

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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STUART R. HARROW, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 23-21  
 )  
DEPARTMENT OF DEFENSE, )  
 )  
 ) Respondent. )  
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Pages: 1 through 57  
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STUART R. HARROW, )

Petitioner, )

v. ) No. 23-21

DEPARTMENT OF DEFENSE, )

Respondent. )

- - - - -

Washington, D.C.

Monday, March 25, 2024

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:31 a.m.

APPEARANCES:

JOSHUA P. DAVIS, ESQUIRE, San Francisco, California;  
on behalf of the Petitioner.

AIMEE W. BROWN, Assistant to the Solicitor General,  
Department of Justice, Washington, D.C.; on behalf  
of the Respondent.

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P R O C E E D I N G S

(11:31 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 23-21, Harrow versus the Department of Defense.

Mr. Davis.

ORAL ARGUMENT OF JOSHUA P. DAVIS

ON BEHALF OF THE PETITIONER

MR. DAVIS: Mr. Chief Justice, and may it please the Court:

Over the past 20 years or so, this Court has clarified the law to prevent ordinary procedural rules like filing deadlines from being misinterpreted as jurisdictional, contrary to congressional intent. The clear statement rule governs that analysis. That rule demands a clear statement from Congress on par with explicit language to establish a jurisdictional requirement.

At issue here is whether 5 U.S.C. Section 7703(b)(1)(A)'s filing deadline is jurisdictional. Nothing in the text of (b)(1)(A) suggests that it is. That can end the inquiry. That conclusion is confirmed by the text of the relevant jurisdictional statute, 28

1 U.S.C. Section 1295(a). As relevant here,  
2 Section 1295(a)(9) creates jurisdiction in the  
3 Federal Circuit over appeals "pursuant to"  
4 Section 7703(b)(1).

5 "Pursuant to" is a notoriously  
6 ambiguous phrase. Nevertheless, the government  
7 claims that the only plausible interpretation of  
8 "pursuant to" is as necessitating that all the  
9 requirements of (b)(1)(A) are satisfied.

10 But "pursuant to" can mean invoking  
11 (b)(1), not satisfying its filing deadline.  
12 That is how this Court interpreted interlocutory  
13 appellate jurisdiction in -- in removal cases in  
14 BP PLC in 2021. It held that "pursuant to"  
15 means invoking a particular statutory provision,  
16 not satisfying its requirements.

17 Using this compelling interpretation  
18 or a similar one, (b)(1)(A)'s filing deadline is  
19 not jurisdictional. That interpretation is at  
20 least plausible. So, under the clear statement  
21 rule, (b)(1)(A)'s filing deadline is a mere  
22 claims processing rule.

23 I would welcome any questions from the  
24 Court.

25 JUSTICE THOMAS: Going back to that

1 provision, why isn't -- 7703, why isn't this  
2 controlled by Lindahl?

3 MR. DAVIS: It's not controlled by  
4 Lindahl for a few reasons. One, Lindahl did not  
5 specifically address at all the filing deadline  
6 provision. It spoke only in loose  
7 jurisdictional terms. And so -- and this Court,  
8 in Wilkins and Santos-Zacaria, has asked for a  
9 much more specific ruling in order for the -- an  
10 inference that the clear statement rule is  
11 satisfied.

12 In addition, Lindahl didn't impose a  
13 jurisdictional requirement at all. It actually  
14 read the jurisdiction of the Federal Circuit  
15 broadly. It interpreted the relevant statute to  
16 say that not only the employees and applicants  
17 for employment are able to bring claims under  
18 7703(b)(1)(A), but so are retirees, even though  
19 they're not mentioned explicitly.

20 So, 1985, Lindahl is not -- it doesn't  
21 specifically address this provision or a filing  
22 deadline whatsoever. And, in addition, it is  
23 the sort of loose jurisdictional language that  
24 the clear statement rule is designed to clean  
25 up.

1                   CHIEF JUSTICE ROBERTS: Well, we know  
2 that one area where jurisdiction is enforced  
3 rigorously is from one level of court to  
4 another, right, from the district court to a  
5 court of appeals. Why does it make sense to  
6 have a totally different rule when it's from an  
7 agency to the court of appeals?

8                   MR. DAVIS: A couple -- a couple of  
9 reasons. First of all, in Bowles, the reason  
10 that the Court adopted this approach was a long  
11 history of this type of notice of appeal from an  
12 Article III court to an Article III court. Now  
13 this Court has repeatedly said that Bowles and  
14 that general rule should not be read beyond the  
15 Article III to Article III context, including in  
16 Hamer and in Fort Bend -- Fort Bend County.

17                   And then, more generally, it's --  
18 there's not only a different statute at play  
19 here, one of much more recent vintage, but also  
20 there's a very different jurisdictional posture.  
21 One of the things this Court has said repeatedly  
22 in interpreting filing deadlines and other  
23 potentially jurisdictional provisions is to look  
24 at the nature of the litigation process that  
25 it's coming from.

1           And the MSPB process, much like this  
2 Court -- like the veterans approach in Henderson  
3 or like the adversarial approach in -- for the  
4 IRS in Boechler, is a much more lenient  
5 approach. It is adversarial, but it is not in  
6 the same way that an Article III litigation is.  
7 And so context is important here.

8           And given that context and also the  
9 precedential reading of the clear statement  
10 rule, I would submit that the clear statement  
11 rule should apply kind of ab initio here, and  
12 then the burden is on the government to show  
13 that the only plausible reading --

14           JUSTICE SOTOMAYOR: There's no history  
15 that you can point to where Congress has always  
16 spoken in jurisdictional terms of an agency  
17 appealing to an Article III court, correct?

18           MR. DAVIS: That's -- that's -- that's  
19 precisely right.

20           JUSTICE SOTOMAYOR: And, in fact,  
21 there are some statutes that clearly on their  
22 face provide for equitable tolling in that  
23 situation?

24           MR. DAVIS: That's right, and --

25           JUSTICE SOTOMAYOR: So that defeats



1 any history?

2 MR. DAVIS: I think that's right.

3 JUSTICE SOTOMAYOR: All right. Could  
4 -- one other argument the government raised was  
5 that courts of appeals are ill suited to handle  
6 the factual basis of this kind of finding.

7 Do you agree with that argument and,  
8 if you don't, why not?

9 MR. DAVIS: I don't agree with that  
10 argument. And if I may say first -- first,  
11 before that, that argument conflates two  
12 separate issues. One is whether this  
13 requirement is jurisdictional, and the other is  
14 whether it's mandatory.

15 And so it is at least possible -- the  
16 only issue before this Court today is, is the  
17 filing deadline jurisdictional. But this Court  
18 could or the lower court would be in the first  
19 instance the right place to address it, is if  
20 the lower court feels that the -- that having a  
21 filing deadline subject to equitable tolling is  
22 not appropriate, it could say that the -- that  
23 the filing deadline is not jurisdictional but  
24 also is mandatory and not subject to equitable  
25 tolling.

1           Having said that, to answer Your  
2 Honor's question more directly, we don't agree  
3 for a series of reasons. I mean, one of them is  
4 that appellate courts often engage in similar  
5 kinds of limited factual inquiries. Standing is  
6 an example. So is Federal Rule of Civil  
7 Procedure 23, where an appellate court is asked  
8 whether class certification would ring the death  
9 knell for litigation.

10           These are kinds of narrowly  
11 constrained procedural questions that a court is  
12 fully able to handle and an appellate court is  
13 fully able to handle. And so it would be the  
14 same thing here. The facts are not actually all  
15 that disputed. They're relatively narrow.

16           Here, the real question is a legal  
17 judgment, and that is the kind of legal judgment  
18 a court of appeals is -- is fully capable of  
19 making.

20           JUSTICE SOTOMAYOR: We look at facts  
21 in mootness, in standing, the statutes that give  
22 us directly equitable tolling permission. The  
23 one thing about mandatory claim processing is  
24 that it can't be sua sponte decided by a court  
25 below. It has to be raised by the opposing

1 party, correct?

2 MR. DAVIS: I believe that's generally  
3 correct. That's right, that --

4 JUSTICE SOTOMAYOR: And was that the  
5 case here?

6 MR. DAVIS: It was the case here.  
7 Here, in fact, the government below never raised  
8 the deadline issue at all. The Federal Circuit  
9 raised it sua sponte.

10 And then, when the Federal Circuit  
11 issued an order to show cause asking for  
12 briefing, my client, Mr. Harrow, addressed the  
13 issue in briefing and the government did not  
14 file a brief addressing that issue. So it was  
15 entirely from the government -- from that  
16 perspective sua sponte that the Federal Circuit  
17 raised it on its own.

18 JUSTICE JACKSON: Well, isn't -- is --

19 JUSTICE ALITO: What's the -- what is  
20 the authority for the proposition that a  
21 mandatory claims processing rule cannot be  
22 raised sua sponte by a court?

23 MR. DAVIS: I would say that -- a  
24 couple of issues. I would say, one, it is --  
25 generally speaking, that has been the approach,

1 but it is -- that's not an issue here today.  
2 And it is also possible, there's at least one  
3 case, Day versus McDonough, which indicates that  
4 that kind of mandatory claims processing rule  
5 could at least potentially. That is not -- so I  
6 wouldn't -- we are not resting our case on the  
7 proposition that if the -- that if this filing  
8 deadline is not jurisdictional, then the Court  
9 is necessarily unable to raise it sua sponte.

10 The indication here, though, is what  
11 we would ask is at least that the Federal  
12 Circuit be given the opportunity on remand to  
13 decide whether it would raise it sua sponte.  
14 What was clear in the reasoning below is the  
15 court felt that it had to because the issue was  
16 jurisdictional. And so we would like to brief  
17 the issue at the least on remand, that -- that  
18 in this circumstance either the Court can't or  
19 it just might not.

20 JUSTICE ALITO: Why would the  
21 government be precluded from raising the  
22 question if we were to send the case back?  
23 They -- before they even had -- my understanding  
24 is that before they even had an opportunity to  
25 respond, the court sua sponte issued an order to

1 show cause, right?

2 MR. DAVIS: That is correct, yes. So  
3 I would say two things. One, we would request  
4 that that issue be reserved for remand as well.  
5 For all we know, the government may or may not  
6 raise this issue at all.

7 It may, 11 years into this pro --  
8 mostly pro se litigation, the government just  
9 might allow Mr. Harrow to proceed on the merits  
10 with his appeal. But the basis for forfeiture  
11 would be not so much the issuance -- issuance of  
12 the order to show cause but the fact that after  
13 the Federal Circuit issued its order to show  
14 cause, the government chose not to submit a  
15 brief. And that has not been an issue that's  
16 been briefed, the forfeiture issue, but we would  
17 suggest that in the first instance the Federal  
18 Circuit should address that.

19 JUSTICE JACKSON: Am I wrong that the  
20 Federal Circuit has precedent that looks at this  
21 very deadline and holds that it's not subject to  
22 equitable forfeiture?

23 MR. DAVIS: Yes, you're right. I  
24 apologize. You're right.

25 JUSTICE JACKSON: I'm right.

1 MR. DAVIS: Yeah. You're right.

2 JUSTICE JACKSON: I'm sorry, I asked  
3 the question in a weird way.

4 MR. DAVIS: No, no, no, entire --  
5 entirely my fault. But -- so, yes, so -- so  
6 there's precedent that goes back almost exactly,  
7 I believe, 40 years in the Federal Circuit that  
8 treats this filing deadline as jurisdictional  
9 and, therefore, not subject to forfeiture and  
10 not subject to equitable tolling.

11 Having said that, this Court has  
12 repeatedly held, as early as 2006 in Arbaugh and  
13 as recently as 2023, I believe, in  
14 Santos-Zacaria, that lower court precedent are  
15 not enough by themselves to establish -- to  
16 satisfy --

17 JUSTICE JACKSON: Yes. I'm just -- I  
18 guess I'm just wondering whether the equitable  
19 tolling finding is bound up with their  
20 jurisdictional finding such that if we said  
21 you're right, it's not jurisdictional and sent  
22 it back, would the Federal Circuit be bound to  
23 say: Well, it's mandatory anyway, and your  
24 client doesn't get any relief?

25 MR. DAVIS: Oh, thank you, Your Honor.

1 So two -- so three -- three pieces, I would say.

2 One, I believe it is -- those two are  
3 bound up. I don't think the Federal Circuit had  
4 occasion to decide what would happen with  
5 equitable tolling if the -- if the filing  
6 deadline were non-jurisdictional because the --

7 JUSTICE JACKSON: I see.

8 MR. DAVIS: -- equitable tolling issue  
9 is subsumed within the determination that the  
10 filing deadline is jurisdictional.

11 JUSTICE JACKSON: I see.

12 MR. DAVIS: Having said that, there is  
13 the issue of forfeiture, so our client still  
14 might get relief. And then there's also the  
15 issue of whether the government on remand might  
16 or might not choose to pursue this issue and  
17 might allow Mr. Harrow, who has proceeded for 11  
18 years seeking \$3,000 of compensation and  
19 interest, to just get his day in court in the  
20 Federal Circuit on the merits.

21 JUSTICE GORSUCH: It is extraordinary,  
22 the lengths to which this case has gone, seven  
23 years waiting and then the email and all that,  
24 but I just have a question on background.

25 Both sides agree that we have a clear

1 statement rule with respect to whether a  
2 statute's jurisdictional or a mandatory claims  
3 processing rule.

4 I'm just curious what -- what you  
5 think the justification for that clear statement  
6 rule is, what you're understanding of its  
7 background?

8 MR. DAVIS: Sure. I think there's a  
9 couple of justifications as I understand it.  
10 One is that in the first instance, courts have  
11 at times used the word "jurisdiction" loosely  
12 when -- with implications that Congress probably  
13 never intended, and so it's a -- it's a rule of  
14 fidelity to congressional intent in that sense.

15 I think there is a second  
16 justification that has now arisen which explains  
17 in part why lower court decisions are not  
18 enough, which is having this Court at least  
19 since 2006 having articulated the clear  
20 statement rule, Congress should be presumed to  
21 -- to legislate with that background in mind.  
22 And so it's sort of double fidelity to  
23 congressional intent.

24 JUSTICE GORSUCH: Yeah, it's a little  
25 awkward, though, isn't it, because, I mean, you



1 could say: Well, there have been a lot of  
2 drive-by jurisdictional rulings, don't -- don't  
3 do that anymore, stop and -- and just faithfully  
4 interpret statutes. But this Court's gone  
5 further and -- and said clear statement rule.

6 MR. DAVIS: Yes, Your Honor. I -- I  
7 actually -- I think either suffices in this  
8 instance because I do think the "pursuant to"  
9 language isn't strong enough, the explicit  
10 language of 7703(b)(1)(A) isn't strong enough to  
11 infer congressional intent and the like.

12 And -- and -- and so -- and Lindahl  
13 really was a drive-by jurisdictional statement.  
14 I do agree that the articulation has been  
15 stronger than that or the rule has been stronger  
16 than that. And I think I would hope that that  
17 makes this a relatively easy case, but -- so  
18 there is a fork in the road, but I would say  
19 either path leads --

20 JUSTICE GORSUCH: What is your  
21 understanding as to why the government has  
22 resisted your client's case so -- so strongly?  
23 I mean, it is -- he spent seven years waiting,  
24 five of which were because the government  
25 couldn't manage to get a quorum together to

1 resolve it, sent an email to an old email  
2 address, and -- and he acted as quickly as he --  
3 as he could when he got it, and yet here we are  
4 in the Supreme Court of the United States over a  
5 \$3,000 claim.

6 MR. DAVIS: Yes. Yes.

7 JUSTICE GORSUCH: We're hearing it.  
8 You know, we've done every other claims  
9 processing rule statute on the books. I'm just  
10 kind of surprised we're having to do -- the  
11 government's making us do this one.

12 MR. DAVIS: Right.

13 JUSTICE GORSUCH: Do you have any  
14 insight?

15 MR. DAVIS: I don't have insight. I  
16 mean, I would say it's a little bit off point,  
17 but my client has great reverence for the law.  
18 In some way, this whole process has been a  
19 tremendous honor for him.

20 JUSTICE GORSUCH: Oh, I don't fault --  
21 I don't fault your client.

22 MR. DAVIS: No, no. Yes.

23 JUSTICE GORSUCH: I'm -- I'm just  
24 wondering why the government's making us do  
25 this.

1 MR. DAVIS: I don't know.

2 (Laughter.)

3 MR. DAVIS: I mean, but it is a sort  
4 of form of compensation, that to be here today  
5 is an honor for me and an honor for him, and so  
6 -- but -- but having said -- having said that --

7 JUSTICE GORSUCH: It's an honor for  
8 all of us.

9 (Laughter.)

10 JUSTICE ALITO: And I -- I  
11 seriously -- I seriously doubt that we have seen  
12 every single statute where there is potential  
13 jurisdictional versus claims processing rule  
14 argument. I'm willing to bet that there are  
15 more.

16 MR. DAVIS: Yeah. Hopefully, a clear  
17 ruling today in our favor would help to  
18 alleviate that issue, but --

19 JUSTICE SOTOMAYOR: I think the  
20 government wants the Court to do the work for  
21 it, meaning it -- the Court has to sua sponte  
22 assert -- determine jurisdiction, and if the  
23 Court doesn't, then they have to do a little  
24 work and look at the record and see if, in fact,  
25 whether they have an exhaustion claim or not.

1                   MR. DAVIS: I hesitate to hazard a  
2                   yes, Your Honor, with a couple of -- a couple of  
3                   thoughts, I would, is, one, the government  
4                   didn't raise this below, so it's at least  
5                   conceivable again that on remand they would let  
6                   it go.

7                   JUSTICE SOTOMAYOR: No, because the  
8                   Court was doing it for them. Thank you,  
9                   counselor.

10                  MR. DAVIS: Absolutely. And I do  
11                  think along those similar lines, and I -- I,  
12                  again, hesitate to be presumptuous, but I think,  
13                  in some ways, at least some members of the  
14                  Federal Circuit would welcome this Court's  
15                  intervention. They seem stuck in a precedent  
16                  that at least some of them believe is no longer  
17                  consistent with Supreme Court doctrine, but they  
18                  are abiding by it unless and until they're told  
19                  otherwise.

20                  CHIEF JUSTICE ROBERTS: Thank you,  
21                  counsel.

22                  Justice Thomas?

23                  Justice Alito? No?

24                  Thank you.

25                  MR. DAVIS: Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Ms. Brown.

2 ORAL ARGUMENT OF AIMEE W. BROWN

3 ON BEHALF OF THE RESPONDENT

4 MS. BROWN: Thank you, Mr. Chief

5 Justice, and may it please the Court:

6 In Section 1295(a)(9), Congress  
7 granted the Federal Circuit jurisdiction over  
8 appeals from final MSPB decisions pursuant to  
9 Section 7703(b)(1), which includes a deadline  
10 for filing an appeal.

11 As this Court has recognized in cases  
12 like BP and SAS Institute, the plain meaning of  
13 "pursuant to" is "in accordance with" or "in  
14 compliance with."

15 By conditioning the Court's  
16 jurisdiction on compliance with 7703(b)(1), the  
17 statutory text provides the clear tie between  
18 the appeal deadline and the jurisdictional grant  
19 which satisfies this Court's clear statement  
20 rule.

21 That view of the text is confirmed by  
22 precedent and history. In Lindahl, this Court  
23 squarely addressed whether the Federal Circuit  
24 had jurisdiction over an appeal from the MSPB  
25 and held that such jurisdiction is governed by

1 Section 1295(a)(9) and 7703(b)(1) together, with  
2 Section 7703(b)(1) setting the jurisdictional  
3 perimeters for the Federal Circuit's review.

4 For the past 40 years, the Federal  
5 Circuit has recognized the same thing and has  
6 repeatedly held that the time limit here is  
7 jurisdictional. Against the backdrop of that  
8 settled precedent, Congress has repeatedly  
9 reenacted or amended the statute, including  
10 specifically the time limit.

11 Petitioner's contrary arguments fail  
12 to offer any plausible alternative reading of  
13 the statutory text. His argument that none of  
14 Section 7703(b)(1) is jurisdictional is directly  
15 contrary to Lindahl and would make Section  
16 1295(a)(9)'s grant of jurisdiction incomplete.  
17 And his alternative argument that the first  
18 sentence of 7703(b)(1) is jurisdictional but the  
19 second is not creates a distinction that  
20 Congress didn't draw.

21 Adopting Petitioner's view would  
22 require the Court to read "pursuant to" to mean  
23 different things for the different sentences of  
24 Section 7703(b)(1). And demanding Congress to  
25 speak more -- with more specificity would turn

1 the clear statement rule into the kind of magic  
2 words requirement that this Court has repeatedly  
3 rejected.

4 Finally, even if the Court were to  
5 hold that the filing deadline is not  
6 jurisdictional, at a minimum, it's not subject  
7 to equitable tolling. Federal Rule of Appellate  
8 Procedure 26(b) prohibits extending the  
9 deadlines for filing appeals from agency  
10 decisions unless authorized by law. Because  
11 Congress did not authorize any such extension  
12 under either the statute or the Federal Rules,  
13 Petitioner's untimely appeal cannot go forward.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: Do you think it's at  
16 least plausible that "pursuant to" modifies  
17 "final order"?

18 MS. BROWN: I don't, and I think the  
19 reason for that is that if you were to -- to  
20 read the statute that way, it would say that the  
21 order or decision needed to be pursuant to or in  
22 accordance with, in compliance with, Section  
23 7703(b)(1). But Section 7703(b)(1) doesn't  
24 impose any requirements or limitations on the  
25 order or decision.

1           I think that's particularly clear if  
2 you look at (b)(1)(A) and (b)(1)(B) together,  
3 and those two provisions talk -- they -- they  
4 sort the cases between either the Federal  
5 Circuit exclusively or the Federal Circuit and  
6 the regional courts of appeals. And the basis  
7 for that sorting is not the scope of the order  
8 or decision. It's based on what challenges to  
9 the order or decision are brought within the  
10 appeal.

11           And so I don't think it's actually  
12 possible to read the statute that way.

13           JUSTICE KAGAN: Do you lose if  
14 "pursuant to" just means "under"?

15           MS. BROWN: I don't think so. As we  
16 said in our brief, if "under" were used in this  
17 -- in this context specifically, it would have  
18 the exact same meaning that it -- that "pursuant  
19 to" has here. That's the same meaning that the  
20 Court gave to "under" in cases like *Pereira*.

21           I think that the easiest way to -- to  
22 understand that is to -- to -- to think about  
23 how this -- how this scheme would work or how  
24 this statute would --

25           JUSTICE KAGAN: I guess I meant



1 "under" as in "go bring an appeal under" that  
2 section. "Go file an order under" that section.

3 MS. BROWN: So do you -- "under" as  
4 kind of like an invoking, it means to invoke?  
5 Okay. So I -- the reason I don't think that  
6 that --

7 JUSTICE KAGAN: I mean, it just  
8 doesn't have anything to do with whether you've  
9 satisfied every jot and tittle of whatever  
10 requirements might apply --

11 MS. BROWN: The --

12 JUSTICE KAGAN: -- to that section.

13 MS. BROWN: The reason that I think  
14 that that interpretation is unavailable here is  
15 because of what the first sentence of Section  
16 7703(b)(1) does require. And I think that it  
17 has to be the case that that part is  
18 jurisdictional and -- and is required by the --  
19 the -- the reading here because, if you imagine,  
20 for example, that the Petitioner here had  
21 brought discrimination claims, and so the case  
22 is a mixed case, and he brought that case in the  
23 -- in the court of appeals, in this -- in the  
24 Federal Circuit in the first instance, and  
25 asserted that he was invoking 7703(b)(1), I

1 don't think that anyone here is suggesting that  
2 that case would then be able to proceed in the  
3 Federal Circuit because the Petitioner had  
4 asserted or invoked or relied on 7703(b)(1). It  
5 belongs in the district court under (b)(2).

6 And so I think, because that  
7 interpretation of the statute and interpretation  
8 of "pursuant to" is mandated for that sentence,  
9 the same thing has to be true for the second  
10 sentence and for the time limit.

11 JUSTICE BARRETT: Ms. Brown, I want to  
12 give you a chance to respond to Justice Gorsuch  
13 and Justice Sotomayor's points about, you know,  
14 why is the government here, why as a practical  
15 matter -- I mean, this is apart from the merits  
16 of your reading of the statute, right, but as a  
17 practical matter, why does the government care  
18 so much whether this is jurisdictional or claims  
19 processing?

20 MS. BROWN: So I -- I think that the  
21 reason that we are here, we -- we take very  
22 seriously this Court's rulings in this area and  
23 its efforts to bring discipline to the use of  
24 jurisdiction, and we're not trying to fight  
25 against the application of the clear statement

1 rule.

2           We do think that this case is quite  
3 different from many of the cases that the Court  
4 has looked at before. In almost every other  
5 case, the suit fell within a clear  
6 jurisdictional grant, and the question was just  
7 whether the -- there was another provision in  
8 another requirement that displaced that  
9 jurisdictional grant with respect to certain --  
10 certain cases or in certain instances.

11           So I think it's really only this case  
12 and Boechler that have dealt with the  
13 interpretation of a provision that clearly has  
14 something to do with jurisdiction, and then the  
15 question there is just what is the scope of that  
16 jurisdictional grant.

17           And so I think we are still kind of  
18 working through and fleshing out and figuring  
19 out how this Court's clear statement rules do  
20 apply to that particular circumstance. And I  
21 think, in this case, that we think we have a  
22 very strong argument as to why reading this --  
23 this jurisdictional provision should lead to the  
24 result that the clear statement rule -- that  
25 even with the clear statement rule, the time

1 limit here is jurisdictional, because we do have  
2 that clear tie with the "pursuant to" language  
3 that was lacking in -- in Boechler itself.

4 JUSTICE BARRETT: Do you have -- does  
5 the government have a position on the question  
6 Justice Alito asked you about whether a court  
7 can raise the mandatory claims processing rule  
8 sua sponte?

9 MS. BROWN: Yes. We do think that  
10 that is permissible under the Court's decision  
11 in Day versus McDonough, and we think it's very  
12 clear that that's what the court of appeals, the  
13 Federal Circuit, was doing here. Both in its  
14 order to show cause and in its order dismissing  
15 the case for lack of jurisdiction, the court  
16 relied on Rule 26.

17 We also think that a remand here would  
18 be somewhat unnecessary, in part because the  
19 Federal Circuit does have binding precedent  
20 holding that -- that equitable tolling does not  
21 apply specifically to Rule -- to Section  
22 7703(b)(1). And that -- that case, which is Oja  
23 versus Department of Army, specifically says,  
24 even if we were wrong and Section 7703(b)(1) is  
25 not jurisdictional, we still think that

1 equitable tolling does not apply.

2           And so I don't think it's the case  
3 that it's bound up in its decision, its  
4 determination about the jurisdictionality of the  
5 provision.

6           JUSTICE GORSUCH: At the very least,  
7 though, the government could waive, right?

8           MS. BROWN: Yes, the government could  
9 choose to waive if it -- if it were to choose  
10 that.

11           JUSTICE GORSUCH: Yeah. So a remand  
12 wouldn't be wholly pointless.

13           MS. BROWN: I suppose that's correct.  
14 I mean, I do think that we have already raised  
15 --

16           JUSTICE GORSUCH: I mean -- and -- and  
17 -- and, gosh, I mean, waiting seven years to  
18 rule on this fellow's claim and then sending  
19 it -- him an email and to an old email address  
20 and he acted as fast as he could, I mean, it's  
21 not wholly inconceivable the government might,  
22 in its magnanimity, choose to waive this defect?

23           MS. BROWN: Sure. So, I -- I mean, I  
24 do want to address the delay here, which I don't  
25 think is really attributable to the -- the

1 executive branch because the -- the board  
2 members' terms expired and there were lags in  
3 time with the nomination and confirmation of --

4 JUSTICE GORSUCH: Well, it was two  
5 years --

6 MS. BROWN: -- the new board members.

7 JUSTICE GORSUCH: -- two years on the  
8 executive and five on Congress if you want to be  
9 specific, right?

10 MS. BROWN: Sure. Yes.

11 JUSTICE GORSUCH: Okay.

12 MS. BROWN: Yes. And then the board  
13 acted as quickly --

14 JUSTICE GORSUCH: But it wasn't --

15 MS. BROWN: -- as possible after that,  
16 and there was an obligation --

17 JUSTICE GORSUCH: -- it wasn't Mr.  
18 Harrow's fault by any stretch.

19 MS. BROWN: He did have an obligation  
20 to keep his email address updated, but,  
21 certainly, the delay --

22 (Laughter.)

23 MS. BROWN: -- I'm not trying to  
24 suggest that the delay here was -- was -- was  
25 his fault.

1 JUSTICE GORSUCH: All right. And you  
2 -- I'd ask you the same question I asked your  
3 friend on the other side about, what do you  
4 understand the justification for this clear  
5 statement rule to be?

6 MS. BROWN: So the way that this Court  
7 has always framed it is that it's intended to  
8 get at what Congress -- what we think Congress  
9 is actually doing in these cases. And we think  
10 that normally Congress doesn't make a lot of  
11 separate requirements jurisdictional, and so,  
12 when Congress does want to do so, we've asked or  
13 Congress or the Court has -- has suggested that  
14 Congress will speak clearly.

15 JUSTICE GORSUCH: And do you think  
16 this is a sound clear statement rule? Does the  
17 government believe it's a sound clear statement  
18 rule?

19 MS. BROWN: That the clear statement  
20 rule itself, in general, is a sound principle?

21 JUSTICE GORSUCH: Mm-hmm.

22 MS. BROWN: I think -- I think, yes,  
23 we haven't disputed that the clear statement  
24 rule should apply here or -- or is an  
25 appropriate use of this Court's authority.

1           I do think that expanding the clear  
2 statement rule in the way that I think you might  
3 have to in order to rule for the Petitioner here  
4 would be a problem, and I think there are kind  
5 of two reasons for that.

6           I think that in order to rule for the  
7 Petitioner here, you would have to say either  
8 that there is something like a magic words  
9 requirement in -- in the context of a  
10 jurisdictional grant in order to give a time  
11 limit jurisdictional consequences and also that  
12 -- or, in the alternative, I guess, that the  
13 Court would be saying that there are some kinds  
14 of extratextual considerations like the kinds of  
15 things that the judiciary thinks should or  
16 should not be jurisdictional that can be  
17 privileged over the clear meaning of the text.

18           JUSTICE KAVANAUGH: I --

19           MS. BROWN: I think that if either of  
20 those principles are adopted, then that really  
21 extends the clear statement rule beyond what the  
22 justification for --

23           JUSTICE KAVANAUGH: What -- if -- if  
24 you were to lose here, what would provide the  
25 most clarity, do you think, for the government



1 and for the courts of appeals and district  
2 courts, the affected courts, on these kinds of  
3 matters? Maybe it is a magic words requirement  
4 would be better, because it seems silly to keep  
5 having this debate.

6 MS. BROWN: I -- I suppose that for  
7 purposes of clarity, a magic words requirement  
8 would -- would be clear, but I don't think that  
9 it would be appropriate because, at that point,  
10 then you are mandating that Congress speak in a  
11 particular way in -- in -- particularly in this  
12 context.

13 JUSTICE KAVANAUGH: Well, maybe "magic  
14 words" is loading the dice. Maybe just speaks  
15 directly to jurisdiction.

16 MS. BROWN: Sure, but I guess we think  
17 that this provision would comply with that  
18 because it -- this is a jurisdictional grant.  
19 We -- we know that this is a jurisdictional  
20 grant, and no one is disputing that.

21 And in that context, generally, when  
22 this Court is interpreting a jurisdictional  
23 grant, it hews very closely to the text in an  
24 effort to avoid either expanding or contracting  
25 the courts' jurisdiction because of the

1 separation-of-powers concerns that come with  
2 that as -- as an Article III court.

3 And so I think, at least in the  
4 context of interpreting what is a clear  
5 jurisdictional grant, a magic words requirement  
6 could raise some -- some concerns there in -- in  
7 putting too much of a burden on Congress --

8 JUSTICE JACKSON: Well, can I ask you  
9 about the clear jurisdictional grant here and  
10 the implications of your view?

11 MS. BROWN: Yes.

12 JUSTICE JACKSON: So I'm looking at  
13 1295(a)(9), and it not only cross-references  
14 7703(b)(1), which is at issue here, but also  
15 7703(d). So is it the government's position  
16 that all of the parts and expectations that come  
17 out of 7703(d) are also jurisdictional?

18 MS. BROWN: So it -- it is our  
19 position that, of course, because the same  
20 language attaches 7703(d) to 1295(a) and to the  
21 jurisdictional grant, that the requirements for  
22 bringing an appeal that are encompassed within  
23 (d) are also jurisdictional. And that is how  
24 OPM has treated them. That's how the Board has  
25 treated them as well.

1           And I recognize that there's some kind  
2 of raised eyebrows from some at the idea that  
3 the director's determination that this  
4 particular issue was one that should be appealed  
5 would be jurisdictional, but I actually don't  
6 think that that issue or that requirement being  
7 jurisdictional is that far afield from some of  
8 the other kinds of gatekeeping requirements for  
9 appeals that this Court has already held to be  
10 jurisdictional and there are --

11           JUSTICE JACKSON: But what about the  
12 procedural oddity of the Federal Circuit having  
13 an affirmative obligation to sua sponte make  
14 this determination in these kinds of cases if it  
15 was a jurisdictional provision?

16           MS. BROWN: So I -- I think that  
17 that's also not particularly odd or -- or  
18 particularly difficult for the -- for the  
19 Federal Circuit to do. It's going to be  
20 apparent on the face of the petition itself, the  
21 Federal Circuit has discretionary jurisdiction  
22 over OPM petitions for -- for review.

23           And so OPM files something that  
24 basically looks like a cert petition and  
25 includes within that a statement of jurisdiction

1 that will say the director has made the  
2 determination that this is a case that  
3 qualifies. And then I think, because that's a  
4 discretionary determination on the part of the  
5 director, the Federal Circuit is just looking  
6 for whether that determination was made and  
7 isn't actually analyzing the substance of that.

8 JUSTICE JACKSON: Well, I guess also  
9 kind of stepping back a bit, buried in your  
10 argument is the notion that both sentences in  
11 7703(b) or 77 -- both sentences have to be  
12 jurisdictional -- sorry, in 1295 -- no.

13 MS. BROWN: In 7703.

14 JUSTICE JACKSON: In 7703.

15 MS. BROWN: Yeah.

16 JUSTICE JACKSON: And I'm just  
17 wondering how you square that with the sort of  
18 holding and reasoning in Santos-Zacaria, where  
19 the -- the Court suggested that you didn't have  
20 to read a provision like that in -- in totality.

21 MS. BROWN: So I think that the reason  
22 this is different from Santos-Zacaria is because  
23 we have the "pursuant to" that connects the  
24 jurisdictional grant to 7703(b)(1) as a whole.  
25 I think we would have a much harder argument and

1 maybe an impossible argument if we were just  
2 looking at 7703(b)(1) out of the context of --

3 JUSTICE JACKSON: But why is that --

4 MS. BROWN: -- that grant.

5 JUSTICE JACKSON: -- different?

6 Santos-Zacaria had "in accordance with this  
7 section" and the government made the argument  
8 that is very similar to this one.

9 MS. BROWN: So I think that the  
10 difference there is that that provision in  
11 Santos-Zacaria, which says notwithstanding any  
12 other provision of law, a petition for review  
13 filed with an appropriate court of appeals, in  
14 accordance with this section, shall be the sole  
15 and exclusive means for judicial review, that  
16 provision is not the jurisdictional grant, and  
17 so it's not conditioning the Court's  
18 jurisdiction on appeals filed or orders filed in  
19 accordance with this section. There's another  
20 section of 1252 that granted jurisdiction.

21 So I think we would have a much harder  
22 argument and, again, maybe an impossible one if  
23 the Court had rejected our reading of a  
24 provision that said something like the court of  
25 appeals shall have jurisdiction to review

1 removal orders in accordance with this section.  
2 But that's not how the Court read that provision  
3 and that's not how the provision is written.

4 JUSTICE JACKSON: Well, that seems  
5 exactly backwards to me, but anyway. We'll --

6 MS. BROWN: I -- I just -- I think it  
7 is the difference between conditioning  
8 jurisdiction and granting jurisdiction with a  
9 condition that it -- that it has to be in  
10 compliance with this section and saying, as in  
11 Santos-Zacaria, that this is the only way you  
12 get jurisdiction, there are no grants of  
13 jurisdiction outside of this section, but that  
14 that provision doesn't say which provisions or  
15 which parts of Section 1252 are themselves  
16 jurisdictional.

17 JUSTICE ALITO: The only thing in --  
18 in all of these cases, in this rich line of  
19 precedent that we have about the clear statement  
20 rule, the only legitimate question is what is  
21 the meaning of the particular statutory  
22 provision that's involved, and what is the  
23 meaning of the provision that's involved with  
24 respect to certain other questions that are  
25 subsumed under the

1 jurisdictional/non-jurisdictional inquiry, such  
2 as can the court -- must the court raise it  
3 itself? Can the -- can the argument be  
4 forfeited?

5 Our cases have gone off on really  
6 niggling interpretations of statutory language  
7 that doesn't speak at all directly and only very  
8 -- in a very loose way indirectly to this  
9 question, but part of your argument gets at  
10 perhaps something we could read into this which  
11 would be more productive, which is to ask what  
12 is it likely that Congress intended with respect  
13 to a particular type of review, and you're  
14 talking about review from an administrative  
15 agency to a -- to a court of appeals.

16 And that seems like it might be more  
17 an inquiry that gets to what Congress likely  
18 thought had it given any thought to this  
19 question. So could you elaborate on that?

20 MS. BROWN: Sure. So I do think that  
21 that argument is persuasive and very helpful to  
22 us here if you look at the category of appeals  
23 to Article III courts.

24 And I -- I think, within that  
25 category, of course, we have appeals from

1 district courts, which the Court has already  
2 addressed in Bowles, and then we have appeals  
3 from agency decisions. And those have in -- in  
4 a variety of contexts also been treated, the  
5 timelines there have also been treated as  
6 jurisdictional.

7 And I do think that it makes sense to  
8 look at, you know, the court that's actually --  
9 whose jurisdiction is at issue and focus more on  
10 that inquiry than where the actual decision  
11 is -- is coming from.

12 JUSTICE ALITO: So what are the  
13 features of the question as it arises in that  
14 context that would make it more likely that  
15 Congress would say this is a hard-and-fast rule  
16 and it has to be raised even by the court?

17 MS. BROWN: So I think --

18 JUSTICE ALITO: What are the features  
19 of it? It's the fact that it would put a  
20 fact-finding obligation on the -- on the  
21 appellate court?

22 MS. BROWN: I do think that that is  
23 part of it. Usually we don't think of appellate  
24 courts as the courts that are going to be  
25 engaging in fact finding in the first instance.



1 Of course, I recognize, as Justice Sotomayor was  
2 pointing out, that there are -- there are  
3 instances in which that happens, but I think the  
4 general rule is that we don't normally see that.

5 I would also think that, you know, the  
6 fact that some amount of process has already  
7 been undertaken and that the -- the claims have  
8 been -- that have started to be reviewed and  
9 there has been a certain amount of -- of that  
10 process that has already gone into effect would  
11 -- would indicate that Congress perhaps wants or  
12 -- or would be less concerned with imposing kind  
13 of harsh consequences because you're already  
14 within kind of the review scheme, whereas it  
15 might then also choose to privilege the idea or  
16 the -- the -- the fact that it wants to ensure  
17 efficient administration and resolution of the  
18 claims that have been brought and to privilege  
19 kind of the -- the finality requirements that --  
20 or the finality interests that -- that arise in  
21 that context as well.

22 I also think that this Court on its  
23 own has -- has recognized that the same  
24 considerations apply to appeals from district  
25 courts and to appeals from agency decisions in

1 its adoption of Rule 26. And I know that that  
2 is a separate argument that we've made here as  
3 well, but even setting the separate argument  
4 aside, I think Rule 26, in -- in stating that  
5 the presumption is going to be that those  
6 deadlines for appeals either from Article III  
7 district courts or from agency decisions are not  
8 subject to equitable tolling or are not able to  
9 be extended unless Congress specifically states  
10 that they are, indicates that this Court  
11 recognized in adopting that rule that the same  
12 kinds of considerations apply and would -- would  
13 -- would warrant that kind of rule in both  
14 instances.

15           If I could speak directly to the  
16 history of this particular provision, I think  
17 that that provides even a further basis to -- to  
18 think that what Congress was doing here was  
19 requiring that this rule to be -- is  
20 jurisdictional.

21           Prior to the creation of the Federal  
22 Circuit, review of MSPB decisions came through  
23 the Court of Claims, where the time limit for  
24 filing is jurisdictional, as this Court  
25 recognized in John R. Sand, or it came through

1 regional courts of appeals through the Hobbs  
2 Act, where the time limits are jurisdictional  
3 under every circuit's precedent.

4 So I think that it makes perfect sense  
5 that Congress would maintain the  
6 jurisdictionality of the time limit when it was  
7 just shifting review of those matters over to  
8 the Federal Circuit.

9 And the Federal Circuit, of course,  
10 then held that the deadline was jurisdictional  
11 very soon after it was created. Lindahl, I  
12 think, likewise, recognized the jurisdictional  
13 status of Section 7703(b)(1).

14 And then, with that backdrop, Congress  
15 has reenacted and amended 7703(b)(1) numerous  
16 times, including with specific reference to the  
17 deadline. It changed the deadline from 30 days  
18 to 60 days. It changed when the time begins to  
19 run.

20 So I think Congress really has been  
21 quite attentive to the way that the deadlines  
22 operate in this area and has never indicated  
23 that it disagrees with the jurisdictional status  
24 that it's -- that it's had.

25 I think, you know, this Court has

1 recognized that in Helsinn a few terms ago that  
2 when this Court adopts an interpretation of a  
3 statute at least implicitly and the Federal  
4 Circuit has exclusive jurisdiction over that  
5 statute and then makes explicit what was  
6 implicit in the Court's decision, that Congress  
7 is then presumed to operate with that in the  
8 background and to -- to know that and to, I  
9 guess, ratify that when it reenacts and readopts  
10 the same statutory language.

11 CHIEF JUSTICE ROBERTS: What -- and at  
12 what point along that history did we adopt the  
13 clear statement rule with respect to  
14 jurisdictional determinations?

15 MS. BROWN: So that was in Arbaugh,  
16 which I think is a 2006 decision I want to say.  
17 And the statute has been amended before that,  
18 but even prior to that, it was also amended. I  
19 think there was amendments in 1998 I want to say  
20 but -- but again in 2012.

21 And even with all of that in place,  
22 and I think and with Lindahl in place  
23 importantly, I -- I don't think that there is a  
24 reason to question that what the Federal Circuit  
25 assumed or what Congress assumed was -- was --

1 was happening here was that the -- the timeline  
2 maintains its jurisdictional status.

3 If I -- if I could talk about Rule 26  
4 just for a moment as well, we do think that the  
5 Rule 26 question is -- is presented, is here  
6 before the Court, and we think that the Court  
7 should actually go ahead and decide that  
8 question for, I would say, I guess three  
9 reasons.

10 The first reason is that we think it's  
11 a particularly easy question. The plain text of  
12 the rule says that Rule 26(b) applies and  
13 doesn't permit the extension of deadlines for --  
14 for appeals from agency decisions. I know that  
15 the Petitioners have argued that it applies only  
16 to time limits that are contained in the rules  
17 themselves, but that language is not in the  
18 particular -- the sentence that prohibits this  
19 expansion.

20 JUSTICE JACKSON: I'm sorry, why do  
21 you think this is encompassed in the question  
22 presented in this case?

23 MS. BROWN: So we -- we think that  
24 this -- this Court has long held that the  
25 Respondent can bring up any alternative basis

1 for affirmance that's apparent in the record  
2 here. And so that's what we are -- we're  
3 relying on. I recognize that the Petitioner  
4 here hasn't framed the question to include  
5 equitable tolling, but we do think it's an  
6 appropriate exercise of this Court's discretion  
7 to -- to address that because it's apparent from  
8 the record. And this Court has done so in cases  
9 like -- or has recognized that principle in  
10 cases like Union Pacific Railroad and others.

11 So I guess, with -- with respect to --  
12 JUSTICE JACKSON: Would we have to --  
13 would we have to address the forfeiture argument  
14 that Petitioner raises in order to exercise that  
15 discretion in this case?

16 MS. BROWN: I think you -- you would  
17 have to raise forfeiture. I'm happy to -- to  
18 address that. I don't think that we did forfeit  
19 this argument. The order to show cause before  
20 the district court -- or before the Federal  
21 Circuit came right after the administrative  
22 record was filed but before any briefing had  
23 occurred. Briefing was then stayed.

24 I think that that order can itself  
25 reasonably be -- be viewed as mainly directed

1       toward the Petitioner because it said that the  
2       order to show cause was -- was to show cause why  
3       this case should not be dismissed, and it cited  
4       Rule 26, and it cited the Federal Circuit's  
5       binding precedent. And so, you know, the  
6       government didn't really have an interest in  
7       explaining the same things that the -- that the  
8       Federal Circuit had already recognized there.

9               We did raise Rule 26 in our brief in  
10       opposition and we noted that the Petitioner had  
11       never said anything about waiver or forfeiture.  
12       In the Petitioner's cert reply, he also didn't  
13       say anything about waiver or forfeiture at that  
14       point and instead stated that the Court could  
15       address Rule 26 on the merits if it wanted to do  
16       so.

17               JUSTICE JACKSON: But the Federal  
18       Circuit's order dismissing the case didn't  
19       discuss it, did it?

20               MS. BROWN: It did include a citation  
21       to Rule 26. I agree that there wasn't any kind  
22       of extended discussion of that. But, again, I  
23       would -- I would say that Federal Circuit  
24       precedent already does make very clear that  
25       there is binding precedent on this issue and

1 that Rule 26 applies to 7703(b)(1) and -- and  
2 would prohibit extending the deadline there.

3 And, again, that's the Oja case that  
4 we cited in our brief.

5 JUSTICE KAGAN: I -- I wasn't quite  
6 sure what argument about Rule 26 your brief was  
7 making. I mean, so distinguish between two  
8 arguments. One is that Rule 26 independently  
9 requires what you think it requires, but  
10 another, which is what I took to be the argument  
11 in your brief, is that Rule 26 should inform our  
12 interpretation of 7703(b)(1).

13 And I thought that that was the  
14 argument you were making in your brief, not the  
15 straight argument about Rule 26.

16 MS. BROWN: Yes. I'm sorry if I was  
17 -- if I confused the issue there. It is the  
18 latter argument. We do think that Rule 26  
19 informs the reading of 7703(b)(1). It shifts  
20 the presumption of equitable tolling and says  
21 that it does not -- it does not apply in the  
22 context of appeals from agency decisions. And  
23 that was a rule that was in place at the time.

24 JUSTICE KAGAN: So, if that's the  
25 argument you're making in your brief, and



1 suppose, just suppose, that the Court rejects  
2 that argument and says 7703(b)(1) is not  
3 jurisdictional, as I read your brief, you don't  
4 have a separate Rule 26 argument, is that right?

5 MS. BROWN: No, I don't think that's  
6 the case. I think that even if there is no  
7 jurisdictional status for this rule, the --

8 JUSTICE KAGAN: Well, I know you're  
9 making that argument here, but you didn't make  
10 it in your brief. And read against the backdrop  
11 of a question presented that doesn't have  
12 anything to do with Rule 26, and then, in your  
13 brief, you only brought up Rule 26 as something  
14 that would inform our understanding of the  
15 statute, what I'm suggesting is that you don't  
16 really have a Rule 26 argument here.

17 MS. BROWN: Okay. I'm sorry. I  
18 misunderstood the question. I think our  
19 argument in our brief and today is that Rule 26  
20 informs the reading of the statute if it's not  
21 jurisdictional on its own. So even if the  
22 statute is not jurisdictional under this -- this  
23 Court's holding and it reads 1295(a) -- (a)(9)  
24 and 7703(b)(1) and says that -- that there is  
25 not a jurisdictional rule here, that then leaves

1 open the question whether equitable tolling can  
2 apply or whether there can be extensions.

3           And at that point, when there is no  
4 language in the statute that speaks to that,  
5 then you either have the Irwin presumption on  
6 the one hand that would say yes, we assume  
7 equitable tolling applies, or you have Rule 26,  
8 which displaces that presumption and says no, if  
9 Congress hasn't expressly stated otherwise, then  
10 equitable tolling does not apply, and that's  
11 where we think Rule 26 comes into play here.

12           JUSTICE KAVANAUGH: You think that  
13 question's simple enough for us to resolve here  
14 in addition to the main question?

15           MS. BROWN: We do. We do think that  
16 the -- the text of Rule 26 is -- is fairly clear  
17 here and says that it applies as a background  
18 rule and a background principle in -- in the  
19 interpretation of statutes.

20           I -- as I was saying earlier, I think  
21 the Petitioner has argued that it only applies  
22 to deadlines that appear in the rules  
23 themselves. But that is -- that's incorrect.  
24 The language of -- of the rule doesn't say that  
25 in the provision that actually talks about the

1 prohibition on extending deadlines.

2           That's even clearer if you look at the  
3 earlier versions of the rule that were in effect  
4 when Section 7703(b)(1) was enacted. We've  
5 included those in our appendix on pages 10a and  
6 11a. And, there, it says, "nor may the Court  
7 enlarge the time prescribed by law" for appeals  
8 or for petitions of review of agency decisions.  
9 So we think that's very clear in stating that --  
10 that the rule applies even to -- to statutory  
11 deadlines as well.

12           And when the language was shifted to  
13 its current form in 1998, the submission that  
14 the Chief Justice gave to Congress said that  
15 this was just a stylistic change. It wasn't  
16 meant to alter the substance of the rule. And  
17 so we do think that that's an easy question.

18           I guess, to go back again to the  
19 second reason that we think that the Court  
20 should address Rule 26 here, again, I'll refer  
21 to the binding precedent of the Federal Circuit.  
22 I think, if this is remanded, it's very clear  
23 what the Federal Circuit would do based on that  
24 precedent.

25           And then the third reason just kind of

1 goes to the consequences of the determination  
2 that the time limit is not jurisdictional, which  
3 is an issue that the parties have joined issue  
4 on and have -- have discussed. And so we do  
5 think it would be appropriate for the Court  
6 to -- to make that determination now and it  
7 would be efficient to do so.

8 JUSTICE BARRETT: Ms. Brown, if  
9 Petitioner's reading is plausible, do you lose?

10 MS. BROWN: So, when this Court has  
11 explained the clear statement rule, I don't  
12 think right now -- up until this point or as of  
13 yet, the Court has said that if there is one  
14 other plausible definition or interpretation,  
15 then it's not clear. The Court in *Boechler* said  
16 that if there are multiple plausible  
17 interpretations and only one of them is  
18 jurisdictional, it's going to be very hard for  
19 the government to prove that the statement is  
20 clear. But, thus far, I think the -- the most  
21 common formulation of the clear statement rule  
22 is just that.

23 If Congress wants to make a certain --  
24 a certain provision jurisdictional, it has to  
25 clearly state that it is. And so I -- I don't

1 think the Court has gone that far yet, but it  
2 could do so, I'm sure.

3 JUSTICE JACKSON: Going back to the  
4 Rule 26 issue, Mr. Davis suggests, I guess, in  
5 conjunction with -- with Justice Gorsuch's  
6 questions that this could be a situation in  
7 which the government might look the other way  
8 regarding its pressing of equitable tolling or  
9 objecting to it on remand.

10 Do you have a comment?

11 MS. BROWN: I -- I haven't spoken with  
12 the -- the agency about what it intends to press  
13 on remand if the Court does bring it to -- to  
14 that point. I -- I do think that the agency and  
15 the government in general has a fairly strong  
16 interest in ensuring that Rule 26 is accurately  
17 applied and that this doesn't open the door to  
18 the potential for equitable tolling in all sorts  
19 of other -- other cases in which --

20 JUSTICE JACKSON: But if it isn't  
21 jurisdictional --

22 MS. BROWN: Right. That's correct.

23 JUSTICE JACKSON: -- it could go back  
24 and it could possibly go forward, correct?

25 MS. BROWN: Yes, although I think that

1 the Federal Circuit would still have the option  
2 of bringing it up sua sponte on its own as well,  
3 which it kind of already has done within the  
4 order to show cause and the order for -- and the  
5 order dismissing the case.

6 But, as I was saying, I do think we  
7 have an interest in the correct application of  
8 Rule 26. I recognize that Mr. Harrow here has  
9 some sympathetic circumstances on his side, and  
10 so I think that would be a conversation, but I  
11 -- but I -- I -- I can't represent to you today  
12 that -- that we would try to waive the issue.

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Justice Thomas, anything?

16 Justice Barrett?

17 JUSTICE SOTOMAYOR: If it's not  
18 mandatory, meaning you can waive it --

19 MS. BROWN: So I think --

20 JUSTICE SOTOMAYOR: -- if you chose?

21 MS. BROWN: I think we think it is  
22 mandatory, just not jurisdictional.

23 JUSTICE SOTOMAYOR: Well, but  
24 mandatory is still a waivable defense.

25 MS. BROWN: Correct, yes.

1 JUSTICE SOTOMAYOR: All right.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Barrett? Nothing?

4 Thank you, counsel.

5 Rebuttal, Mr. Davis -- or Mr. Brown?

6 No, Mr. Davis. Sorry, excuse me.

7 MR. DAVIS: You're the Chief Justice.  
8 It's Mr. Brown now.

9 CHIEF JUSTICE ROBERTS: Fair game to  
10 change your mind.

11 MR. DAVIS: Yes, Your Honor.

12 (Laughter.)

13 REBUTTAL ARGUMENT OF JOSHUA P. DAVIS

14 ON BEHALF OF THE PETITIONER

15 MR. DAVIS: So just a -- a small  
16 number of points on rebuttal.

17 The first one is the analogy to  
18 Section 7703(b)(2) where the government argues  
19 the first sentence must be jurisdictional. The  
20 difficulty for the government by invoking that  
21 particular provision is that in Kloeckner, this  
22 Court held that even if the first sentence there  
23 is jurisdictional, the very close -- the filing  
24 deadline in the second sentence is not. And so,  
25 if one is going to rely on that very close

1 parallel textual interpretation, that would  
2 actually place the government in a position  
3 where it is possible that one of those sentences  
4 could have some jurisdictional implications with  
5 the other one not.

6           What this Court said in the second  
7 sentence, which is, again, very closely  
8 parallel, 7703(b)(2) and (b)(1), is that the  
9 filing deadline is just a filing deadline. So I  
10 don't think that analogy helps the government.

11           Second, the government took the  
12 position that if there were a mixed case, and so  
13 it would go -- it would necessarily fit  
14 appropriately under 7703(b)(1), no one would  
15 contest -- I'm sorry, under (b)(2), no one would  
16 contest that there would be a lack of  
17 jurisdiction if the Petitioner invoked  
18 7703(b)(1).

19           That's not the only possible  
20 interpretation, but, in fact, the government's  
21 position is directly opposite to the holding of  
22 this case in BP PLC as I understand it, where  
23 the "pursuant to" language was used and this  
24 Court said that "pursuant to" can be consistent,  
25 and it was there consistent with invoking.



1                   And the answer to the question of,  
2 well, how then can you go forward with a mixed  
3 case under (b)(1) is, well, if it's frivolous,  
4 then there are other ways to police that,  
5 including sanctions and attorney's fees and  
6 costs. And nobody here is arguing that Mr.  
7 Harrow isn't appropriately proceeding under  
8 (b)(1). So I think the kind of *raductio ad*  
9 *absurdum* that the government invoked is contrary  
10 to at least one Supreme Court precedent.

11                   Two -- well, one final point. Oh, I'm  
12 sorry, two final points quickly.

13                   In terms of the timing of the amending  
14 of (b)(1)(A), the most recent amendment was  
15 2012. And in 2012, the clear statement rule was  
16 already established, including the statement in  
17 *Arbaugh* in 2006 that lower court precedents by  
18 themselves are not enough to satisfy the clear  
19 statement rule, so if we are inferring  
20 Congress's intent from the amendments to  
21 (b)(1)(A), the natural inference would be that  
22 Congress was listening to this Court and not to  
23 the Federal Circuit precedents that this Court  
24 said it -- it should not listen to.

25                   And then the last point I would say is

1 the question presented is, in fact, limited to  
2 the jurisdictional nature or not of the filing  
3 deadline. I do think that between forfeiture  
4 and the complexities at equitable tolling,  
5 government discretion on remand not to raise  
6 this issue, and the complexities under 26(b),  
7 which include not only that the rule -- it cites  
8 to the rules and not statutes, we did not make  
9 the complete set of arguments about Federal Rule  
10 of Appellate Procedure 26(b). We would like the  
11 opportunity if this Court decides the deadline  
12 is not jurisdictional to do so on remand.

13 We think, if that issue were to get  
14 back up to this Court, the Court would be in a  
15 much better position to rule effectively with  
16 that sort of background. Thank you.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel.

19 The case is submitted.

20 (Whereupon, at 12:23 p.m., the case  
21 was submitted.)

22

23

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