.S. 41, 46 (2012) ("The enforcement provisions of the antidiscrimination statutes listed in [Section 7703(b)(2)] all authorize suit in federal district court."). Section 7703(b)(2) thus does not follow the structure of Section 7703(b)(1)(A), which combines an express, self-contained jurisdictional grant to the court of appeals with a time limitation. Section 7703(b)(2) also is not cross-referenced in Section 1295(a), which expressly provides an "exclusive" grant of "jurisdiction" to the Federal Circuit "pursuant to" Section 7703(b)(1). 28 U.S.C. 1295(a)(9). 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 discussed above, the district courts are better equipped to address the fact-intensive inquiries that equitable tolling requires. See pp. 14-15, *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, the court in *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.

c. Petitioner also contends that this Court should grant review because the court of appeals' holding denies federal employees the "'fairness,' 'justice,' and 'full due process' that the [CSRA] was designed to provide." Pet. 22 (citation omitted). But the Federal Circuit has applied the same rule for over 30 years: Section 7703(b)(1)(A)'s 60-day filing requirement is jurisdictional, and—as the Board expressly warned petitioner here—claimants must therefore "be very careful to file on time." Pet. App. 19a. Thus, litigants in the Federal Circuit (including those proceeding pro se, see Pet. 22) are on clear notice that their petitions for review must be received by the Federal Circuit within 60 days of the Board's issuance of the decision, and must act accordingly to obtain review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2018