No. 23-21

In the Supreme Court of the United States

STUART R. HARROW,

Petitioner,

v.

DEPARTMENT OF DEFENSE,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Government agrees that only clear and unmistakable evidence can overcome the presumption that the filing deadline in Section 7703(b)(1)(A) is not jurisdictional. But the Government fails to meet that high bar. Instead, it relies on an ambiguous phrase located in a different title of the U.S. Code, on a prior opinion from this Court that does not discuss the deadline, and on lower-court opinions interpreting different statutes. None of this evidence is persuasive on its own, let alone amounts to clear and unmistakable evidence.

The protean term "pursuant to" in 28 U.S.C. § 1295(a)(9) does not make the deadline in 5 U.S.C. § 7703(b)(1)(A) jurisdictional. The most natural interpretation that term, in light of its legal definition, context, and placement, is that it identifies the types of MSPB orders allocated to the Federal Circuit, as opposed to other courts. The Government's contrary interpretation—that "pursuant to" renders the entirety of Sections 7703(b)(1) and (d) jurisdictional—is inconsistent with this Court's past construction of linking terms, ignores Congress's language, and would make jurisdictional several provisions that Congress surely did not intend to be so. "Pursuant to" cannot amount to clear and unmistakable evidence that Section 7703(b)(1)(A)'s deadline is jurisdictional.

The Government's reliance on *Lindahl* is similarly unavailing. As the Government concedes, the decision says nothing about the jurisdictional character of the deadline at issue. *Lindahl* is a red herring.

The Government's appeal to the historical treatment of other deadlines is misplaced. The Government does not cite a single decision from *this*

Court holding an agency-to-circuit appellate deadline to be jurisdictional. And the Government's resort to lower-court decisions—even were they uniform—is insufficient evidence of a clear statement.

As an alternative to its jurisdictional argument, the Government contends that Section 7703(b)(1)(A)'s deadline, even if nonjurisdictional, is not subject to equitable tolling. The Government forfeited that argument by failing to raise it before the Federal Circuit, despite repeated opportunities to do so. And any remaining nonjurisdictional issues not forfeited by the Government fall outside the question presented.

ARGUMENT

A. The Government's Arguments that the Deadline Is Jurisdictional Lack Merit.

1. The Government does not contend that the text of Section 7703(b)(1)(A) contains any indication that Congress meant to rank the deadline jurisdictional. Instead, the Government's textual argument relies solely on a different provision in a different title of the U.S. Code. The Government contends that 28 U.S.C. § 1295(a)(9)'s phrase "pursuant to" is clear and unmistakable evidence that Congress extended that section's jurisdictional grant through the entirety of 5 U.S.C. § 7703(b)(1) and § 7703(d). Resp. Br. 14. Those two words cannot bear the weight the Government puts on them.

The phrase "pursuant to" is inherently unclear. *See* Bryan A. Garner, *Garner's Dictionary of Legal Usage* 737 (3d ed. 2011) ("Because the phrase means so many things, it is rarely—if ever—useful."); Bryan A. Garner, *LawProse Lesson #105* (Feb. 12, 2013)

("Lawyers are the only ones who use it—and never as a term of art. Worse still, it's imprecise legalese. Because *pursuant to* can mean many things, it's confusing and ineffective. . . . Given the varied uses of *pursuant to*, it can hardly be considered a useful phrase—especially given the ambiguities . . . ." (italics in original)), available at https://lawprose.org/lawprose-lesson-105. The inherent ambiguity of the phrase makes the Government's assertion that it is "unambiguous[]" and has "only one textually plausible interpretation," Resp. Br. 14, 38, highly doubtful.

But were there only one textually plausible interpretation, it would be Harrow's. The most cogent reading of "pursuant to," in light of its text and context, is as an identifying reference. Section 1295(a)(9) grants the Federal Circuit exclusive jurisdiction over appeals of some—but not all—MSPB orders. To identify which orders, Congress supplied the referential phrase "pursuant to sections 7703(b)(1) and 7703(d)," set off by a comma. 28 U.S.C. § 1295(a)(9). The first sentences of Section 7703(b)(1) and Section 7703(d) then do all the identification work needed. They confirm appellate review in the Federal Circuit over all MSPB orders "[e]xcept as provided" in sections identifying other types of orders. 5 U.S.C. §§ 7703(b)(1)(A), 7703(d)(1). Thus, the only purpose of "pursuant to" is to identify the types of MSPB orders and decisions selected for exclusive appeal to the Federal Circuit.

As Harrow demonstrated in his opening brief, this identifying role of "pursuant to" is no different from the term "under." Pet. Br. 14–16; *see also* Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 113 (2008) (stating that the

phrase "can almost always be replaced with" "under"); Michèle M Asprey, *Plain Language for Lawyers* 183 (4th ed. 2010) (same). That use is common legal parlance. Lawyers file pleadings, petitions, briefs, motions, and other papers "under" or "pursuant to" various legal provisions all the time; those phrases simply identify, by reference, the kind of filing made. *See Black's Law Dictionary* 1493 (11th ed. 2019) (illustrating the phrase, set off by a comma, as "pursuant to Rule 56, the plaintiff moves for summary judgment"); *Black's Law Dictionary* 1112 (5th ed. 1979) (defining the phrase as, *inter alia*, "according to"). Consistent with that common usage, "pursuant to" in Section 1295(a)(9) identifies the types of MSPB orders that, "under" or "according to" Section 7703, are designated for exclusive appeal to the Federal Circuit. It has nothing to do with the deadlines or other litigant-directed operational details addressed later in Section 7703(b)(1) and Section 7703(d).

The Government eschews this sensible reading in favor of a far more tenuous one. According to the Government, "pursuant to" sweeps *all* the operational details of Section 7703(b)(1) and Section 7703(d) into Section 1295(a)'s jurisdictional grant. Resp. Br. 17, 33, 38. That is implausible for three reasons.

First, it is contrary to how this Court has previously interpreted jurisdiction-linking terms. In *Gonzalez v. Thaler*, 565 U.S. 134 (2012), the Court considered the jurisdictional status of 28 U.S.C. § 2253(c), which provides:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals … .

> (2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.
>
> (3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2253(c). This Court construed the requirement of the issuance of a certificate in subsection (1) to be jurisdictional because it uses the conditional term "unless." *Gonzalez*, 565 U.S. at 142. But the Court refused to sweep into subsection (1)'s jurisdictional condition the operational details of when that certificate may issue and what it must indicate, according to subsections (2) and (3). *Id.* at 143–44. The Court rejected the argument that subsection (3)'s reference "under subsection (1)" meant that subsection (1)'s jurisdictional sweep included the details of subsection (3). *Id.* at 145.

The Government attempts to distinguish *Gonzalez* as a "mere cross-reference," Resp. Br. 30, but that is no distinction. Subsection (3) links to subsection (1) with the term "under," and subsection (2) uses the restrictive, conditional term "only if." These terms are equivalent to or more conditional than "pursuant to." Further, the *reason* that *Gonzalez* holds terms to be mere cross-references is that subsections (2) and (3) do not speak in jurisdictional terms but instead address only the operational details. *Gonzalez*, 565 U.S. at 143. As *Gonzalez* emphasizes, subsection (2) "speaks only to *when* a [certificate of appealability] may issue," and subsection (3) "reflects a threshold condition for the issuance of a [certificate of appealability]." *Id.* at 143.

Those subsections are nonjurisdictional "even though" they are linked to subsection (1). *Id.* at 145.

Likewise, in *Fort Bend County v. Davis*, 139 S. Ct. 1843 (2019), this Court considered the jurisdictional status of Title VII's charge-filing requirement. Title VII gives district courts jurisdiction over "actions brought under this subchapter," 42 U.S.C. § 2000e-5(f)(3), and the subchapter provides that an "action may be brought" only after complying with the charge-filing procedures, *id.* § 2000e-5(f)(1). Fort Bend County argued that the jurisdictional grant over "actions brought under this subchapter" included the subchapter's charge-filing requirement because a "proper" action could not be brought without complying with the charge-filing requirement. *Fort Bend Cnty.*, 139 S. Ct. at 1851 n.8. The Court rejected that argument, citing *Gonzalez* for the proposition that "a nonjurisdictional provision does not metamorphose into a jurisdictional limitation by cross-referencing a jurisdictional provision." *Id.*

The Government attempts to distinguish *Fort Bend County* as interpreting "actions brought under" as a "term of art" meaning "suits *contending* that the cross-referenced statute contains a certain requirement." Resp. Br. 31–32 (alterations omitted). But that is exactly how this Court has construed "pursuant to" elsewhere. *See BP P.L.C. v. Mayor & City Council of Balt.*, 141 S. Ct. 1532, 1538 (2021) ("To remove a case 'pursuant to' [28 U.S.C.] § 1442 or 1443, then, just means that a defendant's notice of removal must *assert* the case is removable in accordance with or by reason of one of those provisions." (emphasis added and internal quotations omitted)).

Finally, in *Santos-Zacaria v. Garland*, 598 U.S. 411 (2023), this Court held that the statutory exhaustion requirement for appellate review of certain immigration determinations in 8 U.S.C. § 1252(d)(1) is not jurisdictional. The Government argued that Section 1252(a)(5) provides that "a petition for review filed . . . in accordance with this section shall be the sole and exclusive means for judicial review," so "each of § 1252's limits must be jurisdictional." *Santos-Zacaria*, 598 U.S. at 422–23 & n.7. The Court rejected that argument, reasoning that "even if some provisions in a statutory section qualify as jurisdictional, that does not suffice to establish that all others are," and that the Government's argument "fails to demonstrate that it is clear that Congress made § 1252(d)(1)'s exhaustion requirement jurisdictional." *Id.* at 423 (alterations omitted).

Gonzalez, *Fort Bend County*, and *Santos-Zacaria* teach that when Congress links a jurisdictional provision to operational details like timing, content requirements, or exhaustion, the clear-statement test is met only when Congress conditions jurisdiction specifically on compliance with those operational details. Section 1295(a)(9)'s phrase "pursuant to section[] 7703(b)(1)"—whether interpreted as "under" or even "in accordance with"—does not suffice because it does not condition jurisdiction specifically on Section 7703(b)(1)'s deadline. The Government's contrary assertion is inconsistent with this Court's teachings.

Second, the Government elides Congress's words and sentence structure. The Government repeatedly reads "pursuant to" as modifying the term "appeal," as if Section 1295(a)(9) read: "of an appeal pursuant to

sections 7703(b)(1) and 7703(d)." Resp. Br. 11, 13, 15, 17, 30, 32.

But that reading omits half of what Congress actually wrote. Congress placed "pursuant to" after the words "final order or final decision of the Merit Systems Protection Board," indicating that "pursuant to" modifies "order" and "decision" rather than "appeal." *See Barnhart v. Thomas*, 540 U.S. 20, 26 (2003) (stating that a phrase "should ordinarily be read as modifying only the noun or phrase that it immediately follows"); *cf.* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012) (discussing the nearest-reasonable-referent canon); *Chicago Manual of Style* ¶ 5.178, at 280 (17th ed. 2017) ("A prepositional phrase . . . should be as close as possible to the word it modifies to avoid awkwardness, ambiguity, or unintended meanings."). The placement of the phrase thus confirms that it refers to Section 7703's types of "orders" or "decisions," not to the operational details for how a litigant properly or timely files an "appeal."

The Government cobbles together examples of "pursuant to" from contexts having no relevance to the statutory framework here and without attending to Congress's grammatical use of "pursuant to"—modifying a noun and set off with a comma—in Section 1295(a)(9). Resp. Br. 15–16. None of the Government's examples is analogous to the particular statutory framework and use of "pursuant to" here. *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

Congress's words and placement of the phrase undermine the Government's interpretation and, when read in the context of the statutory framework, reinforce the most natural reading that "pursuant to" is simply a cross-reference to the types of MSPB orders and decisions identified in Sections 7703(b)(1) and (d).

Third, the Government's construction would lead to results that Congress likely did not intend. According to the Government, Section 1295(a)(9)'s language sweeps *all* of Section 7703(b)(1) and 7703(d) into its jurisdictional grant. Resp. Br. 17, 33, 38. But Section 7703(d) sets out myriad requirements whose jurisdictional status would be highly unusual.

Were Section 7703(d) a jurisdictional condition, the Federal Circuit could exercise jurisdiction in an appeal brought by the Director of the Office of Personnel Management only 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." 5 U.S.C. § 7703(d)(1). *Accord id.* § 7703(d)(2) (using similar language). In addition, Section 7703(d) would, under the Government's view, condition the Federal Circuit's jurisdiction on a party's right to appear. *Id.* §§ 7703(d)(1), (2) ("[T]he 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."). These activities are not the sort that Congress normally makes jurisdictional.

Making these details jurisdictional, as the Government's interpretation would do, would cause precisely the senseless waste that this Court's clear-

statement rule was designed to avoid. The Federal Circuit would have to police sua sponte whether the Director "determine[d]" that the Board's error "will have a substantial impact," perhaps even by holding a hearing regarding that determination. And the Federal Circuit would seemingly have to dismiss the appeal immediately for lack of jurisdiction if, well into the appellate process, a party before the Board claims that it was not given "the right to appear" before the court of appeals. 5 U.S.C. § 7703(d)(1). These strange and wasteful results of making the entirety of Sections 7703(b)(1) and 7703(d) jurisdictional strongly suggest that the Government's interpretation is an implausible construction of Congress's intent.

But even were the Government's interpretation plausible, plausible is not enough. *MOAC Mall Holdings LLC v. Transform HoldCo LLC*, 598 U.S. 288, 298 (2023) ("[I]t is insufficient that a jurisdictional reading is plausible, or even better, than nonjurisdictional alternatives." (internal quotes omitted)). Instead, this Court demands "unmistakable evidence" that Congress clearly intended filing deadline to be jurisdictional. *Santos-Zacaria*, 598 U.S. at 418. And in light of the sensible interpretation of Section 1295(a)(9) as simply referring to the types of MSPB orders and decisions identified in Section 7703(b)(1) and Section 7703(d), the Government's alternative construction cannot meet the clear-statement test.

2. The Government contends that this Court's decision in *Lindahl v. OPM*, 470 U.S. 768 (1985), constitutes a "definitive earlier interpretation" of the jurisdictional character of Section 7703(b)(1)(A)'s deadline. Resp. Br. 19. The Government is mistaken.

This Court has made clear that the definitive earlier interpretation must turn on the jurisdictional character of the precise provision at issue. *Santos-Zacaria*, 598 U.S. at 421–22; *Wilkins v. United States*, 598 U.S. 152, 160 (2023). The Government concedes that "*Lindahl* did not specifically discuss Section 7703(b)(1)'s time limit." Resp. Br. 21. That concession is fatal. Because *Lindahl* did not discuss—much less turn on—the jurisdictional character of Section 7703(b)(1)(A)'s deadline, *Lindahl* is not a definitive earlier interpretation of the deadline.

The Government erroneously contends that the deadline "is necessarily one of the 'jurisdictional perimeters of § 7703(b)(1)' that *Lindahl* recognized." Resp. Br. 21 (quoting *Lindahl*, 470 U.S. at 793). *Lindahl* recognizes no such thing. *Lindahl*'s casual phrase "jurisdictional perimeters" refers only to the types of "actions for review," not to any timing requirement for filing those actions. *Lindahl*, 470 U.S. at 793. Nothing in *Lindahl* turns on the deadline's jurisdictional character or on the scope of any jurisdictional grant outside the first sentence of Section 7703(b)(1)(A). As a result, *Lindahl* is not a definitive earlier interpretation. *Cf. Wilkins*, 598 U.S. at 165 (rejecting "the Government's method of divining definitive interpretations from stray remarks").

3. The Government argues that statutory deadlines for appeals to Article III courts of appeals have historically been treated as jurisdictional. Resp. Br. 24, 41. That contention is misplaced.

To start, the Government's proffered "type" of appellate deadline is far too broad of a category. This Court has never held that all deadlines for appealing to an Article III court of appeals are jurisdictional. In

Bowles v. Russell, 551 U.S. 205 (2007), the Court recognized only the historical jurisdictional treatment of statutory deadlines governing civil appeals from one Article III court to another. *Bowles*, 551 U.S. at 209–11; *see also Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. 17, 25 (2017) ("If a time prescription governing the transfer of adjudicatory authority *from one Article III court to another* appears in a statute, the limitation is jurisdictional." (emphasis added)); *Fort Bend Cnty.*, 139 S. Ct. at 1850 n.6 ("If a time prescription governing the transfer of adjudicatory authority *from one Article III court to another* appears in a statute, the limitation [will rank as] jurisdictional; otherwise, the time specification fits within the claim-processing category."); *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011) ("*Bowles* concerned an appeal *from one court to another court*." (emphasis added)).

Bowles does not address agency-to-circuit appellate deadlines, for good reason. Unlike district-to-circuit appeals, which are largely transsubstantive and uniform, agency appeals are specialized, reticulated, and context-specific. *See* 16 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3940 (3d ed. 2023) ("Jurisdiction in each case must be found in the specific provisions of a particular statute."); *id.* § 3941 (noting that "a startling array of specific statutory provisions establish court of appeals jurisdiction to review actions of agencies"). In addition, reviewing courts must be sensitive to the fact that review is of an executive-branch agency with expertise over the matter. *Id.* ("[T]he courts of appeals often become embroiled in the most complex problems addressed by the modern administrative state. The responsibilities of review are made manageable by deferring to the expert knowledge and wisdom of

administrators, but can present some of the most difficult tasks to confront the courts.").

These distinctions lead to significant differences between appellate review of district courts and appellate review of agency actions. *E.g.*, *id.* § 3942 ("Court of appeals review of agency action is limited by finality requirements that in some ways are more demanding than the requirements for appeal from district courts . . . . Application of these finality requirements is properly influenced by the specific setting of agency and regulatory scheme."); *compare* Fed. R. App. P. tit. II (setting out rules for appeal of district-court decisions), *with id.* tit. IV (containing different rules for review of agency decisions).

Accordingly, the undifferentiated group of all statutory appellate deadlines to U.S. courts of appeals is not the appropriate category for consideration of longstanding historical treatment. Such omnibus categorization risks bestowing a jurisdictional characterization on specialized types of agency-to-circuit appellate deadlines that Congress never intended to be jurisdictional. *See Wilkins*, 598 U.S. at 157 (stating that the clear-statement framework is designed "to avoid judicial interpretations that undermine Congress' judgment"). *Bowles* cannot be extended to agency-to-circuit appellate deadlines.

And within the category of agency-to-circuit deadlines, the Government has not shown a historical jurisdictional treatment. The historical analysis relevant to the clear-statement framework looks to *this* Court's decisions, not to those of the lower courts. *Fort Bend Cnty.*, 139 S. Ct. at 1849 (citing *Bowles* for the relevance of "a long line of Supreme Court decisions left undisturbed by Congress" (alterations

omitted)); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 167–68 (2010) (stating that *Bowles* "stands for the proposition that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional").

As Harrow has explained, the most relevant "type" of deadlines are those in the statutory framework that Congress has supplied for resolving agency employment disputes, and this Court has never expressly construed the jurisdictional character of any of the deadlines in Section 7703. Pet. Br. 19. But even the Government's proposed broader category of all agency-to-circuit appellate deadlines fails to meet the standard. The Government does not cite a single decision from this Court holding any such deadline to be jurisdictional. Resp. Br. 23–29. That should be the end of the matter.

Instead, the Government relies on lower-court opinions, not one of which engages the clear-statement framework. *Id.* This Court has consistently rejected such evidence as insufficiently clear. *See Santos-Zacaria*, 598 U.S. at 422 ("[P]re-*Arbaugh* lower court cases interpreting a related provision are not enough to make clear that a rule is jurisdictional."); *MOAC Mall*, 598 U.S. at 304 (same); *Wilkins*, 598 U.S. at 165 (same); *Boechler v. Comm'r*, 596 U.S. 199, 208 (2022) (same); *Reed Elsevier*, 559 U.S. at 160 n.2 (same).

Even were lower-court treatment relevant, it would not support the Government's position. Recent lower courts applying this Court's clear-statement test have held agency-to-circuit appellate deadlines to be nonjurisdictional. *E.g.*, *McWhorter v. FAA*, 88 F.4th 1317, 1321–22 (10th Cir. 2023) (holding the deadline

in 49 U.S.C. § 1153(b)(1) to appeal a decision of the National Transportation Safety Board to a U.S. court of appeals to be nonjurisdictional); *Alonso-Juarez v. Garland*, 80 F.4th 1039, 1043 (9th Cir. 2023) (holding the thirty-day deadline in 8 U.S.C. § 1252(b)(1) to petition a U.S. court of appeals for review of an immigration judge's order to be nonjurisdictional); *Nat. Res. Def. Council v. NHTSA*, 894 F.3d 95, 106–07 (2d Cir. 2018) (holding the deadline in 49 U.S.C. § 32909(b) to petition a U.S. courts of appeals for review of a final Traffic Safety Administration rule to be nonjurisdictional and subject to equitable tolling); *Corbett v. TSA*, 767 F.3d 1171, 1177–78 (11th Cir. 2014) (holding the deadline in 49 U.S.C. § 46110(a) for seeking review of certain TSA orders in a U.S. court of appeals to be nonjurisdictional); *Avia Dynamics, Inc. v. FAA*, 641 F.3d 515, 518–19 (D.C. Cir. 2011) (same); *Clean Water Action Council of N.E. Wisc., Inc. v. EPA*, 765 F.3d 749, 751–52 (7th Cir. 2014) (holding the deadline in 42 U.S.C. § 7607(b) to seek review of EPA regulations directly in U.S. courts of appeals to be nonjurisdictional).

4. Finally, the Government argues that "courts of appeals are ill positioned to perform such a task" of "deciding requests for equitable tolling." Resp. Br. 28.

The Government cites no support for its contention that the courts of appeals are so institutionally deficient. The courts of appeals themselves appear to have no qualms about adjudicating questions of equitable tolling. *E.g.*, *Nat. Res. Def. Council*, 894 F.3d at 107. Nor does Congress lack faith in them. *E.g.*, 49 U.S.C. § 1153(b)(1) (allowing, for an untimely petition to a U.S. court of appeals to review an agency final order, the court of appeals to excuse the untimeliness

upon finding "a reasonable ground for not filing within that 60-day period"); *id.* § 46110(a) (supplying a similar "reasonable grounds" exception to timeliness). The Government's contrary assertion lacks support.

B. The Government Has Forfeited Its Argument that the Deadline Is Mandatory.

At the tail of its brief, the Government contends that the deadline in Section 7703(b)(1)(A), even if nonjurisdictional, is mandatory and not subject to equitable tolling. Resp. Br. 42. The Government forfeited that argument by failing to raise it in the court below, and, in any event, the argument is not fairly within the question presented.

1. This Court has repeatedly held that "an objection based on a mandatory claim-processing rule may be forfeited." *Fort Bend Cnty.*, 139 S. Ct. at 1849 (internal quotation marks omitted). *See also Hamer*, 583 U.S. at 19 ("[A] mandatory claim-processing rule [is] subject to forfeiture if not properly raised by the appellee."); *Eberhart v. United States*, 546 U.S. 12, 18 (2005) ("admonish[ing] the Government that failure to object to untimely submissions entails forfeiture of the objection"); *cf. Santos-Zacaria*, 598 U.S. at 423 ("Because [the] exhaustion requirement is not jurisdictional, it is subject to waiver and forfeiture.").

Here, the Government forfeited any argument that the deadline is mandatory. The Government had multiple opportunities to argue that Harrow's petition was untimely but, on each occasion, failed to do so. When Harrow filed his notice of appeal, the Government did not respond. When the Federal Circuit issued a notice to the Government admonishing that "[f]ailure to file required documents

may result in dismissal or other action as deemed appropriate by the court," C.A. Dkt. No. 5, the Government did not respond. When the MSPB filed the complete record of its proceedings, including information necessary to apprise the Government of any nonjurisdictional bars, C.A. Dkt. No. 6, the Government did not respond. When the Federal Circuit issued an order, *sua sponte*, that "[w]ithin 30 days from the date of filing of this order, *the parties* are directed to show cause why this case should not be dismissed," C.A. Dkt. No. 7 (emphasis added), the Government did not respond. In fact, the only action the Government took in the court below was to file a notice of entry of appearance. C.A. Dkt. Nos. 1–15.

Had the Government wished to advance any nonjurisdictional arguments supporting dismissal of the appeal based on untimeliness, it had multiple opportunities, even invitations, to do so. But it declined to make *any* arguments for dismissing Harrow's petition as untimely. The Government instead was content to hang its hat solely on the Federal Circuit's invocation of a jurisdictional bar.

Under these circumstances, the Government has forfeited any nonjurisdictional arguments that Harrow's filing was untimely. *See United States v. Jones*, 565 U.S. 400, 413 (2012) ("We have no occasion to consider this argument. The Government did not raise it below, and the D.C. Circuit therefore did not address it. We consider the argument forfeited." (citation omitted)); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("Because this argument was not raised below, it is waived."). *Cf. Greenlaw v. United States*, 554 U.S. 237, 244 (2008) ("[Courts] do not, or should not, sally forth each day looking for wrongs to

right. . . . Counsel almost always know a great deal more about their cases than we do, and this must be particularly true of counsel for the United States, the richest, most powerful, and best represented litigant to appear before us." (brackets in original and internal quotation marks omitted)).

Indeed, in nearly identical circumstances, the Government has conceded that forfeiture should apply. In *Santos-Zacaria*, the court of appeals dismissed the appeal on the ground that the petitioner had failed to comply with a statutory exhaustion requirement. *Santos-Zacaria*, 598 U.S. at 415. The Government had not raised exhaustion; the court of appeals dismissed *sua sponte* because it considered exhaustion to be jurisdictional. *Id.* In this Court, the Government conceded that its failure to raise or rely on exhaustion in the court of appeals forfeited the issue if exhaustion were deemed to be nonjurisdictional. Opp. Br. 13, *Santos-Zacaria v. Garland*, No. 21-1436 (Aug. 12, 2022) ("[T]he government did not raise or rely on petitioner's failure to exhaust in the court of appeals, so waiver and forfeiture would apply.").

2. In addition to being forfeited, nonjurisdictional timeliness issues fall outside the question presented.

This Court granted certiorari to decide "whether the 60-day deadline in Section 7703(b)(1)(A) is jurisdictional." Pet. i. *See also* Opp. Br. I (framing the question as whether the deadline "is jurisdictional *and therefore* not subject to equitable tolling" (emphasis added)). Nonjurisdictional issues are not fairly within that scope. *See* Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Bloate v. United States*,

559 U.S. 196, 217 (2010) (Ginsburg, J. concurring) (supporting remand of an issue first raised in the respondent's brief in opposition to the petition).

This Court has decided ancillary nonjurisdictional issues only when the court below addressed them or the parties preserved them. *E.g.*, *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145 152–53 (2013) (noting that the petitioner also asked the Court to determine whether the court of appeals erred in allowing equitable tolling); *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (explaining that "counsel for Kontrick used the word 'jurisdiction' 'as a shorthand' to indicate a nonextendable time limit").

Neither feature exists here. The Government failed to preserve any nonjurisdictional time bars before the Federal Circuit. And the opinion below relied on *Fedora*, which in turn relied solely on the jurisdictional character of Section 7703(b)(1)(A). *Fedora v. MSPB*, 848 F.3d 1013, 1014 (Fed. Cir. 2017) ("[T]he jurisdictional nature of the timeliness requirement precludes equitable exceptions."); *id.* at 1016 (citing *Bowles* to find that "we do not have the authority to equitably toll the filing requirements"). The opinion's "cf." cite to Rule 26 of the Federal Rules of Appellate Procedure indicates that Rule 26 is not an independent holding. Pet. App. 2a.

The Government nevertheless argues that Rule 26(b)(2) of the Federal Rules of Appellate Procedure rebuts the established presumption that Congress meant to allow equitable tolling of statutory deadlines like Section 7703(b)(1)(A)'s. Resp. Br. 43–44. But this Court has never squarely held Rule 26(b)(2) to apply to statutes, and it is doubtful that it does. For one, rebutting the presumption of equitable tolling is

up to *Congress*, not this Court. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 (1990) ("Congress, of course, may provide otherwise if it wishes to do so."). For another, Rule 26(b), by its own terms, applies to deadlines "prescribed by these rules." Fed. R. App. P. 26(b). Consistent with that view, lower courts have construed statutory appellate deadlines otherwise within the scope of Rule 26(b)(2) to be subject to equitable tolling. *E.g.*, *Nat. Res. Def. Council*, 894 F.3d at 107; *cf. Fedora v. MSPB*, 868 F.3d 1336, 1339 (Fed. Cir. 2017) (en banc) (Wallach, J., dissenting) (reasoning that *Irwin*'s presumption of equitable tolling applies to Section 7703(b)(1)(A)'s deadline).

Regardless, these issues have nothing to do with the jurisdictional question presented in this case. In accordance with this Court's typical practice, any nonjurisdictional issues that the Government has not forfeited should be remanded to the Federal Circuit for consideration in the first instance. *See, e.g.*, *MOAC Mall*, 598 U.S. at 305 & n.10 (remanding nonjurisdictional issues on the requirement's meaning and scope); *Hamer*, 583 U.S. at 27–28 (remanding for consideration of equitable exceptions); *Henderson*, 562 U.S. at 442 (reversing and remanding for the court of appeals to determine any remaining nonjurisdictional issues); *Reed Elsevier*, 559 U.S. at 170–71 (same); *cf. Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 717 (2019) ("The Court of Appeals did not rule on these alternative grounds, which are beyond the scope of the question presented. Mindful of our role, we will not offer the first word.").

CONCLUSION

The judgment of the Federal Circuit should be reversed.

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Respectfully submitted,

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