**Nos. 17-544, 17-557, and 17-570**

# In the Supreme Court of the United States

ROBERT D. VOCKE, JR.,
*Petitioner,*
*v.*
MERIT SYSTEMS PROTECTION BOARD,
*Respondent.*

LAURENCE M. FEDORA,
*Petitioner,*
*v.*
MERIT SYSTEMS PROTECTION BOARD
AND UNITED STATES POSTAL SERVICE,
*Respondents.*

JEFFERY S. MUSSELMAN,
*Petitioner,*
*v.*
DEPARTMENT OF THE ARMY,
*Respondent.*

*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT*

## BRIEF OF THE FEDERAL CIRCUIT BAR ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONERS


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## QUESTION PRESENTED

Whether the court of appeals erred in holding that the time limit of 5 U.S.C. § 7703(b)(1)(A) is not subject to equitable tolling.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**

**Rules**



**Regulations**



**Other Authority**

## INTEREST OF AMICUS CURIAE[1]

The Federal Circuit Bar Association ("FCBA" or "the Association") is a national organization for the bar of the United States Court of Appeals for the Federal Circuit. Started in 1985, the FCBA was organized to unite the different groups across the nation that practice before the Federal Circuit.

The FCBA helps facilitate *pro bono* representation for claimants such as veterans, individual patent applicants, and government employees, with potential or actual litigation within the Federal Circuit's jurisdiction, with a view to strengthening the litigation process at that court. This includes representation for Merit Systems Protection Board ("MSPB") claimants, either at the MSPB or on appeal to the Federal Circuit. The Federal Circuit's rule foreclosing equitable tolling of appeal deadlines hinders the Association's ability to provide meaningful representation for those claimants.

Because the Respondents in these cases are part of the federal government, FCBA members and leaders who are employees of the federal government have not participated in the Association's decisionmaking regarding whether to participate as an amicus in this litigation, developing the content of this brief, or the decision to file this brief.

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made any monetary contribution to the preparation or submission of this brief. More than ten days before the due date, *amicus* provided counsel of record for all parties in all three cases listed on this brief's front cover (Nos. 17-544, 17-557, and 17-570) with notice of its intent to file this brief. All parties in all three cases have consented to the filing of this brief.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

These three petitions squarely present the same important question and provide a uniquely suitable opportunity for this Court to answer it.

Over the past decade, this Court has made renewed efforts to curb prior undisciplined use of the label "jurisdictional," and has taken a closer look at which deadlines are properly labeled "jurisdictional" and which are not. At the same time, the Federal Circuit has tacitly acknowledged the gradual divergence between its precedent and this Court's precedent, but has nonetheless refused to reconsider its own rule that the deadline at issue here (60 days to appeal from the MSPB to the Federal Circuit) is jurisdictional and thus not subject to equitable tolling. In the three cases underlying these petitions, the Federal Circuit refused again—this time, over thorough dissents by multiple judges, and over three en banc petitions that squarely presented the question that is now before this Court. The Federal Circuit now consistently dismisses untimely appeals from the MSPB, without any consideration of tolling arguments, and will continue to do so unless this Court intervenes.

This Court should grant review because the Federal Circuit's entrenched rule is inconsistent with this Court's precedent. The decisions underlying the three petitions all rely on a misreading of *Bowles v. Russell*, 551 U.S. 205 (2007), that closely resembles the reasoning this Court rejected in *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011). In *Henderson*, the Federal Circuit read *Bowles* to have established a categorical rule that "time of review provisions are

mandatory and jurisdictional," and "*not* subject to equitable tolling unless Congress so provides," and this Court reversed. Here, the Federal Circuit read *Bowles* to establish the same categorical rule for "appeals to Article III courts." This Court's precedents make clear, however, that *Bowles* is properly read as a very specific application of the broader rule that filing deadlines should be presumptively subject to equitable tolling unless there is a clear contrary statement from Congress or something of equivalent force to overcome the presumption. In *Bowles*, the presumption was overcome by a century of practice in American courts treating statutory Article III trial-court-to-appellate-court appeal deadlines as jurisdictional. The Federal Circuit short-circuited any inquiry into whether any evidence requires the same result for the different deadline at issue here, because it read *Bowles* broadly to foreclose equitable tolling for *all* appeals to Article III courts.

The Court should also grant review because the Federal Circuit's rule is firmly entrenched, imposes harsh consequences on appellants from the MSPB (of whom most are *pro se*), and is unlikely to be reconsidered absent direct intervention from this Court. Finally, because the Federal Circuit's jurisdiction includes appeals from a range of agencies and other tribunals, the categorical rule it applies to all "[a]ppeal periods to Article III courts" has important potential consequences for appellants from those tribunals as well as those from the MSPB.

## RELEVANT BACKGROUND

The three petitions that this amicus brief supports present the same common question whether the deadline to appeal from the MSPB to the Federal

Circuit (5 U.S.C. § 7703(b)(1)(A)) is subject to equitable tolling. For several decades, Federal Circuit precedent has held that the deadline is mandatory and jurisdictional and thus not subject to equitable tolling. *See, e.g.*, *Monzo v. Dep't of Transp.*, 735 F.2d 1335, 1336 (Fed. Cir. 1984); *Pinat v. OPM*, 931 F.2d 1544, 1546 (Fed. Cir. 1991); *Oja v. Dep't of the Army*, 405 F.3d 1349, 1357-1360 (Fed. Cir. 2005); *Jones v. Dep't of Health & Human Servs.*, 834 F.3d 1361, 1364-65 (Fed. Cir. 2016) (dictum).

As the certiorari petitions and Judge Plager's panel dissent in *Fedora* (848 F.3d 1013, 1021-1025 (Fed. Cir. 2017), the subject of petition No. 17-557 to this Court) explain in greater detail—this Court has made renewed efforts over approximately the past decade to curb what it has referred to as its own prior "profligate . . . use of the term . . . 'jurisdictional,'" *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006), and to bring discipline to the categorization of filing deadlines as jurisdictional or merely claim-processing rules. *See, e.g.*, *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010). The result is that this Court now "presumes" that time bars are subject to equitable tolling, and requires a "clear statement" from Congress or something of equivalent force to hold otherwise. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631, 1632 (2015). In other words, "traditional tools of statutory construction must *plainly* show that Congress imbued a procedural bar with jurisdictional consequences." *Id.* at 1632 (emphasis added); *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, No. 16-658, 2017 WL 5160782, at *6 n.9 (U.S. Nov. 8, 2017) (describing "clear-statement rule").

Beginning at least with this Court's 2006 decision in *Arbaugh*, several decisions of this Court have given the Federal Circuit opportunities to bring its precedent in line with this Court's by reconsidering its existing precedent holding that 5 U.S.C. § 7703(b)(1)(A)'s deadline is not subject to equitable tolling. In footnotes, dicta, and separate opinions, the Federal Circuit has indicated that it is aware of the growing disconnect between its precedent and this Court's. But the Federal Circuit has nonetheless consistently declined to reconsider its precedent. In 2005, for example, Judge Newman dissented from the panel majority's holding in *Oja* that section 7703(b)(1)(A)'s appeal deadline was not subject to equitable tolling. 405 F.3d at 1361-67. And in 2016, in *Jones*, the unanimous Federal Circuit panel stated in a footnote that "[i]t may be time to ask whether we should reconsider *Oja* and *Monzo* in light of recent Supreme Court precedent finding some time limits nonjurisdictional." 834 F.3d at 1364 n.2.

The cases underlying these three petitions illustrate, however, that the Federal Circuit's view is entrenched, and that that court is unlikely to reconsider its precedent absent direct review from this Court.

As the respective petitions explain in greater detail, Robert Vocke, Laurence Fedora, and Jeffery Musselman were all *pro se* when their appeals initially reached the Federal Circuit. All three appear to have missed the filing deadline of § 7703(b)(1)(A), and all three had arguments for tolling the deadline in their respective cases. Musselman had relied on the U.S. Postal Service's "Priority Mail" service to deliver his petition for review within two days and to arrive at the Federal Circuit on time, but delivery

ultimately took 16 days. Fedora and Vocke had relied on the Federal Circuit's own *Guide for Pro Se Petitioners and Appellants*, which turned out to have misstated the deadline for filing a petition for review as being 60 days from *receipt* of the MSPB decision being appealed rather than 60 days from *issuance*.

All three appeals were pending, and not yet submitted to merits panels, when Mr. Musselman obtained professional *pro bono* counsel. Shortly after Musselman's counsel entered appearances, the Federal Circuit gave yet another sign that it was aware of this Court's more recent cases regarding filing deadlines, and possibly inclined to reconsider its own precedent. The Federal Circuit ordered Musselman's counsel to brief the question whether this Court's decisions had overruled Federal Circuit precedent holding that 5 U.S.C. § 7703(b)(1)(A)'s filing deadline is jurisdictional and not subject to equitable tolling. Musselman Pet. 7-8; Fed. Cir. No. 16-2522, ECF#16 ("The parties should address the Supreme Court's more recent cases dealing with whether statutory-time limits are jurisdictional or merely claims-processing rules and whether those cases have overruled *Oja*, *Monzo*, and *Pinat* or whether those cases should be overruled.").

Before Musselman's counsel could file an opening brief, however, a panel of the Federal Circuit decided the then-pending *Fedora* appeal (in which Mr. Fedora was still *pro se*). *Fedora v. MSPB*, 848 F.3d 1013 (Fed. Cir. 2017). Relying on the proposition that "*[a]ppeal periods to Article III courts*, such as the period in § 7703(b)(1), are controlled by the [Supreme] Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007)," *id.* at 1015 (emphasis added), the Federal

Circuit issued a precedential decision holding, by a 2-1 vote, that 5 U.S.C. § 7703(b)(1)(A)'s deadline is still not subject to equitable tolling. *Id.* at 1015-17. The panel majority acknowledged more recent decisions of this Court, but distinguished them as not specifically addressing "appeal periods to Article III courts." *Id.* at 1015-16. The majority thus dismissed Mr. Fedora's appeal as untimely. Judge Plager dissented. *Id.* at 1017-26.

The very next day, a different panel of the Federal Circuit dismissed Mr. Vocke's appeal as untimely, recognizing that any arguments for tolling were foreclosed by the previous day's decision in *Fedora*. *Vocke v. MSPB*, 680 F. App'x 944, 946-47 (Fed. Cir. 2017).

Fedora and Vocke then obtained professional *pro bono* counsel, and Fedora, Vocke, and Musselman all filed petitions asking the Federal Circuit to sit en banc to reconsider its precedent holding that 5 U.S.C. § 7703(b)(1)(A)'s deadline is not subject to equitable tolling. In orders issued simultaneously in all three cases, the Federal Circuit voted 8-4 against en banc consideration. *Fedora v. MSPB*, 868 F.3d 1336 (Fed. Cir. 2017); *Vocke v. MSPB*, 868 F.3d 1341 (Fed. Cir. 2017); *Musselman v. Dep't of the Army*, 868 F.3d 1341 (Fed. Cir. 2017). In the *Fedora* case, four judges dissented from denial of rehearing en banc. In addition to those four, Judge Plager (a senior judge, and thus not part of the en banc vote) dissented from denial of panel rehearing. In *Vocke* and *Musselman*, the four dissenting judges indicated that the reasons for their dissent from denial of rehearing en banc in *Fedora* applied equally to the *Vocke* and *Musselman* cases (Judges Wallach, Newman, and

O'Malley dissented in *Vocke* and *Musselman* "for the reasons stated in dissent from denial of the petition for rehearing en banc in *Fedora*"; Judge Stoll dissented without opinion in all three cases.). *Vocke*, 868 F.3d at 1341; *Musselman*, 868 F.3d at 1341.

Messrs. Fedora, Vocke, and Musselman have now filed petitions with this Court, all raising the same question whether 5 U.S.C. § 7703(b)(1)(A)'s deadline is subject to equitable tolling. In the FCBA's view, that question warrants this Court's review.

## ARGUMENT

### I. The Federal Circuit's Decisions Rely on Nearly the Same Misreading of *Bowles v. Russell* That This Court Rejected in *Henderson v. Shinseki*.

In the cases underlying these petitions, the Federal Circuit panel relied on the same sort of reasoning that this Court rejected in *Henderson v. Shinseki*, six years ago. The Federal Circuit ruled that the deadline of 5 U.S.C. § 7703(b)(1)(A) is not subject to equitable tolling because, in its view, "*Appeal periods to Article III courts*, such as the period in § 7703(b)(1), are controlled by the [Supreme] Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007)." *Fedora*, 848 F.3d at 1015 (panel majority, emphasis added).

In *Bowles*, this Court ruled that the deadline to appeal from federal district courts to federal circuit courts of appeals (28 U.S.C. § 2107) is mandatory, jurisdictional, and not subject to equitable tolling. 551 U.S. at 208-15. The Federal Circuit's parsing of *Bowles* to divine a hard and fast rule for all "appeal periods to Article III courts" may have been a sensible reading of *Bowles* in 2007 when *Bowles* was de-

cided. Later decisions of this Court, however, distinguish *Bowles* and place it in the context of a broader framework of presuming the availability of tolling absent a clear contrary statement from Congress. In that vein, *Henderson v. Shinseki*, 562 U.S. 428 (2011), is particularly instructive, as the Federal Circuit's decisions here repeat nearly the same mistake that this Court corrected in *Henderson*.

In *Henderson*, the en banc Federal Circuit read *Bowles* as holding broadly that *all statutory appeal periods in civil cases* are presumptively mandatory and jurisdictional. *Henderson v. Shinseki*, 589 F.3d 1201, 1204, 1220 (Fed. Cir. 2009) (en banc). The Federal Circuit had previously held that the 60-day statutory deadline for veterans claimants to appeal from the agency to the Court of Appeals for Veterans Claims (38 U.S.C. § 7266(a)) was *not* jurisdictional and *was* subject to equitable tolling. *See Bailey v. West*, 160 F.3d 1360, 1363 (Fed. Cir. 1998) (en banc); *Jaquay v. Principi*, 304 F.3d 1276, 1283-84 (Fed. Cir. 2002) (en banc). After this Court decided *Bowles*, however, the Federal Circuit viewed *Bowles* as such a broad, significant change in the law that it sat en banc again and overruled its prior decisions. "The critical point," in the Federal Circuit's view, was that "whereas in *Bailey* we relied on *Irwin* [*v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990)] to conclude that time of review provisions are subject to equitable tolling unless Congress has expressed a contrary intent, in *Bowles* the Court reached the conclusion that because time of review provisions are mandatory and jurisdictional, they *are not* subject to equitable tolling unless Congress so provides . . . ." *Henderson*, 589 F.3d at 1216 (original emphasis, citation omitted).

This Court granted certiorari and reversed, holding that the Federal Circuit had read *Bowles* too broadly. *Henderson*, 562 U.S. at 436. *Bowles* did not render the statutory deadline to appeal to the CAVC mandatory and jurisdictional, much less did it do so for *all* statutory appeal deadlines. *Id.* Under the proper analysis, the Federal Circuit should have assumed that the filing deadline was not jurisdictional, and "look[ed] to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'" *Id.* (quoting *Arbaugh*, 546 U.S. at 515-16).

*Henderson* and other decisions of this Court have further clarified *Bowles*' limited scope and placed it in the context of a broader framework. This Court explained in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), for example, that *Bowles* merely "stands for the proposition that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." *Id.* at 168. This Court elaborated further this Term, in its unanimous decision in *Hamer*, explaining that "[s]everal Courts of Appeals . . . have tripped over [the] statement in *Bowles* that 'the taking of an appeal within the prescribed time is 'mandatory and jurisdictional,'" but should do so no longer. 2017 WL 5160782, at *7. That "'mandatory and jurisdictional' formulation" in *Bowles*, *Hamer* explained, "is a characterization left over from days when [this Court] was less than meticulous in [its] use of the term 'jurisdictional.'" *Id.* (some internal quotation marks omitted). *Bowles*' holding, *Hamer* explained, applies to statutory deadlines to appeal "*from one Article III court to another*." *Id.* at *6 & n.9 (emphasis added). For all other deadlines, "a clear-statement rule" applies, be-

ginning with the presumption that the deadline is not jurisdictional. *Id.* at *6 n.9.

*Kwai Fun Wong*, decided two years ago, explained—much as *Henderson* had before, and much as *Hamer* did this Term—that a "clear statement rule" applies to the question whether filing deadlines are jurisdictional and thus not subject to equitable tolling. 135 S. Ct. at 1632. Courts must "presume[]" that filing deadlines are not jurisdictional, unless a "clear statement" from Congress provides otherwise. *Id.* at 1631, 1632. In other words, "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Id.* at 1632.

In light of this Court's post-2007 decisions, *Bowles* is properly read with a framework that requires courts to presume that a filing deadline is non-jurisdictional and subject to equitable tolling, unless a clear indication from Congress shows otherwise. In that context, the rule of *Bowles* is merely that—with respect to the particular deadline at issue in that case—*stare decisis* and more than a century of consistent practice treating statutory *Article III trial-court-to-appellate-court* appeal deadlines as jurisdictional were sufficient to rebut the presumption of tolling. *Henderson*, 561 U.S. at 209 & n.2. In other words, that history was sufficiently powerful evidence to surmount the hurdle that "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Kwai Fun Wong*, 135 S. Ct. at 1632.

In these three cases, the Federal Circuit did not follow the analysis prescribed in *Arbaugh*, *Hender-*

*son*, *Kwai Fun Wong*, and *Hamer*, of presuming that the deadline before it was subject to equitable tolling, and then looking for any clear statement from Congress to the contrary. Instead, the Federal Circuit again over-read the "mandatory and jurisdictional" language in *Bowles* and took much the same approach it had in the decision this Court reversed in *Henderson*—starting with a categorical *Bowles*-based presumption *against* tolling and placing the burden on the party seeking tolling to show otherwise. In other words, the Federal Circuit "tripped over [the] statement in *Bowles* that 'the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" *Hamer*, 2017 WL 5160782, at *7. The Federal Circuit's holding runs counter to this Court's precedent, and warrants this Court's review.

## II. The Federal Circuit's View is Entrenched and Has Far-Reaching Consequences.

The Federal Circuit's ruling that *Bowles* forecloses equitable tolling of "[a]ppeal periods to Article III courts," 848 F.3d at 1015, has important consequences—both for appellants from the MSPB, and for a range of other appellants within the Federal Circuit's jurisdiction.

As the procedural history of these cases makes clear, *Relevant Background, supra*, the Federal Circuit's rule foreclosing tolling under 5 U.S.C. § 7703(b)(1)(A) is firmly entrenched at that court. The Federal Circuit has held fast to that rule for more than thirty years. And though the Federal Circuit has acknowledged this Court's more recent precedent in footnotes, dicta, and separate opinions, it refused to reconsider its precedent once the question was squarely put to it. In *Fedora*, *Mussselman*, and

*Vocke*, the Federal Circuit had three co-pending en banc petitions prepared by experienced counsel, and thorough dissents by Judges Plager and Wallach. Nonetheless, in response, eight judges of the Federal Circuit outvoted five, in favor of a ruling that 5 U.S.C. § 7703(b)(1)(A)'s filing deadline is jurisdictional and not subject to equitable tolling. As far as the Federal Circuit is concerned, the die is cast.

Following its precedential panel decision in *Fedora*, the Federal Circuit now consistently dismisses untimely-filed appeals from the MSPB, without considering tolling arguments. In those cases, the appellants are nearly always *pro se*, they usually miss the deadline by a week or less, the dismissal is usually entered before any merits briefing, and the dismissal order usually cites *Fedora* and other cases for the proposition that the deadline is mandatory, jurisdictional, and not subject to equitable tolling. *See Chaney v. Dep't of Veterans Affairs*, No. 17-1028, ECF #16 (Fed. Cir. Feb. 23, 2017) (*pro se* appellant; petition for review mailed, received three days late); *Baldwin v. Small Bus. Adm.*, No. 17-1300, ECF #11 (Fed. Cir. Feb. 23, 2017) (*pro se* appellant; appeal received one day late); *Jarmin v. OPM*, 678 F. App'x 1023 (Fed. Cir. Mar. 9, 2017) (*pro se* appellant; petition mailed, received two days late); *Obiedzinski v. USPS*, No. 17-1375, ECF #9 (Fed. Cir. Mar. 9, 2017) (*pro se* appellant; petition mailed, dated seven days before deadline, received ten days late); *Barker v. USPS*, No. 17-1662, ECF #7 (Fed. Cir. May 19, 2017) (*pro se* appellant; petition sent one day late, received eight days late); *Brenndoerfer v. USPS*, 693 F. App'x 904 (Fed. Cir. June 8, 2017) (*pro se* appellant; petition mailed, received eight days late; appeal dismissed over dubitante concurrence by Judge Wal-

lach); *Swartwout v. OPM*, No. 17-1522, ECF #12 (Fed. Cir. July 21, 2017) (*pro se* appellant; petition *express mailed* eight days before deadline, received six days late).

The pattern of barely-late filings by *pro se* appellants is unsurprising, as more than 50% of MSPB claimants are *pro se*, and the Federal Circuit has both **(1)** construed 5 U.S.C. § 7703(b)(1)(A) to impose a deadline for receipt by the court, as opposed to a mailbox rule, and **(2)** until recently, given *pro se* appellants incorrect information about when the 60-day deadline begins to run. *See* Fedora Pet. at 7-9 & nn. 2-3 (detailing incorrect information from Federal Circuit); Vocke Pet. at 7-9 & n.2 (same); MSPB, *Congressional Budget Justification FY 2018* at 12 (May 2017) (More than 50% of MSPB claimants are *pro se*, and "do not generally have equal knowledge of the case filing process or equal access to the information available, especially if they are stationed overseas."), *available at* https://tinyurl.com/mspbfy2018. To apply—on top of all of that—a rule that categorically forecloses equitable tolling, is to impose unnecessarily harsh consequences on the thousands of federal employees per year who file appeals with the MSPB. *See* MSPB, *Congressional Budget Justification FY 2018* at 2 ("[T]here are approximately 1.7 million Federal employees over whom the Board has jurisdiction, and those employees file appeals at a rate of 0.387 percent per year," which is approximately 6500 appeals per year).

The consequences of the Federal Circuit's rulings for MSPB appellants are reason enough to grant review, but the Federal Circuit's reasoning sweeps broadly enough to threaten consequences for other

litigants as well. The Federal Circuit held in *Fedora* that all "[*a*]*ppeal periods to Article III courts*" must be treated as mandatory and jurisdictional. 848 F.3d at 1015 (emphasis added). The result is apparently to foreclose equitable tolling, not just for appellants from the MSPB to the Federal Circuit, but for all appellants within that court's jurisdiction.

The Federal Circuit is, of course, an Article III court. And, in addition to the MSPB—and to the district-court patent appeals for which it may be best known—the Federal Circuit has exclusive appellate jurisdiction over appeals from numerous other administrative bodies and Article I courts, including agencies' boards of contract appeals,[2] the Office of Compliance,[3] the Government Accountability Office Personal and Appeals Board,[4] the Court of Appeals for Veterans Claims,[5] the Court of Federal Claims,[6] the Patent Trial and Appeal Board,[7] the Trademark Trial and Appeal Board,[8] and the International

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[2] 41 U.S.C. § 7107(a) (jurisdiction and filing deadline).

[3] 2 U.S.C. § 1407(a), (b)(1) (jurisdiction and filing deadline).

[4] 31 U.S.C. § 755 (jurisdiction and filing deadline).

[5] 38 U.S.C. § 7292(c), (d) (jurisdiction); *id.* § 7292(a) ("within the time and manner prescribed for appeal to United States courts of appeals from United States district courts").

[6] 28 U.S.C. § 1295(a)(3) (jurisdiction); Ct. Fed. Cl. R. 58.1 ("within the time and in the manner prescribed for appeals in [Fed. R. App. P. 3]"); 42 U.S.C. §§ 300aa-12(f), 300aa-21(a) (jurisdiction and filing deadline for Vaccine Act appeals).

[7] 28 U.S.C. § 1295(a)(4)(A) (jurisdiction); 35 U.S.C. § 141 (jurisdiction); *id.* § 142 (deadline to appeal set by regulation); 37 C.F.R. § 90.3.

[8] 28 U.S.C. § 1295(a)(4)(B) (jurisdiction); 37 C.F.R. § 2.145(d)(1) (filing deadline); *see also* 15 U.S.C. § 1071(a).

Trade Commission.[9] It may be that Congress intended to deny tolling in some or all of those categories of appeals, but the Federal Circuit's broad reading of *Bowles* threatens to bypass that inquiry altogether on the theory that all "[a]ppeal periods to Article III courts . . . [are] 'mandatory and jurisdictional,'" *Fedora* at 848 F.3d at 1015 (quoting *Bowles*, 551 U.S. at 209). Those potential broader consequences further underscore the need for this Court's review.

## CONCLUSION

The petitions in *Vocke*, *Fedora*, and *Musselman* present what is likely the best possible opportunity for this Court to consider the important common question presented. The FCBA takes no position on whether any individual petition is more or less suitable as a vehicle than the other two. This Court should grant one or more of the petitions to decide whether the time limit of 5 U.S.C. § 7703(b)(1)(A) is subject to equitable tolling.

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Respectfully submitted,

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[9] 28 U.S.C. § 1295(a)(6) (jurisdiction); 19 U.S.C. § 1337(c) (deadline).