

No. _____

**In the
Supreme Court of the United States**

CLIFFORD W. JONES, SR.,

Petitioner,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 7703(b)(1)(A) of Title 5 establishes a 60-day time limit for a federal employee to seek judicial review of a final decision by the Merit Systems Protection Board in the Federal Circuit. 5 U.S.C. § 7703(b)(1)(A). The question presented is:

Whether the time limit in Section 7703(b)(1)(A) is a jurisdictional requirement or a claim-processing rule subject to equitable tolling.

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PETITION FOR A WRIT OF CERTIORARI

Clifford W. Jones, Sr. respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-3a) is unreported, but is available at 702 F. App'x 988. The decision of the court of appeals denying rehearing en banc (App. 20a-21a) is unreported, but is available at 718 F. App'x 958. The final order of the Merit Systems Protection Board (App. 4a-19a) is unpublished.

JURISDICTION

The court of appeals entered judgment on November 14, 2017. App. 1a-3a. The court of appeals denied rehearing en banc on February 27, 2018. App. 20a-21a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 5, United States Code Section 7703, provides in pertinent part:

(b)(1)(A) Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the [Merit Systems Protection] Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.

[(b)](2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e–16(c)), section 15(c) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(c)), and section 16(b) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 216(b)), as applicable. Notwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.

INTRODUCTION

This Court has spent more than a decade trying to bring discipline to what legal rules are properly characterized as “jurisdictional.” The Court has made clear that statutory time limits are quintessential claim-processing rules unless Congress has clearly indicated to the contrary. And it has articulated a “readily administrable bright line” rule to identify those rare circumstances where a time limit will be treated as jurisdictional: there must be a “clear statement.” In recent years, this Court has reaffirmed those principles nearly every Term—including last year in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017)—when lower courts have gone astray and, with few

exceptions, has declared a variety of mandatory legal rules nonjurisdictional.¹

Over thirty years ago, the Federal Circuit declared the time limit to file a petition for review of a final order of the Merit Systems Protection Board (in § 7703(b)(1)(A)) “jurisdictional” and, thus, not subject to equitable tolling. Despite this Court’s intervening case law reiterating that time limits are rarely jurisdictional, and despite the absence of any “clear

¹ See, e.g., *Hamer*, 138 S. Ct. at 21 (Federal Rule of Appellate Procedure 4(a)(5)(C)); *United States v. Wong*, 135 S. Ct. 1625, 1632 (2015) (Federal Tort Claims Act time limits); *Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 148 (2013) (Medicare time limit for appeal to Provider Reimbursement Review Board); *Gonzalez v. Thaler*, 565 U.S. 134, 137 (2012) (requirement that a certificate of appealability indicate the specific issue to be challenged); *Stern v. Marshall (In re Estate of Marshall)*, 564 U.S. 462, 479 (2011) (carve-out for “personal injury” claims in bankruptcy statute); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 438 (2011) (time limit to file appeal to Veterans Court); *Holland v. Florida*, 560 U.S. 631, 645 (2010) (Antiterrorism and Effective Death Penalty Act statute of limitations); *Dolan v. United States*, 560 U.S. 605, 611 (2010) (statutory deadline for ordering restitution); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010) (requirement that copyright be registered before filing suit); *Union Pacific R.R. Co. v. Brotherhood of Locomotive Eng’rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 71 (2009) (proof of conferencing requirement before National Railroad Adjustment Board arbitration); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 504, 516 (2006) (Title VII provision exempting small employers); *Eberhart v. United States*, 546 U.S. 12, 15 (2005) (per curiam) (federal criminal time limits for new trial); *Scarborough v. Principi*, 541 U.S. 401, 411-12 (2004) (filing deadlines for fee applications under Equal Access to Justice Act); *Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004) (filing deadlines for objecting to debtor’s discharge).

statement” to the contrary in § 7703(b)(1)(A), the Federal Circuit has consistently reaffirmed its outdated “jurisdictional” interpretation of § 7703(b)(1)(A) over vigorous dissent. According to the Federal Circuit, *all* “[a]ppel periods to Article III courts, such as the period in § 7703(b)(1)” are *per se* “mandatory and jurisdictional.” *Fedora v. Merit Sys. Prot. Bd.*, 848 F.3d 1013, 1015 (Fed. Cir. 2017) (“*Fedora I*”) (quoting *Bowles v. Russell*, 551 U.S. 205, 209 (2007)), *cert. denied*, 138 S. Ct. 755 (2018).

Although this Court recently denied three well-supported petitions for *certiorari* on this issue,² those were filed before this Court’s decision in *Hamer*, and even the Government urged the Court to decline review as “premature” because the Federal Circuit should have an opportunity to consider *Hamer*. *E.g.*, *Fedora* BIO 22 (U.S. Dec. 13, 2017). *Hamer* leaves no doubt that the Federal Circuit’s *per se* jurisdictional interpretation of § 7703(b)(1)(A) is flatly incorrect. This Court in *Hamer* specifically warned that courts of appeals were “tripp[ing] over [the] statement in *Bowles* that ‘the taking of an appeal within the

² See Cert. Petition, *Fedora v. Merit Sys. Prot. Bd.*, No. 17-557 (Oct. 6, 2017) (“*Fedora*”); Cert. Petition, *Musselman v. Dep’t of the Army*, No. 17-570 (Oct. 16, 2017) (“*Musselman*”); Cert. Petition, *Vocke v. Merit Sys. Prot. Bd.*, No. 17-544 (Oct. 6, 2017); see also generally *Musselman* Br. of the Federal Circuit Bar Association as *Amicus Curiae* Supporting Petitioners (U.S. Nov. 13, 2017) (“*Musselman* FCBA Br.”); *Fedora* Br. for the National Treasury Employees Union as *Amicus Curiae* in Supp. of Petitioners (U.S. Nov. 13, 2017); *Fedora* Br. of *Amici Curiae* National Veterans Legal Services Program and National Organization of Veterans’ Advocates, Inc. in Supp. of Petitioners (U.S. Nov. 13, 2017); *Fedora* Br. *Amicus Curiae* of Am. Federation of Government Employees in Supp. of Petitioners (U.S. Nov. 13, 2017).

prescribed time is “mandatory and jurisdictional”” and “fail[ing] to grasp the distinction [this Court’s] decisions delineate between jurisdictional appeal filing deadlines and mandatory claim-processing rules, and therefore misappl[ying] *Bowles*” to declare deadlines jurisdictional. *Hamer*, 138 S. Ct. at 21 (quoting 551 U.S. at 209). That is precisely what the Federal Circuit did again here, stating that all “[s]tatutory time limits for appeals are jurisdictional and cannot be equitably tolled or waived” under *Bowles*. App. 2a (citing *Bowles*). Petitioner sought en banc review in light of *Hamer*, but the Federal Circuit (again) declined to revisit its precedent.

This Court’s intervention is now unquestionably warranted. The Federal Circuit’s decision below cannot be reconciled with *Hamer* and prior cases. It conflicts with how other courts of appeals have treated the virtually identical time limit for seeking judicial review in a neighboring statutory section (§ 7703(b)(2)). And it is an important issue that impacts federal employment disputes nationwide. Indeed, federal employees have been routinely denied access to appellate review by the Federal Circuit when their petitions are delivered just a day or two late (or, as here, just a few *hours* late). *See, e.g., Musselman* FCBA Br. 13-14; ECF No. 9-1 at 7.

Absent this Court’s intervention, the Federal Circuit’s erroneous—and thoroughly entrenched—interpretation will control and perpetuate now-discredited understandings of when a statutory time limit qualifies as jurisdictional. The Federal Circuit passed on the opportunity to fix the problem even after *Hamer*. The Court’s review is urgently needed.

STATEMENT

1. “The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101 *et seq.*, establishes a framework for evaluating personnel actions taken against federal employees.” *Kloeckner v. Solis*, 568 U.S. 41, 44 (2012). If the personnel action is sufficiently serious, the employee may appeal an agency’s decision to the Merit Systems Protection Board (“MSPB” or “Board”). *Id.* Section 7703 of the CSRA governs judicial review of MSPB decisions. 5 U.S.C. § 7703. For so-called “mixed cases”—*i.e.*, “claims that an agency action appealable to the MSPB violates an antidiscrimination statute listed in § 7702(a)(1)” — employees must seek judicial review in district court. *Kloeckner*, 568 U.S. at 46, 56. For other cases seeking review of a final Board decision (including this case), a petition for review must be filed in the Federal Circuit. *See* 5 U.S.C. § 7703(b)(1)(A).

Similar language governs the timing for review of both types of cases. For mixed cases, § 7703(b)(2) provides that, “[n]otwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702.” 5 U.S.C. § 7703(b)(2). For other cases, § 7703(b)(1)(A) provides that, “[n]otwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.” *Id.* § 7703(b)(1)(A).

2. Petitioner Clifford Jones, Sr. was removed from his position as a Supervisory Financial Management Specialist for the Department of Health and Human Services on May 20, 2011, after reporting

millions of dollars in potential financial waste. *See* App. 1a-2a; ECF No. 9-1 at 3. He subsequently filed a series of timely appeals to the Board challenging his removal and alleging whistleblower retaliation. *See* App. 5a-7a. For nearly four years, Petitioner’s appeals were shuffled back and forth between Administrative Judges (“AJs”) and the Board, twice dismissed on preliminary grounds by AJs, and twice reinstated by the Board. *See id.* On December 8, 2016, the Board issued a final order on the merits denying relief and holding, *inter alia*, that the AJ had not erred in drawing an adverse inference from Petitioner’s decision not to testify in his case—even though the Government had the burden to sustain his removal. *See* App. 13a-15a.

3. Any petition to review the MSPB’s final decision was due 60 days later, on February 6, 2017. *See* 5 U.S.C. § 7703(b)(1)(A). On February 3, 2017, Petitioner (proceeding pro se) mailed his petition for review to the Federal Circuit. *See* App. 3a. The federal government (through the United States Postal Service) promised that the petition would be timely delivered by February 6, 2017. *See* ECF No. 9-1 at 2. The petition arrived at a Postal Service Destination Facility in Washington, DC, at two o’clock that morning. *Id.* at 7. But, for no apparent reason, the petition was not delivered to the Federal Circuit until around eight o’clock the next morning, February 7, 2017, just hours after the filing deadline. App. 3a; ECF No. 1-2 at 1; ECF No. 9-1 at 7.

4. On November 14, 2017, the Federal Circuit dismissed the petition for review in this case for lack of jurisdiction. App. 1a-3a. The panel concluded that it was “bound by” this Court’s decision in *Bowles* and its decision in *Fedora I*, under which all “[s]tatutory

time limits for appeals are jurisdictional and cannot be equitably tolled or waived.” App. 2a-3a (citing *Fedora I*, 848 F.3d at 1015 and *Bowles*, 551 U.S. at 209).

In *Fedora I*, a divided panel of the Federal Circuit had reaffirmed longstanding circuit precedent holding that the § 7703(b)(1)(A) filing deadline is jurisdictional and therefore not subject to equitable tolling. The majority held that any such deadline on an “appeal to . . . an Article III court” is *per se* jurisdictional under *Bowles*. 848 F.3d at 1016 (citing *Bowles*, 551 U.S. 205 (2007)). The Federal Circuit denied en banc review in *Fedora* and in two other cases presenting the same jurisdictional issue. See *Fedora v. Merit Sys. Prot. Bd.*, 868 F.3d 1336, 1337, 1339-40 (Fed. Cir. 2017) (en banc) (“*Fedora II*”); *Musselman v. Dep’t of the Army*, 868 F.3d 1341, 1341 (Fed. Cir. 2017) (en banc); *Vocke v. Merit Sys. Prot. Bd.*, 868 F.3d 1341, 1341 (Fed. Cir. 2017) (en banc). Judges Wallach, Newman, O’Malley, and Stoll dissented from the denial of en banc review in each case, and Judge Plager dissented from panel rehearing in *Fedora II*.

In October 2017, petitions for certiorari were filed in all three cases. *Supra* note 2. In response, the Government endorsed the Federal Circuit’s *per se* doctrine and reliance on *Bowles* and also argued that it “would be premature” to grant certiorari because the Federal Circuit had not yet had an “opportunity to interpret and apply” *Hamer*, which issued on November 8, 2017. See, e.g., *Fedora* BIO 22 (U.S. Dec. 13, 2017). This Court denied review on January 16, 2018.

5. After those petitions were filed, this Court decided *Hamer*. In *Hamer*, the Court held that the deadline for extending the time for appealing to an Article III court was not jurisdictional. It explained that “a time prescription governing the transfer of adjudicatory authority” in a federal action is jurisdictional only if it governs “the timebound transfer of adjudicatory authority *from one Article III court to another*”—“otherwise, the time specification fits within the claim-processing category” and requires a “clear statement” by Congress to have jurisdictional effect. 138 S. Ct. at 20 & n.9 (emphasis added) (citation omitted).

6. Petitioner requested en banc review in light of *Hamer* and this Court’s recent precedent. See ECF No. 43 at 2-12. On February 27, 2018, the Federal Circuit denied en banc review. App. 20a-21a.

REASONS FOR GRANTING THE WRIT

This case presents the question whether the 60-day deadline to file a petition for review of a final decision of the MSPB is the rare “jurisdictional” time limit that deprives the Federal Circuit of authority to equitably toll the filing deadline. More than a decade of this Court’s precedent plainly answers that question in the negative, including most recently *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017). Time and again, the Court has reaffirmed that—absent a clear statement to the contrary—statutory time limits are nonjurisdictional claim-processing rules presumptively subject to equitable tolling. Congress did nothing special in § 7703(b)(1)(A) to depart from that rule. The Federal Circuit’s decision that the 60-day filing deadline is jurisdictional cannot be reconciled with this Court’s

cases, and that circuit's steadfast refusal to reconsider its precedent warrants this Court's review.

The question presented is also "exceptionally important," as several Federal Circuit judges have recognized. *See, e.g., Fedora v. Merit Sys. Prot. Bd.*, 868 F.3d 1336, 1338 (Fed. Cir. 2017) (en banc) ("*Fedora II*") (Wallach, O'Malley, Newman, and Stoll, JJ., dissenting from denial of rehearing). The Federal Circuit has exclusive jurisdiction over appeals that are subject to § 7703(b)(1)(A)'s deadline. Its erroneous and entrenched decision will control personnel actions involving federal employees nationwide—and many, if not most, of those litigants are pro se. The Federal Circuit's precedent, moreover, conflicts with the decisions of other courts of appeals that have held that the nearly identical deadline for seeking judicial review of "mixed cases" in neighboring § 7703(b)(2) is *nonjurisdictional* and *is* subject to equitable tolling.

Moreover, the facts of this case make it an ideal vehicle to consider the question presented. Petitioner was removed from his position as a Supervisory Financial Management Specialist after reporting millions in potential financial waste, and the Board denied him relief after approving of an adverse inference drawn from his decision not to testify. Yet an Article III court will never consider his removal and the Board's decision on the merits because the United States Postal Service broke its promise to timely deliver the petition and Petitioner missed the deadline as a result by just a few *hours*. The Federal Circuit's rule sanctioning that result cries out for this Court's review.

I. The Federal Circuit’s Decision Conflicts With This Court’s Precedents

A. Section 7703(b)(1)(A) Is Not The Rare Jurisdictional Time Limit

1. It is well-settled that statutory time limits are presumptively nonjurisdictional and subject to equitable tolling. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). The only question is whether that presumption has been rebutted here. One way to rebut the presumption, and the only one at issue in this case, is to establish that the time limit is “jurisdictional.” *United States v. Wong*, 135 S. Ct. 1625, 1631 (2015). Section 7703(b)(1)(A) comes nowhere close to meeting that “high bar.” *See id.* at 1631-32.

As this Court has explained, the question of whether a time limit is “jurisdictional” is far from merely “semantic.” *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). “Branding a rule as going to a court’s subject-matter jurisdiction alters the normal operation of our adversarial system.” *Id.* A jurisdictional time limit is not subject to equitable tolling, and it can be raised at any time to get a case dismissed—including on appeal. *See Sebelius v. Auburn Reg’l Med. Ctr.*, 568 U.S. 145, 153 (2013).

Because of those “untoward consequences” that attach to a jurisdictional label, this Court has “‘tried in recent cases to bring some discipline to the use’ of the term ‘jurisdiction.’” *Id.* (quoting *Henderson*, 562 U.S. at 435). “[E]ven if” a rule is “important and mandatory,” it “should not be given the jurisdictional brand” unless “it governs a court’s adjudicatory capacity.” *Henderson*, 562 U.S. at 435.

“[C]laim-processing rules,” for example, “should not be described as jurisdictional.” *Id.* “These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain times.” *Id.* “Time and again,” this Court has “described filing deadlines as ‘quintessential claim-processing rules,’ which ‘seek to promote the orderly progress of litigation,’ but do not deprive a court of authority to hear a case.” *Wong*, 135 S. Ct. at 1632 (quoting *Henderson*, 562 U.S. at 435).

To be sure, Congress can decide to brand a time limit jurisdictional and, in so doing, impose all of the “harsh consequences” that follow. *Id.* But it has to do so explicitly. Under this Court’s “readily administrable bright line” rule, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006), a “time bar[]” will be treated as jurisdictional “only if Congress has ‘clearly state[d]’ as much,” *Wong*, 135 S. Ct. at 1632 (alteration in original) (quoting *Arbaugh*, 546 U.S. at 515). “[A]bsent such a clear statement, . . . ‘courts should treat the restriction as nonjurisdictional.’” *Id.* (alterations in original) (citations omitted). And applying that “clear statement rule,” this Court has “made plain that most time bars are nonjurisdictional.” *Id.*

2. Section 7703(b)(1)(A) is not the “rare statute of limitations that can deprive a court of jurisdiction.” *Wong*, 135 S. Ct. at 1632. It “provides no clear indication that Congress wanted that provision to be treated as having jurisdictional attributes.” *Henderson*, 562 U.S. at 439. To the contrary, it “reads like an ordinary, run-of-the-mill statute of limitations.” See *Wong*, 135 S. Ct. at 1633 (quoting *Holland v. Florida*, 560 U.S. 631, 647 (2010)); *cf.*

Kloeckner v. Solis, 568 U.S. 41, 52-53 (2012) (describing time limit in § 7703(b)(2) as “nothing more than a filing deadline”). It simply provides that, “[n]otwithstanding any other provision of law, any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board.” 5 U.S.C. § 7703(b)(1)(A).

“Most important,” the section’s text “speaks only to a claim’s timeliness, not to a court’s power.” *Wong*, 135 S. Ct. at 1632. It “does not speak in jurisdictional terms or refer in any way to the jurisdiction” of the Federal Circuit. *Id.* at 1633 (quoting *Arbaugh*, 546 U.S. at 515); see *Henderson*, 562 U.S. at 438. And it does not “address [the Federal Circuit’s] authority to hear untimely suits, or in any way cabin its usual equitable powers.” *Wong*, 135 S. Ct. at 1633. “[I]n case after case,” this Court has “emphasized . . . that jurisdictional statutes speak about jurisdiction, or more generally phrased, about a court’s powers.” *Id.* at 1633 n.4. Section 7703(b)(1)(A), in contrast, uses “mundane statute-of-limitations language.” *Id.* at 1632.

The fact that § 7703(b)(1)(A) uses the word “shall” and is thus framed in “mandatory” terms is “of no consequence” either. *Id.* Indeed, “that is true of most such statutes.” *Id.* No matter how “emphatic[ally]” expressed those terms may be,” this Court has required Congress to do “something special . . . to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.” *Id.* (alteration in original) (citation omitted). And, if anything, the language here is far less emphatic than other prescriptions this Court has deemed nonjurisdictional. See, e.g., *id.* (holding nonjurisdictional a statutory time limit providing

that untimely claims “shall be forever barred” (citation omitted)). Thus, there is no clear statement of congressional intent to make § 7703(b)(1)(A) jurisdictional.

Nor does the statutory context provide the necessary clear statement the text lacks. Section 7703 is titled “Judicial review of decisions of the Merit Systems Protection Board” and is located within Title 5 of the United States Code. The Federal Circuit’s authority to hear appeals from the MSPB comes from a different title, in a section titled “Jurisdiction of the United States Court of Appeals for the Federal Circuit.” See 28 U.S.C. § 1295(a)(9). Nothing in that provision “addresses the time” for seeking review of a Board decision. See *Henderson*, 562 U.S. at 440.³

Moreover, the administrative regime for reviewing adverse personnel actions is protective of the federal employee claimants. See, e.g., *Civil Service Reform: Hearings on H.R. 11280 Before the H. Comm. on Post Office & Civil Service*, 95th Cong. 3, 513, 519-20 (1978) (explaining how the CSRA was designed to “protect[] the[] rights” of federal employees by

³ The cross-reference in § 1295(a)(9) to § 7703(b)(1) is insufficient to make § 7703(b)(1) “jurisdictional” as a whole. This Court has already rejected the notion that a time limitation becomes jurisdictional by “cross-reference” to it in a statutory grant of “exclusive jurisdiction.” See *Wong* U.S. Br. 36-37 (Sept. 9, 2014). Indeed, it is clear that § 7703(b)(1) contains elements that do not relate to the jurisdiction of the Federal Circuit. See, e.g., 5. U.S.C. § 7703(b)(1)(B) (review of certain Board cases *in regional courts of appeals*). And when this Court previously discussed the “jurisdictional perimeters” of “the operative grant of jurisdiction” in § 7703(b)(1), it was addressing the requirement for *finality* of a Board decision, *not* the claim-processing deadline for seeking review of such a decision. See *Lindahl v. Office of Pers. Mgmt.*, 470 U.S. 768, 792-93 (1985).

establishing a framework for them to appeal certain adverse personnel actions to the Merit Service Protection Board”); *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearing on S. 2640, S. 2707, & S. 2830 Before the S. Comm. on Governmental Affairs*, 95th Cong. 33, 100-01, 976 (1978) (“CSRA Senate Report”) (explaining how the CSRA was designed to ensure civil service employees “fairness,” “equity,” and “justice” by helping to guarantee “full due process” to oppose adverse agency actions). Indeed, many of the claimants are pro se (just like Petitioner was here when he filed his Federal Circuit appeal). *See, e.g., Fedora II*, 868 F.3d at 1340. That history and remedial purpose of the CSRA further confirms Congress did not silently impose an unyielding jurisdictional bar in § 7703(b)(1)(A). *See Bowen v. City of N.Y.*, 476 U.S. 467, 480-81 (1986) (noting that Social Security benefits review especially protective of claimants); *Henderson*, 562 U.S. at 437 (same for veterans benefits).

Because nothing in the text, context, history, or purpose of § 7703(b)(1)(A) “indicates (much less does so plainly) that Congress meant to enact something other than a standard time bar,” *Wong*, 135 S. Ct. at 1632, the Federal Circuit erred in branding the 60-day deadline jurisdictional. Without that erroneous classification, the “general rule” set forth in *Irwin* controls: the 60-day time limit is subject to equitable tolling.

B. The Federal Circuit’s Contrary Arguments Are Unavailing

For over thirty years, the Federal Circuit has adhered to its position that § 7703(b)(1)(A)’s time limit

is jurisdictional and therefore not subject to equitable tolling. It has done so despite intervening decisions by this Court directly undermining—if not overruling—the reasoning of those cases. And it has done so over vigorous dissents. Yet none of the ever-evolving reasons offered by the court establish the requisite “clear statement” needed to render § 7703(b)(1)(A) one of the “rare” jurisdictional statutes of limitations.

1. The Federal Circuit first declared that § 7703(b)(1)(A) was jurisdictional and not subject to equitable tolling in *Monzo v. Department of Transportation*, 735 F.2d 1335, 1336 (Fed. Cir. 1984). There, the court held—without further discussion—that the “period for appeal is statutory, mandatory, [and] jurisdictional.” *Id.* The court cited an earlier decision, *Ramos v. United States*, which had rested on “the notion that statutes of limitations are a condition on the sovereign’s consent to suit.” 683 F.2d 396, 397 (Ct. Cl. 1982) (citing *Soriano v. United States*, 352 U.S. 270, 276 (1957)). In 1990, though, *Irwin* rejected that reasoning and held that the rebuttable presumption that equitable tolling is available applies equally to suits against the United States. 498 U.S. at 94-96 (rejecting presumption against equitable tolling set forth in *Soriano*); *see also Wong*, 135 S. Ct. at 1634-37 (recognizing the same).

2. When the Federal Circuit confronted the issue again post-*Irwin*, however, a divided panel refused to change course. *See Oja v. Department of the Army*, 405 F.3d 1349 (Fed. Cir. 2005). In *Oja*, the majority held that it was still “bound” by *Monzo* but also noted that it would have reached the same conclusion “for other reasons.” *Id.* at 1357. According to the majority, *Irwin* might have been limited to Title

VII cases—or at least would have more force in that context. *Id.* But even if *Irwin* applied, the majority reasoned that Federal Rules of Appellate Procedure 15(a)(1) and 26(b)(2) rebutted any presumption of tolling simply because they were “presented to Congress . . . before going into effect,” and Congress “did not” change them. *Id.* at 1359.

Six months later, however, this Court rejected that reasoning in *Eberhart v. United States*, 546 U.S. 12, 15 (2005). There, the Court held that Federal Rules of Criminal Procedure 33 and 45 were not jurisdictional even though, like the Federal Rules of Appellate Procedure, they ostensibly sought to create a rigid set of deadlines for reviewing a judgment and were presented to Congress without any subsequent alteration. *See id.* at 15-19. Thus, even apart from its other flaws (*see, e.g., Oja*, 405 F.3d at 1367 (Newman, J., dissenting)), the majority’s alternative reasoning in *Oja* was unsustainable after *Eberhart*.

3. The Federal Circuit reiterated the jurisdictional nature of § 7703(b)(1)(A) yet again in *Fedora I*. Once more over dissent, a divided panel rejected the argument that the court’s prior decisions were “no longer good law” in light of intervening decisions of this Court. *Fedora I*, 848 F.3d at 1015; *see id.* at 1017-26 (Plager, J., dissenting). And once again, the majority abandoned the grounds articulated in the court’s prior cases in favor of a new reason why the time limit in § 7703(b)(1)(A) is jurisdictional and not subject to equitable tolling.

The new reason: *Bowles*. In the majority’s view, this Court’s other cases stood only for the proposition that “limitations periods . . . are not jurisdictional”; they “d[id] not concern appeal periods.” *Id.* at 1015. But *Bowles*, on the other hand, held that an appeal

period was “mandatory and jurisdictional,” so *all* “[a]ppeal periods to Article III courts” were *per se* jurisdictional. *Id.* (quoting *Bowles*, 551 U.S. at 209). The panel in the present case, applying *Fedora I*, likewise held that *Bowles* means that all “[s]tatutory time limits for appeals are jurisdictional and cannot be equitably tolled or waived.” App. 2a (citing *Fedora I*, 848 F.3d at 1015 and *Bowles*, 551 U.S. at 209).

But *Bowles* stands for no such thing. Indeed, this Court has repeatedly rejected that exact interpretation. In *Henderson*, the Government read “*Bowles* to mean that all statutory deadlines for taking appeals in civil cases are jurisdictional.” 562 U.S. at 436. This Court disagreed: *Bowles* “did not hold categorically that every deadline for seeking judicial review in civil litigation is jurisdictional.” *Id.* Rather, *Bowles* concerned only a special “type” of appeal to which a “century’s worth of precedent and practice in American courts” applied—“an appeal *from one court to another court*.” *Id.* (emphasis added) (citation omitted).

This Court unanimously reiterated that understanding of *Bowles* just last year in *Hamer*: only a statutory “time prescription governing the transfer of adjudicatory authority *from one Article III court to another*” (like the one in *Bowles*) is *per se* jurisdictional; otherwise, it “fits within the claim-processing category” and requires a “clear statement” by Congress to have jurisdictional effect. 138 S. Ct. at 20 & n.9 (emphasis added) (citation omitted). This Court even specifically warned that courts of appeals were improperly “tripp[ing] over [the] statement in *Bowles* that ‘the taking of an appeal within the prescribed time is “mandatory and jurisdictional”’ and “fail[ing] to grasp the distinction

[this Court's] decisions delineate between jurisdictional appeal filing deadlines and mandatory claim-processing rules." *Id.* at 21 (quoting *Bowles*, 551 U.S. at 209).

That is the precise error the Federal Circuit made here. Section 7703(b)(1)(A)'s direct review of an administrative agency decision is simply not an appeal of the same "type" as *Bowles*. *Henderson*, 562 U.S. at 436. And the review of an *agency decision* by a court of appeals is different in kind than an appeal of the decision of another Article III court. Rather, as the dissent from the denial of en banc review in *Fedora II* explained, *Bowen v. City of New York*, 476 U.S. 467 (1986), provides the better analogue. *Bowen* involved a time period within which to seek judicial review of an *agency decision* to an Article III court. *See id.* at 472; *Fedora II*, 868 F.3d at 1338-39. And, just as here, *Bowen* involved an administrative scheme designed to protect claimants who routinely proceeded pro se. 476 U.S. at 472, 480. This Court held that equitable tolling was available for the filing deadline to obtain review of an agency's Social Security benefits decision in an Article III court. *Id.* at 469-70, 487. In the absence of any clear statement from Congress, the Federal Circuit should have reached the same result for § 7703(b)(1)(A).

II. The Federal Circuit's Interpretation Of § 7703(b)(1)(A) Creates Inter-Circuit Conflict

The Federal Circuit has exclusive jurisdiction to review appeals in personnel disputes that are subject to § 7703(b)(1)(A). *See* 28 U.S.C. § 1295(a)(9). But judicial review of certain personnel disputes are filed first in district court and appealed to the regional

circuits when an employee asserts a violation of federal antidiscrimination laws. *See Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1979 (2017). The deadline for seeking review of such “mixed cases” is set forth in the substantially similar neighboring provision, § 7703(b)(2). *See id.* at 1980-81. Other than the length and triggering event for the time to seek review, the recitation of that deadline is virtually identical to that in § 7703(b)(1)(A). *Compare* 5 U.S.C. § 7703(b)(1)(A), *with* § 7703(b)(2); *see Perry*, 137 S. Ct. at 1981-82 & n.2.

Because the Federal Circuit does not have jurisdiction over mixed cases, other courts of appeals have separately considered whether § 7703(b)(2)’s time limit is jurisdictional or, alternatively, subject to equitable tolling. Post-*Irwin*, the courts of appeals that have substantively considered the issue have held that the filing deadline in § 7703(b)(2) is *not* jurisdictional and *is* subject to equitable tolling. *See, e.g., Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002); *Blaney v. United States*, 34 F.3d 509, 512-13 (7th Cir. 1994); *Nunnally v. MacCausland*, 996 F.2d 1, 3 (1st Cir. 1993); *Williams-Scaife v. Department of Def. Dependent Schs.*, 925 F.2d 346, 348 (9th Cir. 1991).⁴ District courts in the Third, Fifth, Eighth,

⁴ The law in the Sixth Circuit is not as clear. Post-*Irwin*, a panel held that the § 7703(b)(2) filing deadline is not subject to equitable tolling, but that decision was vacated on other grounds by this Court and never reinstated. *See Dean v. Veterans Admin. Reg’l Office*, 943 F.2d 667, 669-70 (6th Cir. 1991), *vacated and remanded on other grounds*, 503 U.S. 902 (1992), *remanded to district court without op.*, 972 F.2d 346 (6th Cir. 1992). Later panel decisions have restated that holding without substantive discussion of its merits or consideration of this Court’s more

and D.C. Circuits have reached that conclusion as well.⁵

The decision below cannot be reconciled with those decisions. As Judge Newman explained in her dissent in *Oja*, there is no basis by which to conclude that Congress intended one filing deadline in § 7703(b) to be jurisdictional and not the other. “Both § 7703(b)(1) and § 7703(b)(2) state time limits for the filing of claims against the federal employer, and both are directed to judicial ‘review’ of such claims”—“[t]here is no hint that Congress intended to preclude equitable tolling in actions under § 7703(b)(1) while permitting it in actions under § 7703(b)(2).” *Oja*, 405 F.3d at 1364-65 (Newman, J., dissenting). The entrenched conflict thus provides an additional reason to grant review.

recent case law. See, e.g., *Felder v. Runyon*, 230 F.3d 1358 (6th Cir. 2000) (table); *Johnson v. United States Postal Serv.*, 64 F.3d 233, 237-38 (6th Cir. 1995); *Glarner v. United States, Dep’t of Veterans Admin.*, 30 F.3d 697, 701 (6th Cir. 1994).

⁵ See also *Ware v. Frank*, Civ. A. No. 90-7423, 1992 WL 19861, at *2 (E.D. Pa. Jan. 30, 1992), *aff’d without op.*, 975 F.2d 1552 (3d Cir. 1992); *Doberstein v. St. Paul Dist. of the IRS*, Civ. No. 4-91-663, 1992 WL 42930, at *2 (D. Minn. Feb. 24, 1992), *aff’d*, 978 F.2d 1263 (8th Cir. 1992); *Williams v. Court Servs. & Offender Supervision Agency*, 772 F. Supp. 2d 186, 188 (D.D.C. 2011), *vacated on other grounds*, 840 F. Supp. 2d 192 (D.D.C. 2012); *Hicks v. Peake*, No. 3:07-cv-0819 M ECF, 2008 WL 3884367, at *2-3 (N.D. Tex. Aug. 20, 2008); *Becton v. Pena*, 946 F. Supp. 84, 87 (D.D.C. 1996). But see *Brookens v. Acosta*, 297 F. Supp. 3d 40, 2018 WL 1143144, at *4-6 (D.D.C. 2018), *appeal docketed*, No. 18-5129 (D.C. Cir. May 7, 2018).

III. Review Is Warranted Now

A. The Question Presented Is Exceptionally Important

The question presented is a recurring and an “exceptionally important” issue. *Fedora II*, 868 F.3d at 1338 (Wallach, J., dissenting). Indeed, the Federal Circuit routinely and summarily dismisses untimely petitions for review of MSPB decisions for lack of jurisdiction.⁶ Those federal employees—many of whom are proceeding pro se—are being denied the “fairness,” “justice,” and “full due process” that the statute was designed to provide. CSRA Senate Report at 33, 976. Absent this Court’s intervention, the Federal Circuit’s erroneous treatment of § 7703(b)(1)(A) as jurisdictional—and all the harsh and untoward consequences that come with that label—will be the law that governs federal employment disputes nationwide.

⁶ See, e.g., *Brenndoerfer v. United States, Postal Serv.*, 693 F. App’x 904, 906 (Fed. Cir. 2017); *Jarmin v. Office of Pers. Mgmt.*, 678 F. App’x 1023, 1024-25 (Fed. Cir. 2017); *Hearn v. Department of the Army*, 662 F. App’x 916, 919 (Fed. Cir. 2016); *Cross v. Office of Pers. Mgmt.*, 574 F. App’x 929, 930 (Fed. Cir. 2014); *Willingham v. Department of the Navy*, 526 F. App’x 975, 977 (Fed. Cir. 2013); *Shipp v. Department of Health & Human Servs.*, 498 F. App’x 975, 978 (Fed. Cir. 2012); *Burroughs v. Department of the Army*, 428 F. App’x 998, 999 (Fed. Cir. 2011); *Howard v. Merit Sys. Prot. Bd.*, 392 F. App’x 857, 858 (Fed. Cir. 2010); *West v. Office of Pers. Mgmt.*, 345 F. App’x 554, 555 (Fed. Cir. 2009); *Wilder v. Department of Health & Human Servs.*, 274 F. App’x 888, 889 (Fed. Cir. 2008); *Hebron v. United States Postal Serv.*, 226 F. App’x 994, 994 (Fed. Cir. 2007); *Pike v. Department of the Navy*, 184 F. App’x 952, 952 (Fed. Cir. 2006); *Donnelly v. United States Postal Serv.*, 153 F. App’x 732, 732 (Fed. Cir. 2005).

B. The Federal Circuit's View Is Entrenched, Even Post-*Hamer*

There is no longer any hope that the Federal Circuit will correct course on its own. As discussed, the Federal Circuit has for decades consistently refused to revisit its jurisdictional view of § 7703(b)(1)(A)—even over the dissents of five judges. *See, e.g., Oja*, 405 F.3d at 1364-65 (Newman, J., dissenting); *Fedora I*, 848 F.3d at 1025-26 (Plager, J., dissenting); *Fedora II*, 868 F.3d at 1337 (Wallach, O'Malley, Newman, and Stoll, JJ., dissenting). Because the Federal Circuit has exclusive jurisdiction over cases that are subject to § 7703(b)(1)(A), there is no potential for a direct circuit split on the question presented.

Earlier this term, three petitions challenged the Federal Circuit's anomalous reading of § 7703(b)(1)(A). *Supra* at n.2. In its briefs in opposition, the Government defended the Federal Circuit's now-discredited rationale in *Fedora* and argued that this Court's review was not warranted. *See, e.g., Fedora* BIO 9-22. The Government also argued that, in any event, review “would be premature because the courts of appeals have not yet had the opportunity to interpret and apply [*Hamer*].” *See, e.g., id.* at 22. The Federal Circuit has now had—and declined—that opportunity. *See* ECF No. 43 at 2-3, 6-9. To the extent there was any doubt, it is indisputably clear that the Federal Circuit's jurisdictional rule is thoroughly entrenched. This Court's review is needed now.

C. This Case Is An Ideal Vehicle

This case is an ideal vehicle for the Court's review. The Federal Circuit's answer to the question

presented was dispositive. The petition for review was dismissed as untimely based entirely on the Federal Circuit's determination that § 7703(b)(1)(A) is jurisdictional. And the facts of this case clearly support equitable tolling.

Petitioner was removed after reporting millions in potential financial waste. *See* ECF No. 9-1 at 3. The Board denied Petitioner relief after it approved of drawing an adverse inference from his choice not to testify. *See* App. 13a-15a. Proceeding pro se, Petitioner then diligently mailed his petition for review of that decision, and the federal government (through the United States Postal Service) promised timely delivery. *See* App. 3a; ECF No. 9-1 at 2. But the government failed to perform on its promise, and the Federal Circuit received the petition mere hours past the filing deadline. *See* App. 3a; ECF No. 1-2 at 1; ECF No. 9-1 at 7. For that reason alone, Petitioner was kicked out of court. Convicted felons are afforded greater latitude when filing court papers from jail. *See, e.g.,* Fed. R. App. P. 25(a)(2)(C) (papers filed by inmates timely when deposited in the mail—a rule that, if applied here, would have made the petition timely filed in the Federal Circuit).⁷

If the § 7703(b)(1)(A) filing deadline is not jurisdictional, the deadline should have been equitably tolled and Petitioner's claim would be saved. The question presented warrants this Court's review, and this is the ideal case for it.

⁷ Even this Court accepts postmark dates as effective filing dates. *See* Supreme Court Rule 29.2 (applying equally to pro se filings by petitioners proceeding *in forma pauperis*, as Petitioner was below).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 29, 2018

APPENDIX

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1a

NOTE: This order is nonprecedential.

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CLIFFORD W. JONES, SR.,

Petitioner

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Respondent

No. 2017-1624

Petition for review of the Merit Systems
Protection Board in No. CH-0432-13-1527-B-1.

Decided: November 14, 2017

Before MOORE, REYNA, and TARANTO, *Circuit
Judges*. PER CURIAM.

Clifford W. Jones, Sr. appeals from a final order of the Merit Systems Protection Board (Board) affirming his removal based on unacceptable performance. Because Mr. Jones did not file a timely petition for review, we dismiss for lack of jurisdiction.

BACKGROUND

Mr. Jones worked as a Supervisory Financial Management Specialist for the Department of Health and Human Services (Agency) at the Indian Health Service Cass Lake Hospital in Cass Lake,

Minnesota from February 19, 2008 to May 20, 2011. The Agency removed him after finding unacceptable performance in three critical elements of his position.

Mr. Jones filed an individual right of action appeal (IRA appeal) alleging whistleblower retaliation. The Administrative Judge (AJ) dismissed the IRA appeal for lack of jurisdiction finding no non-frivolous allegation that he had made a protected disclosure. The Board agreed with the dismissal of the IRA appeal, but found that Mr. Jones was entitled to review of his removal. In the removal appeal, the AJ found that substantial evidence supported the Agency's removal of Mr. Jones for unacceptable performance. Mr. Jones filed a petition for review with the Board. The Board issued a final order denying his petition on December 8, 2016. Mr. Jones petitioned this court for review. We received his petition on February 7, 2017.

DISCUSSION

Before addressing the merits, we must ensure that we have jurisdiction over the matter appealed. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998). Our review of final Board orders is limited to those petitions “filed within 60 days after the Board issues notice of the final order or decision of the Board.” 5 U.S.C. § 7703(b)(1)(A). Statutory time limits for appeals are jurisdictional and cannot be equitably tolled or waived. *Bowles v. Russell*, 551 U.S. 205, 209 (2007); *Fedora v. Merit Sys. Prot. Bd.*, 848 F.3d 1013, 1015 (Fed. Cir. 2017).

To be timely filed, this court must receive a petition for review by the due date. Fed. R. App. P.

25(a)(2)(A). The Board issued notice of its final order on December 8, 2016, making Mr. Jones' petition due on February 6, 2017. 5 U.S.C. § 7703(b)(1)(A). We did not receive Mr. Jones' petition until February 7, 2017. Because "filing requires actual receipt by the court," *Fedora*, 848 F.3d at 1016, Mr. Jones did not file a timely petition.

Mr. Jones asks that we recognize his efforts to mail the petition on time and the impact of the weather in delaying delivery. While we recognize that Mr. Jones mailed his petition on February 3, 2017, we are bound by prior precedent holding that we do not have the authority to equitably toll the statutory deadline in § 7703(b)(1)(A). *See, e.g., Fedora*, 848 F.3d at 1017. Because we received the petition after the 60-day statutory period for appeal expired, we do not have jurisdiction to consider the merits of the case.

CONCLUSION

For the reasons stated above, we find that we are without jurisdiction to consider this appeal and therefore *dismiss*.

COSTS

No costs.

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

CLIFFORD W. JONES, SR., DOCKET NUMBER
Appellant, CH-0432-13-1527-B-1

v.

DEPARTMENT OF DATE: December 9,
HEALTH AND HUMAN 2016
SERVICES,
Agency.

THIS FINAL ORDER IS NONPRECEDENTIAL¹

Clifford W. Jones, Sr., Cass Lake, Minnesota, pro
se.

Craig Herkal, Esquire, and Jennifer M. Cassell,
Esquire, Chicago, Illinois, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

FINAL ORDER

¶ 1 The appellant has filed a petition for review of the initial decision, which sustained his removal for unacceptable performance. Generally, we grant

¹ A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See 5 C.F.R. § 1201.117(c).

petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review and AFFIRM the initial decision, which is now the Board's final decision. 5 C.F.R. § 1201.113(b).

¶ 2 Effective May 20, 2011, the agency removed the appellant, a GS-11 Supervisory Financial Management Specialist at the agency's Indian Health Service (IHS) Cass Lake Hospital, for unacceptable performance in three critical elements of his position. *Jones v. Department of Health & Human Services*, MSPB Docket No. CH-0432-13-1527-I-1, Initial Appeal File (IAF), Tab 6, Subtab 4a. The appellant sought corrective action with the Office of Special Counsel (OSC) regarding the removal and subsequently filed an individual right of action (IRA) appeal. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to nonfrivolously allege that

he made a protected disclosure when he revealed to the Office of Inspector General and to OSC alleged irregularities in the agency's hiring/attempting to hire another employee who, according to the appellant, should have been under his supervision, and in the agency's setting up a second accounting section in an auxiliary building. *Jones v. Department of Health & Human Services*, MSPB Docket No. CH-1221-12-0125-W-2, Initial Decision at 2, 4-6 (Oct. 12, 2012). On the appellant's petition for review of that decision, the Board agreed with the administrative judge's findings and the disposition of the appeal but found that the appellant was entitled to review of his removal under 5 U.S.C. chapter 43, and it forwarded the matter for docketing as a removal appeal. *Jones v. Department of Health & Human Services*, MSPB Docket No. CH-1221-12-0125-W-2, Final Order at 7-8 (July 25, 2013). That appeal was initially dismissed without prejudice, pending the Board's decision on a related compliance appeal. *Jones v. Department of Health & Human Services*, MSPB Docket No. CH-0432-13-1527-I-1, Initial Decision at 2-3 (Nov. 20, 2013). The administrative judge subsequently dismissed the refiled removal appeal as untimely, but the Board reversed that finding and remanded the case to the regional office for adjudication on the merits of the appellant's removal. *Jones v. Department of Health & Human Services*, MSPB Docket No. CH-0432-13-1527-1-2, Remand Order at ¶¶ 7-10 (Aug. 7, 2015).

¶ 3 During the remand proceeding, the appellant reiterated generally his claim that, in connection with his removal, the agency retaliated against him because of his whistleblowing activities, and he also alleged generally that the agency had violated his

due process rights. In addition, he argued that the agency denied him use of its computer system after issuance of the notice of proposed removal. Remand File (RF), Tab 9. The appellant subsequently added claims that the agency discriminated against him on the bases of sex and age. RF, Tab 22. During adjudication, the administrative judge determined that the appellant was collaterally estopped from relitigating his claim of retaliation for whistle blowing because he previously had litigated the same issue in his earlier IRA appeal. RF, Tab 25.

¶ 4 After convening the requested hearing, RF, Tab 26, the administrative judge issued an initial decision in which she found that the agency showed by substantial evidence that the Office of Personnel Management approved its performance appraisal system, RF, Tab 32, Remand Initial Decision (RID) at 8-9; that it communicated the performance standards and critical elements of the appellant's position to him, RID at 9-12; that his performance standards were valid under 5 U.S.C. § 4302(b)(1), RID at 12; and that the agency provided the appellant with a reasonable opportunity to demonstrate acceptable performance, RID at 13-21. The administrative judge further found that the agency proved by substantial evidence that the appellant's performance in all three critical elements was unacceptable—critical element #1, ensuring awareness, training, compliance, and discipline in supervisees, RID at 21-24; critical element #2, directing the overall financial objectives and policies for the finances of Cass Lake Hospital, RID at 24-31, and critical element #3, implementing the "M" system for maintaining inventory of medical and office supplies, and providing certain reports within

specified time frames, RID at 31-34. As indicated in her earlier order, the administrative judge found that the appellant's whistleblower retaliation claim was barred by collateral estoppel. RID at 34. The administrative judge found wholly unsupported the appellant's allegation that the agency violated his due process rights. RID at 34-36. The administrative judge considered as an affirmative defense of harmful procedural error the appellant's claim that he was denied computer access during the time following his receipt of the proposal notice and prior to his removal. Weighing the appellant's credibility against the record evidence on this point, the administrative judge found that the agency did not commit procedural error and that, in any event, the appellant offered no evidence or argument that the outcome of the case would have been different if he had access to the agency's Unified Financial Management System at the time in question. RID at 36-37. The administrative judge found that the appellant offered no evidence to support his allegations of sex or age discrimination, RID at 37-40. Finally, finding that the Board lacks authority to mitigate an agency-imposed penalty for an action taken under 5 U.S.C. chapter 43, the administrative judge sustained the appellant's removal. RID at 40.

¶ 5 The appellant filed a petition for review, Remand Petition for Review (PFR) File, Tab 1, to which the agency has responded, RPFR File, Tab 3.

¶ 6 With one exception, the appellant does not challenge on review the administrative judge's findings that the agency proved by substantial evidence that the appellant's performance in the three cited critical elements was unacceptable. That exception involves the part of critical element #3

wherein the agency claimed that the appellant failed to implement the “M” system for inventory. As to this matter, the appellant’s performance improvement plan (PIP) indicated that the system had not yet been implemented, except by other staff because of the appellant’s failure to implement it, and that, to improve his performance, he must implement the system and provide a usage report to the Executive Team on a quarterly basis. IAF, Tab 6, Subtab 400 at 5. In the notice of proposed removal, the agency stated that the system was being implemented by staff from another office because the appellant did not implement it with his own staff or the contractor hired to get the system operating. *Id.*, Subtab 4n. And, in the decision letter, the agency stated that the departure of the contractor was irrelevant to the PIP requirement. *Id.*, Subtab 4b. In finding this part of critical element #3 sustained, the administrative judge relied upon the testimony of the appellant’s second-line supervisor who was also the deciding official in this case to the effect that getting the system to function properly was critical but that the appellant was never able to implement it and that he also did not provide the appropriate quarterly reports to headquarters. RID at 32; Hearing Transcript (HT) at 142-44 (testimony of the deciding official). The administrative judge considered the appellant’s claim in his pleadings² that he could not implement the system because he needed another employee to handle the data entry, but she found that, while the appellant was required to report on what the

² The appellant elected not to testify at the hearing. HT at 162.

employees he supervised were doing, he never provided such a report. RID at 13.

¶ 7 To resolve credibility issues, an administrative judge must identify the factual questions in dispute, summarize the evidence on each disputed question, state which version he believes, and explain in detail why he found the chosen version more credible, considering a number of factors, as appropriate, set forth by the Board in its seminal case of *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987) (explaining that, in assessing credibility, an administrative judge must consider the witness's opportunity and capacity to observe the event or act in question, the witness's character, prior inconsistent statement by the witness, a witness's bias, or lack of bias, the contradiction of the witness's version of events by other evidence or its consistency with other evidence, the inherent improbability of the witness's version of events, and the witness's demeanor). The Board must give due deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). Here, having "observed the demeanor of the agency witnesses," the administrative judge found their testimony to be credible. RID at 21. She further found that the appellant's unsworn statements lacked credibility and that they were inconsistent with the unrebutted evidence presented by the agency. RID at 33. Other than claiming that his second-line supervisor

committed perjury during her testimony, RPFR File, Tab 1 at 8, and that the other agency witnesses did as well, *id.* at 9, the appellant has failed to provide sufficiently sound reasons for overturning the administrative judge's credibility determinations, which were based on her observations of the witnesses' demeanor. Therefore, we find it appropriate to defer to them, *see Haebe*, 288 F.3d at 1302, and reject as unsupported the appellant's challenge to the administrative judge's finding sustained this part of critical element #3.

¶ 8 As noted, the appellant does not challenge on review the administrative judge's findings sustaining the appellant's unacceptable performance under the remaining part of critical element #3, critical element #1, or critical element #2. Based on our review, we otherwise discern no reason to reweigh the evidence or substitute our assessment of the record evidence for that of the administrative judge. *See Haebe*, 288 F.3d at 1302; *Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 105-06 (1997) (finding no reason to disturb the findings of the administrative judge who considered the evidence as a whole, drew appropriate references, and made reasoned conclusions). We therefore find no error in the administrative judge's finding that the agency proved by substantial evidence that the appellant's performance was unacceptable in the three critical elements cited.

¶ 9 On review, the appellant argues that he was denied the ability to "identify" his claims of retaliation for whistleblowing and age and sex discrimination. RPFR File, Tab 1 at 3, 10.

¶ 10 We first address the appellant's whistleblowing claim. The administrative judge

ruled during adjudication that the appellant's affirmative defense of retaliation for whistleblowing was barred by collateral estoppel, RF, Tab 25 at 1-2, and she incorporated that ruling in her initial decision. RID at 34. Collateral estoppel, or "issue preclusion," is appropriate when: (1) an issue is identical to that involved in the prior action; (2) the issue was actually litigated in the prior action; (3) the determination on the issue in the prior action was necessary to the resulting judgment; and (4) the party against who issue preclusion is sought had a full and fair opportunity to litigate the issue in the prior action, either as a party or as one whose interests were otherwise fully represented in the that action. *Kroeger v. U.S. Postal Service*, 865 F.2d 235, 239 (Fed. Cir. 1988); *Encarnado v. Office of Personnel Management*, 116 M.S.P.R. 30, ¶ 13 (2011). The elements of collateral estoppel are present in this appeal. Whether the appellant's claim that the agency creation of a second accounting section in an auxiliary building but not placing that section under his supervision constituted a protected disclosure as raised in his IRA appeal is identical to the affirmative defense that he raises in this appeal, the issue was actually litigated in the prior appeal, it was the critical issue in the jurisdictional determination that the Board lacked jurisdiction over *Jones v. Department of Health & Human Services*, MSPB Docket No. CH-1221-12-0125-W-2, and the appellant, the party precluded from relitigating the issue, had a full and fair opportunity to litigate the issue in the prior action. We therefore find that the appellant has not shown error in the administrative judge's ruling that the appellant is barred by collateral estoppel from

relitigating the issue of whether his disclosure regarding the creation of the second accounting section was protected under the Whistleblower Protection Act. *See Jenkins v. Environmental Protection Agency*, 118 M.S.P.R. 161, ¶ 22 (2012).

¶ 11 We next address the appellant's allegations of age and sex discrimination. After he raised these claims below, RF, 22, the administrative judge set out the appropriate burdens of proof for these claims, RF, Tab 25, but the appellant submitted no documentary evidence in support of either claim. In his prehearing submission, he stated that he would call no witnesses, RF, Tab 9, although in a subsequent untimely submission, he requested that two agency employees be allowed to testify, RF, Tab 17, and he then asked that another employee be allowed to testify in place of one of the first two, RF, Tab 18. During the prehearing conference, the agency objected to the two witnesses on the ground of relevancy. Specifically, the agency argued that one of the witnesses was to testify regarding the Budget Technician position the appellant claimed he should have supervised, and that the other was to testify regarding the appellant's allegedly being denied computer access after his removal was proposed, and the administrative judge granted the objections. RF, Tab 20. The appellant generally noted his objection to the administrative judge's ruling. RF, Tab 22. At the hearing, after the agency rested, the administrative judge asked the appellant if he intended to testify and he replied that he would not do so. HT at 162. The administrative judge then noted that the agency had named the appellant as a witness, but when he expressed reservations about testifying under these circumstances, the

administrative judge stated that she would not require him to do so, but that she would draw “an adverse inference on anything where there are credibility determinations that I need to make if you do not exercise this opportunity to testify.” *Id.* at 163. The appellant stated that he “chose not to.” *Id.* The agency noted its objection, proffering that, if required to, the appellant would testify, *inter alia*, that he had no direct information that he was removed because of his age or sex. *Id.* at 164. Notwithstanding the administrative judge’s repeated explanations of the significance of this matter, *id.* at 165-67, the appellant still declined to testify, *id.* at 167.

¶ 12 In addressing the appellant’s claims of sex and age discrimination, the administrative judge found that he offered no evidence to support his allegations whereas the agency presented sworn evidence that his sex and age played no role in the decision to remove him, HT at 155-56 (testimony of the deciding official); HT at 43-44 (testimony of the proposing official), and that therefore, the appellant had failed to establish his claims of sex and age discrimination in connection with his removal. RID at 38-40. We find no support for the appellant’s bare claim on review that he was denied the opportunity to “identify” his claims of sex and age discrimination. We further find that the administrative judge did not abuse her discretion in denying the two witnesses the appellant requested as he has not shown that either would provide relevant, material, and nonrepetitious testimony. See 5 C.F.R. § 1201.41(b)(3), (8), (10); *Alaniz v. U.S. Postal Service*, 100 M.S.P.R. 105, ¶ 9 (2005). Although the administrative judge indicated that she would draw

an adverse inference from the appellant's refusal to testify, it is unclear whether she actually did so. Instead, she noted that the appellant offered no evidence whatsoever to support his allegations, other than his own assertions. Even if the administrative judge's statement could be deemed an adverse inference, the Board has held that it is proper for an administrative judge to draw an adverse inference under such circumstances.³ *Boal v. Department of the Army*, 51 M.S.P.R. 134, 137 (1991). We find, therefore, that the appellant has failed to show that the administrative judge erred in finding not sustained the appellant's allegations of sex and age

³ The appellant also alleges on review that the administrative judge improperly ruled his proffered evidence inadmissible. RPFR File, Tab 1 at 6. The evidence he referenced in his prehearing submission consisted of a Cass Lake Hospital organizational chart, a blank position description cover sheet, instructions, generally, for how to complete such a cover sheet, two pages from the IHS Performance Plan Reference Guide, and two pages of "People Smart," a document that appears to relate to orienting new IHS employees. RF, Tab 9. The agency objected to these documents on the basis of relevance. The administrative judge found that none of them related to the appellant's performance, RF, Tab 20, and she excluded them, RF, Tab 25. At the hearing, the administrative judge explained that the exhibits were denied because they related to the Budget Technician position that was the subject of the appellant's previous IRA appeal, and that such information was "irrelevant under many doctrines" and precluded by collateral estoppel. HT at 5. The appellant has not shown error in this ruling. To the extent he suggests on review that "each document identifies my duties and responsibilities as the First Line Supervisor or the Age, Gender, and Compensation of the Budget Technician" RPFR File, Tab 1 at 6, our review of the documents does not support the appellant's claim.

discrimination. *See Savage v. Department of the Army*, 122 M.S.P.R. 612, ¶¶ 41, 37 (2015).

¶ 13 Finally, on review, the appellant argues, as he did below, that the agency denied him due process in connection with the newly created Budget Technician position. RPFR File, Tab 1 at 6. Despite being advised of what due process is required in the context of an action taken against an employee; specifically, notice and an opportunity to respond, RF, Tab 21, and directed to identify the specific due process violation committed by the agency in its decision to remove him, the appellant failed to do so, RF, Tab 22. The administrative judge considered the appellant's several claims but found that they were not relevant to a due process violation claim and that, in any event, the record established that he received written notice of the charges against him and opportunities to respond to all the evidence relied upon by the deciding official. RID at 34-36. Beyond his mere disagreement, the appellant has not set forth any specific due process violation or otherwise shown error in the administrative judge's finding that he failed to establish his claim. *See Pollak v. Department of the Treasury*, 99 M.S.P.R. 187, ¶ 9 (2005).

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS⁴

You have the right to request further review of this final decision. There are several options for

⁴ The remand initial decision properly afforded the appellant notice of mixed case appeal rights but did not afford him notice of appeal rights under the Whistleblower Protection Enhancement Act of 2012. We have appropriately provided notice of both types of appeal rights herein.

further review set forth in the paragraphs below. You may choose only one of these options, and once you elect to pursue one of the avenues of review set forth below, you may be precluded from pursuing any other avenue of review.

Discrimination Claims: Administrative Review

You may request review of this final decision on your discrimination claims by the Equal Employment Opportunity Commission (EEOC). *See* title 5 of the U.S. Code, section 7702(b)(1) (5 U.S.C. § 7702(b)(1)). If you submit your request by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations
Equal Employment Opportunity Commission
P.O. Box 77960
Washington, D.C. 20013

If you submit your request via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations
Equal Employment Opportunity Commission
131 M Street, NE
Suite 5SW12G
Washington, D.C. 20507

You should send your request to EEOC no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with EEOC no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time.

Discrimination and Other Claims: Judicial Action

If you do not request EEOC to review this final decision on your discrimination claims, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate U.S. district court. *See* 5 U.S.C. § 7703(b)(2). You must file your civil action with the district court no later than 30 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the district court no later than 30 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. 42 U.S.C. § 2000e-5(f) and 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices described in 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction to review this final decision. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(1)(B) (as rev. eff.

Dec. 27, 2012). If you choose to file, be very careful to file on time.

If you need further information about your right to appeal this decision to court, you should refer to the Federal law that gives you this right. It is found in title 5 of the U.S. Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the U.S. Code, at our website, <http://www.mspb.gov/appeals/uscode/htm>. Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, www.ca9.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through the link below:
<http://www.uscourts.gov/CourtLocator/CourtWebsite.aspx>.

If you are interested in securing pro bono representation for your appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD s/ [illegible]
[initials] Jennifer Everling
Acting Clerk of the Board

Washington, D.C.

20a

NOTE: This order is nonprecedential.

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CLIFFORD W. JONES, SR.,

Petitioner

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Respondent

No. 2017-1624

Petition for review of the Merit Systems
Protection Board in No. CH-0432-13-1527-B-1.

Decided: February 27, 2018

ON PETITION FOR REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE,
DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO,
CHEN, and STOLL, *Circuit Judges*.*

PER CURIAM.

ORDER

Petitioner Clifford W. Jones, Sr. filed a petition
for rehearing en banc. A response to the petition
was invited by the court and filed by respondent

* Circuit Judge Hughes did not participate.

Department of Health and Human Services. The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on March 6, 2018.

FOR THE COURT:

February 27, 2018
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court