No. 18-1061

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

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

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INTEREST OF AMICUS CURIAE[1]

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

The FCBA facilitates *pro bono* representation for claimants such as veterans, individual patent applicants, and government employees who have potential or active litigation within the Federal Circuit's jurisdiction, with a view to strengthening the litigation process at that court. This includes representation for Merit Systems Protection Board ("MSPB") claimants, either at the MSPB or on appeal to the Federal Circuit. Federal Circuit precedent treating certain appeal deadlines as jurisdictional hinders the FCBA's ability to provide meaningful representation for those claimants.

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

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* or its counsel made any monetary contribution to the preparation or submission of this brief. More than ten days before the due date, *amicus* provided counsel of record for all parties with notice of its intent to file this brief. All parties have provided written consent to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The petition presents the question whether 5 U.S.C. § 7703(b)(1)(A)'s 60-day deadline to appeal from the MSPB to the Federal Circuit is jurisdictional or a claim-processing rule. That question warrants this Court's review. Without repeating points made in the petition or the dissenting court of appeals opinions, this brief highlights two additional considerations favoring certiorari in this case.

First, the time is right for this Court to review this question. Over the past decade-and-a-half, this Court announced and applied a clear-statement rule to categorize filing deadlines as either jurisdictional or claim-processing rules: courts must presume that a deadline is a claim-processing rule unless Congress clearly states that the deadline is jurisdictional. Until recently, the Federal Circuit consistently held that 5 U.S.C. § 7703(b)(1)(A)'s filing deadline is jurisdictional, but did so without considering or applying this Court's clear-statement rule. Last Term, the government urged this Court to deny three petitions regarding the status of 5 U.S.C. § 7703(b)(1)(A)'s deadline, reasoning that review would be "premature" because the Federal Circuit had not yet considered *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), which further clarified how to determine whether a filing deadline is jurisdictional or a claim-processing rule. In this case, however, the Federal Circuit has explicitly considered *Hamer*, and finally applied this Court's clear-statement rule to 5 U.S.C. § 7703(b)(1)(A)'s filing deadline. The result is that the Federal Circuit reaffirmed prior precedent holding that the deadline is jurisdictional. The court did so

over a dissent at the panel stage, and denied rehearing en banc over additional dissents from three active judges and a senior judge. Now, unlike last Term, this Court has the benefit of reasoned majority and dissenting opinions actually applying the clear-statement rule to section 7703(b)(1)(A)'s filing deadline. The Federal Circuit's view of 5 U.S.C. § 7703(b)(1)(A)'s filing deadline as jurisdictional is now firmly entrenched and will not change absent this Court's intervention.

Second, the question is important to numerous litigants at the Federal Circuit. Appellants from the MSPB are often *pro se* and not infrequently miss their appeal deadline by a few days. If section 7703(b)(1)(A)'s deadline is jurisdictional, then numerous such appellants will be absolutely foreclosed from pursuing their appeals on the merits. Moreover, the Federal Circuit's reasoning potentially renders "jurisdictional" all of the prescriptions referred to in 28 U.S.C. § 1295(a)(1)-(14), as well as other statutes that make up the Federal Circuit's appellate jurisdiction, and invites the sort of additional litigation this Court sought to avoid when it announced the "readily administrable bright line" of requiring a clear statement from Congress. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006).

ARGUMENT

I. The Federal Circuit's View of the Deadline as "Jurisdictional" is Entrenched and Ready for This Court's Review.

For more than 30 years, the Federal Circuit has held that 5 U.S.C. § 7703(b)(1)(A)'s 60-day deadline deadline to appeal from the MSPB is jurisdictional. The history preceding the decision in this case, and the

subsequent rehearing vote, indicate that the Federal Circuit's view of 5 U.S.C. § 7703(b)(1)(A)'s deadline as "jurisdictional" is firmly entrenched and unlikely to benefit from percolation. This Court should grant review now.

1. Beginning approximately fifteen years ago, this Court made renewed efforts to curb what it referred to as its own prior "profligate . . . use of the term . . . 'jurisdictional'" in connection with deadlines. *Arbaugh*, 546 U.S. at 510; *see also, e.g.*, *Eberhart v. United States*, 546 U.S. 12, 17-19 (2005) (referring to court of appeals' error as "caused in large part by imprecision in our prior cases"); *Scarborough v. Principi*, 541 U.S. 401, 413-14 (2004); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) ("Courts, including this Court, it is true, have been less than meticulous" in using the term 'jurisdictional.'").

Those efforts have produced a clear-statement rule: courts should presume that a deadline is a claim-processing rule (and thus may potentially be waived, forfeited or equitably tolled), unless Congress "clearly states" that the deadline is jurisdictional. *Arbaugh*, 546 U.S. at 515-16. The Court announced that "readily administrable bright line" rule in *Arbaugh* in 2006, and applied it in several subsequent decisions to different types of deadlines—each time reaffirming that deadlines should be presumed to be claim-processing rules unless Congress clearly states otherwise. *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1632 (2015) ("traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences"); *Henderson v. Shinseki*, 562 U.S. 428, 435-36 (2011) ("Under

Arbaugh, we look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'"); *see also Hamer*, 138 S. Ct. at 20 n.9; *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 166 (2010).

2. For more than 30 years, the Federal Circuit has held that 5 U.S.C. § 7703(b)(1)(A)'s deadline to appeal from the MSPB to the Federal Circuit is jurisdictional. *See, e.g.*, *Monzo v. Dep't of Transp.*, 735 F.2d 1335, 1336 (Fed. Cir. 1984); *Pinat v. OPM*, 931 F.2d 1544, 1546 (Fed. Cir. 1991); *Oja v. Dep't of the Army*, 405 F.3d 1349, 1357-60 (Fed. Cir. 2005); *Jones v. Dep't of Health & Hum. Servs.*, 834 F.3d 1361, 1364-65 (Fed. Cir. 2016) (dictum); *Fedora v. MSPB*, 848 F.3d 1013 (Fed. Cir. 2017), *reh'g denied*, 868 F.3d 1336, *cert. denied*, 138 S. Ct. 755 (2018).

Following this Court's decision in *Arbaugh*, the Federal Circuit has indicated—in footnotes, dicta, and separate opinions—its awareness of this Court's efforts to bring discipline to the categorization of filing deadlines as jurisdictional or claim-processing rules, and of the growing disconnect between that precedent and Federal Circuit precedent.[2] Until 2018, however, the Federal Circuit declined numerous opportunities

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[2] *See, e.g*, *Oja*, 405 F.3d at 1361-67 (Newman, J., dissenting); *Jones*, 834 F.3d at 1364 n.2 ("[I]t may be time to ask whether we should reconsider *Oja* and *Monzo* in light of recent Supreme Court precedent finding some time limits nonjurisdictional.") Order, *Musselman v. Dep't of the Army*, Fed. Cir. No. 16-2522, ECF#16 (filed Nov. 14, 2016) (appointing *pro bono* counsel and requesting briefing on whether "the Supreme Court's more recent cases dealing with whether statutory-time limits are jurisdictional or merely claims-processing rules and whether those cases have overruled *Oja*, *Monzo*, and *Pinat* or whether those cases should be overruled.").

to reconsider its own precedent, and never actually analyzed 5 U.S.C. § 7703(b)(1)(A) through the lens of *Arbaugh*'s clear-statement rule.

Indeed, in 2017, in *Fedora v. MSPB*, 848 F.3d 1013 (Fed. Cir. 2017), the Federal Circuit reaffirmed its earlier precedent, without applying *Arbaugh*'s clear-statement rule. Instead, the court reasoned that *Bowles v. Russell*, 551 U.S. 205 (2007) controlled the analysis, and should be read broadly to make all "[a]ppeal periods to Article III courts" jurisdictional, and that *Arbaugh* and similar cases were inapposite. *Id.* at 1015-17. *Fedora* and two other cases presenting the same issue resulted in 8-to-4 votes against rehearing en banc, and certiorari petitions that this Court ultimately denied. *See Fedora v. MSPB*, 868 F.3d 1336 (Fed. Cir. 2017) (denying rehearing), *cert. denied*, 138 S. Ct. 755 (2018); *Vocke v. MSPB*, 868 F.3d 1341 (Fed. Cir. 2017) (denying rehearing), *cert. denied*, 138 S. Ct. 755 (2018); *Musselman v. Dep't of the Army*, 868 F.3d 1341 (Fed. Cir. 2017) (denying initial hearing en banc), *cert. denied*, 138 S. Ct. 739 (2018).

In an amicus brief, the FCBA urged this Court to grant review in *Fedora*, *Vocke*, and/or *Musselman*. *See* Br. of the Fed. Cir. Bar Ass'n as Amicus Curiae Supporting Pet'rs, Nos. 17-544, 17-557, 17-570, *available at* 2017 WL 5478242 (filed Nov. 13, 2017).

In opposing certiorari, the Solicitor General argued that the Court should deny review to give the Federal Circuit the opportunity to consider *Hamer*, which was decided after the *Fedora*, *Vocke*, and *Musselman* certiorari petitions were filed. *Vocke* BIO 24 (U.S. Dec. 13, 2017) (review "would be premature because the courts of appeals have not yet had the opportunity to interpret and apply that decision [*Hamer*]."); *Fedora*

BIO 22 (U.S. Dec. 13, 2017); *Musselman* BIO 24-25 (U.S. Dec. 15, 2017). *Hamer* held that a deadline in the Federal Rules of Appellate Procedure was not jurisdictional, and explained that "[s]everal courts of appeals, including the Court of Appeals in Hamer's case, ha[d] tripped over [the] statement in *Bowles* that 'the taking of an appeal within the prescribed time is 'mandatory and jurisdictional,'" and had cited *Bowles* in support of decisions concluding that various other deadlines were jurisdictional. 138 S. Ct. at 21. This Court denied the *Vocke*, *Fedora*, and *Musselman* petitions, and another petition later that Term that raised the same question. *Jones v. Dep't of Health & Hum. Servs.*, 139 S. Ct. 359 (2018).

3. This case proved that the government's note of caution was somewhat prescient. In this case, the Federal Circuit took note of *Hamer*, and it no longer reasoned that *Bowles* rendered all appeal periods to Article III courts jurisdictional. Instead, for the first time, the Federal Circuit finally considered whether Congress had provided a "clear statement" that 5 U.S.C. § 7703(b)(1)(A)'s appeal deadline was jurisdictional. Pet. App. 7a.

As the petition well explains and this brief will not repeat at length, the court of appeals found such a "clear statement" in 28 U.S.C. § 1295(a)(9)'s cross-reference to 5 U.S.C. § 7703(b)(1). Pet. App. 7a-8a. That ruling drew comprehensive dissenting opinions from Judge Plager, App. 9a-23a (dissenting from the panel disposition), and from three other judges at the rehearing stage. App. 33a-43a (Wallach, J., joined by Newman and O'Malley, JJ., dissenting from denial of rehearing en banc); *see also* App. 44a-46a (Plager, J., dissenting from denial of panel rehearing).

Now, thirteen years after *Arbaugh*, the Federal Circuit has finally applied this Court's clear-statement rule to the filing deadline to appeal from the MSPB to the Federal Circuit. And more than thirty years after its decision in *Monzo*, the Federal Circuit has yet again concluded that the deadline is jurisdictional. The en banc vote in this case—like the en banc votes in the *Vocke*, *Musselman*, and *Fedora* cases that led to petitions to this Court last Term—divided along the same lines as before and further confirms that the Federal Circuit's view is unlikely to change absent review from this Court. Now that this Court has the benefit of reasoned majority and dissenting opinions by the court of appeals applying *Arbaugh*'s clear-statement rule to section 7703(b)(1)(A)'s filing deadline, there is no further percolation to be had at the Federal Circuit, and no reason to delay review. The question is squarely presented here, and the Court should grant review.

II. The Decision Below Has Important Consequences.

1. The first Question Presented is important to the nearly two million federal employees whose employment protections are backed by rights of appeal to the MSPB and, from there, to the Federal Circuit. *See* MSPB, *Congressional Budget Justification FY 2018* at 2 (May 2017) ("[T]here are approximately 1.7 million Federal employees over whom the Board has jurisdiction, and those employees file appeals at a rate of 0.387 percent per year," which is approximately 6500 appeals per year), *available at* https://tinyurl.com/mspbfy2018.

In a similar context, in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982), this Court held

that Title VII's requirement of a timely-filed EEOC charge was not a jurisdictional prerequisite to filing a Title VII suit in federal district court. *Zipes* relied in part on the "guiding principle" that enforcing Title VII's filing requirements strictly would be "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." *Id.* (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)). As a practical matter, that description applies to many appeals from the MSPB to the Federal Circuit. Of the thousands of federal employees who pursue appeals at the MSPB each year, more than 50% are *pro se*. MSPB, *Congressional Budget Justification FY 2018* at 12 (More than 50% of MSPB claimants are *pro se*, and "do not generally have equal knowledge of the case filing process or equal access to the information available, especially if they are stationed overseas."). In part because the Federal Circuit construes 5 U.S.C. § 7703(b)(1)(A) to impose a deadline for receipt by the court (as opposed to a mailbox rule), it frequently happens that *pro se* appellants to the Federal Circuit miss the deadline by a week or less, and that the Federal Circuit dismisses their appeals for lack of jurisdiction.[3]

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[3] *See Chaney v. Dep't of Veterans Affairs*, No. 17-1028, ECF #16 (Fed. Cir. Feb. 23, 2017) (*pro se* appellant; petition for review mailed, received three days late); *Baldwin v. Small Bus. Admin.*, No. 17-1300, ECF #11 (Fed. Cir. Feb. 23, 2017) (*pro se* appellant; appeal received one day late); *Jarmin v. OPM*, 678 F. App'x 1023 (Fed. Cir. 2017) (*pro se* appellant; petition mailed, received two days late); *Obiedzinski v. USPS*, No. 17-1375, ECF #9 (Fed. Cir. Mar. 9, 2017) (*pro se* appellant; petition mailed, dated seven days before deadline, received ten days late); *Barker v. USPS*, No. 17-1662, ECF #7 (Fed. Cir. May 19, 2017) (*pro se* appellant; petition sent one day late, received nine days late); *Brenndoerfer v. USPS*, 693 F. App'x 904 (Fed. Cir. 2017) (*pro se* appellant; petition

2. The Federal Circuit's reasoning also has implications for appellants to that court from tribunals other than the MSPB. In *Arbaugh*, this Court explained that its clear-statement rule would provide a "readily administrable bright line" that would not leave courts and litigants "to wrestle with the issue" of whether a deadline is jurisdictional where Congress' intent was unclear. 546 U.S. at 515-16. The Federal Circuit's reasoning in this case applies the clear-statement rule in a way that invites much unnecessary "wrestling" in future cases. Here, the Federal Circuit held that a cross-reference in a jurisdictional statute—*i.e.*, 28 U.S.C. § 1295(a)(9)'s reference to "an appeal" from the MSPB, "pursuant to section[] 7703(b)(1)"—satisfied the requirement of a clear statement from Congress imbuing the cross-referenced provision's filing deadline with jurisdictional consequences. Pet. App. 7a-8a.

In addition to the MSPB, the Federal Circuit has exclusive appellate jurisdiction over appeals from numerous other administrative bodies and Article I courts, including agencies' boards of contract appeals,[4] the Office of Compliance,[5] the Government Accountability Office Personnel Appeals Board, [6] the

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

[4] 28 U.S.C. § 1295(a)(10) (jurisdiction); 41 U.S.C. § 7107(a) (filing deadline).

[5] 2 U.S.C. § 1407(a) (jurisdiction), (b)(1) (filing deadline).

[6] 31 U.S.C. § 755 (jurisdiction and filing deadline).

Court of Appeals for Veterans Claims,[7] the Court of Federal Claims,[8] the Patent Trial and Appeal Board,[9] the Trademark Trial and Appeal Board,[10] and the International Trade Commission.[11] The various statutes conferring jurisdiction on the Federal Circuit are phrased in different ways. Some—like 28 U.S.C. § 1295(a)(9), at issue here—confer jurisdiction over "an appeal" from another tribunal "pursuant to" a statute that contains numerous provisions including a filing deadline. *See, e.g.*, *id.*; 28 U.S.C. § 1295(a)(10) (cross-referencing 41 U.S.C. § 7107(a)(1), which provides a 120-day deadline to appeal). Others similarly cross-reference statutes containing appeal deadlines, but use cross-referencing words other than "pursuant to." *See, e.g.*, 28 U.S.C. § 1295(a)(6) (jurisdiction "to review the final determinations of the United States International Trade Commission . . . made under . . . 19 U.S.C. § 1337"); 19 U.S.C. § 1337(c) (deadline to appeal). Others simply name the tribunal from which appeals may be taken, and/or the types of orders that may be appealed. *See, e.g.*, 28 U.S.C. § 1295(a)(3) ("final decision of the United States Court of Federal Claims"). Others confer jurisdiction in one subsection

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[7] 38 U.S.C. § 7292(c), (d) (jurisdiction); *id.* § 7292(a) ("within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts").

[8] 28 U.S.C. § 1295(a)(3) (jurisdiction); Ct. Fed. Cl. R. 58.1 ("within the time and in the manner prescribed for appeals in [Fed. R. App. P. 3]"); 42 U.S.C. §§ 300aa-12(f), 300aa-21(a) (jurisdiction and filing deadline for Vaccine Act appeals).

[9] 28 U.S.C. § 1295(a)(4)(A).

[10] 28 U.S.C. § 1295(a)(4)(B) (jurisdiction); 37 C.F.R. § 2.145(d)(1) (filing deadline); *see also* 15 U.S.C. § 1071(a).

[11] 28 U.S.C. § 1295(a)(6) (jurisdiction); 19 U.S.C. § 1337(c) (deadline).

and establish filing deadlines in another subsection of the same statute—either directly or by cross-referencing yet another statute. *See, e.g.*, 2 U.S.C. § 1407(a)(1) (jurisdiction over appeals from Government Accountability Office Personal and Appeals Board), (b)-(c) (filing deadlines). 38 U.S.C. § 7292(c) (jurisdiction over appeals from the Court of Appeals for Veterans Claims), (a) (review "shall be obtained by filing a notice of appeal … within the time and in the manner prescribed for appeal to the Unites States courts of appeals from United States district courts"). Others take different forms. *See, e.g.*, 28 U.S.C. § 1295(a)(8) (cross-referencing 7 U.S.C. § 2461, which states that the "Federal Circuit shall have jurisdiction of any such appeal," and that an appeal "may, within sixty days or such further times as the Secretary allows, be taken under the Federal Rules of Appellate Procedure.").

By ruling in this case that 28 U.S.C. § 1295(a)(9)'s cross-reference to 5 U.S.C. § 7703(b)(1) provides the requisite "clear statement" from Congress to imbue the cross-referenced statute's filing deadline with jurisdictional consequences, the Federal Circuit potentially renders "jurisdictional" a raft of other procedural requirements cross-referenced in 28 U.S.C. § 1295(a)(1)-(14), and at a minimum invites additional litigation over the numerous other corners of the Federal Circuit's appellate jurisdiction. The Federal Circuit's reasoning thereby threatens to replace the "readily administrable bright line" of *Arbaugh*, 546 U.S. at 515-16, with disputes over degrees of proximity between various jurisdiction-conferring statutes and their corresponding deadlines. That is precisely the sort of unnecessary litigation, and "wrestl[ing] with the issue" of a filing deadline's significance that

this Court sought to avoid by announcing the clear-statement rule in *Arbaugh* and reaffirming and refining it over the ensuing 10+ years.

CONCLUSION

The petition should be granted.

March 15, 2019

Respectfully submitted,

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