No. 20-1090

In The

Supreme Court of the United States

THASHA A. BOYD,

Petitioner,

v.

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS, AND UNITED STATES MERIT SYSTEMS PROTECTION BOARD,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The All Circuit Review Act of 2018 ("Act"), provides that under 5 U.S.C. § 7703, a federal employee aggrieved by a final decision of the Merit Systems Protection Board ("MSPB") who raised a claim of reprisal for whistleblowing disclosures and/or other protected activities under 5 U.S.C. § 2302(b)(8) or (b)(9)(A)(i), (B), (C), or (D) may petition for review within "60 days" of the MSPB's issuance of the final decision. Additionally, the Act is retroactive to the date of November 26, 2017.

In this case, Petitioner Thasha Boyd ("Ms. Boyd"), filed a Petition for Permission to Appeal the MSPB's November 2017 order [that removed her from Federal Service]. The United States Court of Appeals for the Eleventh Circuit dismissed the petition concluding that it was deprived of jurisdiction because the petition was filed outside of the 60-day timeframe permitted by 5 U.S.C. § 7703(b)(1)(B) and Rule 15 of the Federal Rules of Appellate Procedure ("FRAP"). The Eleventh Circuit also denied Ms. Boyd's Petition for Rehearing and Rehearing En Banc.

The questions presented are as follows:

1. Whether the 60-day deadline for seeking judicial review pursuant 5 U.S.C. § 7703(b)(1)(B) and the FRAP sets a bar to an appeal, as the Eleventh Circuit has concluded, or whether the Act's retroactive date precludes the enforcement of the deadline thus allowing equitable considerations such as forfeiture, waiver and tolling.

QUESTIONS PRESENTED – Continued

2. Whether the Eleventh Circuit can enter an order barring the right to file an appeal absent analysis beyond a statute's plain text and/or rules of the courts.

PARTIES TO THE PROCEEDING

Petitioner is Thasha A. Boyd. Ms. Boyd was plaintiff-appellant below.

Respondents are the United States Department of Veterans Affairs and the United States Merit Systems Protection Board. Both were defendants-appellees below.

STATEMENT OF RELATED CASES

Petitioner is Thasha A. Boyd is not aware of the existence of a proceeding in state and federal trial and appellate courts [including proceedings in this Court] that are directly related to the case in this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thasha A. Boyd ("Ms. Boyd") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the Eleventh Circuit (Pet. App. 1) is unpublished. The Eleventh Circuit's order denying rehearing en banc and panel rehearing (Pet. App. 3) is unpublished.

JURISDICTION

The judgment of the Eleventh Circuit was entered on September 8, 2020. Pet. App. 1. A timely petition for rehearing and rehearing en banc was denied on November 17, 2020. Pet. App. 3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES INVOLVED

Federal Rule(s) of Appellate Procedure 4 and 15; 5 U.S.C. § 7703; and, the All Circuit Review Act of 2018 are reproduced at Pet. App. 5-18. The United States House and Senate reports surrounding the history of

the All Circuit Review Act of 2018 are reproduced at Pet. App. 19-58.

STATEMENT OF THE CASE

I. Legal Background

The time to file a notice of appeal to a circuit court of appeals is considered either: (1) A jurisdictional bar to suit [which is often derived from statute]; or (2) An inflexible claim processing rule that may be subject to equitable considerations such as waiver, forfeiture, tolling and/or the unique-circumstances doctrine. Accordingly, we first review this Court and lower courts' precedent surrounding timing requirements and jurisdiction; and, retroactive and remedial legislation. Then we review the legislative history [depicting Congress' intent] that gave rise to the All Circuit Review Act, Pub. L. No. 115-195, 132 Stat. 1510 (2018).

A. Claim Processing Rule v. Jurisdictional Bar

This Court's precedent, notably in its recent decision in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017) (quoting *Bowles v. Russell*, 551 U. S. 205, 210–213 (2007)), determined that: "[T]his Court clarified that an appeal filing deadline prescribed by statute will be regarded as "jurisdictional," meaning that late filing of the appeal notice necessitates dismissal of the appeal." In *Hamer*, this Court also established that, "[A] time limit prescribed

only in a court-made rule, *Bowles* acknowledged, is not jurisdictional; it is, instead, a mandatory claim-processing rule subject to forfeiture if not properly raised by the appellee. *Ibid.*; *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004)."

B. Remedial and Retroactive Legislation

This Court's precedent also has upheld the application of retroactive legislation against due process challenges; and, has recognized that retroactive changes in the law and remedial legislation create new legal rights and responsibilities that preclude issues surrounding timeliness, jurisdiction and/or res judicata – even upon cases that were already decided by the lower courts. "When a new law makes clear that it is retroactive, an appellate court must apply that law in reviewing judgments still on appeal that were rendered before the law was enacted, and must alter the outcome accordingly." *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 at 226 (1995). This Court also has upheld the application of retroactive legislation against due process challenges, expressing approval of statutes that establish "[o]nly a modest period of retroactivity . . . confined to short and limited periods required by the practicalities of producing national legislation." *United States v. Carlton*, 512 U.S. 26 (1994). In determining whether or not the application of laws were remedial and/or retroactive, this Court's precedent applies(ed) an analysis beyond the plain

language and text of a statute in order to determine Congress' legislative intent.[1]

In determining whether Congress intended a particular provision to be jurisdictional, "[w]e consider 'context, including this Court's interpretations of similar provisions in many years past,' as probative of [Congress' intent]." *See Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017).

C. Legislative History of the All Circuit Review Act of 2018

"On November 27, 2012, the Whistleblower Protection Enhancement Act of 2012 ("WPEA") became law. This landmark whistleblower law was the first major update to the Whistleblower Protection Act since 1994. Among the many changes established by the WPEA was the creation of a two-year pilot program to allow the appeal of whistleblower cases from the Merit Systems Protection Board ("MSPB" or "Board") to any federal circuit court of appeals. Prior to the WPEA, exclusive jurisdiction over all appeals from the MSPB resided with the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), which was created in 1982, three-and-a-half years after the Civil Service Reform

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[1] In determining whether Congress intended a particular provision to be jurisdictional, "[w]e consider 'context, including this Court's interpretations of similar provisions in many years past,' as probative of [Congress' intent]." *See Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017).

Act of 1978 (CSRA) established the MSPB." (Pet. App. 37, H. Rep. No. 115-337, at 2)

"On September 26, 2014, Congress passed the All Circuit Review Extension Act, introduced by Ranking Member Elijah Cummings (D–MD) with then-Chairman Darrell Issa (R–CA) and Representatives Blake Farenthold (R–TX), Gerald Connolly (D–VA), and Chris Van Hollen (D–MD) as original cosponsors. The bill extended the initial two-year pilot program by three years, allowing additional time to assess the pilot program's impact." (Pet. App. 42, H. Rep. No. 115-337, at 4).

The All Circuit Review Extension Act provision that provided for judicial review of certain whistleblower claims by any circuit court of appeals expired on December 27, 2017. Ultimately, The All Circuit Review Act ("Act"), was signed into law by President Donald J. Trump, on July 7, 2018. Pet. App. 17. Accordingly, under the Act, plaintiffs/appellants who raise claims of reprisal for whistleblowing disclosures and/or protected activities under 5 U.S.C. § 2302(b)(8) or (b)(9)(A)(i), (B), (C), or (D) who wish to challenge only the Board's rulings on their whistleblower and/or protected activities claims have a permanent right to file their request for judicial review with the U.S. Court of Appeals for the Federal Circuit or any circuit court of appeals of competent jurisdiction. The Act is also retroactive to November 26, 2017.

The Act is codified under 5 U.S.C. § 7703(b)(1), which 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." Pet. App. 5.

II. Factual and Procedural Background

Ms. Boyd was honorably discharged from over eight years of service with the United States Army, and had since maintained over a decade of employment as a federal employee without disciplinary action(s). She accepted employment as Veterans Service Representative ("VSR") at the United States Department of Veterans Affairs ("VA"), Veterans Benefits Administration ("VBA") in September 2016. When Ms. Boyd joined the VA, she was trying to put her federal career back on track after enduring years of being underemployed at the Internal Revenue Service; and, her reaching a settlement that closed years of litigation with the United States Department of Labor ("USDOL"). However, the VA did not give Ms. Boyd a chance. The VA knew of Ms. Boyd's [whistleblower] litigation history with USDOL. Accordingly, the VA reverse engineered Ms. Boyd's removal from Federal Service by actions that include creating and fostering a hostile work environment – then, turning around and using Ms. Boyd's [and any reasonable person's] response to such a work environment as grounds to support the removal of Ms. Boyd.

On February 9, 2017, the VA served Ms. Boyd with a notice of proposed disciplinary action for charges of "Inappropriate Conduct" and "Failure to follow your supervisor's instructions". Ms. Boyd filed a timely response; and, on April 19, 2017, Ms. Boyd received the VA's final determination, which terminated Ms. Boyd's employment effective April 24, 2017.

A. Proceedings Prior to the Eleventh Circuit

Ms. Boyd filed two separate appeals to the Merit Systems Protection Board ("MSPB" or "Board"): (1) An Individual Right of Action ("IRA") appeal [Docket No. AT-1221-17-0363-W-1]; and, (2) An appeal of her removal/termination – where she raised as an affirmative defense her protected activity as a whistleblower [Docket No. AT-0752-17-0412-I-1]. During the discovery process in front of the MSPB, Ms. Boyd discovered that ex-parte communication took place between the deciding official and others prior to the deciding official's issuance of the final decision to terminate her from the VA.

Although Ms. Boyd argued this violation of her due process rights to the MSPB, the MSPB not only dismissed Ms. Boyd's arguments of due process violations, but blocked Ms. Boyd's discovery efforts to obtain evidence to refute the substance of the ex-parte communication. Worst, the MSPB took the ex-parte communication and used it to sustain the VA's removal of Ms. Boyd – which is another violation of due process,

because "[T]he Board is not permitted to cure the agency's errors during the adjudication process". *See Ward v. U.S. Postal Service*, 634 F.3d 1274, 1278 (Fed. Cir. 2011). On November 1, 2017, the MSPB issued its denial of Ms. Boyd's appeal of her termination from the VA; and, on November 3, 2017, her IRA appeal was also denied. Ms. Boyd, seeing that the MSPB's full Board lacked a quorum [and to date, still lacks a quorum], reluctantly filed her appeal(s) of the MSPB's decision(s) to the United States Court of Appeals for the Federal Circuit – where the Federal Circuit denied both of Ms. Boyd's appeals [mandate filed on September 13, 2018].

On September 28, 2018, in front of the United States District Court, Northern District of Georgia, Ms. Boyd filed a civil action ("Complaint) [Case No. 1:18-cv04529-MLB] seeking declaratory and injunctive relief from the VA and MSPB's (together "Respondents") violations the Fifth and Fourteenth Amendments of the U.S. Constitution, and violations under the American Procedures Act ("APA") [5 U.S.C. § 551 et seq., and 5 U.S.C. §§ 702, 704, 706]. Respondents filed a motion to dismiss Ms. Boyd's Complaint; and, upon research in preparation for a response to the motion to dismiss, Ms. Boyd discovered that the All Circuit Review Act was passed/signed into law on July 7, 2018. Accordingly, and on January 28, 2019, Ms. Boyd filed her "Motion for Relief from Judgment, Pursuant to Federal Rule of Civil Procedure 60(b), to Reopen, and Change of Venue" – where she requested that the District Court reopen both of her case(s) that were denied by the Federal Circuit. On December 6, 2019,

the District Court issued its order granting Respondents' motion to dismiss; and, denial of Ms. Boyd's Rule 60(b) motion.

B. Proceedings in the Eleventh Circuit

On January 27, 2020, Ms. Boyd filed her appeal of the District Court's dismissal of her Complaint to the Eleventh Circuit [Case No. 19-15099-HH]; and, on May 29, 2020, the Eleventh Circuit entered its order of vacate and remand to the District Court – with instruction to dismiss Ms. Boyd's Complaint without prejudice for want of jurisdiction, and, to deny Ms. Boyd's Rule 60(b) motion as moot. The Eleventh Circuit, in its order, determined that the District Court was not considered a "court of competent jurisdiction" pursuant to 5 U.S.C. § 7703(b)(1)(B). Ms. Boyd, on June 10, 2020, and in front of the Eleventh Circuit, filed her Petition for Permission to Appeal ("Petition") the MSPB's November 1, 2017 order (*Id.*, at 7); and, on September 8, 2020, the Eleventh Circuit's panel denied Ms. Boyd's Petition, finding that Ms. Boyd's Petition was filed "[w]ell outside the 60-day period for seeking review of that order, and accordingly, we [this Court] would lack jurisdiction over the petition". Pet. App. 2. Ms. Boyd then filed a timely Petition for Rehearing and Rehearing En Banc; however, the Eleventh Circuit construed it as a 'motion for reconsideration' and the same panel issued its order of denial on November 17, 2020 – finding that there was no exception to the 60-day deadline to file an appeal and even if said exception existed, that because the Government [Respondents] filed an objection [on

the grounds of timeliness] to Ms. Boyd's Petition, the Eleventh Circuit was required to dismiss Ms. Boyd's Petition. Pet. App. 4.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's Order Conflicts with this Court's Precedents and Other Courts of Appeals' Precedents

Although this Court's precedent has addressed whether or not a timeframe to submit an appeal to the Courts of Appeals is a jurisdictional bar to suit or a claim processing rule, said precedent does not address the application of retroactive dates to a filing time constraint [derived from statue and/or a claim-processing rule of the courts]. Furthermore, this Court's most recent decision in *Hamer*, did not address whether or not equitable considerations can create an exception to a time constraint.[2] This Court's review is needed to address this critical issue for the lower courts, litigants and the government – on a nationwide basis.

[2] "We note, in this regard, that our decision does not reach issues raised by *Hamer*, but left unaddressed by the Court of Appeals, including: (1) whether respondents' failure to raise any objection in the District Court to the overlong time extension, by itself, effected a forfeiture, see Brief for Petitioner 21–22; (2) whether respondents could gain review of the District Court's time extension only by filing their own appeal notice, see *id.*, at 23–27; and (3) whether equitable considerations may occasion an exception to Rule 4(a)(5)(C)'s time constraint, see *id.*, at 29–43." *See Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017).

A. This Court's Decision in *Hamer* Clarified When a Deadline to File An Appeal is a Jurisdictional Bar or Claim Processing Rule, but Did Not Address Whether Retroactive Laws Preclude Bars Involving Jurisdiction, Timeliness and/or Res Judicata

While this Court's precedent, most notably in *Hamer*, addressed cases involving jurisdiction and timeliness, the All Circuit Review Act of 2018's ("Act") removal of exclusive appellate jurisdiction from the United States Court of Appeals for the Federal Circuit, and, the Act's retroactive date of November 26, 2017, has created new issues surrounding jurisdiction and timeliness – that warrant this Court's intervention and clarification.

The Federal Circuit's precedent [which has not been disturbed by this Court] provides that a litigant's failure to comply with the 60-day filing requirement, pursuant to 5 U.S.C. § 7703(b)(1), consists of a jurisdictional bar to suit. Next, while the Federal Rules of Appellate Procedure also impose a 60-day filing requirement upon a litigant – this Court, in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), held that a "claim processing rule" may not automatically become a jurisdictional bar to suit. Ultimately, the fact that the All Circuit Review Act of 2018's ("Act") retroactive date of November 26, 2017, not only made permanent certain MSPB litigants' right to file an appeal to circuit courts outside of the Federal Circuit, the Act creates a new set of legal

rights surrounding the 60-day timeframe upon which certain MSPB litigants may bring a claim to a circuit court [under the Act].

The Eleventh Circuit, in its order denying Ms. Boyd's Petition for Permission to Appeal, applied a jurisdictional bar upon Ms. Boyd's Petition, found that "[T]o the extent Boyd seeks to petition us for permission to file a petition for review of the Board's decision pursuant to 5 U.S.C. § 7703(b)(1)(B), and to the extent that decision is reviewable under that provision, her June 2020 petition was filed well outside the 60-day period for seeking review of that order and, accordingly, we would lack jurisdiction over the petition. *See H. Brown v. Dir., Office of Workers' Compensation Programs*, 864 F.2d 120, 123–24 (11th Cir. 1989) (noting that statutory time limitations for seeking review of agency decisions are jurisdictional)." Pet. App. 2. The Eleventh Circuit's order dismissing Ms. Boyd's Petition also cites to and relies upon Rule 15 of the Federal Rules of Appellate Procedure ("FRAP") to support its decision (Pet. App. 14); however, FRAP Rule 4 [not Rule 15] is where the 60 day timeframe to appeal an order from an agency of the United States is stated. Pet. App. 9. Next, the Eleventh Circuit's order denying Ms. Boyd's Petition for Permission to Appeal provided no consideration and/or analysis of the application of the Act's retroactive date to the 60-day timeframe; and, the Eleventh Circuit's denial of Ms. Boyd's "Petition for Rehearing and Rehearing En Banc" also gave no consideration to the retroactive date of the Act – as the Eleventh Circuit limited its decision upon an analysis

of the plain language/text of the Act's statute and rules of the courts, finding that, "[B]oyd also appears to argue that the All Circuit Review Act, Pub. L. No. 115-195, 132. Stat. 1510 (2018), created a special exception such that the 60-day period does not apply to her. There is no basis in the statute's, or the amendment's, text suggesting this extraordinary exception". Pet. App. 4.

Accordingly, the Eleventh Circuit's determination is inconsistent with this Court's precedent, especially in *Hamer*, where it is clear that in determining matters of jurisdiction, analysis extends beyond the mere language and text of a statute and/or court rule – thus requiring an analysis of the legislative history the Act and Congress' intent. In *Hamer*, this Court found that in determining whether Congress intended a particular provision to be jurisdictional, "[w]e consider 'context, including this Court's interpretations of similar provisions in many years past,' as probative of [Congress' intent]." *Id.*, at 153–154 (quoting *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 168 (2010)).

Therefore, while the Act and the relevant statute where it is codified at, 5 U.S.C. § 7703(b)(1)(B), provide that the 60 day timeframe to appeal a decision from the MSPB has not changed, the statute also provides that the Act is retroactive to November 26, 2017 – which requires an analysis to determine whether or not Congress intended for retroactive date of November 26, 2017, to provide a temporal exception to the 60-day timeframe.

The retroactive application of the Act towards jurisdiction also requires an analysis of remedial legislation – as remedial legislation also has the power to affect and/or preclude established filing requirements and res judicata. Bryan A. Garner's *Black's Law Dictionary* (10th ed. 2014) defines the phrase "remedial statute" to mean (1) "[a]ny statute other than a private bill; a law providing a means to enforce rights or redress injuries" or (2) "[a] statute enacted to correct one or more defects, mistakes or omissions". A review of the legislative history of the Act provides that, "[C]ongress has repeatedly criticized both the MSPB and the Federal Circuit's interpretation of the whistleblower protections implemented by and subsequent to the CSRA." H. Rep. No. 115-337, at 2 (2017) (Pet. App. 38); and, that "[A]lthough Congress updated the law in 1989 and 1994 in response to erroneous MSPB and Federal Circuit decisions, the 1994 House report noted: "The committee recognizes that realistically it is impossible to overturn destructive precedents as fast as they are issued by the MSPB or Federal Circuit." H. Rep. No. 115-337, at 3 (2017). Pet. App. 40. Accordingly, applying jurisdictional review in *Hamer* (*Id.*, at 9), Congress' intent in passing the Act consists of remedial legislation to cure and reverse the destructive precedents of the MSPB and Federal Circuit; and, the Act's retroactive date of November 26, 2017, is the means to uphold Congress' remedial intent – despite 5 U.S.C. § 7703(b)(1)(B) lacking the language to specifically state that Congress intended for November 26, 2017, to serve as a temporal exclusion to the 60-day timeframe, as this Court in *Hamer* determined that

"[T}his is not to say that Congress must incant magic words in order to speak clearly". *See Sebelius v. Auburn Regional Medical Center*, 568 U.S. 145, 153 (2013).

B. The Ninth and Tenth Circuits Have Concluded That the Government's Invocation of a Time Bar Does Not Remove a Court of Appeals' Requirement to Determine The Merits of the Invocation

The Eleventh Circuit, in its order denying Ms. Boyd's Petition for Rehearing and Rehearing En Banc, determined that "[R]egardless of whether this 60-day period is jurisdictional or a claims processing rule, the government objected to Ms. Boyd's untimely petition in its response. Accordingly, we were required to deny her petition regardless of whether the 60-day deadline is jurisdictional". Pet. App. 4. However, regardless if the decision to dismiss Ms. Boyd's Petition for timeliness was made *sua ponte* or in response to an objection from the Government [Respondents in this case], the Courts of Appeals are still required to perform precedent binding analysis of the merits of the Government's objection and/or *sua ponte* dismissal [on the grounds of timeliness].

The Ninth Circuit recognized this Court's own precedent [which counters the Eleventh Circuit], finding that "[t]o invoke an inflexible claim-processing rule effectively, the timeliness objection must itself be proper. Absent a timely and otherwise appropriate invocation of an inflexible but not jurisdictional

claim-processing rule, we are not obliged to enforce the rule." *United States v. Philip Martin Sadler*, 480 F.3d 932 (9th Cir. 2007). The Tenth Circuit also recognized that when the Government invokes a time bar, that the merits of the invocation are still analyzed by the Courts of Appeals, providing that when "[T]he government invoked the time bar here, and Munoz had the burden to show the district court that an extension was warranted." *See United States v. Francisco Olmos Munoz, Sr.*, No. 16-5026, (10th Cir. Nov. 3, 2016). This Court's own precedent also recognized that the Government's timeliness objection must be proper and if it is not, said objection cannot be enforced. *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 16 (2017), "[A] mandatory claim-processing rule [is] subject to forfeiture if not properly raised by the appellee."

In sum, the Eleventh's conclusion the Government's mere invocation of a timeliness objection bars the courts from conducting an analysis of the merits of the objection and/or obligates the courts to enforce the Government's objection [even upon a determination that said objection could not be sustained] is contrary to precedent from this Court and other circuit courts.

II. This Case Is the Proper Vehicle for the Court to Address These Critical Issues

This case is an ideal vehicle for the Court to address the issues. There is no question that this Court's precedent has addressed whether or not a claim processing rule is a jurisdictional bar to suit. However, the

questions of whether or not equitable consideration can be given to the Federal Rule of Appellate Procedures' time constraints remains unaddressed by this Court (*Id.*, at 9). Next, the Eleventh Circuit's holding that the Government's mere invocation of an objection based on timeliness of an appeal, requires that the Eleventh Circuit must enforce jurisdictional bar to suit (1) Absent an analysis beyond the basic language/text of the statute and/or rule of the Court; and (2) Blind enforcement of Government's objection [even if said objection could not be sustained] raises additional questions of critical importance to be resolved by this Court. Lastly, the passing of the All Circuit Review Act of 2018 ("Act") raises questions involving the retroactive application of jurisdictional filing deadlines – which has not been presented to this Court for review.

The Eleventh Circuit, by applying the 60-day timeframe absent an analysis of Congress' intent, the history of the Act and the merit of the Government's objections on timeliness – essentially invalidated the Act's retroactive date of November 26, 2017, and the statute the Act is codified in [5 U.S.C. § 7703(b)(1)(B)]. This invalidation of the Act affects not only Ms. Boyd – but other litigants who are eligible for remedial relief under the Act, the Government and other Courts of Appeals. Furthermore, this Court's precedent has clearly established that the courts cannot use the judiciary to create laws and/or make decisions that are contrary to established laws; and, that only Congress has the power to grant and/or remove a court's jurisdiction [through legislation]. Thus, the Eleventh Circuit's

arbitrary enforcement of the 60-day deadline is tantamount to establishing jurisdictional laws that counter Congress' intent in passing the Act – which warrants this Court's intervention.

Unfortunately, due to the limited amount of litigants affected by the Act, there have not been enough cases generated by the Courts of Appeals to address the issues this Court is now being asked to resolve. Even Congress recognized this limitation of test cases, which resulted in Congress' extension of the All Circuit Review Act (Pet. App. 17) – to allow for the rise of cases to test the effectiveness of the legislation. Therefore, the absence of decisions from other Courts of Appeals on the retroactive application of the Act warrants this Court's intervention and resolution of the questions/issues presented – as the legislative history of the Act demonstrates that if this Court does not resolve the questions/issues presented to it in Ms. Boyd's Petition for Writ of Certiorari, it can take decades for additional cases to arise and/or clarifying legislation is enacted to resolve the issues/questions presented to this Court; and, this would prejudice the remedial force that the Act was established to grant litigants like Ms. Boyd [and others on a nationwide basis].

In sum, this Court's clarification is needed to determine: (1) Whether or not the Act's retroactive application precludes the enforcement of the 60-day deadline to file an appeal [for certain litigants]; and, (2) Whether *sua ponte* and/or Government's invocation of a timeliness bar to suit, bars a Court of Appeals from conducting an analysis beyond the plain language/text

of a statute and/or rule of the court; and/or warrants blind enforcement of the 60-day deadline [even upon a finding that the timeliness issue lacks merit].

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 5, 2021

APPENDIX