No. 23-21

IN THE

Supreme Court of the United States

STUART R. HARROW,

Petitioner,

v.

DEPARTMENT OF DEFENSE,

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

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QUESTION PRESENTED

Not all statutory deadlines 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. This is because a statute must contain a clear statement of Congressional intent that an otherwise basic filing deadline should have jurisdictional force in order to render it "mandatory and jurisdictional." *Hamer v. Neighborhood Housing Services of Chicago, et al.*, 583 U.S. 17 (2017) ("*Hamer*").

The narrow question presented here is whether the 60-day filing deadline in 5 U.S.C. § 7703(b)(1)(A) is jurisdictional.

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INTEREST OF THE AMICUS[1]

The American Federation of Government Employees ("AFGE") is a national labor organization. On its own and in conjunction with its affiliated councils and locals, AFGE represents over 750,000 civilian employees in agencies and departments across the federal government and the District of Columbia. AFGE represents many federal employees under the auspices of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1113 (1978), ("CSRA"). The CSRA grants covered federal employees the right to bargain collectively though the labor organization of their choosing and to challenge agency employment actions taken against them, either through a representative or on their own.

AFGE's representation of federal employees extends to administrative litigation before numerous Executive agencies, such as 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. AFGE's representation includes collective bargaining and representation in grievance arbitrations arising under Chapter 71 of the CSRA, the Federal Service Labor-Management Relations Statute, 5 U.S.C. Ch. 71. *See*, *e.g.*, *American Federation of Government Employees, et al., v. Federal Labor Relations Authority*, 25 F.4th 1 (D.C. Cir. 2022). AFGE's representation likewise includes representing employees before the MSPB in adverse action appeals arising under Chapters 75 and 77 of the CSRA, pertaining to adverse employment actions and

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[1] 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.

appeals. *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 Fed. App'x 989 (Fed. Cir. 2016).

Because each of the administrative forums mentioned above has its own provision for seeking judicial review at the conclusion of the administrative process, AFGE also provides representation 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.*, *American Federation of Government Employees, Nat'l Council of HUD Locals, Council 222 v. Federal Labor Relations Authority, et al.*, 2022 WL 22270037 (D.D.C. 2022); *Archuleta v. Hopper*, 786 F.3d 1340 (Fed. Cir. 2015); *Borza v. Dep't of Commerce*, 774 Fed. App'x 653 (Fed. Cir. 2019).

AFGE therefore has a vested interest in this matter. Adding to AFGE's interest is the fact that many of the federal employees who fall within AFGE's bargaining units appear before the MSPB and the Federal Circuit without representation. These pro se litigants may come to AFGE for advice and guidance at any point in the process. They may, for example, seek AFGE's representation only after judicial review has been sought. But they just as often, if not more often, litigate their cases on their own.

Indeed, half or more of the appellants who proceed before the MSPB do so pro se. *Cf.* Merit Systems Protection Board Fiscal Year 2017 Budget Justification, p. 14, available at https://www.mspb.gov/about/budget/FY_2017_Congressional_Budget_Justification.pdf. These pro se appellants are typically ordinary laypeople who may be unfamiliar with the statutes and regulations governing federal employment. They may even, at times, rely exclusively on their employing

agency for the technology needed to electronically access the appeals process, putting their access within the agency's control. An employee's appeal of an agency's adverse action also may be his first and only experience seeking administrative or judicial review, making the process both more confusing and more onerous.

Resolution of the question presented is important. An erroneous jurisdictional reading of 5 U.S.C. § 7703(b)(1)(A) would be detrimental to the federal employees whom AFGE represents. AFGE therefore has an interest in this case and in ensuring that federal employees have a fair and meaningful opportunity to fully exercise their statutory right to obtain judicial review of MSPB decisions.

SUMMARY OF THE ARGUMENT

The Federal Circuit continues to incorrectly classify the 60-day deadline in 5 U.S.C. § 7703(b)(1)(A), which provides the time for an employee to petition the Federal Circuit for review of an MSPB decision, as a jurisdictional requirement rather than a claim-processing rule. The Federal Circuit's continued error requires this Court's correction because the 60-day deadline is an ordinary claim-processing rule.

Following the issuance of an order to show cause, to which the government failed to respond, the Federal Circuit issued a truncated order dismissing the petition filed by Harrow in this case as untimely filed. It did so based on its earlier decision in *Fedora v. Merit Systems Protection Board*, 848 F.3d 1013 (Fed. Cir. 2017) ("*Fedora*"). *Harrow v. Dep't of Defense*, 2023 WL 1987934 (Fed. Cir. 2023). That is to say, the court of appeals did not engage in an independent analysis of Section 7703(b)(1)(A). Its dismissal instead proceeded mechanically from its earlier deci-

sion in *Fedora*, on the incorrect theory that the 60-day deadline in Section 7703(b)(1)(A) was a jurisdictional bar that could never be subject to equitable exceptions. *Harrow* at *1, quoting *Fedora*, 848 F.3d at 1016. The Federal Circuit has continued to apply *Fedora's* mistaken "mandatory and jurisdictional" reading of the 60-day deadline to dismiss petitions for review filed pro se. *See*, *e.g.*, *Chaudhuri v. Dep't of Veterans Affairs*, 2023 WL 6886799 (Fed. Cir. 2023) (dismissing pro se petition mailed prior to the deadline but received by the court 7 days late due to postal service delay).

More specifically, the Federal Circuit in *Fedora* gave short shrift to this Court's decision in *United States v. Kwai Fun Wong*, 575 U.S. 402 (2015) ("*Wong*"). The court of appeals erroneously waved away *Wong* as inapposite and found the deadline in Section 7703(b)(1)(A) to be jurisdictional under *Bowles v. Russell*, 551 U.S. 205 (2007), solely because it set the time for an employee to petition the Federal Circuit for review of an MSPB decision. *Fedora*, 848 F.3d at 1015-6.

The *Fedora* court did not consider the administrative nature of the MSPB, nor did it engage in a meaningful analysis of whether the statute contained a clear statement of Congressional intent that the 60-day deadline should be considered jurisdictional. The Federal Circuit later flirted with a clear statement analysis in *Federal Education Association—Stateside Region v. Dep't of Defense*, 898 F.3d 1222, 1225-6 (Fed. Cir. 2018). But its analysis there was inadequate, inasmuch as it amounted to a conclusory assertion that merely because 28 U.S.C. § 1295 had the word "Jurisdiction" in its title and because a subsection of Section 1295, 28 U.S.C. § 1295(a)(9), referred to Section 7703(b)(1), Congress had made a clear statement that

the 60-day deadline in Section 7703(b)(1)(A) should be treated as jurisdictional. *Id*. at 1225.

Had the Federal Circuit conducted a proper clear statement analysis, it would have recognized that nothing in the text or context of Section 7703(b)(1)(A) evinces a clear intent by Congress that the 60-day time period for an employee to seek review of a final order or decision of the MSPB should be treated as jurisdictional. Nowhere does the 60-day deadline in Section 7703(b)(1)(A) speak in jurisdictional terms. Nor does Section 1295(a)(9) contain any manner of clear statement that the filing deadline should be considered jurisdictional. All that Section 1295(a)(9) does is list the types of cases, i.e., the subject matter, over which the Federal Circuit's jurisdiction is exclusive. It does not make the circuit's jurisdiction contingent on the timing of a petition. Section 7703(b)(1)(A)'s deadline is therefore nothing more than a run-of-the-mill claim-processing rule.

Finally, a non-jurisdictional reading of Section 7703(b)(1)(A) is warranted because the appeals processes established by the CSRA are for the benefit of employees, the bulk of whom appear before the MSPB and the Federal Circuit pro se. The overall scheme that Congress enacted in the CSRA is protective of employees because it gives them substantive and procedural rights they did not have or that were more limited prior to its passage. A jurisdictional reading would therefore frustrate the intent of Congress.

Consequently, because the 60-day deadline in Section 7703(b)(1)(A) is not jurisdictional and because the Federal Circuit's decision in *Harrow* hinged on its faulty decision in *Fedora* and perpetuated its misapplication of this Court's decisions in *Hamer* and *Wong*,

this Court should reverse the Federal Circuit and remand this matter for further proceedings.[2]

ARGUMENT

I. The 60-day Filing Deadline in 5 U.S.C. § 7703(b)(1)(A) Is Not Jurisdictional

a. Section 7703(b)(1(A) Does Not Contain a Clear Statement by Congress That the 60-day Filing Deadline Should Be Considered Jurisdictional

This Court's controlling precedent plainly requires the application of a two-pronged analysis for determining whether a filing deadline is "jurisdictional" or whether the deadline is a less stern claim-processing rule. *Hamer*, 583 U.S. 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."). The Court has framed the primary inquiry when deciding which type of deadline is implicated in a given case in straightforward terms. "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*, 583 U.S. at 25 (internal citations omitted). A statutory deadline to appeal the decision of an administrative agency, which does not govern the transfer of adjudicatory authority from one Article III court to another, is a claim-processing rule.

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[2] The Federal Circuit did not pass on the ancillary claims raised by the government in its opposition to certiorari. Remand is therefore appropriate.

The next inquiry asks whether the statute contains a clear statement by Congress that the claim-processing rule at issue should be considered jurisdictional. *Id.* at 25 n. 9 ("In cases not involving the timebound transfer of adjudicatory authority form one Article III court to another, we have additionally applied a clear statement rule: A rule is jurisdictional [i]f the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional.") (internal citations and quotations omitted). To decide whether the Legislature 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." *Wong*, 575 U.S. at 410.

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). While this Court has not required Congress to use magic words "to convey its intent that a statutory precondition be treated as jurisdictional[,] . . . the statement must indeed be clear; it is insufficient that a jurisdictional reading is 'plausible' or even 'better' than nonjurisdictional alternatives." *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 598 U.S. 288, 298 (2023) (internal citations omitted). And if a statutory deadline lacks this clear statement and is therefore non-jurisdictional, it is a garden variety claim-processing rule.

Here, the 60-day deadline is a quintessential, non-jurisdictional claim-processing rule. Section 7703(b)(1)(A) does not govern the transfer of adjudicatory authority between Article III courts. Section 7703(b)(1)

(A) sets forth the procedure by which an employee may petition the Federal Circuit for review of final order or decision of the MSPB. The 60-day deadline in Section 7703(b)(1)(A), moreover, does not speak in jurisdictional terms. *Cf. Federal Education Association—Stateside Region v. Dep't of Defense*, 909 F.3d 1141, 1144 (Fed. Cir. 2018) (Wallach, J., dissenting from denial of rehearing en banc because "§ 7703(b)(1)(A)'s text does not treat the sixty-day filing deadline as jurisdictional.").

Section 7703 as a whole is a procedural section that, in relevant part, exists for the benefit of employees. Starting with 5 U.S.C. § 7703(a)(1), Section 7703 says that an employee may obtain judicial review of a final order or decision of the MSPB. In other words, it grants federal employees a right. 5 U.S.C. § 7703(a)(1) ("Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.").

Section 7703(b) then tells an employee *how* to exercise that right. The first sentence of Section 7703(b)(1)(A) does this by telling the adversely affected or aggrieved employee *where* to seek the judicial review promised by Section 7703(a)(1). That is, Section 7703(b)(1)(A) provides that the review envisioned by Section 7703(a)(1) will occur in the Federal Circuit, unless the MSPB order or decision involves a whistleblower claim or a discrimination claim. It does not grant the Federal Circuit power to adjudicate a claim.[3] It just provides directions to the claimant. The second sentence of Section 7703(b)(1)(A) then goes on to tell the employee

[3] That work gets done by 28 U.S.C. § 1295(a)(9), as explained *infra* pp. 11-13.

when to seek the judicial review promised by Section 7703(a)(1) by providing that "any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board."

The later subsections of Section 7703 are of a piece. Each one is procedural. They lay out how review may be obtained and how it will proceed. Section 7703(c), for example, tells the Federal Circuit how it will review MSPB orders and decisions. Section 7703(b)(1)(B) tells an employee where and when to seek review of a whistleblower case. Section 7703(b)(2) tells an employee where and when to seek review of a case involving a claim of prohibited discrimination. Section 7703(d) tells the Director of OPM how and where she may obtain review of MSPB orders or decisions with the potential to have a substantial impact on civil service law. But nowhere does Section 7703 purport to govern the jurisdiction of the Federal Circuit in the sense that the 60-day deadline should be treated as a mandatory component of the Federal Circuit's subject matter jurisdiction.

Section 7703(b)(1)(A) thus lacks a clear statement of Congressional intent. There is no clear or unmistakable textual evidence that Congress intended the deadline in Section 7703(b)(1)(A) to be jurisdictional. It does not use limiting words of any kind. The deadline is a separate procedural step, in essence saying, "and this is how long an employee who wishes to seek judicial review has to file a petition with the Federal Circuit." To be sure, Section 7703(b)(1)(A)'s plain-Jane statement that "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 *Wong*. *See Wong*, 575 U.S. at 413-14.

The Federal Circuit's opinion in *Fedora* offers no compelling argument to the contrary. For example, *Fedora* relied chiefly on two arguments for its jurisdictional construction of Section 7703(b)(1)(A). First, the court of appeals relied on its own earlier decisions, including *Monzo v. Dep't of Transportation*, 735 F.2d 1335 (Fed. Cir. 1984), for the proposition that it had always construed Section 7703(b)(1)(A) to be "mandatory and jurisdictional." *Fedora*, 848 F.3d at 1014-15. Second, it relied on *Bowles* for the proposition that the deadline for the taking of an appeal was "mandatory and jurisdictional." *Id*. at 1015.

But even assuming *arguendo* that a petition for review of an agency decision constitutes an "appeal," the phrase "mandatory and jurisdictional" is outdated, as both the *Fedora* dissent and this Court have pointed out. *See Fedora*, 848 F.3d at 1022 (Plager, J. dissenting), citing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511 (2006). The phrase may no longer substitute as shorthand for a fuller analysis. On top of this, none of the Federal Circuit's earlier precedent invoking the "mandatory and jurisdictional" mantra applied the correct substantive analysis. *Id*. at 1026 (Plager, J., dissenting) (explaining that the Federal Circuit's precedents have not recognized the current state of Supreme Court law).

Reliance on 28 U.S.C. § 1295(a)(9) is similarly misplaced. The deadline for seeking judicial review in Section 7703(b)(1)(A) is not linked to the Federal Circuit's jurisdictional grant in 28 U.S.C. § 1295(a)(9). To start 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 obtain judicial re-

view. Neither Section 1295(a)(9) nor Section 7703(b)(1)(A) state that the Federal Circuit shall have jurisdiction over final MSPB decisions *only if* a petition for review is filed within 60 days after the MSPB issues notice of the decision, for example. Nor does either one use the "forever barred" language at issue in *Wong*. In other words, the jurisdictional grant in Section 1295(a)(9) is not textually tied to the filing deadline in the second sentence of Section 7703(b)(1)(A).

b. The 60-Day Deadline in Section 7703(b)(1)(A) Is Not Tied to the Federal Circuit's Jurisdictional Grant

The Federal Circuit's grant of "exclusive jurisdiction" in 28 U.S.C. § 1295(a)(9) harmonizes easily with this conclusion. This is because, in context, the work that the "pursuant to sections 7703(b)(1) and 7703(d) of title 5" language in Section 1295(a)(9) does is to distinguish which matters may be heard by the Federal Circuit and which matters may not. Put differently, the most natural reading of Section 1295(a)(9)'s "pursuant to" language is that it was not intended to place conditions on the Federal Circuit's power to review those matters over which its jurisdiction was to be exclusive. It was instead intended to reflect the exclusion of certain matters from the Federal Circuit's exclusive review entirely, e.g., discrimination cases covered by 5 U.S.C. § 7703(b)(2).

Looked at as a whole, each subsection of Section 1295(a) distinctly identifies *which* matters are within the Federal Circuit's exclusive jurisdiction. Nothing in its language preconditions that jurisdiction, i.e., the circuit's power to adjudicate, on the filing deadline in Section 7703(b)(1)(A). The statutory provision does not state "but only if received within the 60-day deadline set by section 7703(b)(1)(A)," for example. Section

1295 is merely a list of the types of matters that may be heard by the Federal Circuit, and no other circuit. So, reading Section 1295(a)(9)'s reference to Sections 7703(b)(1) and 7703(d) as identifying the *types* of cases that Congress intended the Federal Circuit to hear makes sense. If Congress had wanted to condition the Federal Circuit's jurisdiction in Section 1295(a)(9) on the 60-day deadline in Section 7703(b)(1)(A), it could have said so. It did not.

This Court's decision in *Lindahl v. Office of Personnel Management* further confirms this reading. 470 U.S. 768 (1985) ("*Lindahl*"). The question presented in *Lindahl*, properly understood, concerned the scope of the Federal Circuit's review in certain types of disability cases appealed to it "pursuant to" 5 U.S.C. § 7703(a)(1). The Court first asked whether 5 U.S.C. § 8347(c) operated as a total bar to judicial review of disability determinations made by the Office of Personnel Management ("OPM") under Section 8347 or whether it constituted a more limited bar confined only to review of OPM's factual findings. The Court held in favor of the latter and found that limited judicial review was available to determine whether there had been a deprivation of an appellant's procedural rights, misapplication of the controlling statutes, or some similar error "going to the heart of the administrative determination." *Lindahl*, 470 U.S. at 791, quoting *Scroggins v. United States*, 397 F.2d 295, 297 (Ct. Cl. 1968).

The Court next asked whether a retiree whose disability retirement appeal was rejected by the MSPB could seek direct review in the Federal Circuit, or whether such retiree had to first seek review in a district court or the claims court before bringing her case to the Federal Circuit. In answering this question in favor of the former, the Court did look to Section 7703(b)

(1), but only insofar as the first sentence of that subsection evinced Congressional intent that review of MSPB decisions should proceed exclusively in the Federal Circuit. *Lindahl*, 470 at 792 ("Sections 1295(a)(9) and 7703(b)(1) together appear to provide for exclusive jurisdiction over MSPB decisions in the Federal Circuit, and do not admit any exceptions for disability claims.").

The *Lindahl* Court did not rely on, let alone analyze, the 60-day filing deadline in the second sentence of Section 7703(b)(1)(A)—undoubtedly because it was not relevant to determining the Federal Circuit's jurisdiction. The better reading of *Lindahl* is thus that it reinforces that the grant of jurisdiction "pursuant to 7703(b)(1)" contained in 28 U.S.C. § 1295(a)(9) is addressed to the types of matters over which the Federal Circuit's jurisdiction is exclusive. As this Court understood in *Lindahl*, this is because the substantive change made by Section 1295(a)(9), following the Federal Courts Improvement Act of 1982, was to consolidate review of those appeals allowed by Section 7703 in the Federal Circuit; whereas review previously had been splintered among the regional courts of appeals and the Court of Claims. *Lindahl*, 470 U.S. at 774-75.

Consequently, the "pursuant to" language in Section 1295(a)(9) denotes only the *types* of cases over which the Federal Circuit's jurisdiction is exclusive, i.e., Section 1295(a)(9) grants the Federal Circuit the sole power to adjudicate certain types of cases. It does not condition the exclusivity or the scope of the Federal Circuit's "jurisdiction" over those cases on the *timing* of their filing. The filing deadline is not part of the jurisdictional grant and goes no distance toward defining the contours of the Federal Circuit's adjudicatory power. It is therefore an ordinary claim-processing rule that lacks jurisdictional force.

c. The Purpose of the CSRA Supports a Non-jurisdictional Reading of the 60-day Deadline in Section 7703(b)(1)(A)

Section 7703(b)(1)(A) exists for the benefit of the claimant. It works in tandem with Section 7703(a), and other parts of the CSRA governing adverse actions and appeals, to instruct adversely affected federal employees how to seek judicial review of a final order or decision of the MSPB. It also helps implement a Congressional preference that the claims of federal employees who appeal agency employment actions taken against them should be heard on the merits. *Cf. Callahan v. Dep't of the Navy*, 748 F.2d 1556, 1559 (Fed. Cir. 1984) ("All indications, therefore, lead to the conclusion that Congress intended the hearing to be for the employee's benefit."); *Frampton v. Dep't of the Interior*, 811 F.2d 1486, 1489 (Fed. Cir. 1987) (A fair hearing is the "basic cornerstone of employee rights.").

This preference for review meshes with the global purpose of the CSRA, which was to create a comprehensive scheme governing federal employment and labor relations that expanded administrative and judicial review of agency-initiated employment actions, strengthened the role of labor unions in collective bargaining and representation, and promoted the legitimate interests of federal employees. *See generally Karahalios v. National Federation of Federal Employees*, 489 U.S. 527, 531 (1989); *Bureau of Alcohol Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 107 (1983); *United States v. Fausto*, 484 U.S. 439, 445 (1988) ("*Fausto*").

Indeed, beginning with enactment of the CSRA and continuing through the present, Congress has repeatedly expanded the rights of federal employees to seek review of adverse employment actions. For example,

when this court held that the CSRA did not provide a right of MSPB review to non-preference eligible employees in the excepted service, notwithstanding its general expansion of employee rights, Congress amended the CSRA to explicitly grant non-preference eligibles in the excepted service the same right of review held by employees in the competitive service. *Compare Fausto*, 484 U.S. at 447, *with* 1990 Civil Service Due Process Amendments, Pub. L. No. 101-376, 104 Stat. 461 (1990); *see also* H.R. Rep. 101-328, 1990 U.S.C.C.A.N. 695, 703, Letter from MSPB Acting General Counsel Mary L. Jenning to Hon. William D. Ford, Chair of the House Committee on Post Office and Civil Service ("The Board is charged under the Civil Service Reform Act with responsibility for protecting the Federal merit systems against prohibited personnel practices, protecting covered Federal employees from reprisal, and ensuring that agencies base employment decisions on individual merit.").

In a similar vein, when dual-status National Guard technicians employed pursuant to Title 32 of the U.S. Code were unable to seek MSPB review of an adverse action taken against them even when acting in their civilian capacity, Congress corrected course by amending Title 32 to explicitly provide for such review. *Compare Alexander v. United States*, 143 Fed. App'x 340 (Fed. Cir. 2005), *with National Defense Authorization Act for Fiscal Year 2017*, Pub. L. No. 114-328, 130 Stat. 2000 (2017); *see also Ohio Adjutant General's Dep't v. Federal Labor Relations Authority, et al.*, 598 U.S. 449 (2023).

The MSPB also has recognized the employee-focused design of the CSRA's review provisions *vis-à-vis* the predominantly pro se appellants who appear before it. When the nature of an appellant's claim is un-

clear, for example, the MSPB has required its administrative judges to provide the appellant with information sufficient for the appellant to understand what is needed to establish that the claim constitutes an appealable action under 5 U.S.C. § 7512. *See*, *e.g.*, *Solaman v. Dep't of Commerce*, 119 M.S.P.R. 1, 7 (2012) ("It is well settled that an appellant must receive explicit information on what is required to establish an appealable jurisdictional issue."). And an administrative judge's failure to provide an appellant with sufficient information is grounds for a remand from the MSPB to the judge. *See Parker v. Dep't of Housing and Urban Development*, 106 M.S.P.R. 329, 331 (2007) ("[W]hen an appellant raises an employment practices claim, an AJ must inform him with specificity of his burden of proving the claim, his burden of going forward with the evidence, and the types of evidence necessary to make a non-frivolous allegation."); *see also* MSPB Judges Handbook, p. 11 ("The MSPB's policy is to make special efforts to accommodate pro se appellants."), available at https://www.mspb.gov/appeals/files/ALJHandbook.pdf.

Ultimately, Chapter 77 is dedicated to the process for prosecuting "Appeals." 5 U.S.C. Ch. 77; *see also* 5 U.S.C. § 7513(d) (providing that an employee against whom an agency takes an adverse employment action "is entitled to appeal to the Merit Systems Protection Board under section 7701 of this title"). Section 7703(b)(1)(A) thus is intended for the benefit of claimants because it provides the procedure by which an employee may exercise his right to seek judicial review of an adverse MSPB decision. Consequently, the purpose of the CSRA weighs in favor of treating the 60-day deadline in Section 7703(b)(1)(A) as non-jurisdictional.

CONCLUSION

The Federal Circuit incorrectly held the 60-day filing deadline in Section 7703(b)(1)(A) to be jurisdictional. The court of appeals failed to recognize that 5 U.S.C. § 7703(b)(1)(A) is a claim-processing rule and the lower court's analysis of the clear statement rule mandated by this Court was flawed. The Federal Circuit then perpetuated its error by uncritically dismissing Harrow's petition on the basis of the circuit's faulty reasoning in *Fedora*.

For the foregoing reasons, the Court should reverse the Federal Circuit and remand this matter for further proceedings.

Respectfully submitted,

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