No. 17-570

IN THE
Supreme Court of the United States

JEFFERY S. MUSSELMAN,
Petitioner,

v.

DEPARTMENT OF THE ARMY,
Respondent.

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

MOTION FOR LEAVE TO FILE, OUT OF TIME, A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

AND

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

GREGORY O'DUDEN*
General Counsel
LARRY J. ADKINS
Deputy General Counsel
PARAS N. SHAH
Assistant Counsel
ALLISON C. GILES
Assistant Counsel

NATIONAL TREASURY EMPLOYEES UNION
1750 H Street, N.W.
Washington, D.C. 20006
(202) 572-5500

*Counsel of Record
Counsel for *Amicus Curiae*

Mosaic - (301) 927-3800 - Cheverly, MD

MOTION FOR LEAVE TO FILE, OUT OF TIME, A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The National Treasury Employees Union (NTEU) respectfully moves this Court for leave to file, out of time, a brief *amicus curiae* in support of Petitioner Jeffery S. Musselman. Both parties have consented to NTEU's filing of an *amicus* brief out of time.

In support of its motion, NTEU states as follows:

1. NTEU was unaware of Mr. Musselman's petition for certiorari until earlier this week. Upon learning of the petition, NTEU prepared this brief as expeditiously as possible. NTEU's submission comes only two days after the November 15, 2017 deadline for *amicus* briefs in support of the petition for certiorari.

2. NTEU submitted an *amicus* brief to this Court on November 13, 2017 in two cases raising the same legal issue raised in Mr. Musselman's petition: *Vocke v. Merit Systems Protection Board*, No. 17-544 and *Fedora v. Merit Systems Protection Board*, No. 17-557. NTEU and its members have a strong interest in the resolution of this legal issue, as discussed in more detail in the accompanying brief.

3. NTEU's participation as an *amicus* would bring important information to the attention of the Court that is not contained in the papers filed in this matter to date.

4. Respondent would not be prejudiced by the Court's granting of this motion. Its deadline to respond to Mr. Musselman's petition, December 15, 2017, is still nearly a month away.

For these reasons, NTEU respectfully requests that the Court grant it leave to file the accompanying brief *amicus curiae* in support of the petitioner.

Respectfully submitted,

GREGORY O'DUDEN*
General Counsel
LARRY J. ADKINS
Deputy General Counsel
PARAS N. SHAH
Assistant Counsel
ALLISON C. GILES
Assistant Counsel

NATIONAL TREASURY
EMPLOYEES UNION
1750 H Street, N.W.
Washington, D.C. 20006
(202) 572-5500

*Counsel of Record
Counsel for *Amicus Curiae*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES AND REGULATIONS

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

BRIEF FOR THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS*[1]

The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents the interests of approximately 150,000 employees of the federal government nationwide. Reflecting its keen interest in protecting employee rights, NTEU has been before this Court multiple times, both as a party, *see*, *e.g.*, *United States v. NTEU*, 513 U.S. 454 (1995); *NTEU v. Von Raab*, 489 U.S. 656 (1989), and as an *amicus*. *See*, *e.g.*, *Whitman v. Dep't of Transp.*, 547 U.S. 512 (2006); *Gilbert v. Homar*, 520 U.S. 924 (1997).

NTEU and the employees that it represents have a substantial interest in the resolution of the central issue presented by this case: whether the United States Court of Appeals for the Federal Circuit was barred from considering a petition seeking review of a decision issued by the Merit Systems Protection Board (MSPB), where that petition was not filed

[1] Pursuant to Supreme Court Rule 37.2(a), *amicus* states that all parties consent to the filing of this brief. As explained in the accompanying motion, counsel for the parties did not receive notice of *amicus*'s intent to file a brief 10 days prior to the due date. Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the preparation or submission of this brief.

within the time frame contained in 5 U.S.C. § 7703(b)(1)(A). NTEU frequently assists employees by, *inter alia*, representing them in adverse action proceedings before the MSPB, adverse action arbitrations, and appeals of adverse action decisions by the MSPB or arbitrators to the Federal Circuit.

NTEU submits this brief to explain that the statutory time frame at issue here applies not only to appeals from the MSPB, but also to appeals from arbitration decisions challenging the very same personnel actions that can be appealed to the MSPB. Accordingly, the Federal Circuit's ruling will affect many more employees than just those in the situation of Petitioner Jeffery S. Musselman. Employees who wish to appeal from an adverse arbitration ruling and who miss a court filing deadline through excusable error or because of unavoidable problems, such as natural disasters or illness, will be completely foreclosed from obtaining the judicial review that Congress intended them to have. The Federal Circuit's harsh and incorrect ruling below is at odds with this Court's precedent, including its recent decision in *Hamer v. Neighborhood Housing Services of Chicago*, No. 16-658, slip op. (Nov. 8, 2017). The ruling is also inconsistent with the Civil Service Reform Act's remedial scheme, as well as Congress's intent to allow federal employees flexibility and fairness in challenging adverse actions.

SUMMARY OF ARGUMENT

The Civil Service Reform Act (CSRA or Act) provides that petitions for judicial review of certain

MSPB decisions or arbitration rulings must be filed in the Federal Circuit within 60 days of the MSPB's or arbitrator's decision. 5 U.S.C. §§ 7703(b)(1)(A), 7121(f). The Federal Circuit has held that this 60-day time limit is jurisdictional and cannot be equitably tolled, even for sympathetic petitioners like Mr. Musselman, who is a dedicated public servant who missed this deadline because of an unanticipated and substantial delay in mail delivery. *See* Pet. for Cert. at 6.

This Court should grant the petition for certiorari. Whether Section 7703(b)(1)(A)'s time limit is jurisdictional is of great importance not only to the many federal employees whose adverse actions are challenged at the MSPB, but also to those federal employees who challenge adverse actions through arbitrations available under collective bargaining agreements. The Federal Circuit's decision below jeopardizes appropriate judicial review of these MSPB or arbitration decisions and conflicts with congressional intent.

In addition, the Federal Circuit's decision is at odds with this Court's ruling that a rebuttable presumption of equitable tolling applies to suits against the federal government. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). The Federal Circuit failed to apply *Irwin*. Had the Federal Circuit applied the appropriate analytical framework, it would have concluded that *Irwin*'s equitable tolling presumption is not rebutted here, given Congress's intent, when it enacted the CSRA, to give federal employees fair and meaningful redress for wrongful agency actions.

ARGUMENT

I. This Issue Warrants Supreme Court Review Because the Federal Circuit's Erroneous Decision Severely Undermines the Adverse Action Appeal Rights of More Than a Million Federal Employees.

Petitioner Musselman appealed an adverse ruling by the MSPB to the Federal Circuit.[2] Relying on its recent decision in *Fedora v. Merit Systems Protection Board*, 848 F.3d 1013 (Fed. Cir. 2017), *pet. for cert. pending*, No. 17-557, the Federal Circuit ruled that it had no choice but to deem his petition for review untimely because it was received three days late.[3] The statutory 60-day time limit for appealing to the Federal Circuit applies not only to appeals from the MSPB, but also to appeals from adverse decisions issued by arbitrators pursuant to grievance procedures in collective bargaining agreements. Accordingly, the Federal Circuit's unreasonable and far-reaching interpretation of the statutory time limit affects many more employees than just those in petitioner's situation.

A. The CSRA Provides Two Avenues for Appealing Adverse Actions.

The Act "established a comprehensive system for reviewing personnel action[s] taken against federal employees." *United States v. Fausto*, 484 U.S. 439, 455 (1988). Under that system, employees may appeal certain "adverse actions" taken against them. Adverse

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[2] *Musselman v. Dep't of the Army, 2017 U.S. App. LEXIS 22166 (*Fed. Cir. Oct. 13, 2017).

[3] *Musselman*, *2017 U.S. App. LEXIS 22166*, at *2.

actions are serious personnel actions, such as removals, suspensions of more than 14 days, reductions in pay or grade, and furloughs of 30 days or less. 5 U.S.C. § 7512. The Act provides two basic ways for federal employees covered by the Act to contest an adverse action. Employees may initiate a "statutory" appeal to the MSPB, as petitioner did. 5 U.S.C. § 7701. Before the MSPB, employees may proceed *pro se* or with the assistance of a union or other representative.

Alternatively, employees covered by collective bargaining agreements may use negotiated grievance-arbitration procedures to appeal an adverse action to an arbitrator with the concurrence of their union. 5 U.S.C. § 7121(e)(1); *U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 5 (2001) (under the CSRA, covered employees may appeal removals and other serious disciplinary actions to the MSPB or seek relief through a negotiated grievance procedure, but not both); *Cornelius v. Nutt*, 472 U.S. 648, 650 (1985).

The availability of negotiated grievance procedures for employees subject to serious personnel actions is an important part of the Act. The Act specifically provides that all collective bargaining agreements in the federal sector shall have grievance procedures that include binding arbitration. 5 U.S.C. §§ 7121(a), (b); *Cornelius*, 472 U.S. at 652 (Act requires any collective bargaining agreement to provide for a grievance procedure and arbitration). The two pathways to appeals have the same legal standards and burdens of proof. 5 U.S.C. §§ 7701(c), 7121(e)(2); *Cornelius*, 472 U.S. at 652 (arbitrators are to apply the same substantive standards as the MSPB would in adverse action appeals).

NTEU routinely represents employees in adverse actions. Such representation is a critical element of the union's function. Employees themselves have no statutory right to invoke arbitration on their own; rather, only the union may invoke arbitration on their behalf. 5 U.S.C. § 7121(b)(1)(C)(iii) (authorizing employees' exclusive representative to invoke arbitration).[4] After an adverse action arbitration is resolved, an employee may appeal an unfavorable decision to the Federal Circuit. In sum, the Act "contemplates that at least some eligible employees (those represented by unions) will have two different forums for challenging disciplinary actions" (*Gregory*, 534 U.S. at 9), with an appeal from either forum going to the Federal Circuit.

B. The Time Limit in 5 U.S.C. § 7703(b)(1)(A) Applies to Appeals From Arbitrations.

The Act stipulates that the filing deadline for judicial review found in Section 7703 shall apply to the award of an arbitrator in the same manner as if the matter had been decided by the MSPB. 5 U.S.C. § 7121(f). As with petitioner's case, the Federal Circuit has dismissed petitions for review of unfavorable arbitration decisions on adverse actions as untimely, if they were filed outside the time limit in 5 U.S.C. § 7703(b)(1)(A). *See Laufenberg v. Dep't of Agric.*, 41 F. App'x 410, 412 (Fed. Cir. 2002); *Bennett*

[4] There are separate procedures to be used if a discrimination claim is involved, *see Perry v. MSPB*, 137 S. Ct. 1975 (2017), which are not at issue here.

v. Nat'l Gallery of Art, 1997 U.S. App. LEXIS 22565, at *2 (Fed. Cir. July 31, 1997).

Accordingly, the time limit at issue here applies to many more employees than simply those who choose to bring their actions to the MSPB. Union-represented employees often elect to pursue adverse action appeals through the negotiated grievance process, which was intended to be more informal than proceedings before the MSPB. *See* 5 U.S.C. § 7121(b)(1) (negotiated grievance procedure must be "fair and simple" and "provide for expeditious processing" of claims). Congress wanted to give unions and employees this option, and it expressly encouraged employees, unions, and employer agencies to use negotiated grievance procedures "for the settlement of grievances." 5 U.S.C. § 7121(a)(1).

The Federal Circuit's decision below is a significant one that limits the judicial adverse action appeal rights of over a million federal employees. It affects employees proceeding before the MSPB, as well as those proceeding with the consent of unions, such as NTEU, to arbitration. This Court should accept review of this matter to resolve the important question of whether the time limits for judicial review of adverse actions under Section 7703(b)(1)(A) are jurisdictional or may be equitably tolled.

II. The CSRA's Time Limit for Seeking Judicial Review is Not Jurisdictional and is Subject to Equitable Tolling.

For over a quarter-century, this Court has held that there is a rebuttable presumption of equitable tolling in suits against the government. *Irwin v. Dep't of Veter-*

ans Affairs, 498 U.S. 89, 95-96 (1990). This presumption can be overcome only if Congress clearly indicated in the statute's text or history that it intended for a statute to be jurisdictional. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631-32 (2015). No such clear Congressional statement exists here. As explained below, the rebuttable presumption in favor of equitable tolling, combined with the remedial nature of the CSRA, require an outcome in petitioner's favor.

A. Time Limits for Federal Court Review of Suits Against the Government Are Presumptively Subject to Equitable Tolling.

This Court has established a "general rule to govern the applicability of equitable tolling in suits against the Government." *Irwin*, 498 U.S. at 95. This rule is that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. This Court has recently underscored that "*Irwin* . . . sets out the framework for deciding 'the applicability of equitable tolling in suits against the Government.'" *Kwai Fun Wong*, 135 S. Ct. at 1630. That presumption in favor of equitable tolling can only be overcome if Congress "clearly state[s]" that it intended that result. *Id.* at 1632. Under *Irwin* and its progeny, there is a presumption that the time limit in Section 7703(b)(1)(A) is subject to equitable tolling, and the Federal Circuit's *per se* rule that the provision is jurisdictional and cannot be equitably tolled is wrong.

The Federal Circuit disregarded *Irwin*. Instead, it reflexively held that *Bowles v. Russell*, 551 U.S. 205

(2007), established a rule that statutory time limits involving judicial review in the federal courts are jurisdictional. *Fedora*, 848 F.3d at 1015. *See Musselman*, *2017 U.S. App. LEXIS 22166*, at *2 (relying on *Fedora*). But *Bowles* did not establish such an expansive bright line rule. *Bowles* held that the statutory time limit in 28 U.S.C. § 2107(a) for filing appeals from federal district courts to appellate courts was jurisdictional. *Bowles*, 551 U.S. at 214 (5-4 decision). But neither *Bowles* nor any subsequent Supreme Court decision overruled or disavowed *Irwin*'s rebuttable presumption ruling.

This Court has clarified the limits of *Bowles*'s holding in several subsequent decisions. In the unanimous decision of *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), the Court made clear that *Bowles* did not categorically rule that all statutory time limits involving Article III courts are jurisdictional, explaining:

> *Bowles* did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such. Nor did it hold that all statutory conditions imposing a time limit should be considered jurisdictional. Rather, *Bowles* 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 167-68.

One year after issuing *Reed Elsevier*, this Court again stated that "*Bowles* did not hold categorically that every deadline for seeking review in civil litiga-

tion is jurisdictional." *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011). And, since *Bowles*, this Court has held that certain time limits are not jurisdictional, even when enshrined in statute and even when they involve petitions for review filed in an Article III court. *See Kwai Fun Wong*, 135 S. Ct. at 1630 (statutory time limit for filing Federal Tort Claims Act suits in federal district court was not jurisdictional).

This Court's recently issued unanimous decision in *Hamer v. Neighborhood Housing Services of Chicago*, No. 16-658, slip op. (Nov. 8, 2017), is especially instructive. *Hamer* underscored that, in "cases *not* involving the timebound transfer of adjudicatory authority from one Article III court to another," the Court has "made plain that most [statutory] time bars are nonjurisdictional." *Id.* at 8 n.9 (emphasis added). *Hamer* therefore distinguishes the method for analyzing whether a time limit for an appeal "from one Article III court to another" is jurisdictional (*id.* at 8), from the method for analyzing a time limit for an appeal from a non-Article III body to an Article III court. *See id.* at 8 n.9.

The Federal Circuit misapprehended the pertinent analysis regarding Section 7703(b)(1)(A)'s time limit. Like "[s]everal [other] Courts of Appeals," the Federal Circuit, in its decisions below, "tripped over [this Court's] statement in *Bowles* that the taking of an appeal within the prescribed time is mandatory and jurisdictional." *Hamer*, slip op. at 9 (internal quotation marks omitted). *See Musselman*, *2017 U.S. App. LEXIS 22166*, at *2 (relying on *Fedora* for its holding that Section 7703(b)(1)(A)'s time limit is "'mandatory' and 'jurisdictional'"); *Fedora*, 848 F.3d at 1015

(quoting *Bowles*'s "mandatory and jurisdictional" language and relying upon it for its holding). As this Court observed in *Hamer*, this "'mandatory and jurisdictional' formulation is a characterization left over from days when we were 'less than meticulous' in our use of the term 'jurisdictional.'" *Hamer*, slip op. at 9 (quoting *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004)).

In sum, the "rebuttable presumption" approach, established in *Irwin*, is the appropriate framework for deciding whether Section 7703(b)(1)(A) is jurisdictional, and the Federal Circuit erred in failing to apply it. The court below, consequently, failed to assess whether that presumption could be overcome. Such an outcome would require a "clear statement" by Congress that it intended the time limit to be jurisdictional. *Hamer*, slip op. at 8 n.9; *Kwai Fun Wong*, 135 S. Ct. at 1632. If the Federal Circuit had performed the proper analysis, this high hurdle would not have been cleared.

B. The CSRA's "Context" Shows That *Irwin*'s Presumption Cannot Be Rebutted Here.

To assess whether a "clear statement" of congressional intent exists to rebut the *Irwin* presumption that equitable tolling is available, courts examine the statutory provision's text, context, and legislative history. *Kwai Fun Wong*, 135 S. Ct. at 1631-32. *Accord Hamer*, slip op. at 8 n.9. This Court has emphasized the heavy burden on the party attempting to show that such a "clear statement" exists in a statute's "context." *Hamer*, slip op. at 8 n.9.

Had the Federal Circuit undertaken this required "clear statement" analysis, it would have concluded

that Congress intended the CSRA to serve the remedial purpose of protecting federal employees' rights. Far from rebutting the *Irwin* presumption, the CSRA's context and purpose further weigh in favor of allowing equitable tolling of Section 7703's time limit for seeking judicial review.

As an initial matter, there is nothing in the text of Section 7703 to indicate that Congress intended its time limit to be jurisdictional. The Federal Circuit's divided panel decision in *Fedora*, followed in *Musselman*, is not to the contrary; the two-judge majority did not attempt to argue that the provision explicitly conferred jurisdiction. *See generally Fedora*, 848 F.3d at 1014-17. We thus turn our focus, as *Irwin* and *Reed Elsevier* instruct, and as the Federal Circuit failed to do, to the CSRA's "context." *See Reed Elsevier*, 559 U.S. at 166. Specifically, we turn to the CSRA's purpose and Congress's intent in enacting it.

This Court has repeatedly considered the remedial nature of a statute when interpreting whether a time limit is jurisdictional or may be equitably tolled. In *Henderson*, for example, this Court recognized that veterans' benefits programs were aimed at protecting claimants, and given this purpose, held that a statutory time limit on filing appeals with the U.S. Court of Appeals for Veterans Claims was not jurisdictional. 562 U.S. at 437, 440. While *Henderson* involved an appeal to an Article I, and not Article III, court, it remains instructive here—in particular, its holding, echoed in other Supreme Court decisions, that context matters in assessing whether a statutory time limit is jurisdictional.

On this same point, the Court held in *Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982), that the time limit for filing Title VII discrimination claims with an administrative agency was not jurisdictional. In so ruling, it "honor[ed] the remedial purpose of the legislation as a whole." *Id.* at 398. And, in *Dolan v. United States*, 560 U.S. 605, 613-14 (2010), this Court excused a statutory deadline for determining the amount of restitution for a crime victim in light of the context and purpose of the Mandatory Victims Restitution Act to help crime victims. *See also Bowen v. New York*, 476 U.S. 467, 480-81 (1986) (equitable tolling of a filing deadline is appropriate given the purpose of the social security disability statute); *Honda v. Clark*, 386 U.S. 484, 495 (1967) (statutory deadline for filing claims was tolled in light of the statute's purpose to fairly distribute assets owned by an enemy government to American residents); *Irwin*, 498 U.S. at 102 (Stevens, J., concurring in part, dissenting in part) (Title VII is a remedial statute, the provisions of which "should be construed in favor of those whom the legislation was designed to protect").

The government may contend that these cases are not on point because they involve "claims processing" statutes. But categorizing a statute as "claims processing" rather than "jurisdictional" is simply a conclusion, not a method for analysis. What cuts across this Court's jurisprudence is the repeated recognition that "context . . . is relevant," *see, e.g.*, *Reed Elsevier*, 559 U.S. at 168, in resolving whether a statutory time limit is jurisdictional. And the important context here is that the CSRA's text and legislative history demonstrate that it is a statute with significant remedial characteristics. Accordingly, its time

limits should be construed favorably towards the employees that the Act was designed to safeguard and should be subject to equitable tolling.

It is indisputable that protecting federal employees was an important purpose of the Act. President Jimmy Carter stressed the protective nature of civil service reform legislation both when he initially proposed it, and when he signed the final bill into law several months later. *See* H.R. Doc. No. 95-299 (March 2, 1978) (*Message from President Jimmy Carter to Congress Regarding Comprehensive Program to Reform the Federal Civil Service System*) (objective of reform is "[t]o strengthen the protection of legitimate employee rights"); *Statement of Jimmy Carter on Signing S. 2640 Into Law* (Oct. 13, 1978), *reprinted in* Legis. History of the Fed. Serv. Labor-Mgmt. Relations Statute, Title VII of the Civil Service Reform Act of 1978, 639 (1979) (new system will provide "better protection for employees against arbitrary actions and abuses").

Indeed, the core merit systems principles of the Act specifically include protecting employees "against arbitrary action, personal favoritism, or coercion for partisan political purposes" and "against reprisal for . . . lawful disclosure[s]" of violation of law or mismanagement. 5 U.S.C. §§ 2301(b)(8), (9). A stated purpose of the final bill was to further the United States' policy that "[f]ederal employees should receive appropriate protection[.]" Pub. L. No. 95-454, § 3(3), 92 Stat. 1111, 5 U.S.C. § 1101 note (1978). *See* H.R. Rep. No. 95-1403 at 405 (1978) (Additional Views of Five Minority Members of House Committee on Post Office and Civil Service) (compe-

tent, dedicated government employees "must be protected as the Congress attempts to evaluate and change the present system").

Congress paid particular attention to protecting employees' "due process rights." S. Rep. 95-969, *reprinted in* 1978 U.S.C.C.A.N. 2723, 2774 (1978). The Act therefore requires a valid reason, such as cause or unacceptable performance, to terminate a tenured employee, and it affords such an employee procedures through which he or she can challenge a proposed removal or other serious adverse actions. *See* 5 U.S.C. §§ 4303, 7511-7513. Courts have recognized that "the federal statutory employment scheme plainly creates a property interest in continued employment" which cannot be removed "without constitutional safeguards." *Stone v. FDIC*, 179 F.3d 1368, 1375 (Fed. Cir. 1999) (internal citation omitted).

An additional safeguard embodied in the Act is judicial review in the Federal Circuit of decisions on adverse actions issued by the MSPB or arbitrators. *See* 5 U.S.C. §§ 7703, 7121(f). Providing judicial review of these decisions—the type of review that Petitioner Musselman has thus far been denied—is a critical protection for federal employees. It provides an opportunity to have an Article III court assess the serious personnel actions to which the employees have been subjected.

Thus, the Act repeatedly demonstrates Congress's intent to treat federal employees with utmost fairness by providing them with meaningful due process and understandable and accessible procedures. *See* 5 U.S.C. § 2301(b)(2) ("[A]ll employees and appli-

cants . . . should receive fair and equitable treatment . . . .”). This intent is reflected throughout the Act’s legislative history. *See*, *e.g.*, S. 2640, 95th Cong. § 7201(c) (1978) (“It is the purpose of this subchapter to prescribe certain rights and obligations of the employees of the Federal Government, subject to the paramount interest of the public . . . .”); H.R. Doc. No. 95-299 (March 2, 1978) (*Message from President Jimmy Carter to Congress Regarding Comprehensive Program to Reform the Federal Civil Service System*) (previous civil service system was a “bureaucratic maze which . . . permits abuse of legitimate employee rights”); 123 Cong. Rec. E5566 (daily ed. Sept. 14, 1977) (statement of Rep. Clay) (existing procedures for resolving employee disputes is “unwieldly”).[5]

It would be incongruous with the Act’s design to view Section 7703 as a strict and unyielding jurisdictional time deadline, as the Federal Circuit did, especially where there is no indication that Congress intended for this provision of the CSRA to be so interpreted. On the contrary, like the statutory schemes at issue in *Irwin* and *Henderson*, it was an important element of the Act to make its remedial appeal provisions accessible. Viewing Section 7703 as non-jurisdictional would be consistent with this principle and consistent with this Court’s precedent.

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[5] This Court has previously considered the Act’s legislative history in interpreting its provisions. *Cornelius*, 472 U.S. at 661 (reviewing Senate and House reports in deciding what standards arbitrators should apply in deciding grievances).

Doing so, moreover, would permit employees to advance equitable arguments relating to a late-filed petition, and thereby keep the courthouse door open in appropriate circumstances such as those surrounding petitioners. Petitioner Musselman understandably relied on the United States Postal Service to deliver his priority mailing in a timely fashion; its inexplicable and substantial delay in delivering his petition for review to the Federal Circuit caused the filing to arrive late, potentially dooming his appeal. Other petitioners might similarly encounter unavoidable problems in meeting the filing deadline.[6] It would be a "'drastic' result" (*see Hamer*, slip op. at 2) and at odds with the CSRA's design if these employees were to lose their right to Article III review because of the Federal Circuit's unwarranted reading of Section 7703(b)(1)(A).

So that employees may fully exercise the appeal rights that Congress intended for them to have, the Federal Circuit should be able to consider petitions that are untimely filed due to circumstances like petitioner's or other events such as natural disasters, fires, and illness. Based on its experience, NTEU strongly believes that the employees it represents would benefit from having the chance to raise such

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[6] *See Pinat v. Office of Pers. Mgmt.*, 931 F.2d 1544, 1546 (Fed. Cir. 1991) (petition dismissed as untimely notwithstanding petitioner's claim of "disastrous typhoons" in his home country from where he was filing); *Bennett*, 1997 U.S. App. LEXIS 22565, at *2 (petition for review of arbitration decision dismissed as untimely, notwithstanding confusing letter petitioner received from the court).

equitable considerations regarding noncompliance with Section 7703's time limit.

CONCLUSION

For the foregoing reasons and those set forth in the petition for writ of certiorari, NTEU respectfully requests that the Court grant certiorari and reverse the Federal Circuit's decision below.

Respectfully submitted,

GREGORY O'DUDEN*
General Counsel
LARRY J. ADKINS
Deputy General Counsel
PARAS N. SHAH
Assistant Counsel
ALLISON C. GILES
Assistant Counsel

NATIONAL TREASURY
EMPLOYEES UNION
1750 H Street, N.W.
Washington, D.C. 20006
(202) 572-5500

*Counsel of Record
Counsel for *Amicus Curiae*