No. 17-570

# In the Supreme Court of the United States

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

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

## REPLY BRIEF FOR PETITIONER

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## INTRODUCTION

A decorated veteran has been denied his day in court because the Government (in the form of the U.S. Postal Service) inexplicably took 16 days to deliver his priority mail petition. That manifestly unjust result is the product of a Federal Circuit rule that treats § 7703(b)(1)(A)'s 60-day deadline as "jurisdictional" and not subject to equitable tolling. That rule has persisted for decades in the face of vigorous dissents and a long line of decisions from this Court holding that most statutory deadlines are *not* jurisdictional and *are* subject to equitable tolling. The question presented is critically important to federal employees nationwide, and this case offers the best vehicle to decide it.

The Government does not dispute any of that. Indeed, in marked contrast to its opposition to the other pending certiorari petitions raising the same question, the Government appears to agree that Petitioner *would* otherwise be entitled to equitable tolling. The Government nonetheless opposes review because it believes that § 7703(b)(1)(A)'s time limit is jurisdictional. The Government's labored defense of the Federal Circuit's rule can and should be considered by this Court *after* granting review. But even a cursory look reveals that the Government's position flouts this Court's recent precedents—including, most notably, the Court's unanimous decision just last month in *Hamer v. Neighborhood Housing Services*, 138 S. Ct. 13 (2017). For whatever reason, neither the Government nor the Federal Circuit has gotten the message. This Court's intervention is needed.

## ARGUMENT

### I. The Federal Circuit's Decision Conflicts With This Court's Precedents

Statutory time limits are presumptively subject to equitable tolling. The Government's only attempt to rebut that presumption is to argue that the 60-day deadline in § 7703(b)(1)(A) is "jurisdictional." But a statutory time limit will not be treated as jurisdictional absent a "clear statement." Pet. 10-12. There is no clear statement here, and the Government's refusal to even acknowledge that standard speaks volumes.

1. The Government begins by invoking this Court's 30-year-old decision in *Lindahl v. OPM*, 470 U.S. 768 (1985). But *Lindahl* did not mention the 60-day deadline at all. Perhaps for that reason, the Federal Circuit has never relied on *Lindahl* to support its decades-long jurisdictional treatment of that time limit.

The issue in *Lindahl* was whether the Federal Circuit had jurisdiction to review an MSPB disability retirement decision directly, or whether retirees were required to first file in the Claims Court or a district court. The Government argued for the latter by relying on § 7703(a)(1)'s reference to "employee[s]" or "applicant[s] for employment," and contending that § 7703(b)(1)'s broader language was "'nothing more than a venue provision.'" *Id.* at 792 (citation omitted). In rejecting *that* argument, this Court explained that "Section 7703(b)(1) confers the operative grant of jurisdiction—the 'power to adjudicate'—and is not in any sense a 'venue provision.'" *Id.* at 793. But the *only* "jurisdictional perimeters" described were those contained in the first sentence of § 7703(b)(1)—*i.e.*, that there be "*a final order or final decision of the Board*."

*Id.* at 792-93. As the Government admits (at 11), the Court nowhere mentioned the 60-day deadline in the second sentence—let alone characterized it as "jurisdictional."

2. The Government next offers two contextual arguments—neither of which comes close to satisfying the "clear statement" test.

First, the Government argues that "the time bar and jurisdictional grant are located in the same provision." Opp. 12. But this Court has repeatedly rejected similar "proximity-based argument[s]." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 155 (2013) (refusing to treat time limit as jurisdictional simply because two other conditions in same section were "jurisdictional requirements"); *see Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975) (holding that only one of three requirements for judicial review in 42 U.S.C. § 405(g) was jurisdictional); *Gonzalez v. Thaler*, 565 U.S. 134, 143 (2012) (holding that 28 U.S.C. § 2253(c)(2) was not jurisdictional even though many surrounding provisions were). As the Court has admonished, "[a] requirement we would otherwise classify as nonjurisdictional . . . does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." *Auburn Reg'l*, 568 U.S. at 155.

Second, the Government notes that the time limit is "link[ed]" to 28 U.S.C. § 1295(a)(9), which states that the Federal Circuit has "exclusive jurisdiction" over "an appeal" of a final MSPB order "pursuant to sections 7703(b)(1) and 7703(d)." Opp. 12 (alteration in original) (citations omitted). As this Court recognized in *Kloeckner v. Solis*, 568 U.S. 41 (2012), however, the different requirements in § 7703(b) serve different

purposes. And while the Court was discussing § 7703(b)(2), the same analysis applies to § 7703(b)(1)(A). "The first sentence defines *which* cases should be brought" in the Federal Circuit, *i.e.*, petitions for review from final MSPB decisions not covered by § 7703(b)(2). *Id.* at 53. "The second sentence states *when* those cases should be brought," *i.e.*, within 60 days after the final decision issues; it "is nothing more than a filing deadline." *Id.* at 52. That the Federal Circuit has "exclusive jurisdiction" over certain cases set forth in the first sentence—*i.e.*, "pursuant to § 7703(b)(1)"—does not mean the Federal Circuit lacks *jurisdiction* over those cases if not timely filed under the 60-day deadline set forth in the second sentence.

Notably, the Government made a similar "cross-reference" argument in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015). *See Wong* U.S. Br. 36-37 (Sept. 9, 2014) (arguing that grant of "exclusive jurisdiction" was "expressly conditioned" on compliance with time limitation based on a "cross-reference"). In finding the time limit nonjurisdictional, the Court necessarily rejected the argument there too.

3. The Government then turns to the case law and argues congressional acquiescence. These arguments fare no better.

a. The Government first contends (at 12-13) that the Federal Circuit has treated § 7703(b)(1)'s time limit as jurisdictional "for more than 30 years" and that Congress "did nothing to alter the jurisdictional nature of the filing deadline" when it amended § 7703(b)(1) in

2012.[1] But as the Government later acknowledges, this Court will only "presume that Congress intended to follow" such a course when "a long line of *this Court's* decisions" treating a requirement as jurisdictional is "left undisturbed." Opp. 13, 15 (quoting *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 436 (2011) (emphasis added) (internal quotation marks omitted)); *see Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 173–74 (2010) (Ginsburg, J., concurring).

The Government, moreover, identifies nothing suggesting that Congress was aware of the Federal Circuit's "jurisdictional" decisions—let alone that it "acquiesce[d]" in them. And this Court was unpersuaded by a far stronger acquiescence argument in *Wong*. *See Wong* U.S. Br. 42-45. There is no justification for a different result here.

b. As for *this Court's* decisions, the Government repeats the Federal Circuit's error in overreading *Bowles v. Russell*, 551 U.S. 205 (2007).

As the petition explained (at 18), *Henderson* clarified that *Bowles* concerned "an appeal from one court *to another court*," and that "[t]he 'century's worth of precedent and practice in American courts' on which *Bowles* relied involved *appeals of that type*." *Henderson*, 562 U.S. at 436 (emphases added). Earlier this Term, the Court reaffirmed that understanding. In *Hamer v. Neighborhood Housing Services*, the Court explained that *Bowles* stands only for the

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[1] The other courts of appeals decisions the Government relies on (at 12) were "drive-by jurisdictional rulings" in the early 1980s—well before this Court's more recent decisions bringing discipline to what legal rules are properly characterized as jurisdictional.

proposition that "a time prescription governing the transfer of adjudicatory authority *from one Article III court to another*" is jurisdictional. 138 S. Ct. 13, 20 (2017) (emphasis added). "[C]ases not involving the timebound transfer of adjudicatory authority *from one Article III court to another*," in contrast, are subject to a "clear-statement rule." *Id.* at 20 n.9 (emphasis added).

The Government's suggestion (at 13) that *Hamer* supports its reading of *Bowles* is puzzling.[2] The MSPB is not an "Article III court." And § 7703(b)(1)(A) thus does not involve the transfer from "one Article III court to another." The Government seeks to extend *Bowles*, not apply it.[3]

c. The Government's reliance on *Stone v. INS*, 514 U.S. 386 (1995), is also misplaced. Notably, the Federal Circuit did not rely on *Stone*, which it interprets to mean "that statutory provisions specifying the time for review are not subject to equitable tolling, after *Irwin* [*v. Department of*

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[2] The Government also ignores *Hamer* when it contends (at 15 n.6) that the Federal Rules of Appellate Procedure "support treating the time limit in Section 7703(b)(1)(A) as jurisdictional." That argument was unsustainable after *Eberhart v. United States*, 546 U.S. 12 (2005). *See* Pet. 16-17. It is incomprehensible after *Hamer*. 138 S. Ct. at 19-22 (clarifying that FRAP time limits are never jurisdictional).

[3] The Government says it is not arguing that "*Bowles* renders *all* statutory time bars, or all time bars in civil litigation, jurisdictional." Opp. 20 n.7. But the Government *is* arguing that an "appeal from a quasi-judicial agency to the court of appeals[] is jurisdictional" (*id.*), and *Bowles* cannot support that contention either. Without *Bowles*, the Government has to find the requisite "clear statement" elsewhere.

*Veterans Affairs*, 498 U.S. 89 (1990)], *if Congress has so expressed its intent*." Pet. 16 n.3 (citation omitted). That just brings the Court back to the question at hand: Did Congress speak with the necessary clarity?

Indeed, *Stone* was not even about equitable tolling or the jurisdictional nature of the time limit. The issue was whether a "timely motion for reconsideration of a decision by the Board of Immigration" tolled the 90-day period for seeking judicial review. *Stone*, 514 U.S. at 388. The vast majority of the opinion is devoted to answering that question. In the final section, the Court broadly states that "[j]udicial review provisions . . . are jurisdictional in nature," and that "statutory provisions specifying the timing of review . . . [are] 'mandatory and jurisdictional'" and not "subject to equitable tolling." *Id.* at 405 (citation omitted). These stray statements were not essential to the Court's decision and were made "without elaboration." *Henderson*, 562 U.S. at 437. And they are quintessential "drive-by" statements, fundamentally inconsistent with the Court's more recent decisions. Whatever precedential effect *Stone* may (or may not) have with respect to the specific time limit at issue in that case, there is absolutely no basis to extend that discredited reasoning to other "judicial review provisions."[4]

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[4] Citing *Henderson*, the Government also relies on courts of appeals decisions treating the Hobbs Act time limit as jurisdictional. Opp. 14. *Henderson*, in turn, cites the Government's brief in that case, which identifies two decisions so holding. *Henderson* Br. of Resp. 18 (Nov. 1, 2010), 2010 WL 4312791. The Eighth Circuit case is 20 years old and contains no reasoning. *See Florilli Corp. v. Pena*, 118 F.3d 1212, 1214 (8th Cir. 1997). And the D.C. Circuit recently questioned the viability of its prior decisions. *See Free Access & Broadcast Telemedia, LLC v.*

4. Finally, the Government (at 15) relies on the "origins" of § 7703(b)(1). But Congress's decision to *depart* from the Tucker Act and the Hobbs Act cannot suggest an intent to adhere to (never mentioned) court interpretations of those distinct time limits. *Cf. Stone*, 514 U.S. at 397 ("Had Congress intended review of INS orders to proceed in a manner no different from review of other agencies" it would not have excepted the relevant provision from the Hobbs Act). Moreover, *Wong* refused to extend this Court's Tucker Act precedent to the FTCA's identically worded provision despite evidence that Congress adopted that language with full knowledge of those recently decided cases. 135 S. Ct. at 1634-36. And *this Court* has never found the Hobbs Act time limit to be jurisdictional. *See supra* at 4-5 & 7 n.4.

5. The Government does not (and cannot) dispute that this Court's recent decisions overwhelmingly find statutory time limits nonjurisdictional. In attempting to parse and distinguish each case, the Government forgets this Court's consistent refrain: Time limits are *rarely* jurisdictional and a *clear* statement is *always* required. The question is thus not whether this case is more like *Bowles*, on the one hand, or *Wong*, *Henderson*, *Bowen*, and *Irwin*, on the other. Even if § 7703(b)(1)(A)'s time limit fell somewhere in between, the question is whether Congress *clearly* deemed it jurisdictional. It obviously did not.

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*FCC*, 865 F.3d 615, 618 n.1 (D.C. Cir. 2017) (noting that, although "we have previously described this deadline as jurisdictional, the relevant statute does not—and the Supreme Court has told us to treat such statutory limits as non-jurisdictional unless Congress clearly says otherwise" (citation omitted)).

In any event, the Government's proffered distinctions fall flat. For example, the Government asserts (at 20-21) that *Wong*, *Bowen*, and *Irwin* all involved judicial review of an agency decision in a district court, not a court of appeals. But this Court has never relied on the trial or appellate nature of the reviewing tribunal, and it is hard to understand why an appellate court's adjudicatory authority should be more limited than a district court's. The Government's suggestion (at 16) that appellate courts may not be "well-situated to perform" "adjudicatory factfinding" both overstates the "factfinding" necessary to resolve an equitable tolling claim and understates an appellate court's capacity to resolve ancillary factual disputes. *See*, *e.g.*, Fed. R. App. P. 8 (authorizing stays and injunctions pending appeal); *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168, 1170-76 (Fed. Cir. 2017) (making factual findings required to determine party's standing on appeal). Indeed, the Government identifies *no* factual dispute in this case at all.

The Government also notes that *Henderson* and *Bowen* involved statutory schemes "unusually protective" of the claimants. Opp. 19, 20 (citations omitted). But the CSRA's administrative scheme is also especially protective of federal employees, who include veterans and who often proceed pro se. Pet. 13-14, 18; *see* NVLSP *et al.* Amicus Br. 14-18, *Fedora v. MSPB*, No. 17-557 (Nov. 13, 2017), 2017 WL 5479488 (explaining adverse impact on veterans).

## II. Judges And Courts Disagree On This Important Question

1. The Federal Circuit's exclusive jurisdiction is a reason to grant, not deny, review. There is vigorous disagreement among Federal Circuit judges regarding

the question presented. Pet. 19. It is a critically important and recurring question for federal employees nationwide—as evidenced by the sheer number of decisions (Pet. 19 n.4; FCBA Amicus Br. 13-14), the three pending certiorari petitions, and the multiple amicus briefs filed in support. And there is little reason to think the Federal Circuit will suddenly change course.[5] The Government does not dispute any of these basic facts. That is reason enough to grant review.

2. The Government argues (at 22-24) that the decision below does not conflict with other courts of appeals decisions finding that the neighboring time limit in § 7703(b)(2) is *not* jurisdictional. Tellingly, the Government does not take a position on whether those cases were correctly decided. And it does not dispute that § 7703(b)(1)(A) and (b)(2)'s time limits are textually indistinguishable. Instead, the Government asserts that § 7703(b)(2) involves judicial review in a district court, and is otherwise contextually distinct. Those arguments fail for the reasons set forth above. And the Government's suggestion (at 24) that § 7703(b)(2) might be nonjurisdictional because it

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[5] On December 19, 2017, Clifford Jones, Sr. filed a petition for rehearing en banc raising this issue, based on this Court's recent decision in *Hamer*. *See* Petition for Rehearing En Banc, *Jones v. DHS*, No. 17-1624 (Fed. Cir.), ECF No. 39. Likewise, the Government suggests (at 24-25) that this Court review may be "premature" because of *Hamer*. But the Federal Circuit has had multiple opportunities to reconsider its precedent in light of this Court's intervening decisions, yet—with the Government's encouragement and support—it has consistently refused to do so. That the Government has not acquiesced or proposed a GVR even after *Hamer* suggests this Court's intervention is needed.

includes Title VII claims like those in *Irwin* proves far too much; the presumption against equitable tolling is obviously not so limited.[6]

## III. This Case Is The Best Vehicle For Resolving The Question Presented

The Government does not dispute that this case presents an ideal vehicle; that the Federal Circuit's answer to the question presented was dispositive; and that the untimely filing was not Petitioner's fault and purely a result of the inexplicable 16 days it took to deliver Petitioner's priority mail filing. Moreover, unlike its response to the two other pending certiorari petitions raising the same issue, the Government appears to agree that Petitioner *would* otherwise be entitled to equitable tolling. *Compare* Opp. 25, *with* Opp. 28, *Fedora v. MSPB*, No. 17-557 (Dec. 13, 2017) ("it is far from clear that petitioner's reliance on the *Guide* would entitle him to equitable tolling even if it were available"), *and* Opp. 29, *Vocke v. MSPB*, No. 17-544 (Dec. 13, 2017) (same).[7]

The facts of this case are also particularly egregious: Petitioner is a Bronze Star recipient who served this country with distinction for decades, and

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[6] The Government suggests (at 13) that the 2012 amendments made the time limit in § 7703(b)(1)(A) less "petitioner-friendly." But, as the Government notes elsewhere (at 24 n.9), Congress gave federal employees 60 days to seek such review, unlike under § 7703(b)(2), which provides only 30.

[7] *Fedora* may also present a separate jurisdictional issue. It was filed as a "mixed case" directly in the Federal Circuit, raising questions regarding the Court's authority to hear the case after *Perry v. MSPB*, 137 S. Ct. 1975 (2017). *See Fedora v. MSPB*, 868 F.3d 1336, 1337 (Fed. Cir. 2017).

who reasonably relied on the U.S. Postal Service to deliver his priority mail filing in a timely manner. And Petitioner has a strong claim that he was subjected to adverse personnel actions in retaliation for protected whistleblower disclosures—as even the MSPB agreed. He deserves his day in court.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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