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

PETITIONER'S REPLY

Dorothy Lee
7728 Windwood Drive
Dublin, Ohio 43017
(614) 439-0135

Brian Wolfman
Counsel of Record
Bradley Girard
GEORGETOWN LAW
APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW
Washington, D.C. 20001
(202) 661-6582
wolfmanb@georgetown.edu

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PETITIONER'S REPLY

Given the importance of the principal question presented, it is no surprise that petitioner is supported by the Nation's largest federal-employee labor organization, national veterans' organizations, and leading federal-jurisdiction scholars. The Federal Circuit Bar Association—which "represents the interests of those involved with the subject matter which comes before the United States Court of Appeals for the Federal Circuit and its reviewed tribunals"—also urges this Court's review.[1]

The Government's brief in opposition does nothing to negate the petition's importance. Nor does it rehabilitate the Federal Circuit's gravely mistaken ruling or weaken this case's status as an ideal vehicle for correcting that ruling. Review should be granted.

I. The principal question presented is important and demands this Court's attention now.

A. The Government does not seriously dispute that the petition presents "a question of exceptional importance." Pet. App. 43a (Wallach, C.J., dissenting from denial of reh'g en banc). For starters, the Government does not respond to the petition's showing that this case is at least as important as the many other cases in which this Court has granted review to decide whether a congressional prescription is a conventional nonjurisdictional claim-processing rule or a rare jurisdictional bar. Pet. 28-30.

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[1] https://fedcirbar.org/About-FCBA/Who-We-Are/Mission-Vision.

Nor does the Government deny that about two million federal employees have appeal rights to the MSPB and are potentially affected by the decision below. Pet. 30; *see also* Br. of Amer. Fed'n Gov't Emps. (AFGE) 1; Br. of Fed. Cir. Bar Ass'n (FCBA) 8. And it does not contest that more than 600,000 of these employees are veterans, Pet. 30, whose interests are protected under congressional programs that grant veterans "special solicitude." Br. of Nat'l Veterans Legal Servs. Program et al. (NVLSP) 9; *see id.* at 7-11 (explaining programs in detail).[2]

B. But that is not all. Unless this Court steps in, the decision below will reach far beyond the federal-employment context. *See* Pet. 25-26, 30-31. Recall that the Federal Circuit's rationale for finding Section 7703(b)(1)(A)'s time limit jurisdictional is that Section 7703(b)(1) is cross-referenced in 28 U.S.C. § 1295(a)(9), one of the fourteen paragraphs of Section 1295(a) that grant the Federal Circuit jurisdiction over myriad tribunals and subject matters. That rationale would render jurisdictional every time limit or other procedural requirement of the varied review schemes cross-referenced in the other thirteen paragraphs of 28 U.S.C. § 1295(a)—all without a congressional word to that effect. *See* Pet. 30-31.

The Government's footnoted rejoinder—that "[t]he longevity of the Federal Circuit's precedent" holding Section 7703(b)(1)(A) jurisdictional "refutes" the logical consequences of the decision below, BIO 23 n.7—is incorrect. Though the relevant Federal Circuit

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[2] *See also* FCBA 9 (more than 50% of MSPB litigants appear pro se and occasionally need the flexibility that nonjurisdictional time limits allow).

precedent dates to 1984, Pet. 20 n.2, the panel majority below abandoned the rationale of its earlier decisions, Pet. 10-11, and made Section 1295(a)(9)'s cross-reference its exclusive rationale, Pet. App. 7a-8a; *see* FCBA 7. As the petition explains (at 25-26)—and the Government nowhere disputes—nothing in Section 1295(a)'s text or logic distinguishes among the cross-references in paragraphs (a)(1) through (a)(14). Thus, "the Federal Circuit's reasoning would mean that a slew of other requirements—beyond those relating to MSPB decisions—would also be swept into the 'jurisdictional' category." Br. of Law Professors (Profs) 16; *see id.* at 16 n.6 (reviewing Section 1295(a)'s various paragraphs); FCBA 10-11 (same).

At a minimum, by "imbu[ing] the cross-referenced statute's filing deadline with jurisdictional consequences," FCBA 12, the Federal Circuit has created a breeding ground for wasteful litigation about whether this or that requirement is "jurisdictional," undermining the "readily administrable bright line" that this Court sought in establishing the clear-statement rule, *id.* (quoting *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)). This situation should not persist without this Court's blessing.

II. The decision below is wrong.

A. The Government's defense of the Federal Circuit's decision does not withstand scrutiny. The Federal Circuit sought to apply this Court's clear-statement rule: that statutory claim-processing requirements are presumed nonjurisdictional unless Congress "clearly states" otherwise, *Arbaugh*, 546 U.S. at 515-16. *See* Pet. 7a. The Government grudgingly acknowledges that the clear-statement

rule applies here, because this case does not involve "the timebound transfer of adjudicatory authority from one Article III court to another." BIO 17 (quoting *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 n.9 (2017)). But it badly misapplies the rule.

This Court has said that it is up to the "*Legislature* [to] clearly state[]" that a procedural prescription is jurisdictional. *Arbaugh*, 546 U.S. at 515 (emphasis added). And so, in case after case, the Court has scrutinized the relevant provision's text to see whether it "speak[s] in jurisdictional terms or refer[s] in any way to the jurisdiction of the courts." *Gonzalez v. Thaler*, 565 U.S. 134, 143 (2012) (quoting *Arbaugh*, 546 U.S. at 515). And though Congress "need not 'incant magic words in order to speak clearly,'" BIO 17 (quoting *Hamer*, 138 S. Ct. at 20 n.9), it must use *some* words to do so.

Yet, the Government points to nothing in Section 7703(b)(1)(A)—no statutory text whatsoever—to meet the clear-statement rule. Why? Because Section 7703(b)(1)(A) never mentions "jurisdiction" nor "define[s] a federal court's jurisdiction over … claims generally, address[es] its authority to hear untimely suits, or in any way cabin[s] its usual equitable powers." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1633 (2015). The sixty-day provision prescribes only when a petition for review "shall be filed," 5 U.S.C. § 7703(b)(1)(A)—a standard, nonjurisdictional claim-processing rule that "does not speak to a court's authority, but only to a party's procedural obligations." *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 512 (2014).

B. Rather than relying on Section 7703(b)(1)(A)'s text, as this Court's decisions would demand, the

Government rests on a grab-bag of inapt case law and implications from legislative inaction. These insinuations make no statement about Section 7703(b)(1)(A)'s time prescription, let alone a clear one.

1.a. The Government relies principally on *Lindahl v. Office of Personnel Management*, 470 U.S. 768 (1985), which, it asserts, "held" that Section 7703(b)(1) is jurisdictional, BIO 17. That is incorrect. *See* Pet. 20-21. *Lindahl*'s only relevant *holding* was that the Federal Circuit, and not a trial-level court, was the appropriate first-instance judicial forum for certain federal-retiree claims. 470 U.S. at 788-89. And, as the Government concedes, "*Lindahl* did not specifically discuss Section 7703(b)(1)(A)'s timing requirement," BIO 9—which is the issue here. To be sure, *Lindahl* made loose references to Section 7703(b)(1)(A) as "jurisdictional," artifacts of a pre-*Arbaugh* world, before this Court's effort to "bring some discipline" to the "jurisdictional" moniker. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). These references are precisely the kinds of "drive-by" jurisdictional characterizations that, this Court has held, "should be accorded 'no precedential effect.'" *Arbaugh*, 546 U.S. at 511 (citation omitted).[3]

b. The Government's reliance on *Stone v. INS*, 514 U.S. 386 (1995), is even weaker. The Government says *Stone* held that an appeal period under the Immigration and Nationality Act could not be tolled "*because* it was 'jurisdictional in nature.'" BIO 12 (emphasis added; quoting *Stone* in part). But *Stone*

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[3] It bears repeating that the Federal Circuit has never cited *Lindahl* in any of its decisions holding Section 7703(b)(1)(A) jurisdictional. *See* Pet. 20 & n.2.

held no such thing. The question presented there was whether a motion for reconsideration tolled the review period (not whether the review period itself was jurisdictional). *See* Pet. Br. 1, *Stone v. INS*, No. 93-1199 (July 28, 1994). And both the majority and the dissent addressed that issue largely by asking whether tolling was administratively sensible as a matter of agency policy (which would have been unnecessary if the time prescription were jurisdictional). *See Stone*, 514 U.S. at 390-405; *id.* at 406-18 (Breyer, J., dissenting). *Stone*'s dictum that the review provision was "jurisdictional in nature," *id.* at 406, made *after* concluding that tolling was impermissible, is a classic example of the "profligate use" of the "jurisdictional" label that this Court has repeatedly condemned. *EPA*, 572 U.S. at 512 (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)).

2. The Government asks this Court to infer that Congress wants Section 7703(b)(1)(A)'s time limit to be jurisdictional based on (a) the line of Federal Circuit decisions holding that limit jurisdictional, (b) earlier circuit authority to similar effect, and (c) subsequent congressional inaction. BIO 11. Whether a generous inference of this kind ever can genuinely divine the meaning of statutory text is questionable, but, surely, it cannot meet the demands of a *clear-statement* rule.

a. This Court has sometimes inferred congressional acquiescence in its prior decisions from legislative inaction—though this Court approaches that exercise with considerable skepticism, *see, e.g.*, *Brown v. Gardner*, 513 U.S. 115, 120-22 (1994). More to the point, arguments to infer congressional acquiescence in lower-court precedent "deserve little

weight in the interpretive process," *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). Indeed, rather than inferring congressional acquiescence, this Court has not hesitated to reject longstanding, uniform lower-court precedent when it is inconsistent with the statutory text. *See, e.g.*, *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res.,* 532 U.S. 598, 605 (2001); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 33, 35 (1998); *cf. Brown*, 513 U.S. at 122 (sixty years of contrary regulatory interpretation is "no antidote" to the statutory text).

b. The Government's congressional-acquiescence theory is particularly weak here given the circumstances. The supposedly pedigreed line of Federal Circuit authority on which Congress purportedly has relied contained *no* reasoning until just two years ago. *See* Pet. 20 n.2. That unreasoned authority was the product of a now-rejected regime in which all manner of time prescriptions were reflexively deemed "jurisdictional," an understanding "left over" from when this Court was "less than meticulous" in using the "jurisdictional" label. *Hamer*, 138 S. Ct. at 21 (citation omitted).

In the last two years, the Federal Circuit has analyzed the issue, but its approach has rapidly flip-flopped. *See* Pet. 10-11. First, that court held Section 7703(b)(1)(A) jurisdictional based on *Bowles v. Russell*, 551 U.S. 205 (2007). *See Fedora v. MSPB*, 848 F.3d 1013, 1015 (Fed. Cir. 2017). But, then, after this Court's decision in *Hamer* made reliance on *Bowles* untenable, the Federal Circuit opined that Section 7703(b)(1)(A)'s time limit is jurisdictional—and *clearly* so, no less—because it is cross-referenced in 28 U.S.C.

§ 1295(a)(9). *See* Pet. App. 7a-8a; FCBA 7; Profs 15. Given the Federal Circuit's inconsistency, that court's Section 7703(b)(1)(A) authority is hardly something one would expect Congress to acquiesce in.

And if we add to the mix this Court's decision in *Kloeckner v. Solis*, which held that the time limit in 5 U.S.C. § 7703(b)(2)—Section 7703(b)(1)'s similarly-structured neighbor—does *not* demarcate the Federal Circuit's jurisdiction but is "nothing more than a filing deadline," 568 U.S. 41, 52 (2012), it is impossible to ascribe to Congress the Federal Circuit's understanding of Section 7703(b)(1)(A).

3. Relying on *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130 (2008), the Government says that this Court should look to judicial interpretations of time limits in the Tucker Act and Hobbs Act, which governed federal-employment review *before* enactment of a revised Section 7703(b)(1)(A) in the Federal Courts Improvement Act (FCIA), Pub. L. No. 97-164, 96 Stat. 25 (1982). *See* BIO 13. The simple answer to this argument is that the FCIA revamped Section 7703, placing review in the Federal Circuit for the first time, and there is no evidence, textual or otherwise, that Congress then viewed Section 7703(b) as imposing jurisdictional time bars.

The somewhat more complicated answer is that, unlike Section 7703(b)(1)(A), the Tucker Act's time limit arguably speaks in jurisdictional terms, *see* 28 U.S.C. § 2501, and this Court held that limit jurisdictional in *John R. Sand* because of "[b]asic principles of *stare decisis*," 552 U.S. at 139—an unbroken, on-point line of *this Court's* authority reaching back to 1883, *id.* at 134-35. As for the Hobbs Act's time limit, this Court has not held it

jurisdictional. And even assuming its relevance here, like Section 7703(b)(1)(A), it must withstand scrutiny under this Court's modern clear-statement rule. *See Clean Water Council of Nw. Wis., Inc. v. EPA*, 765 F.3d 749, 751-52 (7th Cir. 2014) (Easterbrook, J.) (explaining that any argument that the Hobbs Act's time limit is jurisdictional would not survive this Court's clear-statement decisions).

4.a. The Government maintains that Congress would have had "good practical reason" to make Section 7703(b)(1)(A)'s time limit jurisdictional because it would be "cumbersome for a court of appeals, as opposed to a district court," to adjudicate equitable tolling disputes. BIO 14. But the Government itself views the issue here as whether Section 7703(b)(1)(A)'s time limit "is jurisdictional and not subject to *forfeiture* or equitable tolling," BIO 7 (emphasis added), and *petitioner's* claim is that the Government forfeited reliance on Section 7703(b)(1)(A) by failing to raise it in nearly three years of litigation, Pet. 3, 9, 27. As the petition explains (at 34), there is nothing "cumbersome" in deciding forfeiture questions, and appellate courts frequently decide them without difficulty. *See, e.g.*, *Kontrick v. Ryan*, 540 U.S. 443, 458-60 (2004) (enforcing forfeiture for failure to timely raise a defense).

b. The Government similarly asserts that a jurisdictional time limit would "promot[e] judicial efficiency." BIO 14 (quoting *John R. Sand*, 552 U.S. at 133). But forfeiture doctrine seeks just that, by incentivizing parties "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), and preventing wasted effort by courts and parties. *See* Pet. 27-28.

The Government just made this point in *Fort Bend County v. Davis*, No. 18-525 (argued Apr. 22, 2019), which concerns whether Title VII exhaustion is jurisdictional. It argued there that failing to enforce a forfeiture (and, rather, deeming exhaustion jurisdictional) would be "unfair to a plaintiff who has achieved full or partial success litigating the merits," while "diminish[ing] defendants' incentive to review a plaintiff's complaint carefully and raise any issues regarding [it] promptly." U.S. Am. Br. 32, *Fort Bend Cty. v. Davis*, No. 18-525 (Apr. 3, 2019).

III. This case is an ideal vehicle.

A. The Government nowhere contests that petitioner's case squarely raises the questions presented and that no antecedent issues could impede this Court's review. *See* Pet. 32.

1. The Government argues, however, that this Court's decisions denying review on recent petitions raising the question whether Section 7703(b)(1)(A) is amenable to equitable tolling is reason to deny review here. BIO 7-8, 22-23. The Government is wrong. *See* Pet. 32-34.

Though the Government now suggests otherwise, BIO 23, in each of those other cases, the Government urged that review be denied in part because, it asserted, equitable tolling is not a proper subject for appellate adjudication. *See* Pet. 33-34. But this case involves forfeiture, which, as just noted (at 9), appellate courts address regularly. And as this Court has said many times, regardless of whether a claim-processing rule is amenable to equitable tolling, it

always "can be waived or forfeited by an opposing party." *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714 (2019). *See* Pet. 34-35.[4]

2. As explained above (at 7-8), this petition also is different from the earlier ones because the Federal Circuit's rationale for holding Section 7703(b)(1)(A)'s time limit jurisdictional is different from the reasoning it employed in its earlier cases.

The Government disagrees, BIO 22, but is simply wrong, as the panel majority's opinion shows, *see* Pet. App. 6a-8a; *see also id.* 18a (Plager, J., dissenting). Moreover, in opposing certiorari in three of the earlier cases, the Government itself maintained that review "would be premature" because courts of appeals had "not yet had the opportunity to interpret and apply" this Court's just-announced decision in *Hamer*, 138 S. Ct. 13.[5] The fourth case was litigated pro se in the Federal Circuit and was decided just six days after *Hamer* came down, without any suggestion in that court's unpublished decision that *Hamer* was ever

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[4] Though unclear, the Government appears to insinuate that this case involves equitable tolling as well as forfeiture. BIO 23. To be sure, the Federal Circuit referred generally to equitable tolling, Pet. App. 6a, but that court understood petitioner's claim as one of forfeiture. *See id.* 14a & n.6 (Plager, J., dissenting) (the "Government would appear to have forfeited its right to challenge Ms. Graviss's petition as untimely."). And in the briefing below, though petitioner also used the word "tolling," she sought relief from the time limit based solely on the Government's forfeiture, which she urged repeatedly. CAFed Doc. 124, at 2, 3-4, 8, 14, 17. Thus, the Government's brief in opposition does not, because it cannot, assert that petitioner did not raise forfeiture below.

[5] BIO 22, *Fedora v. MSPB*, No. 17-557 (Dec. 14, 2017); *see also* BIO 25, *Musselman v. Dep't of Army*, No. 17-570 (Dec. 15, 2017); BIO 24, *Vocke v. MSPB*, No. 17-544 (Dec. 13, 2017).

considered. *Jones v. HHS*, 702 F. App'x 988, 989 (Fed. Cir. 2017) (relying exclusively on this Court's decision in *Bowles* and the Federal Circuit's *Bowles*-based ruling in *Fedora v. MSPB*, 848 F.3d 1013 (2017)), *cert. denied*, 139 S. Ct. 359 (2018).

The Federal Circuit has now fully considered *Hamer*, *see* Pet. App. 6a-7a, 17a-18a, 34a-35a, 45a, and the panel majority has crafted a different rationale for finding Section 7703(b)(1)(A)'s time limit jurisdictional—a rationale that, unless this Court intervenes, will adversely affect review regimes within the Federal Circuit's purview and the people who rely on them. *See* Pet. 29-31; *supra* at 2-3. The questions presented are ripe for review, and this Court should take them up now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Dorothy Lee
7728 Windwood Drive
Dublin, Ohio 43017
(614) 439-0135

Brian Wolfman
Counsel of Record
Bradley Girard
GEORGETOWN LAW
APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW
Washington, D.C. 20001
(202) 661-6582
wolfmanb@georgetown.edu

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