No. 18-___

IN THE

Supreme Court of the United States

KAREN GRAVISS,
Petitioner,

v.

DEPARTMENT OF DEFENSE, DOMESTIC DEPENDENT ELEMENTARY AND SECONDARY SCHOOLS,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under 5 U.S.C. § 7703, a federal employee aggrieved by a final decision of the Merit Systems Protection Board or a final arbitration decision under 5 U.S.C. § 7121 may petition for review in the United States Court of Appeals for the Federal Circuit. A "petition for review shall be filed within 60 days" of issuance of the final decision. 5 U.S.C. § 7703(b)(1)(A).

In this case, an arbitrator upheld petitioner's removal from federal employment. Petitioner then sought review in the Federal Circuit, and a panel of that court reversed on the merits. After granting the Government's request for en banc review and full briefing on the merits, the en banc Federal Circuit sua sponte remanded to the panel to consider the petition's timeliness—nearly three years after the petition had been filed and even though the Government had never raised a timeliness defense. The panel held, in a split decision, that Section 7703(b)(1)(A) imposes an absolute jurisdictional bar on any late petition for review and dismissed for lack of jurisdiction because the petition had been filed one day late. The Federal Circuit denied rehearing and rehearing en banc, with four judges dissenting.

The questions presented are:

1. Whether the 60-day period for seeking Federal Circuit review under 5 U.S.C. § 7703(b)(1)(A) sets a jurisdictional bar, as the panel majority held, or prescribes a claim-processing rule subject to exceptions such as forfeiture, as the dissenting judges below maintained.

2. Whether the Government forfeited its timeliness defense.

PARTIES TO THE PROCEEDING

Petitioner Karen Graviss was a petitioner in the court of appeals. The Federal Education Association – Stateside Region was also a petitioner in the court of appeals but is not a petitioner in this Court. *See* Pet. App. 3a n.1. Respondent Department of Defense, Domestic Dependent Elementary and Secondary Schools was the sole respondent in the court of appeals and is the sole respondent in this Court.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Karen Graviss respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. 1a) is published at 898 F.3d 1222. The Federal Circuit's order denying rehearing en banc and panel rehearing (Pet. App. 30a) is published at 909 F.3d 1141. The Federal Circuit's earlier order granting rehearing en banc (Pet. App. 24a) is published at 873 F.3d 903. The Federal Circuit's order dissolving the en banc court and remanding to the panel (Pet. App. 28a) is published at 889 F.3d 1385.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 2018. Pet. App. 1a. A timely petition for rehearing en banc was denied on December 3, 2018. Pet. App. 30a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

5 U.S.C. § 7703(b)(1) provides in relevant part:

> (A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after

> the Board issues notice of the final order or decision of the Board.

5 U.S.C. § 7121 provides in relevant part:

> (f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board.

28 U.S.C. § 1295 provides in relevant part:

> (a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction …
>
> (9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5[.]

INTRODUCTION

This Court should grant review because, as the dissenting judges below observed, the Federal Circuit "majority's holding [is] directly contrary to binding Supreme Court precedent" on "a question of exceptional importance." Pet. App. 43a.

Petitioner Karen Graviss was removed from her federal employment following proceedings that she maintains violated her due-process rights. After an arbitrator rejected Graviss's due-process argument, she filed a petition for review in the U.S. Court of

Appeals for the Federal Circuit. After briefing and oral argument, Graviss vindicated her due-process claim before a panel of the Federal Circuit.

The Federal Circuit then granted the Government's petition for rehearing en banc on the due-process issue. After full merits briefing, the en banc court, on its own initiative, asked the parties to address whether Graviss's petition for review was timely under 5 U.S.C. § 7703(b)(1)(A), which gives federal employees 60 days to seek review in the Federal Circuit of an adverse employment decision. By then, Graviss had been litigating her claim in the Federal Circuit for 33 months, and the Government had never challenged the timeliness of her petition. After further briefing, the en banc court remanded the timeliness issue to the panel.

Over Graviss's objection that the Government had long ago forfeited any timeliness defense, the panel held, in a split decision, that Section 7703(b)(1)(A) erects an absolute jurisdictional bar. It therefore dismissed Graviss's petition for lack of jurisdiction because it had been filed one day late. In doing so, the panel majority brushed aside this Court's sustained efforts to distinguish between jurisdictional rules, which when violated deprive a court of authority over the case and necessitate dismissal, and claim-processing rules, which "are less stern" and "may be waived or forfeited." *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17 (2017).

Filing deadlines "are quintessential claim-processing rules," *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011), and are presumed nonjurisdictional unless Congress "clearly states" otherwise, *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006). Claim-

processing rules "seek to promote the orderly progress of litigation," but branding a rule jurisdictional "alters the normal operation of our adversarial system" and may result in "waste of judicial resources" and "unfair[] prejudice." *Henderson*, 562 U.S. at 434.

Graviss's predicament—dismissal of her due-process claim after nearly three years of litigation and victory on the merits before the panel—is a perfect example of the "drastic" consequences that may occur when a rule is labeled "jurisdictional." *Henderson*, 562 U.S. at 435. Those consequences should not have occurred here because Congress has not clearly stated that the time limit in Section 7703(b)(1)(A) is jurisdictional, as Congress must before a court may say it is. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013). That is so because Section 7703(b)(1)(A) "does not speak in jurisdictional terms or refer in any way to the jurisdiction" of the Federal Circuit. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982).

This Court should grant this petition to consider whether Section 7703(b)(1)(A)'s time limit is jurisdictional or, rather, is a claim-processing rule subject to exceptions such as forfeiture. That question is important. It potentially affects the rights of thousands of federal employees who may seek review of adverse employment decisions only in the Federal Circuit. And because the Federal Circuit's ruling below is based on an interpretation of 28 U.S.C. § 1295, the statute giving the Federal Circuit jurisdiction over myriad tribunals and subject matters, unless this Court intervenes, the decision below will be felt far beyond the federal employment context.

STATEMENT OF THE CASE

I. Legal background

A litigant's failure to satisfy a claim-processing rule generally is not a jurisdictional bar to suit. Instead, it is an affirmative defense that is forfeited when, as here, it is not timely raised by the litigant's opponent. We first review the Court's precedent on this topic and then describe the relevant statutes.

A. Congress may (and sometimes does) place jurisdictional limits on a court's adjudicatory authority. More frequently, however, it prescribes procedural rules for claim processing that, though perhaps mandatory when properly invoked, do not limit the court's jurisdiction. Among these are "filing deadlines," which "are quintessential claim-processing rules." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

Courts "have sometimes mischaracterized claim-processing rules" as "jurisdictional limitations." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010). This Court's recent decisions, however, have sought to correct these mischaracterizations and "bring some discipline to the use" of the term "jurisdictional." *Henderson*, 562 U.S. at 435.

This Court's general approach to distinguish claim-processing rules from jurisdictional bars follows a "readily administrable bright line":

> If the Legislature *clearly states* that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. … But when Congress does not rank a

> statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Arbaugh v. Y & H Corp., 546 U.S. 500, 515-516 (2006) (emphasis added) (citation and footnote omitted). Congress can make a clear statement when a statute "speak[s] in jurisdictional terms or refer[s] in any way to the jurisdiction" of the courts. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982).

This Court's historical treatment of a statutory prescription "is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier*, 559 U.S. at 167-68, (2010). In *Bowles v. Russell*, 551 U.S. 205 (2007), this Court held that the statutory time period to appeal from a district court to a court of appeals—found in 28 U.S.C. § 2107—is jurisdictional because of "a century's worth of precedent" to that effect. *Bowles*, 551 U.S. at 209. At the same time, however, the Court has cautioned against reading *Bowles* broadly. Recently, this Court observed 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.'" *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 21 (2017) (citing *Bowles*, 551 U.S. at 209). The "mandatory and jurisdictional" language in *Bowles* is "left over" from when this Court was "less than meticulous" in its use of the term "jurisdictional." *Id.* (citation and quotation marks omitted).

"*Bowles* did not hold" "that all statutory conditions imposing a time limit should be considered jurisdictional." *Reed Elsevier*, 559 U.S. at 167. Quite the contrary, "[i]n cases not involving the timebound

transfer of adjudicatory authority from one Article III court to another," this Court has "made plain that most statutory time bars are nonjurisdictional." *Hamer*, 138 S. Ct. at 20 n.9 (quoting *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015)) (brackets omitted).

B. Several statutory provisions concerning review from the Merit Systems Protection Board (MSPB or Board) or agency arbitrators are involved here. The relevant time limit is found in 5 U.S.C. § 7703(b)(1)(A), which states that "a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit" within 60 days of issuance of the Board's final decision. Section 7703(b)(1)(A) applies here because 5 U.S.C. § 7121(f) provides that certain unionized federal employees, like petitioner, seeking Federal Circuit review of an arbitration decision shall proceed under Section 7703 as if they were seeking review of an MSPB decision. Finally, 28 U.S.C. § 1295(a), enacted in 1982 at the Federal Circuit's inception, lists all the tribunals and case types within the Federal Circuit's exclusive jurisdiction. Section 1295(a)(9), which the panel majority below thought relevant to the question presented, provides that the Federal Circuit has exclusive jurisdiction over an appeal taken under Section 7703(b)(1).

II. Factual and procedural background

A. For many years, petitioner Karen Graviss was a special-education teacher employed by respondent Department of Defense, Domestic Dependent Elementary and Secondary Schools. In 2010, after an internal agency removal proceeding, respondent

terminated Graviss from her job for restraining a screaming student whose arms and legs were flailing. *Fed. Educ. Ass'n – Stateside Region v. Dep't of Def.*, 841 F.3d 1362, 1363 (Fed. Cir. 2016) (*FEA*).

Graviss's union challenged her removal by invoking arbitration. *FEA*, 841 F.3d at 1364; *see* 5 U.S.C. § 7121(e)-(f). During discovery in the arbitration, Graviss learned for the first time of ex parte communications that occurred prior to her removal. *FEA*, 841 F.3d at 1364. These communications involved, among others, the person who would later become the deciding official in Graviss's removal proceeding and the deciding official's supervisor. *Id.* In one of these ex parte communications, the supervisor urged that "we need to try and terminate [Graviss]." *Id.*

Graviss argued before the arbitrator that these ex parte communications violated her due-process rights because they had tainted the fairness of her removal proceeding. *FEA*, 841 F.3d at 1364. The arbitrator found that Graviss's due-process rights had not been violated and affirmed Graviss's termination. *Id.* at 1365.

B. Graviss petitioned for review in the Federal Circuit, *FEA*, 841 F.3d at 1362, as authorized by 5 U.S.C. §§ 7121 and 7703. The case was briefed before the Federal Circuit on the due-process issue. The Government "did not object to the timeliness of the petition." Pet. App. 3a.

A divided panel of the Federal Circuit reversed on the merits. It held that Graviss's due-process rights had been violated under circuit precedent providing that when "new and material information has been

conveyed by [an] *ex parte* communication, 'then a due process violation has occurred and the former employee is entitled to a new constitutionally correct removal procedure.'" *FEA*, 841 F.3d at 1366 (quoting *Stone v. FDIC*, 179 F.3d 1368, 1377 (Fed. Cir. 1999)); *see* Pet. App. 2a. The Government sought rehearing en banc on the due-process issue. Pet. App. 25a. Still, the Government never suggested that the petition for review was untimely.

C. The Federal Circuit granted en banc review on the due-process issue. Pet. App. 25a. After another round of merits briefing—some 33 months after Graviss's petition for review and 16 months after the panel ruled in her favor on the merits—the en banc court asked the parties to address whether Graviss's petition was timely under 5 U.S.C. § 7703(b)(1)(A), which provides that "any petition for review shall be filed within 60 days" after issuance of a final decision. Pet. App. 3a.

As relevant here, Graviss argued that, even if her petition was untimely, Section 7703(b)(1)(A) is a nonjurisdictional claim-processing rule and the Government forfeited any timeliness defense by not raising it. *See* CAFed Doc. 124, at 17. But the en banc court did not address the issue. Instead, over two dissents, the en banc court voted to dissolve and remand to the original panel to consider the timeliness issue. *See* Pet. App. 29a.

III. Federal Circuit rulings below

A. The Federal Circuit panel held, in a split decision, that Graviss's petition for review had been filed one day late and, for that reason, the court lacked jurisdiction. Pet. App. 6a.

The panel majority began by citing the Federal Circuit's decision in *Fedora v. MSPB*, 848 F.3d 1013 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 755 (2018)—which held that Section 7703(b)(1)(A)'s 60-day filing period is jurisdictional. Pet. App. 4a, 6a. *Fedora* had relied on *Bowles v. Russell,* 551 U.S. 205 (2007), for the proposition that "the taking of an appeal within the prescribed time is mandatory and jurisdictional." 848 F.3d at 1015 (quoting *Bowles*, 551 U.S. at 209).

Graviss contended that *Fedora* was inconsistent with this Court's recent statement in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13, 20 (2017), that *Bowles* held only that statutory time limits governing appeals between two Article III courts are jurisdictional. The panel majority appeared to realize that *Fedora* was no longer sufficient to justify the conclusion that Section 7703(b)(1)(A) is jurisdictional. It thus embraced Graviss's understanding of *Bowles* and *Hamer*, observing that "[i]n cases not involving the timebound transfer of adjudicatory authority *from one Article III court to another*," this Court has "applied a clear-statement rule." Pet. App. 7a (emphasis added) (quoting *Hamer*, 138 S. Ct. at 20 n.9).

The panel majority next sought to apply the clear-statement rule. It first turned to 28 U.S.C. § 1295(a)(9), which provides that "the Federal Circuit shall have exclusive jurisdiction … of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5."

The majority then considered *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015), which held that the time limit under the Federal Tort Claims Act

(FTCA) for seeking district-court review of an adverse agency decision is not jurisdictional. There, this Court noted that "[n]othing [in the FTCA] conditions the jurisdictional grant on the limitations period, or otherwise links those separate provisions." *Id.* at 1633. The majority reasoned that because Section 1295(a)(9) expressly references Section 7703(b)(1), the time limit found in Section 7703(b)(1)(A) is "linked" to the jurisdictional grant in Section 1295. Pet. App. 7a-8a. According to the panel majority, this link "constitute[d] a clear statement that [the Federal Circuit's] jurisdiction is dependent on the statutory time limit." Pet. App. 7a.

B. Judge Plager dissented, describing the majority's reasoning as "manifestly contrary to current Supreme Court instructions for determining when a statutory time bar is jurisdictional." Pet. App. 9a.

Judge Plager observed that, "as th[is] Court makes clear," "most statutory time bars are not jurisdictional. The two exceptions are (1) [appeals] from one Article III court to another Article III court, or (2) [when] Congress has expressly made clear an intention that the time bar be jurisdictional." Pet. App. 16a. The first exception did not apply, he explained, because Graviss appealed an agency decision, not a decision of an Article III court. Pet. App. 16a.

As for the second exception, Judge Plager rejected the panel's new-found theory that, simply by referencing Section 7703(b)(1) in Section 1295(a)(9), Congress had made a "clear statement" that Section 7703(b)(1)(A)'s time provision was itself jurisdictional. He noted that Section 1295(a)(9) is just one of over a dozen subsections in Section 1295(a) that provide

bases for review in the Federal Circuit. Pet. App. 18a. Many of these other subsections, he explained, reference other statutes, several of which "contain the same 'pursuant to' language found in subsection 9 relating to the MSPB," and others that use "different phrases," such as "arising under." Pet. App. 18a-19a (quotation marks omitted).

"Reading anything into this mélange of phrasing that might qualify as a 'clear statement'" that Congress intended to render other statutes jurisdictional, Judge Plager concluded, "requires an especially creative act of judicial reading." Pet. App. 19a. Given that Section 1295 makes no express reference to Section 7703(b)(1)(A)'s time limit, "[w]hat is clear is that the purpose of § 1295(a) is to state *which* cases come to the Federal Circuit, not *when* they may come." Pet. App. 19a.

C. Graviss sought rehearing en banc. "[T]he full court, after some going back and forth," denied en banc review. Pet App. 45a (Plager, J., dissenting). Judge Wallach, joined by Judges Newman and O'Malley, dissented, calling "the majority's holding directly contrary to binding Supreme Court precedent" on "a question of exceptional importance." Pet. App. 43a. "Section 7703(b)(1)(A)'s sixty-day filing deadline does not contain the hallmarks of a jurisdictional statute," Judge Wallach maintained, but instead "reads as a claim-processing rule." Pet. App. 36a. Section 1295(a)(9)'s "cross-reference [to Section 7703(b)(1)] hardly constitutes a *clear statement* by Congress that the sixty-day deadline is jurisdictional." Pet. App. 40a. Further, because this Court has described the similar sixty-day time limit in Section 7703(b)(2) as "nothing more than a filing deadline," Judge Wallach reasoned,

Pet. App. 38a (quoting *Kloeckner v. Solis*, 568 U.S. 41, 52 (2012)), "historical treatment does not favor treating the sixty-day filing deadline as jurisdictional," Pet. App. 42a.

Judge Plager, who has senior status, did not participate in rehearing en banc, but dissented from the denial of panel rehearing. Echoing his dissent from the panel decision, he observed that "we once again invite the Supreme Court to correct our errors." Pet. App. 45a.

REASONS FOR GRANTING THE WRIT

The Federal Circuit's holding that Section 7703(b)(1)(A)'s 60-day time limit creates an absolute jurisdictional bar is wrong and warrants this Court's review. Section 7703(b)(1)(A) itself contains no clear statement that its time limit is jurisdictional. Nor does Section 1295(a)(9)'s reference to Section 7703(b)(1) amount to a clear statement. Because the time provision is a claim-processing rule, not a jurisdictional bar, and the Government never raised timeliness—even after nearly three years of litigation on the merits—the Government has forfeited any timeliness defense.

The principal question presented is important because all petitions for review from the MSPB are currently subject to the Federal Circuit's erroneous interpretation of this Court's precedent. Review here would also afford this Court an opportunity to eliminate judicial confusion over whether a time limit governing an appeal from an agency to an Article III court is presumptively nonjurisdictional.

This case is an especially suitable vehicle for resolving the questions presented. There are no

predicate issues that could prevent the Court from answering these questions. And deciding whether Section 7703(b)(1)(A)'s time prescription is jurisdictional or a claim-processing rule would be outcome determinative. If it is the former, Graviss's case is over, and, if it is the latter, the Government indisputably forfeited any timeliness defense.

I. The decision below is wrong and defies this Court's precedent.

A. Section 7703(b)(1)(A)'s time limit is a nonjurisdictional, claim-processing rule.

1. The 60-day period for seeking review from an MSPB decision is nonjurisdictional because Congress has not clearly stated otherwise.

This Court has repeatedly held that most congressional time prescriptions are nonjurisdictional claim-processing rules.[1] To determine whether a provision is nevertheless jurisdictional, this Court has generally "applied a clear-statement rule: 'A rule is jurisdictional '[i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.'" *Hamer*, 138 S. Ct. at 20 n.9 (quoting *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012) (in turn quoting *Arbaugh*, 546 U.S. at 515)).

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[1] *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 & n.9 (2017); *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015); *Sebelius v. Auburn Reg. Med. Ctr.*, 568 U.S. 145, 154 (2013); *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2011); *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004); *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

To be sure, statutory time limits governing appeals "from one Article III court to another" are presumptively jurisdictional, *see Hamer*, 138 S. Ct. at 20-21 & n.9, based on the "long held" tradition of treating those limits as such, *Bowles v. Russell*, 551 U.S. 205, 209 (2007). That exception does not apply here because no similar tradition exists for treating appeals from an agency to an Article III court as jurisdictional. *See, e.g.*, *Bowen v. City of New York*, 476 U.S. 467, 478 (1986) (holding nonjurisdictional the time period to seek district-court review of a decision of the Secretary of Health and Human Services under 42 U.S.C. § 405(g)); *Kwai Fun Wong*, 135 S. Ct. at 1632-33 (holding nonjurisdictional the FTCA's time period for seeking district-court review from agency decisions).

In sum, Section 7703(b)(1)(A) is jurisdictional only if it contains a clear congressional statement of jurisdictional intent. As we now explain, it does not.

2. Because "most time bars are nonjurisdictional," generally "Congress must do something special, beyond setting an exception-free deadline, to tag" a time bar as "jurisdictional." *Kwai Fun Wong*, 135 S. Ct. at 1632. As this Court has said many times, Congress tags a statute as jurisdictional when it "speak[s] in jurisdictional terms or refer[s] … to the jurisdiction of the [relevant] courts." *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 394 (1982); *see also Arbaugh*, 546 U.S. at 515*; Gonzalez*, 565 U.S. at 143; *Henderson*, 562 U.S. at 438; *Kwai Fun Wong*, 135 S. Ct. at 1633. Congress has not done so here.

a. The time prescription here is contained in the second sentence of Section 7703(b)(1)(A), which provides that "any petition for review shall be filed

within 60 days" of a final decision. Nothing in it speaks in jurisdictional terms. Although Congress "need not use magic words in order to speak clearly," *Henderson*, 562 U.S. at 436, using the word "jurisdiction" is the simplest and clearest way to designate a provision as jurisdictional, *see, e.g., Arbaugh*, 546 U.S. at 515 n.11; *Musacchio v. United States*, 136 S. Ct. 709, 717 (2016). Section 7703(b)(1)(A) never mentions "jurisdiction." And it does not "define a federal court's jurisdiction over … claims generally, address its authority to hear untimely suits, or in any way cabin its usual equitable powers." *Kwai Fun Wong*, 135 S. Ct. at 1633.

b. Nor does Section 7703(b)(1)(A) "speak to the power of the court." *Reed Elsevier Inc. v. Muchnik*, 559 U.S. 154, 161 (2010) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994)). Congress sometimes demonstrates its intent to make a time limit jurisdictional by referring to the court as an actor and describing the court's actions, but Section 7703(b)(1)(A) does not do those things. It prescribes only the process for a litigant to file a claim ("any petition for review shall be filed"). Contrast the situation here with the provision the Court found jurisdictional in *Bowles*, 551 U.S. at 208, 213. That provision, 28 U.S.C. § 2107(c), speaks to actions taken by the district court concerning its power to hear a case ("the district court may reopen the time for appeal …"). *Bowles*, 551 U.S. at 208. This language describes the actor (the district court) and an action related to the court's adjudicatory authority (reopening the time to appeal).

Gonzalez v. Thaler, 565 U.S. at 142-44, further illustrates the distinction between a jurisdictional bar addressing the court's authority to hear a case and a

claim-processing rule simply describing the process for obtaining review. *Gonzalez* found jurisdictional one provision of the federal habeas statute, 28 U.S.C. § 2253(c)(1), which speaks of the court as an actor in issuing a certificate of appealability ("unless a circuit justice or judge issues a certificate of appealability") about an action flowing from the court's power to adjudicate ("an appeal may not be taken to the court of appeals"). 565 U.S. at 142. But *Gonzalez* found *non*jurisdictional a clause in the same statutory subsection that describes only the process for filling out a certificate of appealability. *Id.* at 143 ("The certificate … shall indicate which specific issue or issues satisfy the showing required"); *see also Kwai Fun Wong*, 135 S. Ct. at 1632 (finding "[m]ost important" in holding a provision nonjurisdictional that the "text speaks only to a claim's timeliness, not to a court's power").

c. Congress's use in Section 7703(b)(1)(A) of "shall" instead of an arguably less "stringent" word does not "manifest a different congressional intent" concerning whether the 60-day time period is jurisdictional. *See Irwin*, 498 U.S. at 95. "Time prescriptions, however emphatic," generally "are not properly typed 'jurisdictional.'" *Arbaugh*, 546 U.S. at 510 (2006) (quotation marks omitted). As this Court put it in *Kwai Fun Wong*, "filing deadlines [are] quintessential claim-processing rules … even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are)." 135 S. Ct. at 1632 (quotation marks omitted); *see also Irwin*, 498 U.S. at 95 (case-by-case analysis of whether purportedly mandatory language such as "shall" is jurisdictional has "the disadvantage of continuing

unpredictability without the corresponding advantage of greater fidelity to the intent of Congress").

Section 7703(b)(1)(A)'s time prescription is certainly no more emphatic than the language found nonjurisdictional in *Hamer*, 138 S. Ct. at 19-20 ("*No extension* … may exceed 30 days"); in *Kwai Fun Wong*, 135 S. Ct. at 1639 ("A tort claim against the United States *shall be forever barred* unless it is presented… within two years"); in *Henderson*, 562 U.S. at 438 (an aggrieved party "*shall* file a notice of appeal … within 120 days"); or in *Zipes*, 455 U.S. at 394 n.10 ("A charge under this section *shall* be filed within one hundred and eighty days") (emphases added throughout). This type of "mandatory" language means, at its most restrictive, that the court "must address the [asserted] defect" only when there is a "timely objection," *Gonzalez*, 565 U.S. at 146.

d. No language adjacent to Section 7703(b)(1)(A)'s time provision suggests any intent to make that provision jurisdictional. The 60-day filing period is, as noted earlier, in its own sentence (sentence two), and it does not refer to any other provision. Section 7703(b)(1)(A)'s other sentence (sentence one) provides that "a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit." Notably, that sentence does not mention "jurisdiction" or speak to the Federal Circuit's adjudicatory authority and so is not itself jurisdictional. Indeed, Congress placed the jurisdictional grant to the Federal Circuit to hear appeals from the MSPB "in an entirely different title of the U.S. Code." Pet. App. 39a (Wallach, J., dissenting from denial of reh'g en banc) (citing 28

U.S.C. § 1295(a)(9)); *see* Pet. App. 18a (Plager, J., dissenting).

Even assuming (incorrectly) that the first sentence of Section 7703(b)(1)(A) is jurisdictional, it would not render the 60-day time period in the second sentence jurisdictional. As this Court found when analyzing Section 7703(b)(1)'s similarly-structured neighbor, 5 U.S.C. § 7703(b)(2), a time limit contained in its own separate sentence, making no reference to other subsections, is not jurisdictional; rather, it "is nothing more than a filing deadline." *Kloeckner v. Solis*, 568 U.S. 41, 52 (2012); *see* Pet. App. 38a, 42a (Wallach, J., dissenting from denial of reh'g en banc).

That is because "[m]ere proximity" to a jurisdictional provision "will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle." *Gonzalez*, 565 U.S. at 147. The jurisdictional clause in *Gonzalez*, which premises jurisdiction on issuance of a certificate of appealability, 28 U.S.C. § 2253(c)(1), did not render jurisdictional the requirements for filling out the certificate in Section 2253(c)(3), even though (c)(3) and (c)(1) are located in the same statutory subsection and (c)(3) expressly references (c)(1). *Id.* Similarly, in *Zipes*, 455 U.S. 385, the Court considered neighboring subsections of Title VII, 42 U.S.C. § 2000e-5(e) and -5(f), containing the time limit and the jurisdictional grant, respectively, and the Court found that timely filing was not a jurisdictional requirement. The time limit, this Court said, "appears as an entirely separate provision, and it does not speak in jurisdictional terms." *Id.* at 394. Here, Section 7703(b)(1)(A)'s time prescription lacks not only "jurisdictional terms" but also any cross

reference to a jurisdictional provision like this Court found *insufficient* in *Gonzalez*.

e. The disagreement within the Federal Circuit casts a cloud over the panel majority's view that the relevant statutes provide a clear statement of jurisdictional intent. *See Smiley v. Citibank (S.D.) N.A.*, 517 U.S. 735, 739 (1996) (noting that it is "difficult indeed" to find a statutory term unambiguous when appellate judges disagree about its meaning). Four Federal Circuit judges disagree with the panel's ruling below that Section 7703(b)(1)(A)'s time prescription is jurisdictional. *See* Pet. App. 27a (Wallach, Newman, and O'Malley, JJ., dissenting from denial of reh'g en banc); Pet. App. 38a (Plager, J., dissenting from denial of panel reh'g); *Fedora v. MSPB*, 868 F.3d 1336 (Fed. Cir. 2017) (same dissenters). A clear congressional statement would not engender so much disagreement.

f. In opposing en banc review below, the Government relied on language from this Court's decision in *Lindahl v. Office of Personnel Management* to the effect that "Sections 1295(a)(9) and 7703(b)(1) together appear to provide for exclusive jurisdiction over MSPB decisions in the Federal Circuit." 470 U.S. 768, 792 (1985). *See* CAFed Doc. 144, at 6-7. The Government badly overreads *Lindahl*, which the Federal Circuit itself has never cited in any of its decisions holding Section 7703(b)(1)(A) jurisdictional.[2]

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[2] The Federal Circuit precedent finding Section 7703(b)(1)(A) jurisdictional originates in *Monzo v. Department of Transportation*, 735 F.2d 1335, 1336 (Fed. Cir. 1984), a one-paragraph decision that simply proclaimed Section 7703(b)(1)(A)

For starters, *Lindahl* was decided before this Court's push to "bring some discipline" to the term "jurisdictional." *Henderson*, 562 U.S. at 435. And the language on which the Government relies clarified only that the Federal Circuit had exclusive jurisdiction over petitions for review from MSPB disability retirement decisions. *Lindahl*, 470 U.S. at 791-92. Most importantly, in *Lindahl*, this "Court did not decide the question of whether *the filing deadline* is jurisdictional." Pet. App. 40a (Wallach, J., dissenting from denial of reh'g en banc). Indeed, *Lindahl* never mentioned Section 7703(b)(1)(A)'s time provision or any other purported limit on the Federal Circuit's jurisdiction, and *Lindahl*'s core holding answered entirely different questions—involving the availability of judicial review of federal retirees' disability claims—from the one presented here. *See Lindahl*, 470 U.S. at 792-94.

3. As shown above, Section 7703(b)(1)(A) nowhere contains a clear congressional statement that the period for seeking Federal Circuit review is jurisdictional. The panel majority seemed to acknowledge as much because it made no attempt to show that Section 7703(b)(1)(A) speaks in jurisdictional terms or refers to the power of the courts. *See* Pet. App. 7a-8a. Indeed, the panel majority abandoned any reliance on Section 7703(b)(1)(A) itself.

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jurisdictional without any reasoning. Later, in *Oja v. Department of Army*, the Federal Circuit summarily held, "per *Monzo*," that Section 7703(b)(1)(A) is jurisdictional. 405 F.3d 1349, 1357 (Fed. Cir. 2005); *see also Musselman v. Dep't of the Army*, 868 F.3d 1341 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 739 (2018); *Fedora v. MSPB*, 868 F.3d 1336 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 755 (2018).

a. Instead, the majority reached for 28 U.S.C. § 1295(a)(9), which gives the Federal Circuit exclusive jurisdiction over "an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5." The panel majority then hitched Section 1295(a)(9) to a brand-new, "clear statement" theory, Pet. App. 7a, which the Government itself had never advanced and has no basis in the Federal Circuit's earlier Section 7703(b)(1)(A) decisions. *See supra* at 20 note 2; Pet. App. 18a (Plager, J., dissenting) ("The majority's theory now is that 28 U.S.C. § 1295(a)(9) *alone* constitutes a 'clear statement' by Congress that § 7703(b)(1)(A)" is jurisdictional.).

That theory was premised on a negative implication extrapolated from *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015). There, this Court found a statutory time limit in the FTCA *non*jurisdictional in light of its text. After doing so, the Court then "confirm[ed] that reading" by noting that the Act's jurisdictional grant is located in a different section of Title 28 than the time limit and that "[n]othing conditions the jurisdictional grant on the limitations periods, or otherwise links those separate provisions." *Id.* at 1633.

Seizing on this language, the panel majority maintained that the reference in Section 1295(a)(9) to Section 7703(b)(1) was the type of necessary "link" missing between the jurisdictional statute and the time limit in *Kwai Fun Wong*. *See* Pet. App. 7a-8a. Because Section 1295 contains a jurisdictional grant, the majority reasoned, this "link" alone "constitutes a clear statement that [the Federal Circuit's] jurisdiction is dependent on the statutory time limit"

in Section 7703(b)(1)(A). Pet. App. 8a. But this Court has never held, in *Kwai Fun Wong* or anywhere else, that a "link" between a jurisdictional statute and a threshold limitation in another statute suffices to render a claim-processing rule jurisdictional.

With or without a "link," a clear congressional statement of jurisdictional intent is still required. And Section 1295(a)(9) is not a clear congressional statement that Section 7703(b)(1)(A)'s time limit is jurisdictional because Section 1295 nowhere mentions that limit, let alone clearly states that Section 7703(b)(1)(A) erects an absolute jurisdictional bar. Although Congress need not use "magic words" to clearly state that a time limit is a jurisdictional bar, *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011), surely a *clear* statement requires at least *some* words to that effect.

b. If a cross-reference alone were sufficient to render another statute jurisdictional, *Gonzalez v. Thaler*, 565 U.S. 134 (2012), would have found 28 U.S.C. § 2253(c)(3) jurisdictional. But *Gonzalez* found that provision *non*jurisdictional. *Id.* at 137. Section 2253(c)(3)—requiring a habeas certificate of appealability to list the issues involved—expressly references Section 2253(c)(1), which requires judicial issuance of certificates of appealability and which this Court has found jurisdictional. *Gonzalez*, 565 U.S. at 142, 145. In holding Section 2253(c)(3) nonjurisdictional, the Court focused on the fact that Section 2253(c)(3) *itself*, just like Section 7703(b)(1)(A), "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the courts." *Id.* at 143 (internal quotation marks and insertion omitted) (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515 (2006)).

The Government maintained in *Gonzalez*, 565 U.S. at 145, that the link between the two subsections meant that jurisdiction depended on satisfaction of Section 2253(c)(3). But this Court responded that "the statute provides no such thing. Instead, Congress set off the requirements in distinct paragraphs and, rather than mirroring their terms, excluded the jurisdictional terms in one from the other." 565 U.S. at 145. In *Gonzalez*, the two provisions were separated by only a one-sentence subsection. Here, the two purportedly linked provisions relied on by the panel majority appear in different titles of the U.S. Code. And the jurisdictional language of Section 1295(a) is notably absent from Section 7703(b)(1)(A).

c. Construing Section 1295(a)(9) as imposing its jurisdictional grant on Section 7703(b)(1)(A)'s garden-variety time limit misapprehends Section 1295's structure and history. The Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 25 (1982), established the Federal Circuit to "creat[e] an appellate forum" with nationwide jurisdiction over "areas of the law where Congress determines there is a special need for nationwide uniformity." S. Rep. No. 97-275, at 2 (1982). Because the Federal Circuit was a new, specialized circuit court, with its jurisdiction "defined in terms of subject matter rather than geography," *id.* at 13, Congress could not realize its vision for that court with a general grant of appellate jurisdiction like 28 U.S.C. § 1291. Congress instead had to craft a more reticulated statute detailing the specific courts, agencies, and case types that would fall under the Federal Circuit's purview.

The most practical way to accomplish Congress's purpose was for the statutory grant to refer to other

statutes to signify case types and tribunals that Congress wished to bring within the grant. Section 1295(a)'s fourteen paragraphs contain many such references. For instance, Section 1295(a)(6) authorizes review of "final determinations of the United States International Trade Commission … made under section 337 of the Tariff Act of 1930," and Section 1295(a)(7) grants jurisdiction to review "findings of the Secretary of Commerce under U.S. note 6 to subchapter X of chapter 98 of the Harmonized Tariff Schedule of the United States."[3]

This placement of specific kinds of cases within the Federal Circuit's purview is exactly what Congress was doing—and no more—when it wrote Section 1295(a)(9); that is, it intended to give the Federal Circuit exclusive jurisdiction over most, but not all, cases appealed from the MSPB. For example, cases alleging discrimination are reviewed by district courts, not the Federal Circuit. *See* 5 U.S.C. § 7703(b)(2). Therefore, Congress could not simply say "the Federal Circuit shall have exclusive jurisdiction over appeals from the MSPB." Instead, Congress had to specify which categories of MSPB cases fell within the court's exclusive jurisdiction and so used its "pursuant to" language in Section 1295(a)(9) to carefully exclude discrimination cases falling under 5 U.S.C. § 7703(b)(2).

The next paragraph of Section 1295, Section 1295(a)(10), uses language nearly identical to Section 1295(a)(9), stating that the Federal Circuit has exclusive jurisdiction over "an appeal from a final decision of an agency board of contract appeals

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[3] *See also* 28 U.S.C. § 1295(a)(8), (11)-(14).

pursuant to Section 7107(a)(1) of title 41." Section 7107(a)(1) says that a party may appeal within 120 days from an agency board of contract appeals to the Federal Circuit, but Section 7107(a)(2) specifies that decisions of the Tennessee Valley Authority's board of contract appeals should instead be appealed within 120 days to a district court. *See* 41 U.S.C. § 7107(a)(2). So, much like the "pursuant to" language in Section 1295(a)(9), Section 1295(a)(10) used "pursuant to Section 7107(a)(1)" to ensure that cases from the Tennessee Valley Authority remained outside the Federal Circuit's authority.

The text and history of Section 1295 thus "confirms that the purpose of this statute is to identify *which* cases, by subject matter, are within [the Federal Circuit's] jurisdiction, rather than *which timely-brought* cases are within [the Federal Circuit's] jurisdiction." Pet. App. 39a (emphasis in original) (Wallach, J., dissenting from denial of reh'g en banc). The Federal Circuit majority rejected this simple—and historically accurate—understanding of Section 1295. Under the panel majority's theory, Congress referred to a wide variety of other statutes in Section 1295 not simply to describe the case types within the Federal Circuit's purview, but with the hidden intent to type the procedural requirements described in each of those statutes as jurisdictional prerequisites to appeal—all without a word to that effect. For the reasons just explained, that cannot be right.

B. The Government forfeited any timeliness defense.

"[A] mandatory claim-processing rule [is] subject to forfeiture if not properly raised by the appellee."

Hamer v. Neighborhood Hous. Servs. of Chi., 138 S. Ct. 13, 16 (2017). "The government did not object to the timeliness of [Graviss's] petition." Pet. App. 3a. Rather, the Federal Circuit raised the timeliness issue on its own *after* Graviss's victory on the merits and more than 33 months after Graviss sought Federal Circuit review. *Id.* Thus, if Section 7703(b)(1)(A) is a claim-processing rule, the Government forfeited any timeliness defense it may have had.

Although the forfeiture question here may not be independently worthy of certiorari, it is "sufficiently connected to the ultimate disposition of the case that the efficient administration of justice supports [its] consideration." *City & Cty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1779 (2015) (Scalia, J., concurring in part and dissenting in part). Indeed, after finding a time limit or other prescription nonjurisdictional, this Court has sometimes considered whether forbearance was appropriate under the circumstances.[4]

And the Court should do so here. As explained, the Government's forfeiture here is plain. Moreover, this case exemplifies the forfeiture rule's well-established rationale: to provide parties with the "incentive to raise legal objections as soon as they are available." *Freytag v. Comm'r*, 501 U.S. 868, 900 (1991) (Scalia, J., concurring in part and concurring in the judgment). Otherwise, judges' time "would frequently be expended uselessly, and appellate consideration of difficult questions would be less informed and less

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[4] *See, e.g.*, *Scarborough v. Principi*, 541 U.S. 401, 414-23 (2004); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990).

complete." *Id.* This Court could have been speaking of this case when it explained that if a claim-processing rule is mistaken for an atypical jurisdictional bar "many months of work on the part of the attorneys and the court may be wasted." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). Nothing could have been more wasteful or unfair than dismissing Graviss's petition for review—after briefing, oral argument, and a ruling on the merits—because her petition arrived a day late.

II. The principal question presented is important to private litigants, the Government, and the judiciary, and answering it would help eliminate confusion in the lower courts.

A. Whether a provision is jurisdictional or a claim-processing rule is "of considerable practical importance for judges and litigants." *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). "Branding a rule" jurisdictional "alters the normal operation of our adversarial system" and, as occurred here, can "result in the waste of judicial resources and may unfairly prejudice litigants." *Id.* "Because the consequences that attach to the jurisdictional label may be so drastic," this Court has "tried in recent cases to bring some discipline to the use of this term." *Id.* at 435. It has thus granted review repeatedly to consider whether a statutory time limit or other procedural proscription is jurisdictional.[5]

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[5] *See, e.g.*, *Fort Bend Cty. v. Davis*, No. 18-525 (cert. granted Jan. 11, 2019); *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13 (2017); *United States v. Kwai Fun Wong,* 135 S. Ct. 1625 (2015); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145 (2013); *Gonzalez v. Thaler*, 565 U.S. 134 (2012); *Henderson*, 562 U.S.

That the principal question presented involves a review provision applicable only in the Federal Circuit underscores, not mitigates, the need for this Court's intervention. The absence of decisions from other circuits on the status of Section 7703(b)(1)(A) means that, without this Court's review, there would be no "antidote to the risk that the specialized court may develop" incorrect precedent. *See Holmes Grp., Inc. v. Vornado Air Circulation Sys.*, 535 U.S. 826, 839 (2002) (Stevens, J., concurring in part and concurring in the judgment). Indeed, this Court's recent effort to curb misapplication of the "jurisdictional" label includes a case within the Federal Circuit's exclusive authority. *See Henderson*, 562 U.S. 428; *see also Scarborough v. Principi*, 541 U.S. 401 (2004) (reversing Federal Circuit's holding that statutory time limit was jurisdictional).

Determining whether Section 7703(b)(1)(A)'s time limit is jurisdictional is at least as important as the questions this Court has considered in similar cases. *See supra* at 28 note 5. The MSPB is responsible for "processing appeals from Federal employees involving, among others, adverse [employment] actions,

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428; *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008); *Bowles v. Russell*, 551 U.S. 205 (2007); *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Eberhart v. United States*, 546 U.S. 12 (2005); *Scarborough v. Principi*, 541 U.S. 401 (2004); *Kontrick v. Ryan*, 540 U.S. 443 (2004); *Becker v. Montgomery*, 532 U.S. 757 (2001); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89 (1990); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988); *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

whistleblower claims and veterans concerns."[6] "Approximately 2 million Federal employees, or about two-thirds of the full-time civilian [government] work force, currently have appeal rights to the Board."[7] For many federal employees nationwide, the sole route to challenge an agency's adverse employment decision is through the MSPB. *See* 5 U.S.C. § 7703. The federal civilian workforce includes over 600,000 veterans.[8]

Answering the principal question presented is important for another reason. If the decision below stands, the Federal Circuit will find jurisdictional "links" to time limits and other prescriptions in the various statutory regimes referenced by 28 U.S.C. § 1295(a)'s thirteen paragraphs in addition to paragraph (a)(9), all of which designate tribunals and subject matters within the Federal Circuit's exclusive jurisdiction. *See supra* at 24-26. Put another way, the decision below creates a slew of new jurisdictional limits on appeals to the Federal Circuit from decisions

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[6] *See* U.S. Merit Sys. Prot. Bd., *Congressional Budget Justification FY 2019* (Feb. 2018), 1, https://www.mspb.gov/MSPBSEARCH/viewdocs.aspx?docnumber=1488641&version=1494222&application=ACROBAT [https://perma.cc/Q94Q-BKZ2] (MSPB administrative judges receive "about 6,500-7,000 appeals and other cases in [MSPB] regional and field offices; and the Board members will receive approximately 1,350 cases at headquarters").

[7] U.S. Merit Sys. Prot. Bd., *Jurisdiction*, https://www.mspb.gov/About/jurisdiction.htm [https://perma.cc/K6RN-JR2U].

[8] *See* U.S. Office of Pers. Mgmt., *Employment of Veterans in the Federal Executive Branch, Fiscal Year 2016* (June 2017), 2, https://www.fedshirevets.gov/veterans-council/veteran-employment-data/employment-of-veterans-in-the-federal-executive-branch-fy2016.pdf [https://perma.cc/3NPY-FK4E].

of the U.S. International Trade Commission, the Secretary of Commerce, and agency boards of contract appeals, among other tribunals. *See, e.g.*, 28 U.S.C. § 1295(a)(6), (7), (10).

B. A grant of certiorari would help eliminate confusion—made more pronounced by the decision below—over whether a statutory review period from an agency to an Article III court is presumptively nonjurisdictional.

This confusion is exemplified by decisions over whether the time limit for circuit-court review of EPA rules issued under the Clean Air Act is jurisdictional. The Act provides that a petition for review "shall be filed within sixty days" of the rule's promulgation, 42 U.S.C. § 7607(b)(1). The D.C. Circuit has repeatedly held that this limit is jurisdictional. *See, e.g., Medical Waste Inst. and Energy Recovery Council v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011) (reaffirming earlier precedent). Then-Judge Kavanaugh explained that these precedents likely are at odds with this Court's decisions, *see Utility Air Regulatory Group v. EPA*, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring), but the D.C. Circuit continues to adhere to its position, *see Sierra Club v. EPA*, 895 F.3d 1, 16 (D.C. Cir. 2018); *Sierra Club de Puerto Rico v. EPA*, 815 F.3d 22, 26 (D.C. Cir. 2016). The Tenth Circuit has also found Section 7607(b)(1) jurisdictional. *See Utah v. EPA*, 765 F.3d 1257, 1258-62 (10th Cir. 2014).

On the other hand, the Seventh Circuit has applied the clear-statement rule and held that Section 7607(b)(1)'s time limit is a nonjurisdictional claim-processing rule. *See Clean Water Council of Nw. Wis., Inc. v. EPA*, 765 F.3d 749, 751-52 (7th Cir. 2014) (Easterbrook, J.). In doing so, it explained why the

D.C. Circuit's rule cannot be squared with this Court's modern precedents and noted that *Bowles v. Russell*, 551 U.S. 205 (2007), is limited "to appeals from district courts." 765 F.3d at 752.

C. Similar confusion pervades the Federal Circuit's understanding that Section 7703(b)(1)(A)'s time limit is jurisdictional. The panel majority apparently accepted that Section 7703(b)(1)(A)'s limit is presumptively a claim-processing rule, following this Court's decision in *Hamer*, *see* Pet. App. 6a-7a, but then found a clear statement that it is jurisdictional in a "link" from Section 1295. *See* Pet. App. 7a. Yet the Federal Circuit has not definitively disavowed the rationale of *Fedora v. MSPB,* 848 F.3d 1013, 1015 (Fed. Cir. 2017), which held that "[a]ppeal periods to Article III courts, such as the period in § 7703(b)(1), are controlled by the Court's decision in *Bowles v. Russell*," *id.* at 1015, and are therefore presumptively jurisdictional. Indeed, the panel majority cited *Fedora* with apparent (but paradoxical) approval, *see* Pet. App. 6a, which should have rendered the rest of its analysis unnecessary. This doctrinal confusion is further reason to grant review.

III. This case is an ideal vehicle for resolving the questions presented.

A. This case provides an especially suitable vehicle to resolve the questions presented. Whether Section 7703(b)(1)(A)'s time limit is jurisdictional was the only question considered by the panel below, and no antecedent issues could prevent this Court from reaching it.

B. We recognize that this Court has recently denied review in cases that presented the question

whether Section 7703(b)(1)(A) is subject to equitable tolling.[9] This Court should nonetheless grant review here for several reasons.

First, the decision below rests on an entirely different rationale from that employed in the other cases. In those cases, the Federal Circuit derived a categorical rule from *Bowles* that "[a]ppeal periods to Article III courts, such as the period in § 7703(b)(1)" are always jurisdictional. *See, e.g.*, *Fedora*, 848 F.3d at 1015. In the decision below, by contrast, the Federal Circuit appeared to recognize that *Fedora*'s rationale no longer suffices and that this Court's precedent requires application of the clear-statement rule to Section 7703(b)(1)(A)'s time provision. *See* Pet. App. 6a-7a; *supra* at 32. Because the other cases were decided under *Fedora*'s rationale, this case presents an opportunity for this Court to review the Federal Circuit's new, highly impactful, and, in our view, erroneous holding that Section 1295(a)(9)'s cross-reference to Section 7703(b)(1)(A) is a clear statement that Section 7703(b)(1)(A)'s time limit is jurisdictional. *See supra* at 24-26, 30-31.

Second, the Government argued that the other petitions for certiorari were poor vehicles for review because the petitioners there sought relief on equitable-tolling grounds. The Federal Circuit, the

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[9] *Jones v. HHS*, 702 F. App'x 988 (Fed. Cir. 2017), *cert. denied*, 139 S. Ct. 359 (2018); *Musselman v. Dep't of Army*, 868 F.3d 1341, *cert. denied*, 138 S. Ct. 739 (2018); *Vocke v. MSPB*, 680 F. App'x 944 (Fed. Cir. 2017), *cert. denied*, 138 S. Ct. 755, U.S. (2018); and *Fedora v. MSPB*, 848 F.3d 1013, *cert. denied*, 138 S. Ct. 755 (2018).

Government maintained, "would not be well-situated to … evaluate and weigh these competing factors in the equitable-tolling analysis," and the cost of remanding to the MSPB would "outweigh[] any potential benefit of trying to identify the rare case in which equitable tolling might in fact be warranted."[10] We believe these concerns are unjustified. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94-96 (1990). But right or wrong, they do not apply to a forfeiture argument, where, as in Graviss's case, the facts are clear, and the appellate court easily can determine whether forfeiture occurred, as appellate courts often do.

Finally, it is possible that some mandatory time limits are not subject to equitable tolling. *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 18 n.3 (2017); *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631 n.2 (2015); *see also Lambert v. Nutraceutical Corp.*, No. 17-1094 (argued Nov. 27, 2018) (concerning whether Federal Rule of Civil Procedure 23(f)'s nonjurisdictional time limit is subject to equitable tolling). We believe that Section 7703(b)(1)(A) is amenable to equitable tolling. *See Irwin*, 498 U.S. at 94-96. But there is no doubt that if Section 7703(b)(1)(A)'s time limit is nonjurisdictional,

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[10] U.S. Opp. 16, *Fedora v. MSPB*, No. 17-557 (Dec. 14, 2017); *see also* U.S. Opp. 16, *Musselman v. Dep't of Army*, No. 17-570 (Dec. 15, 2017); U.S. Opp. 17, *Vocke v. MSPB*, No. 17-544 (Dec. 13, 2017); U.S. Opp. 15, *Jones v. HHS*, No. 17-1610 (Aug. 30, 2018).

it is "subject to forfeiture if not properly raised by the appellee." *Hamer*, 138 S. Ct. at 16.

C. The decision below and other recent decisions holding Section 7703(b)(1)(A) jurisdictional demonstrate that the principal question presented here is not going away.[11]

Without an answer to that question, the Federal Circuit's insistence that Section 7703(b)(1)(A)'s time limit is jurisdictional will continue to cause unfairness to litigants and waste judicial resources, at odds with congressional intent. This Court should provide that answer now.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[11] *See Jones*, 702 F. App'x 988; *Fedora*, 848 F.3d 1013; *Musselman*, 868 F.3d 1341; *Vocke*, 680 F. App'x 944; *Brenndoerfer v. USPS*, 693 F. App'x 904 (Fed. Cir. 2017); *see also Fuerst v. Dep't of Air Force*, No. 3:17-cv-184, 2018 WL 1587454, at *3 (S.D. Ohio Apr. 2, 2018) (holding 5 U.S.C. § 7703(b)(2) jurisdictional and refusing to consider tolling argument in reliance on Federal Circuit's decision in *Fedora*).

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February 11, 2019