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 AMICUS CURIAE OF AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES IN SUPPORT OF PETITIONER GRAVISS

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QUESTION PRESENTED

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

Most claim-processing rules are non-jurisdictional. There must thus be clear Congressional intent that a deadline have jurisdictional force in order to render it "mandatory and jurisdictional." *Hamer v. Neighborhood Housing Services of Chicago, et al.*, 138 S.Ct. 13 (2017) ("*Hamer*"). Assessing whether a claim-processing deadline is jurisdictional, and therefore a mandatory time bar, is a textual and contextual inquiry. Analysis of whether Congress has made a clear statement of its intent that a claim-processing deadline be treated as jurisdictional requires a reviewing court to examine the text, structure, and purpose of the statute in question. *Id.*; *see also Elgin v. Dep't of Transportation*, 567 U.S. 1, 10 (2012).

The question presented is whether the time period for a federal employee to seek review of an arbitrator's decision by the United States Court of Appeals for the Federal Circuit under 5 U.S.C. § 7703(b)(1)(A) is subject to equitable exceptions or forfeiture.

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INTEREST OF THE AMICUS[1]

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

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

Additionally, because each of the above-mentioned administrative forums has its own mechanism for seeking judicial review at the conclusion of the administrative process, AFGE often provides representation

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[1] Counsel for AFGE notified counsel for all parties on February 28, 2019, of AFGE's intent to submit this amicus brief in support of petitioner. Each party has consented in writing to AFGE's filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person or entity other than AFGE or its counsel made a monetary contribution to the preparation or submission of this brief.

before federal district courts and federal courts of appeals across the United States, including the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). *See, e.g.*, *Archuleta v. Hopper*, 786 F.3d 1340 (Fed. Cir. 2015). The question of whether the deadline for seeking judicial review of an arbitrator's decision or a final MSPB decision is subject to equitable exceptions or forfeiture is therefore of great interest to AFGE.

The question raised here is important and likely to have a widespread effect on federal employees. Certiorari should be granted.

SUMMARY OF THE ARGUMENT

The decision below is in direct conflict with this Court's decisions in *Hamer* and *United States v. Kwai Fun Wong*, 135 S.Ct. 1625 (2016) ("*Fun Wong*"). The Federal Circuit incorrectly classified 5 U.S.C. § 7703(b)(1)(A), which governs petitions for review of decisions by an arbitrator and the MSPB to the Federal Circuit, as a jurisdictional bar rather than a claim-processing rule.[2] The Federal Circuit erroneously concluded that the text of 28 U.S.C. § 1295(a)(9) is a clear statement of Congressional intent that the filing deadline in Section 7703(b)(1)(A) be jurisdictional.

The Federal Circuit failed to properly analyze the text, structure, and purpose of both Section 7703(b)(1)(A) and Section 1295(a)(9). Had the court of appeals done so, it would have recognized that Congress did not intend to bar the courthouse door to equitable exceptions to the time-period in which an employee may seek

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[2] Pursuant to 5 U.S.C. §§ 7121(e) & (f), certain arbitrator's decisions are treated the same as MSPB decisions for the purpose of judicial review.

judicial review of a final decision of the MSPB or to claims that the government forfeited a timeliness objection by failing to raise it in a timely fashion. Put differently, Congress has made no clear statement that the filing deadline in Section 7703(b)(1)(A) should be treated as jurisdictional. As a result, equitable exceptions and forfeiture remain available. This should especially be so given the informal nature of arbitrations, the administrative nature of MSPB appeals, and the high number of pro se appeals handled by the MSPB, many of which are then appealed pro se to the Federal Circuit.

The Court should therefore grant certiorari.

ARGUMENT

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

The Federal Circuit misapplied this Court's decisions in *Hamer* and *Fun Wong* in the case below. The court below erroneously concluded that the time to seek judicial review of an arbitrator's decision, as set forth in 5 U.S.C. § 7703(b)(1)(A), was jurisdictional based on the language of a different statute in a different title of the U.S. Code, 28 U.S.C. § 1295(a)(9). *See Fed. Educ. Ass'n—Stateside Region v. Dep't of Def., Domestic Dependents Elementary and Secondary Sch.*, 898 F.3d 1222, 1225-26 (2018). More specifically, the Federal Circuit summarily held that the text of 28 U.S.C. § 1295(a)(9) "constitutes a clear statement that [the Federal Circuit's] jurisdiction is dependent on the statutory time limit" contained in 5 U.S.C. § 7703(b)(1)(A). *Id.* at 1225. The court of appeals then extended this faulty reasoning to conclude, *ipso facto*, that the time to seek review of an arbitrator's decision could

not be subject to equitable exceptions or forfeiture under any circumstances. *Id.*

This Court's controlling precedent plainly requires the application of a two-pronged analytical framework for determining whether a filing deadline is "jurisdictional" in the sense that it may never be waived or forfeited, or whether the deadline is a mandatory claim-processing rule, in which case equitable exceptions to the deadline, or a forfeiture defense, may be available. *Hamer*, 138 S.Ct. at 17 ("Mandatory claim-processing rules are less stern. If properly invoked, mandatory claim-processing rules must be enforced, but they may be waived or forfeited.").

To decide which type of deadline is implicated in a given case, the Court has expressed the analytical framework as follows: "If a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional, otherwise the time specification fits within the claim-processing category." *Hamer*, 138 S.Ct. at 20 (internal citations omitted). Put another way, a statutory deadline to appeal an agency decision is a claim-processing rule because it cannot govern the transfer of adjudicatory authority from one Article III court to another. Such a claim-processing rule may nonetheless have a jurisdictional impact, but only if there is a clear statement of Congressional intent that the rule be considered jurisdictional. *Id.* at 20, n. 9. Even so, most statutory claim-processing rules are not jurisdictional. *Id.*

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

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

Here, the deadline at issue is a quintessential claim-processing rule. Section 7703(b)(1)(A) of Title 5 governs petitions for review of a final agency decision to a court of appeals. It plainly does not govern "the transfer of adjudicatory authority from one Article III court to another[.]" *Hamer*, 138 S.Ct. at 20. As a result, the filing deadline in Section 7703(b)(1)(A) fits comfortably within the "claim-processing category" and may only have jurisdictional impact through a clear statement of Congressional intent. *See id.* at 20, n. 9.

There is no meaningful argument to be had that Congress intended the deadline in Section 7703(b)(1)(A) to be jurisdictional. The statute itself admits of no "clear statement" of Congressional intent to imbue the deadline with jurisdictional force. Rather, the deadline stands alone. Section 7703(b)(1)(A)'s plain-Jane statement that "[n]otwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board" is even less emphatic than the "forever barred" construction that the Court found to be non-jurisdictional in *Fun Wong*. *See Fun Wong*, 135 S.Ct. at 1634-35.

The grant of subject matter jurisdiction to the Federal Circuit in 28 U.S.C. § 1295(a)(9), moreover, is not textually tied to the petition filing deadline. Paraphrased, the first sentence of Section 7703(b)(1)(A) says that the Federal Circuit will have subject matter jurisdiction over appeals from the MSPB, leaving

aside "mixed case" appeals. The second sentence, again paraphrased, then says "and this is how long an employee has to appeal." The former does not depend on the latter.

The language in 28 U.S.C. § 1295(a)(9) that purports to grant the Federal Circuit exclusive "jurisdiction" over MSPB final decisions is not a "clear statement" of Congressional intent that the 60-day deadline be jurisdictional. The text, structure, and purpose of Section 1295(a) are too equivocal to support such a reading. To begin with, Section 1295(a)(9) does not contain any special words or phrases stating or implying that Section 7703(b)(1)(A)'s time bar should be a jurisdictional limit, such that a failure to meet it would conclusively extinguish a petitioner's right to review. For example, neither Section 1295(a)(9) nor Section 7703(b)(1)(A) state that the Federal Circuit shall have jurisdiction over final MSPB decisions *if* a petition for review is filed within 60 days after the MSPB issues notice of the decision. In other words, the jurisdictional grants in Section 1295(a)(9) and the first sentence of Section 7703(b)(1)(A) are not textually tied to the claim-processing deadline in the second sentence of Section 7703(b)(1)(A).

Further, the text, structure, and purpose of Section 1295(a) plainly show that this statutory section governs *which* matters may be heard by the Federal Circuit as opposed to *when* they should be filed. Each subsection of Section 1295(a) distinctly identifies *which* matters are within the Federal Circuit's exclusive jurisdiction without specifying *when* those matters should be brought. It is, in other words, a simple list of the types of matters that may be heard by the Federal Circuit, and no other circuit, without any textual consideration of the exact nature of each listed

matter. This is the antithesis of a "clear statement." In fact, it is no statement at all. In addition, Congress's separation of the jurisdictional grant in 28 U.S.C. § 1295(a)(9) from the filing deadline in 5 U.S.C. § 7703(b)(1)(A) implies a "structural divide built into the statute." *Fun Wong*, 135 S.Ct. at 1633.

Section 1295 also offers no useful interpretative guidance of Section 7703(b)(1)(A) because it was added to Title 28 four years after the Civil Service Reform Act of 1978. *Compare* Pub. L. No. 97-164, § 127(a), 96 Stat. 25 (1982) *with* Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 205, 92 Stat. 1111 (1978). Public Law 97-164, which established the United States Court of Appeals for the Federal Circuit added Section 1295 to Title 28 and substituted the Federal Circuit for the "Court of Claims or a United States court of appeals" in Section 7703(b)(1)(A). Pub. L. No. 97-164, §144. The language in Section 1295(a) does not meaningfully contribute to the statutory interpretation of Section 7703(b)(1)(A) because it was enacted after the fact and states the obvious: the Federal Circuit has jurisdiction to hear appeals from final decisions of the MSPB. This language is not a clear statement that Congress intended the time bar in 7703(b)(1)(A) to be jurisdictional.

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

In summary, the court of appeals misapplied this Court's decisions in the case below. The court of appeals failed to recognize that 5 U.S.C. § 7703(b)(1)(A) is a claim-processing rule that is subject to equitable exceptions. Congress has not supplied a clear statement that Section 7703(b)(1)(A) should be treated as jurisdictional, and the statute's text, structure, and purpose support the availability of equitable exceptions and forfeiture. The Government cannot therefore meet its heavy burden of showing that Congress intended Section 7703(b)(1)(A) to be jurisdictional.

CONCLUSION

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

Respectfully submitted,

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