No. 17-557
No. 17-544

IN THE
Supreme Court of the United States

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

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

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICUS CURIAE* OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES IN SUPPORT OF PETITIONERS FEDORA AND VOCKE

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QUESTION PRESENTED

In *Hamer v. Neighborhood Housing Services of Chicago, et al.*, the Court very recently reiterated that not all appeal filing deadlines are jurisdictional in nature. Deadlines that do not involve the transfer of adjudicatory authority from one Article III court to another, such as the time to appeal an agency decision to a court of appeals, are claim-processing rules.

Most claim-processing rules are non-jurisdictional. There must thus be clear Congressional intent that a deadline have jurisdictional force in order to render it "mandatory and jurisdictional." *Hamer v. Neighborhood Housing Services of Chicago, et al.*, 583 U.S. __ , 2017 WL 5160782 (Nov. 8, 2017) ("*Hamer*"). Assessing whether a claim-processing deadline is jurisdictional, and therefore a mandatory time bar, is a textual and contextual inquiry. That is, analysis of whether Congress has made a clear statement of its intent that a claim-processing deadline be treated as jurisdictional requires the reviewing court to examine the text, purpose and structure of the statute in question. *Id.*; *see also Elgin v. Dep't of Transportation*, 132 S. Ct. 2126, 2133 (2012).

The question presented is whether, in the absence of a clear statement of Congressional intent to the contrary, equitable tolling may be applied to the time period for a federal employee to seek review of a final decision of the Merit Systems Protection Board by the United States Court of Appeals for the Federal Circuit.

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INTEREST OF THE *AMICUS*[1]

The American Federation of Government Employees ("AFGE") is a national labor organization that, on its own and in conjunction with affiliated councils and locals, represents over 650,000 civilian employees in agencies and departments across the federal government.

AFGE's representation of these federal employees extends to administrative litigation before numerous Executive agencies, including the United States Merit Systems Protection Board ("MSPB"), the United States Equal Employment Opportunity Commission, the United States Federal Labor Relations Authority, and the United States Office of Special Counsel. *See e.g.*, *Brown v. Dep't of Defense*, 121 M.S.P.R. 584 (2014), vacated by *Brown v. Dep't of Defense*, 646 Fed. App'x 989 (Fed. Cir. 2016). AFGE's representation also includes collective bargaining, and representation in grievance arbitrations arising under the Federal Service Labor-Management Relations Statute, 5 U.S.C., Chapter 71.

Additionally, because each of these administrative forums has its own provision for seeking judicial review at the conclusion of the administrative process, AFGE often provides representation before federal district courts and federal courts of appeals across

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[1] Counsel for AFGE notified counsel for all parties on November 2, 2017, of AFGE's intent to submit this amicus brief in support of the petitioners. Each party in each case has consented in writing to AFGE's filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than AFGE or its counsel made a monetary contribution to the preparation or submission of this brief.

the United States, including the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). *See*, *e.g.*, *Archuleta v. Hopper*, 786 F.3d 1340 (Fed. Cir. 2015). The question of whether the deadline to appeal from a final MSPB decision may ever be subject to equitable exception is therefore of great consequence to AFGE.

Adding to AFGE's vested interest in this question is the fact that many of the employees who fall within AFGE's bargaining units appear before the MSPB and its reviewing court, the Federal Circuit, without representation. These pro se litigants may come to AFGE for advice and guidance at any point in the process. They may, for example, seek AFGE's representation only after judicial review has been sought. But they just as often, if not more often, litigate their cases on their own. Being laypersons, these employees may rely, understandably, on the Federal Circuit's Guide for Pro Se Petitioners and Appellants.

The question raised here is thus important and likely to have a widespread effect on federal employees. This effect will not be limited to the practical aspects of the MSPB appeal process but is also likely to reach employees' confidence in the integrity of the judicial decision-making process. Consequently, AFGE has an interest in this case.

SUMMARY OF THE ARGUMENT

The decisions below are in direct conflict with this Court's decisions in *Hamer* and *United States v. Kwai Fun Wong*, 135 S.Ct. 1625 (2016) ("*Fun Wong*"). The Federal Circuit incorrectly classified 5 U.S.C. § 7703(b)(1)(A), which governs petitions for review

of an MSPB decision to the Federal Circuit, as a jurisdictional bar, rather than a claim-processing rule.

The Federal Circuit compounded this error by failing to examine the intent of Congress. Had the court of appeals done so, it would have recognized that Congress did not intend to bar the courthouse door to equitable tolling of the time period in which an employee may seek judicial review of a final decision of the MSPB. Put differently, Congress has made no clear statement that section 7703(b)(1)(A) should be treated as jurisdictional. As a result, equitable exceptions are available. This should especially be so given the administrative nature of MSPB appeals and the high number of pro se appeals handled by that agency, many of which are then appealed pro se to the Federal Circuit.

The Court should therefore grant certiorari.

ARGUMENT

I. The Decisions Below Conflict with Relevant Decisions of this Court Because 5 U.S.C. § 7703(b)(1)(A) is a Non-jurisdictional Claim-processing Rule

The court of appeals misapplied this Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), in each of the cases below. The court erroneously concluded that the time to seek judicial review of a decision of the MSPB, as set forth in 5 U.S.C. § 7703(b)(1)(A), was mandatory and jurisdictional merely because it prescribed the time for taking an appeal. *See Fedora v. Merit Systems Protection Board*, 848 F.3d 1013, 1015 (2017). The court of appeals then extended this faulty reasoning to conclude, *ipso facto*, that the time

to seek review of an MSPB decision could not be equitably tolled under any circumstances. *Id.*

Hamer makes even clearer what *Fun Wong* explained. That is, this Court's controlling precedent plainly requires the application of a two-pronged analytical framework for determining whether a filing deadline is "jurisdictional" in the sense that it may never be waived or forfeited, or whether the deadline is a mandatory claim-processing rule, in which case equitable exceptions to the deadline may be available. *Hamer*, 2017 WL 5160782 at *4 ("Mandatory claim-processing rules are less stern. If properly invoked, mandatory claim-processing rules must be enforced, but they may be waived or forfeited.").

To decide which type of deadline is implicated in a given case, the Court has expressed the analytical framework as follows: "If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional, otherwise the time specification fits within the claim-processing category." *Hamer* at *6 (internal citations omitted). Put another way, a statutory deadline to appeal **an agency decision** is a claim-processing rule. That rule may nonetheless have a jurisdictional impact, but only if there is a clear statement of Congressional intent that the rule be considered jurisdictional. *Id.* at n. 9. Even so, most statutory claim-processing rules are not jurisdictional. *Id.*

To decide, in turn, whether Congress has made the "clear statement" necessary to give a deadline jurisdictional effect, the Court employs traditional tools of statutory construction. "But traditional tools of statutory construction must plainly show that Con-

gress imbued a procedural bar with jurisdictional consequences." *Fun Wong*, 135 S.Ct. at 1632. This is to say that "**Congress must do something special**, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." *Id.* (emphasis added).

Here, the deadline at issue is a quintessential claim-processing rule. Section 7703(b)(1)(A) of Title 5 governs petitions for review of a final agency decision to a court of appeals. It does not govern "the transfer of adjudicatory authority from one Article III court to another[.]" *Hamer* at *6. The court of appeals thus erred by assuming, incorrectly, that this Court's holding in *Bowles* settled the question of the deadline's nature with no further inquiry.

The *Fedora* majority, for example, relied chiefly on two arguments for its jurisdictional construction of section 7703(b)(1)(A). First, the court of appeals relied on its own earlier decisions, including *Monzo v. Dep't of Transportation*, 735 F.2d 1335 (Fed. Cir. 1984), for the proposition that the court had always construed section 7703(b)(1)(A) to be "mandatory and jurisdictional." *Fedora*, 848 F.3d at 1014-15. Second, it relied on *Bowles* for the proposition that the deadline for the taking of an appeal was "mandatory and jurisdictional." *Id.* at 1015. The opinion in *Vocke* engaged in an even more cursory analysis, finding simply that that panel was bound by the court's prior precedent. *Vocke v. Merit Systems Protection Board*, 680 Fed. App'x. 944, 946-7 (Fed. Cir. 2017).

But as both the *Fedora* dissent below and this Court have pointed out, the phrase "mandatory and jurisdictional" is an outdated cheat. *See Fedora*, 848

F.3d at 1022 (Plager, J. dissenting), citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), 511. The phrase may no longer substitute as shorthand for a fuller analysis. On top of this, none of the Federal Circuit's earlier precedent invoking the "mandatory and jurisdictional" mantra applied the correct substantive analysis. *Id.* at 1026 (Plager, J., dissenting) (Federal Circuit's precedents have not recognized the current state of Supreme Court law on this subject).

As a result, there is no meaningful argument to be had that the court of appeals applied the correct mode of analysis in these cases. Nor is there a meaningful argument that Congress intended the deadline in section 7703(b)(1)(A) to be jurisdictional. The statute itself admits of no "clear statement" of Congressional intent to imbue the deadline with jurisdictional force. Rather, the deadline stands alone. Section 7703(b)(1)(A)'s plain-Jane statement that "[n]otwithstanding 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" is even less emphatic than the "forever barred" construction that the Court found to be non-jurisdictional in *Fun Wong*. *See Fun Wong*, 135 S.Ct. at 1634-5.

The grant of subject matter jurisdiction to the Federal Circuit, moreover, is not textually tied to the petition filing deadline. Paraphrased, the first sentence of section 7703(b)(1)(A) says that the Federal Circuit will have subject matter jurisdiction over appeals from the MSPB, leaving aside "mixed case" appeals. The second sentence, again paraphrased, then says "and this is how long an employee has to appeal." The former does not depend on the latter.

Finally, one of the goals of the Civil Service Reform Act ("CSRA") was to not only create a comprehensive scheme governing federal employment but to create a comprehensive scheme accessible to federal employees. *See, e.g.*, *Karahalios v. National Federation of Federal Employees*, 489 U.S. 527, 531 (1989). In other words, the very exclusiveness of the CSRA's administrative procedures and their broad application counsel in favor of a "protective" interpretation. A jurisdictional reading of section 7703(b)(1)(A) does not service this purpose.

In summary, the court of appeals misapplied this Court's decisions in each of these cases for which certiorari is sought. In each of these cases the court of appeals failed to recognize that 5 U.S.C. § 7703(b)(1)(A) is a claim-processing rule that is presumptively subject to equitable tolling and that, in fact, is subject to equitable tolling. Congress has not supplied a clear statement that section 7703(b)(1)(A) should be treated as jurisdictional, and the statute's text, purpose, and structure support the availability of equitable exceptions.

Further, each petitioner appeared pro se below. In each case, the filing delay was minor. In each case, the delay was at least in part caused by inaccurate information contained in the Guide for Pro Se Petitioners and Appellants provided by the court of appeals itself. In neither case can the Government make a compelling argument of prejudice. The Government cannot therefore meet its heavy burden of showing that Congress intended section 7703(b)(1)(A) to be jurisdictional.

CONCLUSION

For the foregoing reasons, the Court should grant the petitions for certiorari.

Respectfully submitted,

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