No. 23-21

In the Supreme Court of the United States

STUART R. HARROW, PETITIONER

v.

DEPARTMENT OF DEFENSE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
PATRICIA M. MCCARTHY
FRANKLIN E. WHITE, JR.
GALINA I. FOMENKOVA
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the 60-day time limit for seeking Federal Circuit review of an order or decision of the Merits Systems Protection Board, 5 U.S.C. 7703(b)(1)(A), is jurisdictional and therefore not subject to equitable tolling.

ADDITIONAL RELATED PROCEEDINGS

United States Court of Appeals (Fed. Cir.):

Harrow v. *Department of Defense*, No. 2022-2254 (Feb. 14, 2023)

Harrow v. *Department of Defense*, No. 2022-2254 (Apr. 17, 2023) (denying rehearing)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes, regulations, and rules:

Statutes, regulations, and rules—Continued: Page

In the Supreme Court of the United States

No. 23-21

STUART R. HARROW, PETITIONER

v.

DEPARTMENT OF DEFENSE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter, but is available at 2023 WL 1987934. The final order of the Merit Systems Protection Board (Pet. App. 1c-16c) is not published in the Merit Systems Protection Board Reporter, but is available at 2022 WL 1495611.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2023. A petition for rehearing was denied on April 17, 2023 (Pet. App. 1b-2b). The petition for a writ of certiorari was filed on July 3, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "A federal employee subjected to an adverse 'personnel action'"—including a discharge, demotion, or

furlough of 30 days or less—"may appeal her agency's decision to the Merit Systems Protection Board (MSPB or Board)." *Kloeckner* v. *Solis*, 568 U.S. 41, 43 (2012); see 5 U.S.C. 7512(a) and 7701(a). "The Board is an independent, quasi-judicial federal administrative agency," *Garcia* v. *DHS*, 437 F.3d 1322, 1327 (Fed. Cir. 2006) (en banc), charged with adjudicative functions that "track those of the civil courts," *Martin* v. *Office of Special Counsel*, 819 F.2d 1181, 1188 (D.C. Cir. 1987).

MSPB proceedings are "adversarial." *Martin*, 819 F.2d at 1188. Employees proceeding before the Board have statutory rights "to be represented by an attorney or other representative" and "to a hearing for which a transcript will be kept." 5 U.S.C. 7701(a)(1) and (2); see 5 C.F.R. 1201.72 (authorizing discovery). The Board's administrative judges possess the authority to conduct hearings. 5 C.F.R. 1201.41. And following the opportunity for a hearing, the administrative judge must "prepare an initial decision" containing "[f]indings of fact and conclusions of law," "[t]he reasons or bases for those findings and conclusions," and "[a]n order" providing for "appropriate relief." 5 C.F.R. 1201.111(a) and (b)(1)-(3); see *Thomas* v. *GSA*, 794 F.2d 661, 664 (Fed. Cir. 1986) (MSPB is a "quasi-judicial tribunal[]" issuing decisions "on the basis of an adversary, litigated record").

A federal employee may seek the full Board's review of an administrative judge's adverse initial decision, or the Board may grant such review *sua sponte*. 5 U.S.C. 7701(e)(1); see C.F.R. 1201.114. The full Board reviews the administrative judge's initial decision for legal error, an abuse of discretion, or "erroneous findings of material fact," giving deference to any demeanor-based credibility determinations, 5 C.F.R. 1201.115(a)-(c), in a

role consistent with that of an appellate review panel. See 5 C.F.R. 1201.117(a) (providing the Board with authority to, *inter alia*, hear oral arguments, require the submission of briefs, and remand the case to the administrative judge). If appropriate, the full Board issues a final order, which may be either precedential or nonprecedential. See 5 C.F.R. 1201.117(c).

b. Once the Board's decision is final, the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, Tit. II, § 205, 92 Stat. 1143-1144, establishes two paths for judicial review.

First, a federal employee aggrieved by the Board's final decision in a "'mixed case'"—that is, a case involving both "a personnel action serious enough to appeal to the MSPB *and*" an allegation "that the action was based on discrimination"—"shall" file an action "in district court." *Kloeckner*, 568 U.S. at 44, 49-50; see *Perry* v. *MSPB*, 582 U.S. 420 (2017); 5 U.S.C. 7702 and 7703(b)(2). A district court action in a mixed case "must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action." 5 U.S.C. 7703(b)(2).

Second, and most relevant here, for all other cases, the CSRA provides for judicial review directly in the courts of appeals. In 1978, upon passage of the Act, such review was vested in either the Court of Claims or the regional courts of appeals. CSRA § 205, 92 Stat. 1143. In 1982, Congress created the Federal Circuit and gave that court "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." 28 U.S.C. 1295(a)(9); Federal Courts Improvement Act of 1982, Pub. L. No.

97-164, Tit. I, § 144, 96 Stat. 45. Section 7703(b)(1)(A) provides in relevant part:

> [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. 7703(b)(1)(A).

In 2012, Congress reinstated the option of review in the regional circuits for non-mixed cases involving allegations of whistleblower retaliation; those appeals can now be brought in either the Federal Circuit or "any court of appeals of competent jurisdiction." 5 U.S.C. 7703(b)(1)(B); Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, Tit. I, § 108, 126 Stat. 1469. Like appeals in other non-mixed cases, appeals in whistleblower-retaliation actions must be filed "within 60 days after the Board issues notice of the final order or decision of the Board." 5 U.S.C. 7703(b)(1)(B).[1]

2. Petitioner was employed by the Defense Contracting Management Agency, a component of the Department of Defense. Pet. App. 2c. In 2013, petitioner was furloughed for six days under a Department-wide furlough order. *Id.* at 2c-3c.

When petitioner received notice of the proposed furlough, he requested that the agency exempt him due to

---

[1] Congress initially provided regional-circuit review for whistleblower claims for only two years. WPEA § 108, 126 Stat. 1469. Congress later extended the period to five years, and in 2018, made such review permanent. See All Circuit Review Extension Act, Pub. L. No. 113-170, § 2, 128 Stat. 1894; All Circuit Review Act, Pub. L. 115-195, § 2(a) and (b), 132 Stat. 1510.

financial hardship. Pet. App. 3c. That request was denied, and petitioner filed a timely appeal of his furlough to the MSPB. *Ibid.* An administrative judge held a hearing and issued an initial decision affirming the furlough. *Id.* at 5c.

3. Petitioner sought the Board's review. In January 2017, while petitioner's case was pending, the Board lost its quorum. See Pet. 2-3. His petition therefore could not be resolved until after a quorum was restored in March 2022. *Ibid.*

The Board issued its final order on May 11, 2022, denying the petition for review and affirming the initial decision as the Board's final decision. Pet. App. 1c-16c. The Board's order included a section entitled "**NOTICE OF APPEAL RIGHTS**," which stated that "an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. 5 U.S.C. § 7703(b)(1)(A)." *Id.* at 11c-12c.

4. Petitioner filed his petition with the Federal Circuit on September 16, 2022, 128 days after the Board's final decision. Pet. App. 2a.

a. Before any briefing was due, the Federal Circuit issued an order to show cause why the petition should not be dismissed as untimely. Pet. App. 1a; see C.A. Doc. 7 (Nov. 21, 2022). The order cited *Fedora* v. *MSPB*, 848 F.3d 1013 (Fed. Cir. 2017), cert. denied, 583 U.S. 1091 (2018), which reaffirmed the Federal Circuit's longstanding holding that Section 7703(b)(1)(A)'s timing requirement is jurisdictional and not subject to equitable tolling. See *id.* at 1016; see also *Monzo* v. *Department of Transp.*, 735 F.2d 1335, 1336 (Fed. Cir. 1984). The order also cited Federal Rule of Appellate

Procedure 26(b), which provides that a court may not extend the time to file a petition for review of a decision by an administrative agency "unless specifically authorized by law." Fed. R. App. P. 26(b)(2).

In response to the order to show cause, petitioner did not "dispute that he filed his petition for review outside of th[e] statutory deadline." Pet. App. 2a. Instead, petitioner contended that his untimely filing was "excusable" because "he did not become aware of the [Board's] decision until August 30, 2022," a month and a half after the deadline for seeking review in the Federal Circuit. *Ibid.* When the Board decided petitioner's case, it served him with notice via the email address it had on file. But petitioner explained that his email address had changed during the pendency of the case and that he had failed to notify the Board of that change—apparently because he "mistakenly believed that the emails addressed to the old address would be forwarded to his current email address." Pet. C.A. Response to Order to Show Cause 8.

Petitioner acknowledged that "[s]ince the inception of his case," he had used the Board's "e-Appeal Online system." Pet. C.A. Response to Order to Show Cause 7-8. The regulations governing that system provide that "[r]egistration as an e-filer constitutes consent to accept electronic service of pleadings filed by other registered e-filers and documents issued by the MSPB." 5 C.F.R. 1201.14(e)(1). Accordingly, the regulations state that "[e]ach e-filer must notify the MSPB and other participants of any change in his or her e-mail address." 5 C.F.R. 1201.14(e)(6). In light of the period in which the Board lacked a quorum, the Board also issued a notice as a public courtesy on May 5, 2022—six days before its final order in petitioner's case—reminding parties with pending cases before the full Board to

update their contact information. Office of the Clerk of the Board, MSPB, *Notice To Parties With A Pending Petition For Review Or Case Before The Full Board*, https://www.mspb.gov/Notice_about_contact_information.pdf.

b. The Federal Circuit dismissed the petition for review. Pet. App. 1a-3a. The court explained that under its longstanding precedent, "[t]he timely filing of a petition from the Board's final decision is a jurisdictional requirement and 'not subject to equitable tolling.'" *Id.* at 2a (quoting *Fedora*, 848 F.3d at 1016). The court also cited Rule 26(b), noting that the rule's prohibition on extending the time to petition for review deprived the court of any authority to "excuse a failure to timely file based on individual circumstances." *Ibid.*

ARGUMENT

The court of appeals correctly held that Section 7703(b)(1)(A)'s 60-day deadline for seeking Federal Circuit review of an order or decision of the Board is jurisdictional. That holding does not conflict with any decision of this Court or of any other court of appeals. This Court has recently and repeatedly denied petitions for writs of certiorari raising the same question. See *Gossage* v. *MSPB*, 142 S. Ct. 218 (2021) (No. 21-38); *Graviss* v. *Department of Defense*, 139 S. Ct. 2616 (2019) (No. 18-1061); *Jones* v. *HHS*, 139 S. Ct. 359 (2018) (No. 17-1610); *Fedora* v. *MSPB*, 583 U.S. 1091 (2018) (No. 17-557); *Vocke* v. *MSPB*, 583 U.S. 1091 (2018) (No. 17-544); *Musselman* v. *Department of the Army*, 583 U.S. 1097 (2018) (No. 17-570); see also *Boyd* v. *Department of Veterans Affairs*, 141 S. Ct. 1739 (2021) (20-1090); *Lara* v. *OPM*, 566 U.S. 974 (2012) (No. 11-915). The same result is warranted here. Indeed, this case would be an especially poor vehicle in which to

consider Section 7703(b)(1)(A)'s jurisdictional status because the court of appeals' decision is independently supported by its conclusion that equitable tolling is foreclosed by Federal Rule of Appellate Procedure 26(b)—which petitioner does not address—and because petitioner would not be entitled to equitable tolling even if it were otherwise available.

1. Section 1295(a) of Title 28 of the United States Code provides that "[t]he 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 [MSPB], pursuant to sections 7703(b)(1) and 7703(d) of title 5." 28 U.S.C. 1295(a)(9). As relevant here, Section 7703(b)(1)(A) states:

> [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. 7703(b)(1)(A). In light of the text, structure, and history of these provisions, the court of appeals correctly concluded that it lacks jurisdiction over petitions that fail to comply with Section 7703(b)(1)(A)'s 60-day deadline.

a. This Court has previously recognized that Section 7703(b)(1) is jurisdictional. In *Lindahl* v. *OPM*, 470 U.S. 768, 792 (1985), the Court explained that "Sections 1295(a)(9) and 7703(b)(1) together * * * provide for exclusive jurisdiction over MSPB decisions in the Federal Circuit." The Court continued: "Section 7703(b)(1) confers the operative grant of *jurisdiction—the 'power to adjudicate*.'" *Id.* at 793 (emphasis added); see, *e.g.*, *Bowles* v. *Russell*, 551 U.S. 205, 213 (2007) ("[T]he

notion of subject-matter jurisdiction obviously extends to classes of cases falling within a court's adjudicatory authority.") (citation, ellipses, and internal quotation marks omitted). *Lindahl* expressly rejected the argument that Section 7703(b)(1) was "nothing more than a venue provision" with no "relat[ion] to the power of a court." 470 U.S. at 792, 793 n.30 (citation omitted). Instead, the Court emphasized that "Section 7703(b)(1) confers the operative grant of jurisdiction"—*i.e.*, it is what gives the Federal Circuit the "'power to adjudicate'" cases that "fall within [the Section's] jurisdictional perimeters." *Id.* at 793. Thus, *Lindahl* "addressed whether [Section 7703(b)(1)] is technically jurisdictional—whether it truly operates as a limit on a court's subject-matter jurisdiction." *Wilkins* v. *United States*, 143 S. Ct. 870, 877 (2023) (brackets, citation, and internal quotation marks omitted). And although *Lindahl* did not specifically discuss Section 7703(b)(1)'s timing requirement (which was then 30 days), that condition is necessarily one of the "jurisdictional perimeters" that *Lindahl* recognized as defining the Federal Circuit's power to adjudicate and limiting the statute's "jurisdictional grant." 470 U.S. at 792-793; see 5 U.S.C. 7701(b)(1) (1982).

Section 7703(b)(1)'s time bar thus differs markedly from other requirements that this Court has held to be nonjurisdictional. The Court emphasized that those statutes separately addressed jurisdiction and timeliness, without "condition[ing] the jurisdictional grant on the limitations periods, or otherwise link[ing] those separate provisions." *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 412 (2015); see, *e.g.*, *Wilkins*, 143 S. Ct. at 877 ("The Quiet Title Act's jurisdictional grant is in 28 U.S.C. § 1346(f), well afield of § 2409a(g)."); *Fort Bend*

Cnty. v. *Davis*, 139 S. Ct. 1843, 1850 (2019) ("Separate provisions" from the jurisdictional grants "contain the Act's charge-filing requirement"); *Gonzalez* v. *Thaler*, 565 U.S. 134, 145 (2012) (Congress "set off the [jurisdictional and non-jurisdictional] requirements in distinct paragraphs"); *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 164-165 (2010) (registration requirement was "located in a provision 'separate' from those granting federal courts subject-matter jurisdiction," and those provisions did not "condition[] [their] jurisdictional grant[s] on whether copyright holders have registered their works before suing for infringement").

Here, by contrast, this Court has held that Section 7703(b)(1) *itself* is part of the relevant jurisdictional grant. And that conclusion was compelled by the statutory text and structure: Section 1295(a)(9) provides the Federal Circuit with "jurisdiction" over "an appeal from a final order or final decision of the [MSPB], *pursuant to section[] 7703(b)(1)*." 28 U.S.C. 1295(a)(9) (emphasis added). The scope of that grant of jurisdiction is thus defined by Section 7703(b)(1), which both identifies the covered MSPB decisions—those in non-mixed cases—and imposes the time bar at issue here. Like the identification of the covered decisions, the time bar is jurisdictional because it is "link[ed]" to Section 1295(a)(9)'s grant of jurisdiction, *Kwai Fun Wong*, 575 U.S. at 412, by an express cross-reference.

Every court of appeals to consider the question has held that Section 7703(b)(1)'s time bar is jurisdictional. The Federal Circuit has so held for nearly 40 years. See *Monzo* v. *Department of Transp.*, 735 F.2d 1335, 1336 (1984). Before the creation of the Federal Circuit, when the CSRA provided for review in either the Court of Claims or the regional courts of appeals, the Eighth,

Ninth, and D.C. Circuits also recognized the jurisdictional nature of the statute's time limitation. See *Oja* v. *Department of the Army*, 405 F.3d 1349, 1357 n.5 (Fed. Cir. 2005) (collecting decisions).

Congress has left those holdings undisturbed. It did not alter the jurisdictional rule established by the Eighth, Ninth, and D.C. Circuits when it channeled appeals of MSPB decisions to the Federal Circuit in 1982. And in 2012, Congress changed the commencement of the appeal period to the date of issuance of the MSPB decision, not its receipt. WPEA § 108(a), 126 Stat. 1469. In imposing a less petitioner-friendly triggering date for the appeal period in Section 7703(b)(1), Congress did nothing to alter the long-established jurisdictional nature of the filing deadline.

b. The conclusion that Section 7703(b)(1)(A)'s time limit is jurisdictional accords with this Court's precedents addressing analogous time limits for seeking judicial review in the federal courts of appeals. Cf. *Henderson* v. *Shinseki*, 562 U.S. 428, 436 (2011) ("When 'a long line of this Court's decisions left undisturbed by Congress,' has treated a similar requirement as 'jurisdictional,' we will presume that Congress intended to follow that course.") (citation omitted). In *Bowles*, this Court held that the statutory time limit for filing a notice of appeal in a civil case is jurisdictional. As the Court explained, "[a]lthough several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional." 551 U.S. at 210. The Court reiterated that holding in *Hamer* v. *Neighborhood Housing Services*, 138 S. Ct. 13 (2017), explaining 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." *Id.* at 16 (citation omitted).[2]

c. The courts of appeals' treatment of the Hobbs Act's time bar further supports the decision below. The Hobbs Act, ch. 537, 60 Stat. 420, has a similar structure to Sections 1295(a)(9) and 7703(b)(1). One provision of the Hobbs Act (28 U.S.C. 2342) provides that "[t]he court of appeals * * * has exclusive jurisdiction" over certain agency actions, and that "[j]urisdiction is invoked by filing a petition as provided by section 2344 of this title." Section 2344, in turn, states that "[a]ny party aggrieved by" an agency's final, reviewable order "may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies." 28 U.S.C. 2344. The courts of appeals have uniformly held that Section 2344's time limit for court-of-appeals review of agency decisions under the Hobbs Act is jurisdictional. See *Henderson*, 562 U.S. at 437; see also, *e.g.*, *Matson Navigation Co.* v. *United States Dep't of Transp.*, 895 F.3d 799, 804 (D.C. Cir. 2018); *Owner-Operator Indep. Drivers Ass'n* v. *United States Dep't of Transp.*, 858 F.3d 980, 982-983 (5th Cir. 2017); *Council*

---

[2] In *Henderson*, this Court held that the deadline for filing an appeal to the U.S. Court of Appeals for Veterans Claims is not jurisdictional, but emphasized that the case involved "review by an Article I tribunal as part of a unique administrative scheme" rather than "review by Article III courts." 562 U.S. at 437-438. And the Court's recent decisions holding other statutory time limits nonjurisdictional likewise did not involve appeals to an Article III tribunal. See *Wilkins*, 143 S. Ct. at 881 (statute of limitations for filing a Quiet Title Act suit in district court); *Boechler, P.C.* v. *Commissioner*, 142 S. Ct. 1493, 1501-1502 (2022) (time to petition for review to the Article I Tax Court).

Tree Investors, Inc. v. *FCC*, 739 F.3d 544, 551, 554 (10th Cir. 2014); *Brown* v. *Nuclear Regulatory Comm'n*, 644 F.3d 726, 727-728 (8th Cir. 2011) (per curiam).

d. The origins of Section 7703(b)(1)(A) likewise support the conclusion that the provision is jurisdictional. Cf. Pet. 11 (agreeing that "statutory context" is "relevant"). Before the CSRA's enactment, federal employees could seek review of employment-related actions in the Court of Claims pursuant to the Tucker Act, ch. 359, 24 Stat. 505 (28 U.S.C. 1491). As this Court held in *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 134-139 (2008), the Tucker Act's filing deadline, 28 U.S.C. 2501, is jurisdictional. The CSRA established the MSPB and directed that "jurisdiction over 'a final order or final decision of the Board' would be in the Court of Claims, pursuant to the Tucker Act, or in the regional courts of appeals, pursuant to 28 U.S.C. 2342," the Hobbs Act's judicial-review provision. *Lindahl*, 470 U.S. at 774 (quoting CSRA § 205, 92 Stat. 1143). As the courts of appeals agree, the Hobbs Act's time bar, like the Tucker Act's, is jurisdictional. See pp. 12-13, *supra*. Thus, Section 7703(b)(1) replaced judicial review provisions for which the applicable time bar has been held to be jurisdictional in nature. That history further supports the conclusion that Congress intended Section 7703(b)(1)(A)'s filing deadline, too, to be jurisdictional. Cf. *Henderson*, 562 U.S. at 436.

e. Finally, "[j]urisdictional treatment" of the time limit in Section 7703(b)(1)(A) "makes good sense." *Bowles*, 551 U.S. at 212. Congress has good practical reason to enact jurisdictional time limitations where, as here, a claimant seeks direct review of an agency action in the court of appeals. As a general matter, it will be more cumbersome for a court of appeals, as opposed to

a district court, to adjudicate a litigant's claim that his is the rare case in which a deadline should be equitably tolled. Cf. *John R. Sand*, 552 U.S. at 133 (listing "facilitating the administration of claims" and "promoting judicial efficiency" among the reasons why a statute might contain a jurisdictional time limit). A jurisdictional time limitation forecloses that inquiry.

Nor does treating Section 7703(b)(1) as jurisdictional raise the "risk of disruption and waste." *Wilkins*, 143 S. Ct. at 876. When the Board issues a decision, it emphatically warns would-be petitioners of the deadline for seeking further review. For example, petitioner's MSPB decision included the following notice:

> As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision.

Pet. App. 12c (emphases in original); see *id.* at 14c-15c (same with respect to whistleblower-retaliation appeals). And as demonstrated by this case (and others petitioner cites, see Pet. 15), the Federal Circuit actively enforces this deadline, preventing the time and expense of unnecessary briefing.

2. Petitioner offers no persuasive reason to treat Section 7703(b)(1)(A) as nonjurisdictional.

a. Petitioner contends (Pet. 8-11) that the Federal Circuit's decision in *Fedora* v. *MSPB*, 848 F.3d 1013 (2017), cert. denied, 583 U.S. 1091 (2018), misinterpreted *Bowles* "to set a categorical rule that '[a]ppeal periods to Article III courts' are jurisdictional." Pet. 8 (quoting *Fedora*, 848 F.3d at 1014) (brackets in original). But as petitioner acknowledges, "*Bowles* stands

for the proposition that context * * * is relevant to whether a statute ranks a requirement as jurisdictional." Pet. 9 (quoting *Reed Elsevier*, 559 U.S. at 167-168); see Pet. 11 (similar). And as discussed above, several textual and contextual indicators demonstrate that Section 7703(b)(1)(A)'s deadline is jurisdictional.

Petitioner also errs in arguing (Pet. 8) that the decision below conflicts with *Bowen* v. *City of New York*, 476 U.S. 467 (1986). In that case, this Court held that a *district court* could toll the deadline for obtaining review of the denial of Social Security benefits. *Id.* at 479-482. Thus, the statute at issue in *Bowen* did not involve direct review in a court of appeals. Moreover, the statute in *Bowen* explicitly permitted tolling by the Secretary of Health and Human Services; Congress had thus expressed a "clear intention to allow tolling in some cases," and this Court simply made clear that courts also could toll the period when the agency did not. *Id.* at 480. In addition, like the provision at issue in *Henderson*, the time limit in *Bowen* was "contained in a statute that Congress designed to be 'unusually protective' of claimants." *Ibid.* (citation omitted). By contrast, the framework Congress adopted for MSPB actions has far more in common with the appeals in "ordinary civil litigation" at issue in *Bowles* than it does with the scheme considered in *Bowen* or the other decisions on which petitioner relies. *Henderson*, 562 U.S. at 440; see *Fedora*, 848 F.3d at 1015-1016; pp. 2-3, *supra*.

b. Petitioner next contends (Pet. 12) that the Federal Circuit's reliance on "Section 1295(a)(9)'s reference to Section 7703(b)(1)" conflicts with this Court's statement that "a nonjurisdictional provision does not metamorphose into a jurisdictional limitation by cross-referencing a jurisdictional provision." *Ibid.* (quoting

Fort Bend Cnty., 139 S. Ct. at 1851 n.8). But the decision on which petitioner relies rejected an argument based on a purported "textual[] link[]" between a jurisdictional provision and an entire subchapter. *Fort Bend Cnty.*, 139 S. Ct. at 1851 n.8 (citation omitted). Petitioner acknowledges that a time bar is jurisdictional if "Congress has 'condition[ed]' the jurisdictional grant on compliance with the deadline." Pet. 13 (quoting *Reed Elsevir*, 559 U.S. at 165) (brackets in original). And that is the case here: As *Lindahl* recognized, Section 1295(a)(9) grants the Federal Circuit "jurisdiction" over appeals from the MSPB "*pursuant to* section[] 7703(b)(1)," 28 U.S.C. 1295(a)(9) (emphasis added), and one cannot determine the scope of that jurisdictional grant without reference to Section 7703(b)(1). The Federal Circuit thus correctly determined that the express "link" between the time limit here and the court's power to adjudicate demonstrates Section 7703(b)(1)(A)'s jurisdictional nature. *Federal Educ. Ass'n—Stateside Region* v. *Department of Def.*, 898 F.3d 1222, 1224 (2018), cert. denied, 139 S. Ct. 2616 (2019).

3. The decision below does not warrant this Court's review.

a. As petitioner correctly observes (Pet. 15), because Section 7703(b)(1)(A) applies only in the Federal Circuit, there is no division of authority with respect to the question presented. Rather, for four decades, the Federal Circuit has held that the timing requirement of Section 7703(b)(1) is "jurisdictional," *Monzo*, 735 F.2d at 1336, and that "[c]ompliance with [it] is a prerequisite to [the court of appeals'] exercise of jurisdiction," *Oja*, 405 F.3d at 1360. During periods of concurrent jurisdiction, the regional courts of appeal have agreed. See

id. at 1357 n.5 (collecting cases from the Eighth, Ninth, and D.C. Circuits).

Petitioner contends that decisions interpreting "Section 7703(b)(2) as nonjurisdictional conflict with the Federal Circuit's interpretation of Section 7703(b)(1)(A)." Pet. 8. That is incorrect. Section 7703(b)(2) governs "mixed cases"—that is, cases before the Board that also include claims of discrimination. See *Perry* v. *MSPB*, 582 U.S. 420, 425-426 (2017). Section 7703(b)(2) states:

> Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

5 U.S.C. 7703(b)(2).

Unlike Section 7703(b)(1)(A), Section 7703(b)(2) does not provide jurisdiction in a particular appellate court; it instead channels mixed cases to the district courts, which have jurisdiction to hear those cases under 28 U.S.C. 1331 or other provisions that do not reference Section 7703(b)(2). See *Kloeckner* v. *Solis,* 568 U.S. 41, 46 (2012). Section 7703(b)(2) thus does not follow the structure of Section 7703(b)(1)(A), which combines a jurisdictional grant to the court of appeals with a time limitation. And this Court's decision in *Lindahl*—which stated that Section 7703(b)(1) "confers the operative

grant of jurisdiction"—did not address Section 7703(b)(2). 470 U.S. at 793.

That Section 7703(b)(2) steers cases to the district courts, rather than the court of appeals, is significant in other respects as well. As noted above, the district courts are better equipped to conduct the fact-intensive inquiries that equitable tolling requires. See pp. 13-14, *supra*. And the specific provisions cross-referenced in Section 7703(b)(2) affected the jurisdictional analysis in the cases petitioner cites. For example, in holding that Section 7703(b)(2)'s filing deadline is subject to equitable tolling, the First Circuit's decision in *Nunnally* v. *MacCausland*, 996 F.2d 1 (1993) (per curiam), explained that the provision "is not only similar to, but intersects with, the * * * provision directly addressed in *Irwin* [v. *Department of Veterans Affairs*, 498 U.S. 89 (1990)]," 42 U.S.C. 2000e-16(c). 996 F.2d at 3. Given the link between the two provisions, the court was unwilling to treat the deadline the plaintiff faced in that case differently (*i.e.*, as jurisdictional) because of the particular procedural route she had chosen to take. *Ibid.*; see *Oja*, 405 F.3d at 1358. Petitioner's reliance on cases addressing Section 7703(b)(2) therefore does not demonstrate a division of authority warranting this Court's review.

b. In any event, even if Section 7703(b)(1)(A) were nonjurisdictional, it would not be subject to equitable tolling. Although "nonjurisdictional limitations periods are presumptively subject to equitable tolling," some such periods are "'mandatory'" and cannot be tolled. *Boechler, P.C.* v. *Commissioner*, 142 S. Ct. 1493, 1500 (2022); see *Nutraceutical Corp.* v. *Lambert*, 139 S. Ct. 710, 714 (2019). At a minimum, Section 7703(b)(1)(A) falls within that class.

That conclusion is dictated by Federal Rule of Appellate Procedure 26(b), which provides that "the court may not extend the time to file * * * a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law." Fed. R. App. P. 26(b). The deadline in Section 7703(b)(1)(A) falls squarely within the plain text of that directive because it governs the time to file "a petition to review a final order or final decision" of the MSPB. Accordingly, "Rule 26(b) says that the deadline for the precise type of filing at issue here may not be extended." *Nutraceutical Corp.*, 139 S. Ct. at 715. And as in *Nutraceutical Corp.*, that means that Section 7703(b)(1)(A) "is not amenable to equitable tolling" because Rule 26 "express[es] a clear intent to compel rigorous enforcement of [Section 7703(b)(1)(A)'s] deadline, even where good cause for equitable tolling might otherwise exist." *Ibid.*

The court of appeals specifically cited Rule 26 in both its order to show cause and its subsequent order dismissing the petition for review. Pet. App. 2a-3a; C.A. Doc. 7 (Nov. 21, 2022). But petitioner does not even acknowledge, much less refute, that alternative basis for the court of appeals' decision. That by itself would be a sufficient reason to deny the petition even if the question presented otherwise warranted this Court's review.[3]

---

[3] *Boechler* explained that "mandatory" deadlines may be waived or forfeited, 142 S. Ct. at 1500, but petitioner does not suggest that the government waived or forfeited the time bar in this case. The court of appeals dismissed the case before the government filed any brief. See C.A. Doc. 7 (order to show cause suspended briefing schedule).

c. Finally, this case would be a poor vehicle for resolving the question presented for an additional reason: Even if equitable tolling were generally available under Section 7703(b)(1)(A), petitioner could not benefit from it. As petitioner acknowledges (Pet. 3), he did not receive timely notice of the Board's decision because, despite having agreed to receive electronic notices and to update his email address, he "failed to notify the Board of his changed email address." *Ibid.* Those facts would not permit petitioner to establish either that "he has been pursuing his rights diligently," or that "some extraordinary circumstance" "beyond [petitioner's] control" "prevented timely filing," as required to obtain equitable tolling. *Menominee Indian Tribe of Wis.* v. *United States*, 577 U.S. 250, 255-257 (2016) (citation omitted).

The history of Section 7703(b)(1) confirms that tolling would be particularly unwarranted in this case. Before 2012, the trigger for the period to seek the Federal Circuit's review was "the date *the petitioner received notice* of the final order or decision of the Board." 5 U.S.C. 7703(b)(1) (2010) (emphasis added). But in 2012, Congress changed that trigger to the date on which the "*Board issues notice* of the final order or decision." WPEA § 108, 126 Stat. 1469 (emphasis added). Permitting petitioner to invoke delay in his receipt of the final decision as a basis to extend the deadline to seek Federal Circuit review would contravene that specific change in the statute. Cf. *Intel Corp. Inv. Policy Comm.* v. *Sulyma*, 140 S. Ct. 768, 779 (2020) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.") (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General
PATRICIA M. MCCARTHY
FRANKLIN E. WHITE, JR.
GALINA I. FOMENKOVA
Attorneys

OCTOBER 2023