No. 23-21

In the Supreme Court of the United States

STUART R. HARROW, PETITIONER

v.

DEPARTMENT OF DEFENSE

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

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

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OPINIONS BELOW

The order 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, and granted on December 8, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS, AND RULES INVOLVED

Pertinent constitutional provisions, statutory provisions, and rules are reproduced in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

A. Legal Background

Article III, Section 1, of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. Art. III, § 1. "All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1." *Lockerty* v. *Phillips*, 319 U.S. 182, 187 (1943). That authority "to ordain and establish inferior courts includes the power 'of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'" *Ibid.* (citation omitted).

In the Federal Courts Improvement Act of 1982 (FCIA), Congress exercised its power under Article III, Section 1, to establish the United States Court of Appeals for the Federal Circuit. Pub. L. No. 97-164, 96 Stat. 25. In doing so, Congress granted the Federal Circuit "jurisdiction" over certain categories of appeals from the Merit Systems Protection Board (Board or MSPB), an independent agency that adjudicates federal employment disputes. FCIA § 127(a), 96 Stat. 37-38;

see 5 U.S.C. 1204; 5 C.F.R. 1200.1. That jurisdictional grant, set forth in 28 U.S.C. 1295(a)(9), states:

> The United States Court of Appeals for the Federal Circuit shall have 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.

As amended by the FCIA, Section 7703(b)(1) provided that, except in discrimination cases covered by Section 7703(b)(2), "a petition to review a final order or final decision of the Board shall be filed in" the Federal Circuit "within 30 days after the date the petitioner received notice of the final order or decision of the Board." 5 U.S.C. 7703(b)(1) (1982); see FCIA § 144, 96 Stat. 45.[1] Section 7703(d), the other provision referred to in Section 1295(a)(9), specified the conditions under which the Director of the Office of Personnel Management (OPM) could obtain Federal Circuit review of a final MSPB decision. 5 U.S.C. 7703(d) (1982).

Three years after Congress's enactment of the FCIA, this Court addressed "the jurisdictional framework" established by Sections 1295(a)(9) and 7703(b)(1) in *Lindahl* v. *OPM*, 470 U.S. 768, 792 (1985). That case involved a dispute about the Federal Circuit's jurisdiction

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[1] The discrimination cases covered by Section 7703(b)(2) are known as "mixed" cases—cases in which "an employee complains of a personnel action serious enough to appeal to the MSPB *and* alleges that the action was based on discrimination" in violation of a federal antidiscrimination statute. *Kloeckner* v. *Solis*, 568 U.S. 41, 44 (2012). In a mixed case, an employee may obtain review of an MSPB decision by filing, within 30 days of receiving notice of the decision, a civil action in federal district court as provided by the relevant antidiscrimination statute. 5 U.S.C. 7703(b)(2); see *Perry* v. *MSPB*, 582 U.S. 420, 423, 425-426 (2017).

—specifically, whether that court "ha[d] jurisdiction directly to review MSPB decisions" in a particular category of cases, or whether claimants were instead required to "file a Tucker Act claim in the United States Claims Court or a United States district court." *Id.* at 771. In holding that the Federal Circuit had jurisdiction, this Court identified Sections 1295(a)(9) and 7703(b)(1) as the relevant "jurisdictional grants." *Id.* at 799. Rejecting the suggestion that Section 7703(b)(1) is "'nothing more than a venue provision,'" the Court held that "Section 7703(b)(1) confers the operative grant of jurisdiction—the 'power to adjudicate.'" *Id.* at 792-793 (citation omitted). Around the same time, the Federal Circuit held that Section 7703(b)(1)'s time limit is "jurisdictional" and therefore not subject to equitable tolling. *Monzo* v. *Department of Transp.*, 735 F.2d 1335, 1336 (1984); see *Pinat* v. *OPM*, 931 F.2d 1544, 1546 & n.2 (Fed. Cir. 1991).

In 1998, Congress amended Section 7703(b)(1) by extending the time for filing a petition for review from 30 days to 60 days. Federal Employees Life Insurance Improvement Act, Pub. L. No. 105-311, § 10(a)(1), 112 Stat. 2954. In 2012, Congress re-enacted Section 7703(b)(1), divided it into subparagraphs (A) and (B), and changed the trigger for the 60-day clock so that it now begins running when "the Board issues notice" of the final MSPB decision, rather than when the petitioner receives notice. Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-199, § 108(a), 126 Stat. 1469. In subparagraph (B), Congress granted all federal courts of appeals (not just the Federal Circuit) jurisdiction over certain appeals from final MSPB deci-

sions concerning allegations of whistleblower retaliation. 5 U.S.C. 7703(b)(1)(B).[2]

In its current form, Section 7703(b)(1) provides:

> (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.
>
> (B) A petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. 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).

B. Factual And Procedural Background

1. Petitioner was employed by the Defense Contract Management Agency (DCMA), a component of the De-

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[2] The WPEA provided for review in all circuits of covered whistleblower-related appeals for only two years. WPEA § 108, 126 Stat. 1469. Congress later extended the period to five years and, in 2018, extended it indefinitely. See All Circuit Review Extension Act, Pub. L. No. 113-170, § 2, 128 Stat. 1894; All Circuit Review Act, Pub. L. No. 115-195, § 2, 132 Stat. 1510.

partment of Defense. Pet. App. 2c. In May 2013, DCMA notified petitioner of its plan to furlough him as part of a Department-wide sequestration order. *Id.* at 2c-3c; C.A. Doc. 6, at 10-12 (Nov. 4, 2022); see 5 U.S.C. 7511(a)(5) (defining "furlough" as "the placing of an employee in a temporary status without duties and pay because of lack of work or funds or other nondisciplinary reasons"). Petitioner requested an exemption on the ground that the furlough would impose a financial hardship. Pet. App. 3c. In July 2013, DCMA denied the request, and petitioner was furloughed for six days. *Ibid.*

2. Petitioner appealed the furlough to the MSPB. C.A. Doc. 6, at 3; see 5 U.S.C. 7511(a)(1)(A), 7512(5), 7701(a). Although he had a right "to be represented by an attorney," 5 U.S.C. 7701(a)(2), petitioner proceeded pro se, Pet. Br. 8. He argued, among other things, that his furlough did not "promote the efficiency of the service," 5 U.S.C. 7513(a), and that he was entitled to a hardship exemption, Pet. App. 3c-4c. The case was referred to an administrative judge. C.A. Doc. 6, at 5-6; see 5 U.S.C. 7701(a)(1) and (b)(1).

In July 2016, the administrative judge issued an initial decision affirming the furlough. C.A. Doc. 6, at 9-25; see 5 C.F.R. 1201.111. The judge found that DCMA had "satisfied its burden" of showing that the furlough "promoted the efficiency of the service." C.A. Doc. 6, at 20. While acknowledging that the "furlough, by its very nature, undoubtedly created regrettable financial hardship," the judge explained that "such essentially equitable considerations" furnished no basis for deeming the furlough "improper." *Id.* at 19.

A series of notices appeared at the end of the administrative judge's decision. Those notices informed petitioner that "[t]his initial decision will become final on

August 23, 2016," absent a request for the Board's review. C.A. Doc. 6, at 20; see 5 C.F.R. 1201.113. The notices also informed petitioner that if he chose to forgo the Board's review, he had a "right to request review" by the Federal Circuit, but that "[t]he court must receive [his] request no later than 60 calendar days after the date this initial decision becomes final." C.A. Doc. 6, at 24 (citing 5 U.S.C. 7703(b)(1)(A)). The notices continued: "If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed." *Ibid.* (citing *Pinat*, *supra*).

3. On August 23, 2016, petitioner sought the Board's review. C.A. Doc. 6, at 8; see 5 U.S.C. 7701(e)(1); 5 C.F.R. 1201.114. The following January, while petitioner's petition for review was pending, the Board lost its quorum. MSPB, *Frequently Asked Questions About the Lack of Quorum Period and Restoration of the Full Board* 1 (July 12, 2023) (*FAQ*), perma.cc/9N43-3X34; see 5 U.S.C. 1201; 5 C.F.R. 1200.3(e). The Board therefore could not resolve petitioner's case until after a quorum was restored in March 2022. *FAQ* 2.

On May 11, 2022, the Board issued a final order affirming the administrative judge's decision. Pet. App. 1c-16c. The Board declined to reconsider its "standard for analyzing whether a furlough promotes the efficiency of the service," *id.* at 10c, and found no basis for disturbing the administrative judge's application of that standard, see *id.* at 2c, 10c-11c; 5 C.F.R. 1201.115.

The Board's final order concluded with a section entitled "**NOTICE OF APPEAL RIGHTS.**" Pet. App. 11c. The notice advised: "If you wish to seek review of this final decision, you should immediately review the law

applicable to your claims and carefully follow all filing time limits and requirements. Failure to file within the applicable time limit may result in the dismissal of your case." *Ibid.* Citing Section 7703(b)(1)(A), the notice further stated: "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." *Id.* at 12c.

4. On September 8, 2022—120 days after the Board issued its final order—petitioner moved the Board for an extension of time to seek judicial review. C.A. Doc. 1-2, at 16-21 (Sept. 27, 2022). In his motion, petitioner asserted that he did not become aware of the Board's final order until August 30, 2022, after searching for it on the MSPB's website. *Id.* at 17. According to petitioner, he then emailed the Office of the Clerk of the Board, which responded that the Board had served him with notice of its final order via the email address that it had on file. *Id.* at 17, 27, 30-31. The Clerk's Office further noted that petitioner was registered as an e-filer in the MSPB's e-filing system, *id.* at 30; that such registration constitutes consent to receiving electronic service of documents issued by the MSPB, *ibid.*; see 5 C.F.R. 1201.14(e)(1); that each e-filer is responsible for notifying the MSPB of any change in e-mail address, C.A. Doc. 1-2, at 28; see 5 C.F.R. 1201.14(e)(6); and that on May 5, 2022, six days before the Board's final order in petitioner's case, the MSPB had posted a notice on its website reminding parties with pending cases to update their contact information, C.A. Doc. 1-2, at 28; see MSPB, *Notice to Parties with a Pending Petition for Review or Case Before the Full Board* (May 5, 2022),

perma.cc/3Y6T-CMXT. Petitioner acknowledged that his email address had changed during the pendency of his case and that he had failed to notify the MSPB of that change, "mistakenly believ[ing] that the emails addressed to the old address would be forwarded to his current email address." C.A. Doc. 1-2, at 17.

On September 12, 2022, the Acting Clerk of the Board responded to petitioner's motion. C.A. Doc. 1-2, at 22-23. The Acting Clerk explained that petitioner's case before the Board was "closed" and that the Board could not "extend the deadline for seeking review in another forum, such as a court." *Id.* at 22.

5. On September 16, 2022—128 days after the MSPB issued its final order—petitioner filed a petition for review in the Federal Circuit. C.A. Doc. 1-2, at 1. Before any briefing was due, the Federal Circuit issued an order to show cause why the petition should not be dismissed as untimely. C.A. Doc. 7, at 2 (Nov. 21, 2022). The order cited circuit precedent recognizing that Section 7703(b)(1)(A)'s time limit is jurisdictional and not subject to equitable tolling. *Ibid.* (citing *Fedora* v. *MSPB*, 848 F.3d 1013, 1016 (Fed. Cir. 2017), cert. denied, 583 U.S. 1091 (2018)). 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 to review an order of an administrative agency unless specifically authorized by law. C.A. Doc. 7, at 2.

In response to the order to show cause, petitioner acknowledged that he had filed his petition for review beyond Section 7703(b)(1)(A)'s 60-day limit. See Pet. C.A. Resp. to Order to Show Cause 2. But petitioner argued that the time limit should not be enforced on the view that his "late filing," *ibid.*, was the result of "excusable neglect," *id.* at 6—namely, his "fail[ure] to no-

tify MSPB of his new email address," *id.* at 7 (emphasis omitted). Petitioner also acknowledged that while he had been "fully aware of the quorum's restoration" and had even attended a webcast about the Board's new members in May 2022, he "had underestimated the efficiency of the new Board" and had "presumed, incorrectly, in retrospect, that a decision in his case would be long in coming." *Id.* at 9.

6. The Federal Circuit dismissed petitioner's 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 therefore concluded that it could not "excuse a failure to timely file based on individual circumstances." *Ibid.* The court also cited Rule 26(b)(2), noting that the rule "prohibit[ed] the court from extending or reopening the time to petition for review 'unless specifically authorized by law.'" *Ibid.* (quoting Fed. R. App. P. 26(b)(2)).

SUMMARY OF ARGUMENT

I. This case concerns the scope of a statutory grant of jurisdiction to an Article III court. Section 1295(a)(9) of Title 28 grants the Federal Circuit jurisdiction over appeals from final MSPB decisions, "pursuant to sections 7703(b)(1) and 7703(d) of title 5." Section 7703(b)(1), in turn, both specifies which MSPB decisions are subject to Federal Circuit review and requires that an appeal be filed within 60 days after the MSPB issues notice of its final decision. The question is whether an appeal filed outside that time limit nevertheless falls within Section 1295(a)(9)'s grant of jurisdiction.

The answer to that question is no. In an effort to capture Congress's likely intent, this Court's recent decisions have declined to lightly attach jurisdictional consequences to procedural requirements imposed by statute. Instead, the Court will "treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is." *Boechler, P.C.* v. *Commissioner*, 596 U.S. 199, 203 (2022) (citation omitted). Here, text, precedent, and history all make clear that Section 1295(a)(9)'s grant of jurisdiction over appeals "pursuant to" Section 7703(b)(1) does not encompass appeals filed outside Section 7703(b)(1)'s time limit.

When Section 1295(a)(9) was enacted, "pursuant to" was understood to be a "restrictive" term, *Black's Law Dictionary* 1112 (5th ed. 1979), meaning "in conformance to," "in compliance with," or "in accordance with," see pp. 15-16, *infra*. An appeal conforms to, complies with, or accords with Section 7703(b)(1) only if it both seeks review of a final MSPB decision identified in that provision and is filed within 60 days. Section 1295(a)(9)'s plain text therefore incorporates Section 7703(b)(1)'s time limit as a jurisdictional prerequisite.

Consistent with that straightforward reading, this Court has already held that Section 7703(b)(1) establishes "the jurisdictional perimeters" of the Federal Circuit's "'power to adjudicate.'" *Lindahl* v. *OPM*, 470 U.S. 768, 793 (1985). For the past 40 years, the Federal Circuit has recognized Section 7703(b)(1)'s time limit as jurisdictional. And Congress has repeatedly re-enacted or amended Section 7703(b)(1) against the backdrop of that settled precedent while leaving Section 7703(b)(1)'s jurisdictional status intact. There is no sound basis for undoing that status now.

Moreover, other statutory deadlines for appeals to the courts of appeals—such as 28 U.S.C. 2107's deadline for filing a notice of appeal in a civil case and the Hobbs Act's deadline for seeking review of certain agency actions—have historically been treated as jurisdictional. The deadline in Section 7703(b)(1) itself was considered jurisdictional even before Congress established the Federal Circuit. And Congress had good reason for making the time to seek review in an Article III court of appeals jurisdictional: That limit is clear and can easily be enforced by the courts at the outset of an appeal—as this case illustrates. In contrast, allowing requests for equitable tolling would require courts of appeals to engage in factfinding outside the agency or trial-court record—a task no court of appeals is well suited to perform.

II. Even if this Court holds that Section 7703(b)(1)'s deadline is nonjurisdictional, it should affirm on the ground that the deadline is mandatory and thus not subject to equitable tolling. Congress enacted Section 7703(b)(1) against the backdrop of Federal Rule of Appellate Procedure 26(b), which prohibits courts from extending the time to file a petition for review of agency action except as specifically authorized by law. Petitioner cannot plausibly argue that Congress specifically authorized equitable tolling in Section 7703(b)(1).

ARGUMENT

I. THE JURISDICTION GRANTED BY 28 U.S.C. 1295(a)(9) DOES NOT ENCOMPASS APPEALS FILED OUTSIDE 5 U.S.C. 7703(b)(1)'S TIME LIMIT

Article III courts are courts of limited jurisdiction that possess "only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto." *Bender* v. *Williamsport*

Area Sch. Dist., 475 U.S. 534, 541 (1986). This case concerns the interpretation of one such jurisdictional grant, 28 U.S.C. 1295(a)(9). In that provision, Congress gave the Federal Circuit "jurisdiction" over a particular category of appeals: "appeal[s] 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." *Ibid.* The question is whether that category encompasses an appeal filed outside Section 7703(b)(1)'s 60-day limit.

The answer is no. Congress did not give the Federal Circuit jurisdiction over all appeals from final decisions of the MSPB; instead, it limited the relevant jurisdictional grant to appeals "pursuant to sections 7703(b)(1) and 7703(d)." An appeal "pursuant to" Section 7703(b)(1) is one taken in conformance to Section 7703(b)(1). And an appeal filed outside the 60-day limit plainly does not conform to Section 7703(b)(1).

Petitioner emphasizes this Court's recent decisions holding that it will "treat a procedural requirement as jurisdictional only if Congress 'clearly states' that it is." *Boechler, P.C.* v. *Commissioner*, 596 U.S. 199, 203 (2022) (citation omitted). But that now-familiar principle neither requires Congress to "incant magic words" nor authorizes courts to avoid limits on their jurisdiction by disregarding a statute's plain text. *Ibid.* (citation omitted). Instead, the Court has justified its approach as a means of discerning "Congress' likely intent," *MOAC Mall Holdings LLC* v. *Transform Holdco LLC*, 598 U.S. 288, 298 (2023) (citation omitted), by ensuring that courts do not "lightly apply" jurisdictional consequences to rules intended to govern the conduct of the parties rather than to limit the power of the courts, *Wilkins* v. *United States*, 598 U.S. 152, 158 (2023).

Here, Section 1295(a)(9) is explicitly and unmistakably directed at the Federal Circuit's jurisdiction—its power to adjudicate. And the conclusion that Section 1295(a)(9)'s grant of jurisdiction does not extend to appeals filed outside Section 7703(b)(1)'s time limit is not just the "better" interpretation of Section 1295(a); it is the "clear" meaning of that provision. *Boechler*, 596 U.S. at 206. As this Court has recognized, the requisite clarity can be found in (1) "[s]pecific statutory language," *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 137-138 (2008); (2) "a definitive earlier interpretation of the statute," *id.* at 138; or (3) "historical treatment of the type of limitation" in question, *Reed Elsevier, Inc.* v. *Muchnick*, 559 U.S. 154, 168 (2010). All three of those sources—text, precedent, and history—make clear that timely filing is a jurisdictional prerequisite here.

A. Section 1295(a)(9)'s Text Clearly Incorporates Section 7703(b)(1)'s Time Limit As A Jurisdictional Prerequisite

As relevant here, Section 1295(a)(9) grants the Federal Circuit jurisdiction over appeals of final MSPB decisions, "pursuant to section[] 7703(b)(1)." 28 U.S.C. 1295(a)(9). The phrase "pursuant to" unambiguously ties the Federal Circuit's jurisdiction to the requirements of Section 7703(b)(1), including its time limit. The text thus clearly makes the time limit jurisdictional.

1. Section 1295(a)(9) provides:

> The United States Court of Appeals for the Federal Circuit shall have 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). Section 1295(a)(9) thus grants the Federal Circuit "jurisdiction" over a particular category of appeals. *Ibid.* To fall within that category, an appeal must be (1) "from a final order or final decision of the [MSPB]," and (2) "pursuant to sections 7703(b)(1) and 7703(d) of title 5." *Ibid.* At issue here is the meaning of that latter requirement.

"When called on to resolve a dispute over a statute's meaning, this Court normally seeks to afford the law's terms their ordinary meaning at the time Congress adopted them." *Niz-Chavez* v. *Garland*, 593 U.S. 155, 160 (2021). When Congress enacted Section 1295(a)(9) in 1982, "pursuant to" was ordinarily understood to mean "in conformance to or agreement with: according to." *Webster's Third New International Dictionary* 1848 (1976); see *Webster's New International Dictionary* 2018 (2d ed. 1957) (defining "pursuant" as meaning "[a]greeably; conformably; according; as, *pursuant* to our contract"); 12 *Oxford English Dictionary* 887 (2d ed. 1989) (defining "pursuant," when used "[w]ith *to*," as meaning "consequent and conformable to; in accordance with").

Black's Law Dictionary likewise explained that "[p]ursuant to" means "in conformance to or agreement with." *Black's Law Dictionary* 1112 (5th ed. 1979) (citation omitted); cf. *Black's Law Dictionary* 1493 (11th ed. 2019) (defining "pursuant to" as meaning "[i]n compliance with; in accordance with; under"). And it emphasized that "'[p]ursuant to,'" "when used in a statute, is a restrictive term," *Black's Law Dictionary* 1112 (5th ed. 1979), citing a decision that had interpreted a statute's use of the phrase, when referencing another law, as requiring "compl[iance] with" that other law, *Knowles* v. *Holly*, 513 P.2d 18, 23 (Wash. 1973).

This Court has given "pursuant to" that restrictive meaning in statutes. In *SAS Institute Inc.* v. *Iancu*, 138 S. Ct. 1348 (2018), for example, this Court addressed the meaning of a provision authorizing the Director of the Patent and Trademark Office "to institute an inter partes review * * * pursuant to a petition" filed by a private party. 35 U.S.C. 314(b). The Court explained that "by using the term 'pursuant to,' Congress told the Director what he must say yes or no to: an inter partes review that proceeds 'in accordance with' or 'in conformance to' the petition." *SAS Inst.*, 138 S. Ct. at 1355-1356 (brackets omitted) (quoting *Oxford English Dictionary* (3d ed. Mar. 2016), www.oed.com/view/Entry/155073). The Court therefore rejected the contention that the Director could "depart from the petition and institute a *different* inter partes review of his own design." *Id.* at 1356.

That restrictive understanding of "pursuant to" has deep roots; the Constitution uses the phrase's close cousin—"in pursuance of"—in the same way. See *Black's Law Dictionary* 1493 (11th ed. 2019) (explaining that "pursuant to" is "[a]lso termed *in pursuance of*"). The Supremacy Clause "makes 'Law of the Land' only 'Laws of the United States which shall be made in Pursuance [of the Constitution].'" *Printz* v. *United States*, 521 U.S. 898, 924 (1997) (brackets in original) (quoting U.S. Const. Art. VI, Cl. 2). The Clause thus makes supreme only laws "in accord with the Constitution." *Id.* at 925. As Chief Justice Marshall wrote for the Court in *Marbury* v. *Madison* 5 U.S. (1 Cranch) 137 (1803), "a law repugnant to the constitution is void" because only those laws "which shall be made in *pursuance* of the constitution" shall "be the *supreme* law of the land." *Id.* at 180.

2. A straightforward application of the ordinary meaning of "pursuant to" resolves this case. An appeal "pursuant to sections 7703(b)(1) and 7703(d)," 28 U.S.C. 1295(a)(9), is one "in conformance to," "in compliance with," or "in accordance with" those provisions. Section 7703(b)(1)(A), in turn, requires that the appeals it covers "be filed in the United States Court of Appeals for the Federal Circuit * * * 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). Because an appeal is not "in conformance to," "in compliance with," or "in accordance with" Section 7703(b)(1)(A) unless it is filed within that 60-day limit, timely filing is a jurisdictional prerequisite for such an appeal.

The phrase "pursuant to section[] 7703(b)(1)," 28 U.S.C. 1295(a)(9), thus provides "a clear tie between the deadline and the jurisdictional grant," *Boechler*, 596 U.S. at 207. As this Court has recognized, "Congress may make other prescriptions jurisdictional by incorporating them into a jurisdictional provision." *Fort Bend County* v. *Davis*, 139 S. Ct. 1843, 1849 (2019). By granting the Federal Circuit jurisdiction over appeals "pursuant to" Section 7703(b)(1), Congress incorporated the requirements of Section 7703(b)(1) into the jurisdictional grant itself. The jurisdiction granted in Section 1295(a)(9) therefore does not encompass an appeal filed outside Section 7703(b)(1)'s 60-day limit.

3. Statutory context reinforces the clear import of the operative text. In addition to imposing a 60-day limit, Section 7703(b)(1) also performs the essential function of a jurisdictional provision by "delineating the classes of cases a court may entertain." *Fort Bend County*, 139 S. Ct. at 1848. Again, Section 1295(a)(9) gives the Federal Circuit "exclusive jurisdiction" over appeals from

final MSPB decisions "pursuant to" Section 7703(b)(1). 28 U.S.C. 1295(a)(9). And it is Section 7703(b)(1) that determines *which* MSPB decisions fall within that jurisdictional grant.

Section 7703(b)(1) specifies that "[e]xcept 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 Federal Circuit. 5 U.S.C. 7703(b)(1)(A). The reference to subparagraph (B) creates an exception to the Federal Circuit's exclusive jurisdiction over non-mixed cases, authorizing either "the Federal Circuit or any court of appeals of competent jurisdiction" to hear appeals in certain whistleblower cases. 5 U.S.C. 7703(b)(1)(B). And the reference to paragraph (2) excludes mixed cases from the Federal Circuit's jurisdiction altogether; such cases must be filed in district court under the relevant antidiscrimination statute. 5 U.S.C. 7703(b)(2); see *Kloeckner* v. *Solis*, 568 U.S. 41, 51 (2012) (describing "§ 7703(b)(2)'s exception to Federal Circuit jurisdiction"); p. 3 n.1, *supra*.[3]

Accordingly, Section 1295(a)(9) is not itself a complete grant of jurisdiction—instead, its essential contours are found in Section 7703(b)(1). That confirms that Section 1295(a)(9) uses "pursuant to" in its usual restrictive sense to incorporate Section 7703(b)(1)'s requirements. The Federal Circuit lacks jurisdiction over

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[3] Section 7703(d), the other provision referenced in Section 1295(a)(9), performs a similar function. In addition to imposing a 60-day limit on petitions for review filed by the Director of OPM, Section 7703(d) also makes an exception to the Federal Circuit's exclusive jurisdiction by specifying that the Director may file a petition for review in certain whistleblower cases in either "the Federal Circuit or any court of appeals of competent jurisdiction." 5 U.S.C. 7703(d)(2).

an appeal from the MSPB's final decision in a mixed case because such an appeal is not an appeal "pursuant to" Section 7703(b)(1). See, *e.g.*, *Ash* v. *OPM*, 25 F.4th 1009, 1012 (Fed. Cir. 2022) (per curiam) ("[T]his appeal is a mixed case over which we do not have jurisdiction."). And precisely the same thing is true of an appeal filed outside Section 7703(b)(1)'s 60-day limit.

B. This Court Has Definitively Interpreted Section 7703(b)(1) To Be Jurisdictional

This Court has held that even in the absence of express jurisdictional language, the clear-statement rule can be satisfied by a "definitive earlier interpretation" of a statutory provision as jurisdictional. *John R. Sand*, 552 U.S. at 138; see *Wilkins*, 598 U.S. at 159. This Court rendered just such an interpretation of Section 7703(b)(1) four decades ago. And Congress has repeatedly re-enacted or amended Section 7703(b)(1) without disturbing that interpretation.

1. In *Lindahl* v. *OPM*, 470 U.S. 768 (1985), this Court definitively interpreted Section 7703(b)(1) as jurisdictional. The petitioner in that case, Wayne Lindahl, was a retired federal employee who claimed that he was entitled to a "disability retirement annuity" under federal law. *Id.* at 775. After the MSPB affirmed the denial of Lindahl's claim, the Federal Circuit dismissed his appeal of the MSPB's decision. *Id.* at 775-778.

Before this Court, the government argued that Section 1295(a)(9) did not grant the Federal Circuit jurisdiction over Lindahl's appeal. *Lindahl*, 470 U.S. at 791. While acknowledging Section 1295(a)(9)'s link to Section 7703(b)(1), the government characterized Section 7703(b)(1) as "nothing more than a venue provision." Gov't Br. at 22, *Lindahl*, *supra* (No. 83-5954); see *id.* at 13. The government viewed the Federal Circuit's juris-

diction as defined by a different provision, 5 U.S.C. 7703(a)(1), which grants a right of judicial review only to an "employee or applicant for employment." Gov't Br. at 21, *Lindahl*, *supra* (No. 83-5954) (quoting 5 U.S.C. 7703(a)(1)). And the government contended that because Lindahl was not an employee but a retiree, the Federal Circuit had no jurisdiction to hear his appeal. *Id.* at 9, 22.

This Court rejected the government's understanding of the "jurisdictional framework." *Lindahl*, 470 U.S. at 792. The Court held that the Federal Circuit's jurisdiction over appeals from the MSPB is defined not by Section 7703(a)(1), but by "Sections 1295(a)(9) and 7703(b)(1) together." *Ibid.* The Court explained that Section 1295(a)(9) grants the Federal Circuit jurisdiction over certain appeals "pursuant to section[] 7703(b)(1)." *Ibid.* (quoting 28 U.S.C. 1295(a)(9)). And the Court understood Section 7703(b)(1) as establishing the "jurisdictional perimeters" of that grant. *Id.* at 793. The Court thus held that "Section 7703(b)(1) confers the operative grant of jurisdiction—the 'power to adjudicate'—and is not in any sense a 'venue' provision." *Id.* at 793; see *id.* at 793 n.30 (distinguishing "[v]enue provisions" from provisions "relating to the power of a court").

Given that understanding of the "jurisdictional framework," the Court concluded that the Federal Circuit had jurisdiction over Lindahl's appeal. *Lindahl*, 470 U.S. at 792. The Court examined the relevant "jurisdictional grants," *id.* at 799, and found no "exceptions for disability retirement claims" in the text of either Section 1295(a)(9) or Section 7703(b)(1), *id.* at 792. Lindahl's appeal thus fell "within the jurisdictional perimeters of § 7703(b)(1)," *id.* at 793, and the Federal Circuit had jurisdiction to decide it, *id.* at 799.

2. *Lindahl*'s understanding of the jurisdictional framework established by Sections 1295(a)(9) and 7703(b)(1) is controlling here for three reasons.

First, *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*, 598 U.S. at 160 (citation and internal quotation marks omitted). And the Court concluded that Section 7703(b)(1) *is* jurisdictional in that sense—*i.e.*, that it establishes "the jurisdictional perimeters" of the Federal Circuit's "'power to adjudicate.'" *Lindahl*, 470 U.S. at 793.

Second, the Court's decision in *Lindahl* "turned on" its holding that Section 7703(b)(1) is jurisdictional. *Wilkins*, 598 U.S. at 160 (brackets and citation omitted). Indeed, the very question the Court was addressing was a jurisdictional one: whether the Federal Circuit had "jurisdiction" over Lindahl's appeal, or whether Lindahl was instead required to file in a district court or the Court of Claims. *Lindahl*, 470 U.S. at 791. And the Court's conclusion that Section 7703(b)(1) establishes the relevant "jurisdictional perimeters" was necessary to its resolution of that question and its rejection of the government's reliance on Section 7703(a)(1) as the jurisdiction-defining provision. *Id.* at 793; see *id.* at 792-793, 799.

Third, although *Lindahl* did not specifically discuss Section 7703(b)(1)'s time limit (which was then 30 days, see p. 3, *supra*), that condition is necessarily one of the "jurisdictional perimeters of § 7703(b)(1)" that *Lindahl* recognized as defining the Federal Circuit's "'power to adjudicate.'" 470 U.S. at 793. Section 1295(a)(9) grants the Federal Circuit jurisdiction over appeals "pursuant to section[] 7703(b)(1)," 28 U.S.C. 1295(a)(9); it provides

no basis for parsing Section 7703(b)(1)'s requirements to give jurisdictional effect to some of them while denying it to others.

Consistent with that understanding, the Federal Circuit has long held that Section 7703(b)(1)'s time limit for filing a petition for review is "jurisdictional" and therefore not subject to equitable tolling. *Monzo* v. *Department of Transp.*, 735 F.2d 1335, 1336 (1984); see, *e.g.*, *Federal Educ. Ass'n—Stateside Region* v. *Department of Def.*, 898 F.3d 1222, 1224 (Fed. Cir. 2018), reh'g en banc denied, 909 F.3d 1141 (Fed. Cir. 2018), cert. denied, 139 S. Ct. 2616 (2019); *Fedora* v. *MSPB*, 848 F.3d 1013, 1016 (Fed. Cir. 2017), reh'g en banc denied, 868 F.3d 1336 (Fed. Cir. 2017), cert. denied, 583 U.S. 1091 (2018); *Oja* v. *Department of the Army*, 405 F.3d 1349, 1355-1360 (Fed. Cir. 2005); *Pinat* v. *OPM*, 931 F.2d 1544, 1546 & n.2 (Fed. Cir. 1991).

3. "Basic principles of *stare decisis*" require adherence to *Lindahl*'s holding that Section 7703(b)(1) establishes the jurisdictional perimeters of the Federal Circuit's power to adjudicate. *John R. Sand*, 552 U.S. at 139. And those principles apply with added force here because Congress has repeatedly re-enacted or amended Section 7703(b)(1) without disturbing the jurisdictional status of Section 7703(b)(1) or its time limit. See *ibid.* (relying on the fact that Congress had "long acquiesced" in the Court's interpretation of a statutory provision as jurisdictional).

In 2012, for instance, Congress re-enacted Section 7703(b)(1) in its entirety. WPEA § 108(a), 126 Stat. 1469. In 1998 and 2012, Congress amended the time limit itself—first to extend it to 60 days, Federal Employees Life Insurance Improvement Act, § 10(a)(1), 112 Stat. 2954, and then to change when the 60-day clock starts

running, WPEA § 108(a), 126 Stat. 1469. And between 2012 and 2018, Congress amended Section 7703(b)(1) on multiple occasions to grant the regional circuits jurisdiction over certain appeals from final MSPB decisions concerning allegations of whistleblower retaliation. *Ibid.*; p. 5 & n.2, *supra*.

Congress re-enacted and amended Section 7703(b)(1) against the "backdrop" of this Court's and the Federal Circuit's "settled" understanding of Section 7703(b)(1)'s jurisdictional status. *Helsinn Healthcare S.A.* v. *Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633 (2019). In general, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978); see *Helsinn*, 139 S. Ct. at 633-634 (presuming that Congress "adopted [an] earlier judicial construction" of a statute where this Court had "never addressed the precise question presented" but the Federal Circuit had "made explicit what was implicit in [this Court's] precedents"). And that presumption carries special force here, where Congress has been unusually attentive to the details of Section 7703(b)(1)'s operation while leaving undisturbed the holdings of this Court and the Federal Circuit that the statute imposes jurisdictional limits.

C. History Reinforces The Jurisdictional Status Of Section 7703(b)(1)'s Time Limit

In determining whether the clear-statement rule has been satisfied, this Court also considers the "'relevant historical treatment' of the provision at issue." *Musacchio* v. *United States*, 577 U.S. 237, 246 (2016) (quoting *Reed Elsevier*, 559 U.S. at 166). Here, historical treatment of the type of limitation at issue and the history

of Section 7703(b)(1) itself reinforce that Section 7703(b)(1)(A)'s time limit is jurisdictional.

1. Section 7703(b)(1)(A) establishes a statutory deadline for filing an appeal in an Article III court of appeals. The "relevant question," then, is whether that "type of limitation"—*i.e.*, "statutory deadlines for filing appeals" in the Article III courts of appeals—has been historically treated as jurisdictional. *Reed Elsevier*, 559 U.S. at 168. The answer is yes.

An appeal typically reaches an Article III court of appeals from one of two sources: a district court or an administrative agency. With respect to appeals from district courts, this Court has already held that any statutory deadline is jurisdictional. As the Court put it in *Hamer* v. *Neighborhood Housing Services of Chicago*, 583 U.S. 17 (2017), "[i]f a time prescription governing the transfer of adjudicatory authority from one Article III court to another appears in a statute, the limitation is jurisdictional." *Id.* at 25; see, *e.g.*, *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 90, 99 (1994) (holding that 28 U.S.C. 2101(c), which governs the time for filing a petition for a writ of certiorari in a civil case, is jurisdictional). In *Bowles* v. *Russell*, 551 U.S. 205 (2007), for example, this Court concluded that 28 U.S.C. 2107, which governs the time for filing a notice of appeal in a civil case, is jurisdictional. 551 U.S. at 209-210 & n.2. In reaching that conclusion, *Bowles* "focus[ed]" on "the historical treatment of statutory conditions for taking an appeal." *Reed Elsevier*, 559 U.S. at 168. And "*Bowles* emphasized that this Court had long treated such conditions as jurisdictional, including in statutes *other* than § 2107." *Ibid.*

With respect to appeals from administrative agencies, the courts of appeals have uniformly treated the

statutory deadline for seeking review of certain agency actions under the Hobbs Act, ch. 537, 60 Stat. 420, as jurisdictional. See *Henderson* v. *Shinseki*, 562 U.S. 428, 437 (2011); see also, *e.g.*, *Gorss Motels, Inc.* v. *FCC*, 20 F.4th 87, 96 (2d Cir. 2021); *Council Tree Commc'ns, Inc.* v. *FCC*, 503 F.3d 284 (3d Cir. 2007); *Owner-Operator Indep. Drivers Ass'n* v. *United States Dep't of Transp.*, 858 F.3d 980, 982-983 (5th Cir. 2017); *Consumers' Research* v. *FCC*, 67 F.4th 773, 784 (6th Cir. 2023); *Schneider Nat'l, Inc.* v. *ICC*, 948 F.2d 338, 341 (7th Cir. 1991); *Brown* v. *Nuclear Regulatory Comm'n*, 644 F.3d 726, 727-728 (8th Cir. 2011) (per curiam); *West Coast Truck Lines, Inc.* v. *American Indus., Inc.*, 893 F.2d 229, 234 (9th Cir. 1990); *Council Tree Investors, Inc.* v. *FCC*, 739 F.3d 544, 551, 554 (10th Cir. 2014); *Consumers' Research* v. *FCC*, 88 F.4th 917, 922 (11th Cir. 2023), petition for cert. pending, No. 23-743 (filed Jan. 5, 2024); *Matson Navigation Co.* v. *United States Dep't of Transp.*, 895 F.3d 799, 804 (D.C. Cir. 2018). Notably, the jurisdictional framework of the Hobbs Act is similar to that of Sections 1295(a)(9) and 7703(b)(1). One provision of the Hobbs Act grants the regional courts of appeals "exclusive jurisdiction" over certain agency actions and provides that "[j]urisdiction is invoked by filing a petition as provided by section 2344 of this title." 28 U.S.C. 2342. Section 2344, in turn, requires that the petition be filed "within 60 days" of the agency action. 28 U.S.C. 2344.[4]

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[4] Contrary to petitioner's assertion in his certiorari-stage reply brief (at 6 n.1), both the Ninth Circuit and the D.C. Circuit have recognized that the Hobbs Act's time limit is "jurisdictional in nature, and may not be enlarged or altered by the courts." *Matson*, 895 F.3d at 804 (citation omitted); see *West Coast Truck Lines*, 893

Historical treatment of similar statutory deadlines thus supports the jurisdictional status of Section 7703(b)(1)(A)'s time limit. Indeed, although this Court has deemed nonjurisdictional various other types of deadlines, it has never held that a statutory deadline for appealing to an Article III court of appeals is nonjurisdictional. See, *e.g.*, *Wilkins*, 598 U.S. at 155-156 (statute of limitations for commencing a civil action in district court); *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (same); *Bowen* v. *City of New York*, 476 U.S. 467, 478 (1986) (same); *Musacchio*, 577 U.S. at 246-247 (statute of limitations for filing an indictment in district court); *Boechler*, 596 U.S. at 202 (time to petition for review to an Article I tribunal); *Henderson*, 562 U.S. at 431 (same); *United States* v. *Kwai Fun Wong*, 575 U.S. 402, 411-412 (2015) (limitations periods for presenting a claim to a federal agency and for commencing a civil action in district court); *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 149 (2013) (time for appealing to an Executive-Branch agency).

F.2d at 234 (similar). The Ninth Circuit decision that petitioner cites simply found that the petitioner could not satisfy the requirements of equitable tolling anyway. *Carpenter* v. *Department of Transp.*, 13 F.3d 313, 317 (1994). And the "exceptions" that the D.C. Circuit has recognized are merely exceptions to the general principle that an agency's regulations cannot be challenged after the time for seeking review of the order *promulgating* the regulations has expired; the D.C. Circuit has recognized that in certain situations, an agency's regulations can still be challenged as part of timely review of a subsequent agency action, such as an enforcement proceeding applying the regulations. *Brotherhood of Locomotive Eng'rs* v. *Federal R.R. Admin.*, 972 F.3d 83, 103 (2020) (citation omitted); see *NLRB Union* v. *FLRA*, 834 F.2d 191, 195-197 (D.C. Cir. 1987) (summarizing circuit precedent).

2. The history of Section 7703(b)(1) itself reinforces that Section 7703(b)(1)(A)'s time limit is jurisdictional. Before the enactment of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111, one of the ways in which federal employees could seek review of employment-related actions was by filing a Tucker Act suit in the Court of Claims (now the Court of Federal Claims). See Tucker Act, ch. 359, 24 Stat. 505; 28 U.S.C. 1346(a)(2), 1491 (1976). The statutory time limit for filing such a suit in the Court of Claims was jurisdictional. See 28 U.S.C. 2501; *John R. Sand*, 552 U.S. at 134-139.

In 1978, the CSRA created the MSPB and directed, in Section 7703(b)(1), 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 jurisdiction-conferring provision. *Lindahl*, 470 U.S. at 774 (quoting CSRA § 205, 92 Stat. 1143). The CSRA further established in Section 7703(b)(1) a statutory time limit of 30 days for filing a petition for review in either the Court of Claims or the regional courts of appeals. CSRA § 205, 92 Stat. 1143. Every court to consider the question held that the time limit was jurisdictional, like the Tucker Act's and the Hobbs Act's own filing deadlines in Section 2501 and Section 2344, respectively. See *Lewis* v. *IRS*, 691 F.2d 858, 859 (8th Cir. 1982); *Boehm* v. *Foster*, 670 F.2d 111, 113 (9th Cir. 1982) (per curiam); *Devine* v. *White*, 697 F.2d 421, 429 (D.C. Cir. 1983); *Ramos* v. *United States*, 683 F.2d 396, 397 (Ct. Cl. 1982).

When Congress established the Federal Circuit in 1982, it granted that court the jurisdiction that had belonged to the Court of Claims and the regional circuits

in Section 7703(b)(1), but did not touch the statutory time limit for filing a petition for review in that provision. FCIA § 144, 96 Stat. 45. The Federal Circuit thus inherited a statutory deadline that was already understood to be jurisdictional.

3. Finally, the history of Section 7703(b)(1) shows why treating the time limit as jurisdictional "makes good sense." *Bowles*, 551 U.S. at 212. When Congress granted courts of appeals jurisdiction over appeals from the MSPB, it expected those courts to conduct "traditional review of agency action based on the agency record." *Lindahl*, 470 U.S. at 797; see S. Rep. No. 969, 95th Cong., 2d Sess. 52, 63-64 (1978). As this case illustrates, however, deciding requests for equitable tolling would require the court to engage in factfinding outside the agency record. See C.A. Doc. 1-2, at 15-35 (relying on materials outside the administrative record in an attempt to justify petitioner's late filing); *Holland* v. *Florida*, 560 U.S. 631, 654 (2010) (describing equitable tolling as a "fact-intensive" inquiry) (citation omitted). Because courts of appeals are ill positioned to perform such a task, Congress had good reason to make the time limit mandatory and jurisdictional. Cf. *John R. Sand*, 552 U.S. at 133 (identifying "facilitating the administration of claims" and "promoting judicial efficiency" as reasons for a jurisdictional time limit).

Moreover, jurisdictional treatment of Section 7703(b)(1)'s time limit over the past 40 years has not led to the sort of "disruption and waste" that can accompany jurisdictional treatment of some other types of procedural requirements. *Wilkins*, 598 U.S. at 158. The 60-day limit is easy to administer, as jurisdictional rules should be. See *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010) (emphasizing that "administrative simplicity is a

major virtue in a jurisdictional statute"). Determining whether an appeal was filed "within 60 days after the Board issue[d] notice of the final order or decision," 5 U.S.C. 7703(b)(1)(A), is ordinarily a ministerial exercise in comparing two dates that are matters of public record. The Federal Circuit can—and routinely does—enforce that deadline at the outset of an appeal, before the parties or the court devote resources to addressing the merits. See pp. 9-10, *supra*; Pet. Br. 7-8 (collecting examples). And the MSPB, for its part, goes out of its way to warn would-be petitioners of the deadline. In this case, for example, the administrative judge's initial decision advised that if that decision were to become final, petitioner would have "60 calendar days" to file a petition for review in the Federal Circuit, and that "filings that do not comply with the deadline must be dismissed." C.A. Doc. 6, at 24; see Pet. App. 12c (similar notice in the Board's final order).

D. Petitioner's Contrary Arguments Lack Merit

Petitioner asserts that "no unmistakable evidence of a clear statement establishes that the deadline in Section 7703(b)(1)(A) is jurisdictional." Pet. Br. 11 (capitalization altered; emphasis omitted). But none of petitioner's arguments identify any lack of clarity in Section 1295(a)(9)'s jurisdictional directive. And in asking this Court to invoke the clear-statement principle to depart from a straightforward reading of Section 1295(a)(9)'s plain text, petitioner seeks to transform that principle from a useful guide to determining congressional intent into an unwarranted excuse for avoiding jurisdictional limits set by Congress.

1. Petitioner's construction contradicts the clear text of Sections 1295(a)(9) and 7703(b)(1)

a. Petitioner asserts (Br. 13) that "[n]othing" in Section 7703(b)(1)(A) itself "clearly and unmistakably marks the deadline as jurisdictional." But "Congress may make other prescriptions jurisdictional by incorporating them into a jurisdictional provision." *Fort Bend County*, 139 S. Ct. at 1849. Congress has done just that in Section 1295(a)(9) by granting the Federal Circuit jurisdiction over certain appeals "pursuant to" Section 7703(b)(1). 28 U.S.C. 1295(a)(9). That language also distinguishes this case from the "other cases" that petitioner cites (Br. 13-14). What was missing in each of those cases is present here: "a clear tie between the deadline and the jurisdictional grant." *Boechler*, 596 U.S. at 207.

Petitioner observes (Br. 14) that a "mere cross-reference is not enough to bring a requirement within the jurisdictional fold." But "pursuant to" is not a mere cross-reference like the one this Court considered in *Gonzalez* v. *Thaler*, 565 U.S. 134 (2012). There, the provision at issue simply "refer[red] back" to an earlier grant of jurisdiction. *Id.* at 145 (citing 28 U.S.C. 2253(c)(3)). Here, in contrast, the operative jurisdictional grant *incorporates* the requirements of Section 7703(b)(1) by conferring jurisdiction only over appeals "pursuant to" that provision.

Petitioner defines "pursuant to" as meaning "as authorized by; under." Pet. Br. 16 (quoting the second definition in *Black's Law Dictionary* 1493 (11th ed. 2019)) (brackets omitted). But it is hard to see how that definition helps him. After all, Section 7703(b)(1)(A) does not "authorize" an appeal filed outside the 60-day limit, any more than it "authorizes" an appeal filed in a mixed

case. So even petitioner's preferred definition of "pursuant to" preserves the clear tie between the deadline and the jurisdictional grant.[5]

Petitioner errs in asserting that an appeal would be "authorized by" Section 7703(b)(1)—and thus taken "pursuant to" that provision—so long as it "identif[ied]" Section 7703(b)(1) as the basis for review. Pet. Br. 16 (emphasis omitted). When, for example, an employee seeks to appeal the MSPB's final disposition of a discrimination claim in a mixed case covered by Section 7703(b)(2), Section 1295(a)(9) does not grant the Federal Circuit jurisdiction over that appeal even if the employee invokes Section 7703(b)(1) as the basis for review. See, *e.g.*, *Ash*, 25 F.4th at 1011-1012. The court's jurisdiction turns on whether the appeal was in fact "in accordance with" (or "authorized by") Section 7703(b)(1)—not on whether the employee identified it as such.

Petitioner observes that in *Fort Bend County*, 139 S. Ct. at 1851 n.8, this Court declined to interpret Title VII's jurisdiction-conferring provision—which grants district courts jurisdiction over "actions brought under this subchapter," 42 U.S.C. 2000e-5(f)(3)—to make all of the requirements in "this subchapter" (*i.e.*, Title VII) jurisdictional prerequisites. See Pet. Br. 16. But the phrase "actions brought under" is a term of art. As the

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[5] Petitioner's suggestion (Br. 16) that "pursuant to" should be read to mean "under" likewise does not help him. According to the dictionary on which he relies, "pursuant to" can mean "under" only in the two senses already discussed: as meaning "in accordance with" or "[a]s authorized by." *Black's Law Dictionary* 1493 (11th ed. 2019); cf. *Pereira* v. *Sessions*, 138 S. Ct. 2105, 2110, 2117 (2018) (holding that a "notice to appear under section 1229(a)" means "a 'notice to appear' 'in accordance with' or 'according to' the substantive time-and-place requirements set forth in § 1229(a)") (brackets omitted).

Court has explained, the phrase "actions 'brought under,'" when followed by a statutory cross-reference, means "suits *contending* that [the cross-referenced statute] contains a certain requirement." *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 93 (1998). The phrase in Title VII's jurisdiction-conferring provision thus means "suits *contending* that [Title VII] contains a certain requirement" that the defendant violated. *Ibid.* And *Fort Bend County*'s discussion of that phrase sheds no light on Section 1295(a)(9)'s use of a different phrase ("pursuant to") followed by a far more specific cross-reference ("sections 7703(b)(1) and 7703(d)").

Petitioner contends (Br. 15) that if Congress meant to condition jurisdiction on compliance with Section 7703(b)(1)'s deadline, it would have done so by using the words "where," "unless," or "if." But "pursuant to" does the same work because an appeal is "pursuant to" Section 7703(b)(1) *only if* it complies with the time limit. And this Court has repeatedly emphasized that the clear-statement rule is not a "magic words" requirement. *MOAC*, 598 U.S. at 298 (citation omitted).

Petitioner also suggests (Br. 15-16) that Congress could have used language similar to that of 38 U.S.C. 7292(a) and granted the Federal Circuit jurisdiction over appeals of final MSPB decisions "*when filed within the time and in the manner prescribed by* section 7703(b)(1)." But such language would have failed to incorporate Section 7703(b)(1)'s exclusion of mixed cases. In any event, the fact that Congress has made other time limits jurisdictional using "different and arguably even more obvious terms" does not make Section 1295(a)(9) "any less clear." *Department of Agric. Rural Dev. Rural Hous. Serv.* v. *Kirtz*, No. 22-846 (Feb. 8, 2024), slip op. 8; see, *e.g.*, *Lac du Flambeau Band of*

Lake Superior Chippewa Indians v. *Coughlin*, 599 U.S. 382, 394 (2023).

b. Petitioner contends (Br. 17-18) that even if Section 7703(b)(1)(A)'s first sentence is jurisdictional, its second sentence, where the statutory deadline appears, is not. But the text of Section 1295(a)(9) does not distinguish between Section 7703(b)(1)(A)'s two sentences. What appears after "pursuant to" is a cross-reference to "section[] 7703(b)(1)" as a whole. 28 U.S.C. 1295(a)(9). The text thus forecloses petitioner's attempt to "cherry pick from the material covered by the statutory cross-reference." *Cyan, Inc.* v. *Beaver County Emps. Ret. Fund*, 583 U.S. 416, 428 (2018).

Nor is there any other basis for distinguishing between Section 7703(b)(1)(A)'s two sentences. Just as Congress has authority to "decide[] what cases the federal courts have jurisdiction to consider," Congress "can also determine when, and under what conditions, federal courts can hear" those cases. *Bowles*, 551 U.S. at 212-213. And, as noted, treating Section 7703(b)(1)(A)'s time limit as jurisdictional accords with both the history of similar provisions and the history of Section 7703(b)(1) itself. See pp. 23-29, *supra*. There is thus no justification for interpreting "pursuant to section[] 7703(b)(1)" to confer jurisdictional status on every applicable requirement in Section 7703(b)(1) except the time limit. 28 U.S.C. 1295(a)(9).

c. Petitioner contends that this Court in *Kloeckner* "suggested that the similarly worded and structured deadline in Section 7703(b)(2) is *nonjurisdictional*." Pet. Br. 19; see *id.* at 18-19. But *Kloeckner* did not address the jurisdictional status of the time limit in Section 7703(b)(2); rather, it simply held that the sentence in which that time limit appears does not affect what qual-

ifies as a "mixed" case that "belong[s] in district court instead of in the Federal Circuit." 568 U.S. at 53.

In any event, whether Section 7703(b)(2)'s time limit is jurisdictional has no bearing on the question presented here. Section 7703(b)(2) provides that mixed cases "'shall be filed under' the enforcement provision of an enumerated antidiscrimination statute," each of which in turn "authorizes an action in federal district court." *Kloeckner*, 568 U.S. at 49 (quoting 5 U.S.C. 7703(b)(2)). The statutes that grant district courts jurisdiction to hear those actions, such as the general grant of federal-question jurisdiction in 28 U.S.C. 1331, do not contain any language, like Section 1295(a)(9)'s "pursuant to" clause, linking them to Section 7703(b)(2)'s time limit. See, *e.g.*, *Fort Bend County*, 139 S. Ct. at 1850 & n.7 (discussing Title VII). In addition, because Section 7703(b)(2)'s time limit is a deadline for commencing an action in district court, it is not the same "type of limitation" at issue here. *Reed Elsevier*, 559 U.S. at 168; see pp. 24-26, *supra*.

2. Petitioner's extratextual arguments cannot trump the statute's clear text

Petitioner's remaining arguments are not about the statutory text at all. He asserts (Br. 1) that "filing deadlines are ordinarily not jurisdictional." And he argues (Br. 20-21) that Section 7703(b)(1)(A)'s time limit should be treated as nonjurisdictional in order to avoid harsh consequences for federal employees. But such extratextual considerations cannot trump a statute's clear text, in this context or in any other. And petitioner's extratextual arguments are unpersuasive even on their own terms.

a. When "the statutory text is plain and unambiguous," a court "must apply the statute according to its

terms." *Carcieri* v. *Salazar*, 555 U.S. 379, 387 (2009). Extratextual considerations cannot overcome a statute's unambiguous language because "the authoritative statement is the statutory text, not the legislative history or any other extrinsic material." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005).

That principle applies equally in cases subject to a clear-statement rule. This Court recently emphasized, for example, that although a clear statement is necessary to find a waiver of sovereign immunity, when the statutory text "clearly" waives such immunity, "that is the end of the matter." *Kirtz*, slip op. 8-9. Extratextual considerations cannot render an otherwise clear text unclear.

Separation-of-powers principles provide special reasons to adhere to the clear text of statutes defining and limiting the jurisdiction of the federal courts. Under the Constitution, "Congress, and not the Judiciary, defines the scope of federal jurisdiction." *New Orleans Pub. Serv., Inc.* v. *Council of the City of New Orleans*, 491 U.S. 350, 359 (1989). Accordingly, when the text of a statute clearly states that a requirement is jurisdictional, the "judicial inquiry is complete." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) (citation omitted). As this Court has emphasized, "the jurisdiction Congress confers may not 'be expanded by judicial decree.'" *Badgerow* v. *Walters*, 596 U.S. 1, 11 (2022) (citation omitted); see *American Fire & Cas. Co.* v. *Finn*, 341 U.S. 6, 17 (1951) (warning against the "expansion" of the "jurisdiction of the federal courts" by "judicial interpretation").

b. Consistent with the foregoing, this Court's decisions applying the clear-statement principle have never relied on extratextual considerations to decline to give

effect to clear statutory language or to create ambiguity that does not exist in the text. Instead, when the Court has found the requisite clear statement lacking, it has identified a lack of clarity in the statutory text itself—a lack of clarity that does not exist here.

Arbaugh v. *Y & H Corp.*, 546 U.S. 500 (2006), for example, involved a Title VII action brought in federal district court, and there was no dispute that the case fell within two statutory grants of jurisdiction, 28 U.S.C. 1331 and Title VII's own jurisdiction-conferring provision, 42 U.S.C. 2000e-5(f)(3). 546 U.S. at 503-504. The question was whether a "separate provision"—which limits Title VII's application to defendants with 15 or more employees—should nevertheless be read as displacing the district court's jurisdiction. *Id.* at 515; see 42 U.S.C. 2000e(b). In concluding that Congress had not "clearly state[d]" that the 15-employee limit should be treated as jurisdictional, the Court emphasized that the relevant provision "does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts." 546 U.S. at 515 (citation omitted). Similarly, in *Santos-Zacaria* v. *Garland*, 598 U.S. 411 (2023), the Court declined to read an exhaustion requirement to displace jurisdiction granted in other provisions when there was no "express language addressing the court's jurisdiction" that was connected to the exhaustion requirement. *Id.* at 418. The vast majority of this Court's decisions applying the clear-statement rule fit the same mold: They hold that a procedural or other requirement that was neither framed in jurisdictional terms nor incorporated into a jurisdictional grant did

not implicitly withdraw jurisdiction conferred by other statutory provisions.[6]

Unlike *Arbaugh* and those other cases, this case concerns the interpretation of a statutory provision that *does* speak in jurisdictional terms and that *does* refer to a court's jurisdiction—Section 1295(a)(9), which gives the Federal Circuit "jurisdiction" over appeals "pursuant to section[] 7703(b)(1)." 28 U.S.C. 1295(a)(9). And petitioner cannot identify any plausible alternative to the government's interpretation of that express jurisdictional language.

That distinguishes this case from *Boechler*, where this Court applied the clear-statement principle to a jurisdictional grant that had more than one textually plausible reading. The relevant statute provided that a per-

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[6] See, *e.g.*, *MOAC*, 598 U.S. at 299-301 (declining to read the limitation on relief in 11 U.S.C. 363(m) as displacing "federal courts' jurisdiction" granted in 28 U.S.C. 157, 158, and 1334); *Wilkins*, 598 U.S. at 158-159 (declining to read the time limit in 28 U.S.C. 2409a(g) as displacing a district court's jurisdiction "grant[ed]" in 28 U.S.C. 1346(f)); *Fort Bend County*, 139 S. Ct. at 1850-1851 (declining to read Title VII's charge-filing requirement in 42 U.S.C. 2000e-5(e)(1) and (f)(1) as displacing a district court's jurisdiction "grant[ed]" in 28 U.S.C. 1331 and 42 U.S.C. 2000e-5(f)(3)); *Musacchio*, 577 U.S. at 246-247 (declining to read 18 U.S.C. 3282(a)'s time limit as displacing a district court's "general criminal subject-matter jurisdiction" granted in 18 U.S.C. 3231); *Kwai Fun Wong*, 575 U.S. at 411-412 (declining to read the time limits in 28 U.S.C. 2401(b) as displacing a district court's jurisdiction "grant[ed]" in 28 U.S.C. 1346(b)(1)); *Gonzalez*, 565 U.S. at 142-143 (declining to read 28 U.S.C. 2253(c)(3) as displacing a court of appeals' jurisdiction "grant[ed]" in 28 U.S.C. 2253(a)); *Henderson*, 562 U.S. at 438-440 (declining to read the time limit in 38 U.S.C. 7266(a) as displacing the jurisdiction granted to the Veterans Court in 38 U.S.C. 7252(a)); *Reed Elsevier*, 559 U.S. at 157, 164-166 (declining to read the Copyright Act's registration requirement, 17 U.S.C. 411(a), to "deprive[]" the district courts of jurisdiction under 28 U.S.C. 1331 and 1338).

son seeking review of certain decisions by the Internal Revenue Service's Independent Office of Appeals "may, within 30 days of a determination under [the relevant statute], petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)." 26 U.S.C. 6330(d)(1); see *Boechler*, 596 U.S. at 204. The Court reasoned that the reference to "'such matter'" could plausibly be understood to refer either "to the entire first clause of the sentence, sweeping in the deadline and granting jurisdiction only over petitions filed within that time," or "only to the immediately preceding phrase," which would make the filing deadline "independent of the jurisdictional grant." 596 U.S. at 204. Faced with at least two textually plausible interpretations, the Court applied the clear-statement principle and declined to treat the deadline as jurisdictional. *Id.* at 204-206.

Here, in contrast, there is only one textually plausible interpretation of Section 1295(a)(9)'s jurisdictional grant: that appeals "pursuant to section[] 7703(b)(1)" means appeals filed in accordance with *all* of Section 7703(b)(1)'s requirements. 28 U.S.C. 1295(a)(9). Petitioner principally asserts that *none* of Section 7703(b)(1)'s requirements are jurisdictional, but that would contradict the ordinary meaning of "pursuant to" and render Section 1295(a)(9) an incomplete grant of jurisdiction that fails even to specify which MSPB decisions are subject to Federal Circuit review. See pp. 14-19, 30-31, *supra*. Alternatively, petitioner posits that only *some* of Section 7703(b)(1)'s requirements are jurisdictional, but that would require reading words into the statute by treating Section 1295(a)(9) as if it provided that the Federal Circuit has jurisdiction over appeals "pursuant

to the first sentence of section 7703(b)(1)(A) and the first sentence of section 7703(b)(1)(B)." See p. 33, *supra*.

c. Because Section 1295(a)(9)'s text clearly makes Section 7703(b)(1)(A)'s time limit jurisdictional, that should be the end of the matter. Petitioner's remaining arguments relying on extratextual considerations cannot justify a departure from the statute's clear text.

First, petitioner contends (Br. 1) that "filing deadlines are ordinarily not jurisdictional." But even if that were true of the type of deadline at issue here, it could not justify disregarding the clear text of Sections 1295(a)(9) and 7703(b)(1). After all, Congress's power to "decide[] what cases the federal courts have jurisdiction to consider" encompasses the power to "determine when * * * federal courts can hear them." *Bowles*, 551 U.S. at 212-213. And when Congress enacts a statute whose text clearly "prohibits federal courts from adjudicating an otherwise legitimate 'class of cases' after a certain period has elapsed," *id.* at 213, courts must enforce that text according to its terms. Thus, although this Court has noted that "most time bars are nonjurisdictional," *Kwai Fun Wong*, 575 U.S. at 410, it has never invoked that observation as a basis for ignoring text that clearly makes a time limit jurisdictional.

Nor can petitioner's assertion (Br. 1) that "filing deadlines are ordinarily not jurisdictional" justify treating Section 7703(b)(1)(A)'s second sentence differently than its first. See p. 33, *supra*. If the text of Section 1295(a)(9) is clear enough to make the first sentence jurisdictional, then it is necessarily clear enough to make the second sentence jurisdictional too, because both sentences share the same textual "link" to Section 1295(a)(9). *Boechler*, 596 U.S. at 206. The fact that the second sentence involves a filing deadline as opposed to

some other type of limit cannot justify holding the second sentence to a higher, magic-words-like standard of clarity. If it were otherwise, the clear-statement rule would become "a burden courts impose on Congress," rather than a "principle" that "seeks to avoid judicial interpretations that undermine Congress' judgment." *Wilkins*, 598 U.S. at 157.

Second, petitioner argues (Br. 20-21) that Section 7703(b)(1)(A)'s time limit should be treated as nonjurisdictional in order to avoid harsh consequences for federal employees. This Court has emphasized the "[h]arsh consequences" that sometimes accompany jurisdictional requirements, which cannot be waived or forfeited and must be raised sua sponte by courts. *Santos-Zacaria*, 598 U.S. at 416 (citation omitted); see, *e.g.*, *Arbaugh*, 546 U.S. at 513-514. But the Court has recognized that those consequences are not themselves a justification for declining to give effect to a statute's clear text. Again, the authority to define the jurisdiction of the courts belongs to Congress, which is "'free to attach' jurisdictional consequences to a requirement that usually exists as a claim-processing rule." *Santos-Zacaria*, 598 U.S. at 418 (quoting *Henderson*, 562 U.S. at 435). And when Congress enacts a statute whose text clearly does attach jurisdictional consequences, extratextual concerns about those consequences cannot override "Congress' likely intent" as expressed in the text itself. *Henderson*, 562 U.S. at 436; see, *e.g.*, *MOAC*, 598 U.S. at 298. In this context as in others, "the potential for harsh results in some cases" cannot justify "rewrit[ing] the statute that Congress has enacted." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005).

d. In any event, petitioner's extratextual arguments would fail even if they could be legitimately considered.

Petitioner's assertion (Br. 1) that "filing deadlines are ordinarily not jurisdictional" defines the relevant type of limitation at too high a level of generality. In *Reed Elsevier*, this Court described the relevant category as "statutory deadlines for filing appeals." 559 U.S. at 168. And since then, the Court has distinguished "review by Article III courts" from "review by an Article I tribunal." *Henderson*, 562 U.S. at 437-438. Thus, the relevant type of limitation here is a statutory deadline for filing an appeal to an Article III court of appeals. And as explained above, such deadlines have historically been treated as jurisdictional. See pp. 24-26, *supra*.

Petitioner's focus on consequences is likewise misguided. He asserts (Br. 20) that "the CSRA creates a dispute-resolution scheme that is solicitous of federal employees" and suggests that the CSRA's solicitude supports the availability of equitable tolling. But the question here is not the jurisdictional status of a deadline for seeking review within the MSPB. Cf. *Henderson*, 562 U.S. at 440-441 (noting that Congress created an administrative review scheme solicitous of veterans in the course of concluding that a filing deadline within that scheme was nonjurisdictional). Instead, the question is the jurisdictional status of a deadline for filing an appeal in the Federal Circuit. Proceedings in the Federal Circuit follow the traditional adversarial model of appellate litigation. And as particularly relevant here, Federal Rule of Appellate Procedure 26(b) would prohibit the Federal Circuit from equitably tolling the time limit in Section 7703(b)(1)(A) even if that limit were not jurisdictional. See pp. 42-44, *infra*.

Accordingly, neither the CSRA's asserted solicitude for employees nor petitioner's view that equitable tolling would be desirable justifies a departure from Sec-

tion 1295(a)(9)'s clear jurisdictional directive. "No statute pursues a single policy at all costs." *Bartenwerfer* v. *Buckley*, 598 U.S. 69, 81 (2023). It is for Congress to strike what it views as the appropriate balance between solicitude for employees, on the one hand, and judicial efficiency and administrability, on the other. Cf. p. 44, *infra* (describing Congress's amendment of the time limit to make it an even brighter line). And Congress struck the balance here by enacting a jurisdictional time limit. If that "rigorous" jurisdictional rule is "thought to be inequitable," Congress can revise the law. *Bowles*, 551 U.S. at 214.

II. EVEN IF SECTION 7703(b)(1)'S TIME LIMIT IS NOT JURISDICTIONAL, IT IS MANDATORY AND NOT SUBJECT TO EQUITABLE TOLLING

Even if Section 7703(b)(1)'s time limit were not jurisdictional, it would still not be subject to equitable tolling. "The mere fact that a time limit lacks jurisdictional force * * * does not render it malleable in every respect." *Nutraceutical Corp.* v. *Lambert*, 139 S. Ct. 710, 714 (2019). To the contrary, "some claim-processing rules are 'mandatory'" and not subject to equitable tolling or other judicial modification. *Ibid.* (citation omitted). At a minimum, the filing deadline in Section 7703(b)(1) falls within that category.

Equitable tolling is a "common-law adjudicatory principle[]." *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 10-11 (2014) (citation omitted). It "derive[s] from the traditional power of the courts to apply the principles of equity jurisprudence." *California Pub. Employees' Ret. Sys.* v. *ANZ Sec., Inc.*, 582 U.S. 497, 507 (2017) (citation, ellipsis, and internal quotation marks omitted). And it "permits a court to pause a statutory time limit 'when a litigant has pursued his rights diligently but some ex-

traordinary circumstance prevents him from bringing a timely action.'" *Ibid.* (citation omitted).

Whether "equitable tolling is available" under a particular statute "is fundamentally a question of statutory intent." *Lozano*, 572 U.S. at 10. In many cases, "common-law adjudicatory principles" supply the relevant "background" against which Congress enacts a "statute[] of limitations." *Ibid.* (citation omitted). When that is so, this Court presumes that Congress incorporated equitable tolling into the statute. *Id.* at 11; see *Boechler*, 596 U.S. at 208-209; *Irwin*, 498 U.S. at 95-96.

In 1968, however, the Federal Rules of Appellate Procedure, as prescribed by this Court, displaced the application of common-law equitable-tolling principles to certain kinds of time limits. See 28 U.S.C. 2072, 2074. Specifically, Rule 26(b) prohibits courts from extending the time for filing "a petition to enjoin, set aside, suspend, modify, enforce or otherwise review * * * an order of an administrative agency" or "board," except as "specifically authorized by law." Fed. R. App. P. 26(b)(2) (2023); Fed. R. App. P. 26(b) (1968). The rule thus prohibits courts from applying common-law equitable-tolling principles to the time for filing such a petition for review; under the rule, a court may extend such a deadline only if "specifically authorized by law." *Ibid.*; see *Nutraceutical Corp.*, 139 S. Ct. at 716.

When Congress enacted Section 7703(b)(1)'s time limit for filing a petition for review in 1978, it did so against the backdrop of Rule 26(b). See CSRA § 205, 92 Stat. 1143; Fed. R. App. P. 26(b) (1976). Because Rule 26(b) had displaced the application of common-law equitable-tolling principles to that kind of time limit, the usual presumption that Congress incorporated equita-

ble tolling into the statute does not apply.[7] Instead, the question is whether Congress specifically authorized equitable tolling in Section 7703(b)(1). It did not. See *Oja*, 405 F.3d at 1360 (finding "no specific authorization for the equitable tolling of section 7703(b)(1)").

By its terms, Section 7703(b)(1)'s time limit is mandatory; there are no exceptions. 5 U.S.C. 7703(b)(1). In fact, in the years since Section 7703(b)(1)'s enactment, Congress has amended the time limit to make it an even brighter line. Originally, the trigger for the period to file a petition for review was the date on which "*the petitioner received notice* of the final order or decision of the Board." CSRA § 205, 92 Stat. 1143 (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).

Because the time limit in Section 7703(b)(1)(A) is mandatory, the Federal Circuit correctly determined that it could not "excuse a failure to timely file based on individual circumstances." Pet. App. 2a (citing Fed. R. App. P. 26(b)(2)). Thus, even if this Court concludes that Section 7703(b)(1)(A)'s deadline is not jurisdictional, it should affirm on the ground that the deadline is mandatory and not subject to equitable tolling. See Br. in Opp. 18-19.

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[7] Alternatively, one could say that the usual presumption has been rebutted. Either way, the "bottom line is the same." *Kwai Fun Wong*, 575 U.S. at 409 n.3.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

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APPENDIX

1. U.S. Const. Art. III provides:

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

2. 5 U.S.C. 7703 provides:

Judicial review of decisions of the Merit Systems Protection Board

(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.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(b)(1)(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.

(B) A petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. 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.

(2) 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.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review

the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d)(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for

judicial review shall be at the discretion of the Court of Appeals.

(2) This paragraph shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.

3. 28 U.S.C. 1295 provides:

Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from a final decision of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court of the Northern Mariana Islands, in any civil action arising under, or in any civil action in which a party has asserted a compulsory counterclaim arising under, any Act of Congress relating to patents or plant variety protection;

(2) of an appeal from a final decision of a district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on section 1346 of this title, except that jurisdiction of an appeal in a case brought in a district court under section 1346(a)(1), 1346(b), 1346(e), or 1346(f) of this title or under section 1346(a)(2) when the claim is founded upon an Act of Congress or a regulation of an executive department providing for internal revenue shall be governed by sections 1291, 1292, and 1294 of this title;

(3) of an appeal from a final decision of the United States Court of Federal Claims;

(4) of an appeal from a decision of—

(A) the Patent Trial and Appeal Board of the United States Patent and Trademark Office with respect to a patent application, derivation proceeding, reexamination, post-grant review, or inter partes review under title 35, at the instance of a party who exercised that party's right to participate in the applicable proceeding before or appeal to the Board, except that an applicant or a party to a derivation proceeding may also have remedy by civil action pursuant to section 145 or 146 of title 35; an appeal under this subparagraph of a decision of the Board with respect to an application or derivation proceeding shall waive the right of such applicant or party to proceed under section 145 or 146 of title 35;

(B) the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office or the Trademark Trial and Appeal Board with respect to applications for registration of marks and other proceedings as provided in section 21 of the Trademark Act of 1946 (15 U.S.C. 1071); or

(C) a district court to which a case was directed pursuant to section 145, 146, or 154(b) of title 35;

(5) of an appeal from a final decision of the United States Court of International Trade;

(6) to review the final determinations of the United States International Trade Commission relating to unfair practices in import trade, made under section 337 of the Tariff Act of 1930 (19 U.S.C. 1337);

(7) to review, by appeal on questions of law only, findings of the Secretary of Commerce under U.S. note 6 to subchapter X of chapter 98 of the Harmonized Tariff Schedule of the United States (relating to importation of instruments or apparatus);

(8) of an appeal under section 71 of the Plant Variety Protection Act (7 U.S.C. 2461);

(9) 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;

(10) of an appeal from a final decision of an agency board of contract appeals pursuant to section 7107(a)(1) of title 41;

(11) of an appeal under section 211 of the Economic Stabilization Act of 1970;

(12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973;

(13) of an appeal under section 506(c) of the Natural Gas Policy Act of 1978; and

(14) of an appeal under section 523 of the Energy Policy and Conservation Act.

(b) The head of any executive department or agency may, with the approval of the Attorney General, refer to the Court of Appeals for the Federal Circuit for judicial review any final decision rendered by a board of contract appeals pursuant to the terms of any contract with the United States awarded by that department or agency which the head of such department or agency has concluded is not entitled to finality pursuant to the review standards specified in section 7107(b) of title 41. The head of each executive department or agency shall make

any referral under this section within one hundred and twenty days after the receipt of a copy of the final appeal decision.

(c) The Court of Appeals for the Federal Circuit shall review the matter referred in accordance with the standards specified in section 7107(b) of title 41. The court shall proceed with judicial review on the administrative record made before the board of contract appeals on matters so referred as in other cases pending in such court, shall determine the issue of finality of the appeal decision, and shall, if appropriate, render judgment thereon, or remand the matter to any administrative or executive body or official with such direction as it may deem proper and just.

4. Fed. R. App. P. 26 (1968) provides:

Computation and Extension of Time

(a) COMPUTATION OF TIME. In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period extends until the end of the next day which is not Saturday, Sunday or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day

appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

(b) ENLARGEMENT OF TIME. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

(c) ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period.

5. Fed. R. App. P. 26 (1976) provides:

Computation and Extension of Time

(a) COMPUTATION OF TIME. In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day

of the period shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in this rule "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States. It shall also include a day appointed as a holiday by the state wherein the district court which rendered the judgment or order which is or may be appealed from is situated, or by the state wherein the principal office of the clerk of the court of appeals in which the appeal is pending is located.

(b) ENLARGEMENT OF TIME. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

(c) ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon

him and the paper is served by mail, 3 days shall be added to the prescribed period.

6. Fed. R. App. P. 26 (2023) provides:

Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) Period Stated in Days or a Longer Unit. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) Period Stated in Hours. When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Inaccessibility of the Clerk's Office. Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 26(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 26(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) "Last Day" Defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing in the district court, at midnight in the court's time zone;

(B) for electronic filing in the court of appeals, at midnight in the time zone of the circuit clerk's principal office;

(C) for filing under Rules 4(c)(1), 25(a)(2)(A)(ii), and 25(a)(2)(A)(iii)—and filing by mail under Rule 13(a)(2)—at the latest time for the method chosen for delivery to the post office, third-party commercial carrier, or prison mailing system; and

(D) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" Defined. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) "Legal Holiday" Defined. "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Juneteenth National Independence Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where either of the following is located: the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

(b) Extending Time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:

(1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or

(2) 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.

(c) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after being served, and the paper is not served electronically on the party or delivered to the party on the date stated in the proof of service, 3 days are added after the period would otherwise expire under Rule 26(a).