No. 17-544

IN THE
# Supreme Court of the United States

ROBERT D. VOCKE, JR,

*Petitioner*,

*v.*

MERIT SYSTEMS PROTECTION BOARD,

*Respondent*.

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

## REPLY BRIEF OF PETITIONER


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## INTRODUCTION

The petition demonstrates persistent confusion about an important and recurring question: How to assess whether the time to appeal an agency's decision is "jurisdictional" in nature. Specifically, should a court apply the categorical rule from *Bowles* (in which case tolling is unavailable), or the rebuttable presumption announced in *Irwin* that such provisions are non-jurisdictional (and therefore can be tolled)? In a published decision in Mr. Fedora's case, over multiple dissents, the Federal Circuit gave its answer: It applied *Bowles*. It did so even though the Federal Circuit itself had misled pro se litigants, like Mr. Vocke, about the relevant timing provision. Pet. 33-34. Not only is this a gross injustice; the Federal Circuit's answer conflicts with *Irwin* and subsequent decisions of this Court.[1]

The government now has filed a mini-merits brief that, like the sharply divided decision it defends, suggests that the Court's guidance is falling on deaf ears. And in so doing, the government's brief has done more to confirm the need for this Court's review than we

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[1] In addition to Mr. Vocke's petition, petitions for certiorari have also been filed to challenge the decision in *Fedora v. Merit Systems Protection Board* (No. 17-557), the Federal Circuit's latest published decision on the issue, as well as the follow-on disposition in *Musselman v. Dep't of Army* (No. 17-570), which was voluntarily dismissed in an unpublished order in light of *Fedora*. Because the briefs in opposition in *Fedora* and *Vocke* are near-identical, Mr. Vocke and Mr. Fedora are filing reply briefs that differ only in non-substantive ways. This petition cites the petition, opposition, and petition appendix in *Fedora* as "Fedora Pet.," "Fedora Opp.," and "Fedora App."

ever could. By now, the proper mode for analyzing jurisdiction should be clear. First, a court must ask whether a timing provision "govern[s] the transfer of adjudicatory authority from one Article III court to another." *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 20 (2017). If so, the provision is jurisdictional. *Bowles v. Russell*, 551 U.S. 305 (2007). If not, there is a "rebuttable presumption" that tolling is available, which can be overcome by a clear statement that Congress intended the time limit to be jurisdictional. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990); *see also, e.g.*, *Hamer*, 138 S. Ct. at 20 & n.9; *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1630-32 (2015).

Yet confusion reigns. In *Fedora*, the Federal Circuit held that *Bowles* governs, and so never even looked "'to see if there is any clear indication that Congress wanted the rule to be jurisdictional.'" Fedora App. 41a (Wallach, J.) (quoting *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011)). As Judge Plager explained, the majority opinion reads as if 15 years of the Court's decisions never happened. Fedora App. 10a-31a. Now the government takes the same approach. But the centerpiece of its argument—*Lindahl v. OPM*, 470 U.S. 768 (1985)—*wasn't even cited* by the Federal Circuit. That is proof positive that something is seriously amiss. The government's argument also is wrong; *Lindahl* does not address whether a time limit is jurisdictional, let alone apply the Court's "newer thinking about jurisdiction," Fedora App. 21a (Plager, J.). And nothing else in the government's lengthy argument justifies the Federal Circuit's elevation of and reliance on *Bowles*.

The government freely admits—indeed, it repeatedly trumpets—that the Federal Circuit has applied its rule "for over 30 years." *E.g.*, Opp. 29. That's exactly the problem, as the dissenting judges explained. Fedora App. 28a-31a. And as an array of amici have explained, that rule applies to millions of veterans and federal employees, who may lose their only opportunity for independent Article III review of agency action even when equity demands otherwise. *See also* Pet. 22-25. The Court has intervened repeatedly to "bring some discipline to the use of th[e] term" "jurisdictional," *Henderson*, 562 U.S. at 435-36, and it should do so here.

## I. The Decision Below Departs From This Court's Precedents.

1. The Federal Circuit misread *Bowles* to mean that *all* "[a]ppeal periods to Article III courts" are jurisdictional, even those governing review of administrative agencies. Fedora App. 4a. Some courts agree with this broad reading of *Bowles*; others do not. Pet. 26-30; *infra* 8-10. As the petition explains, this holding directly contravenes the Court's clear admonition that "*Bowles* did not hold categorically that every deadline for seeking judicial review in civil litigation is jurisdictional. Instead, *Bowles* concerned an appeal *from one court to another court*." *Henderson*, 562 U.S. at 436 (emphasis added); *Hamer*, 138 S. Ct. at 20 (*Bowles* applies to time limits "governing the transfer of adjudicatory authority from one Article III court to another"); *see* Pet. 16. But outside of that situation, a time limit is *not* jurisdictional unless Congress clearly said so. *Irwin*, 498 U.S. at 95-96. The government therefore is wrong that *Bowles* broadly "held that the

statutory time limit for filing a notice of appeal in a civil case is jurisdictional." Opp. 14.[2]

2. The government invokes other precedents that, it says, demonstrate that the Federal Circuit didn't need to look for a clear congressional statement. Its arguments are wrong, and if they weren't, the ad hoc regime it advocates would cry out for review and repair.

First, the government says the Court *already has decided* that the timing provision in § 7703(b)(1) is jurisdictional. Opp. 11-12, 19, 23. That would be surprising if it were true, given that the decision below didn't even cite *Lindahl* (unlike the government, which cites it six times, *see* Opp. IV). But elsewhere, the government has to admit that *Lindahl* does "not specifically discuss Section 7703(b)(1)(A)'s timing requirement." Opp. 12. Exactly. *Lindahl* said nothing about whether the timing provision in § 7703(b)(1) is "jurisdictional" (as opposed to claims-processing). Rather, it considered a different question entirely—whether a separate provision, § 7703(a)(1), limited the Federal Circuit's ability to review certain claims by retired employees that otherwise would fall within § 7703(b)(1). The Court rejected that argument, concluding that the Federal Circuit had the power—the "jurisdiction"—to hear such claims. 470 U.S. at 791-92. The government's argument thus amounts to wordplay over the term "jurisdiction," "a word of

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[2] The government elsewhere suggests the rule is that a provision "govern[ing] an appeal from a quasi-judicial agency to the court of appeals[] is jurisdictional." Opp. 21 n.8. It never reconciles its proposals.

many, too many, meanings," *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998). At most, *Lindahl* (decided in 1985) is an example of the "sometimes … profligate … use of the term" that the Court has sought to eradicate. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 510 (2006).[3]

Next, the government points to *Stone v. INS*, 514 U.S. 386 (1995), and *Henderson*, 562 U.S. 428, as obviating the need to look for a clear statement. Opp. 14-15. But the Court rejected this argument in *Henderson* itself. There, the government likewise "relie[d] on *Stone*" to argue that "*Bowles*' reasoning extends to the judicial review of administrative decisions." 562 U.S. at 437. But *Henderson* rejected the government's argument that *Bowles* ends the inquiry, and applied the clear-statement rule. And it dismissed *Stone*'s "descri[ption]" of an administrative-review deadline "as 'mandatory and jurisdictional'" as having been made "without elaboration." *Id.*

Finally, the government seeks to avoid the clear-statement rule—and to distinguish cases applying tolling to administrative-review deadlines, like *Bowen v. City of New York*, 476 U.S. 467 (1986), *see* Opp. 21—on the theory that it "makes good sense" to treat § 7703(b)(1) as jurisdictional. Opp. 17. It says that equitable tolling could involve "cumbersome" fact-finding. *Id.* But (as here), tolling often involves undisputed facts, and appellate courts have had no

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[3] The same is true of the old non-Federal-Circuit decisions the government invokes (at 13), the latest of which was decided in 1983, and each of which characterized § 7703(b)(1) as "jurisdictional" in a single, unreasoned sentence.

difficulty assessing tolling in the first instance. *E.g.*, *Smith-Penny v. SEC*, 672 F. App'x 19 (D.C. Cir. 2016) (per curiam); *Jones v. Dep't of Treasury*, No. 02-1184, 2002 WL 31655853, at *1 (D.C. Cir. Nov. 22, 2002) (per curiam). As the government itself recognizes, if additional factfinding is required, that can be conducted in the agency. Opp. 18.

3. Most of the government's argument is about these cases—under which, it says, no clear-statement rule even applies. It does ultimately acknowledge the existence of the clear-statement rule, Opp. 22, and says a little about § 7703(b)(1)'s text and structure, Opp. 12-13. But as we have explained (Pet. 20-21), the statute contains no clear statement that this timing provision is jurisdictional.

The government points to 28 U.S.C. § 1295(a)(9), which establishes subject-matter jurisdiction; notes that it cross-references § 7703(b)(1); and on that basis argues that § 7703(b)(1) is jurisdictional. Opp. 13. But the Court already has rejected this type of argument. *See Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012) (holding one provision nonjurisdictional "even though" it cross-referenced a jurisdictional provision). On the contrary, when the provision at issue (here, § 7703(b)(1)) does not speak in jurisdictional terms, and a separate provision (i.e., § 1295(a)(9)) does, "the contrast" instead "show[s] that Congress would have spoken in clearer terms if it intended [the provision] to have similar jurisdictional force." 565 U.S. at 143.

Next, the Government looks to the "origins" of § 7703(b)(1), which it says "replaced" review provi-

sions—notably the Hobbs Act—that it says are jurisdictional. Opp. 16. But to support its claim that the Hobbs Act's provision was "jurisdictional," the government cites not judicial authority, but the Court's recitation of *the government's argument* in *Henderson*, 562 U.S. at 437; *see* Respondent's Br., *Henderson v. Shinseki*, No. 09-1036, 2010 WL 4312791, at *17. What's more, that argument was based on lines of antiquated precedent that other courts since have rejected. *See Clean Water Action Council of Ne. Wisconsin, Inc. v. EPA*, 765 F.3d 749, 752 (7th Cir. 2014) (the D.C. Circuit's Hobbs Act precedent relied on "exactly the sort of thing that the Supreme Court has held does *not* mark a rule as jurisdictional"). This further conflict and confusion reaffirms the need for review.[4]

4. Not only does the government fail to demonstrate a "clear statement"; it ignores the many aspects

[4] The government elsewhere argues in a footnote (at 16-17 n.6) that § 7703(b)(1) is jurisdictional because Federal Rule of Appellate Procedure 26(b)(2) prohibits extending the time to file a petition for review. But that court-promulgated rule is not a clear statement *from Congress*. Time limits imposed by rule, rather than by statute, are *not* jurisdictional. *Hamer*, 138 S. Ct. at 17-18; *Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004); *Eberhart v. United States*, 546 U.S. 12, 19 (2005).

That same error infects *Oja v. Department of the Army*, 405 F.3d 1349, 1360 (Fed. Cir. 2005), which the government cites to show the consistency of the Federal Circuit's approach. Opp. 3-4. All *Oja* shows is that the Federal Circuit has consistently gotten § 7703(b)(1) wrong. The court in *Oja* did apply the clear-statement rule, but erroneously relied on Rule 26(b)(2) to give § 7703(b)(1) jurisdictional effect, contrary to *Kontrick*, *Eberhart*, and *Hamer*.

of the statute's text, structure, and history that show § 7703(b)(1) to be non-jurisdictional. Pet. 20-21. As noted above (at 6), § 7703(b)(1) is separate from the grant of subject-matter jurisdiction in 28 U.S.C. § 1295(a)(9). In addition, the purpose of the Civil Service Reform Act (CSRA) was to protect employees' interest in employment—to protect and expand, not cut off, their access to independent Article III courts. Nat'l Treasury Emps. Union (NTEU) Br. 11-16; Fedora App. 30a n.8 (Plager, J.); *but cf.* Opp. 19-21 (suggesting that the CSRA is not claimant-protective).

Section 7703(b)(1) is utterly unlike filing a notice of appeal in "ordinary civil litigation," Opp. 20. Rather, it is a litigant's only chance for independent Article III review of arbitrary agency decisionmaking. Congress, acting against a background presumption that tolling is available in suits against the government, "purposefully made [§ 7703(b)(1)] … applicable to … legal regimes intended to be specially protective of claimants"—including USERRA and the Veterans Employment Opportunities Act. *See* Nat'l Veterans Legal Servs. Program (NVLSP) Br. 9-10. That makes it especially unlikely that Congress intended to attach harsh jurisdictional consequences to § 7703(b)(1). Certainly Congress did not say so clearly. The government has not identified a clear statement, and the Federal Circuit didn't even look.

## II. The Lower Courts Are Riddled With Confusion.

As the petition explains, the Federal Circuit is not alone in its misunderstanding. The circuits are confused about how to treat time limits for appeals from

agencies to federal appellate courts. Pet. 25-30. Some courts, like the Federal Circuit, have found in *Bowles* a categorical rule that all appeals to Article III courts are jurisdictional. *E.g.*, *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 118-19 (2d Cir. 2008). Others apply the clear-statement rule that the Court requires. *E.g.*, *Clean Water Action Council*, 765 F.3d at 751-53. Still others continue to apply dusty precedents that "predated" the Court's "recent cases that … tightened the definition of when a rule is considered jurisdictional." *Util. Air Regulatory Grp. v. EPA*, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring).

Tellingly, the government never seriously disputes that there are multiple conflicts concerning timing provisions for appealing agency action to Article III courts. Instead, it says this case isn't about "those other disagreements." Opp. 23. Yes, obviously this isn't a Clean Air Act case. We cited these cases (*see* Pet. 31-33) because they vividly illustrate the confusion about how to treat timing provisions governing judicial review of agency decisions.[5]

The confusion is not so far removed from this case as the government suggests. There is a 4-2 circuit split over whether the time limit in § 7703(b)(1)'s neighboring provision, § 7703(b)(2), is jurisdictional.

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[5] The government similarly minimizes those conflicts as the product of "the particular provision at issue in each case." Opp. 27. For example, it says *Ruiz-Martinez* merely reaffirmed earlier statute-specific holdings, rather than being more broadly about *Bowles*. *Id.* On the contrary, *Ruiz-Martinez* turned on the same overreading of *Bowles* at issue here. 516 F.3d at 118.

Pet. 31. The government asserts that § 7703(b)(2) "differ[s] in important ways." Opp. 25. That's not the view of the D.C. Circuit, which has treated the provisions as "analogous" for jurisdictional purposes, and observed that "constructions accorded to section 7703(b)(1) apply equally to like terms in section 7703(b)(2)." *King v. Dole*, 782 F.2d 274, 275-76 (D.C. Cir. 1986). Clarification is needed, and this case is an uncommonly good vehicle to provide it.

## III. This Case Is An Ideal Vehicle For Resolving This Important And Recurring Question.

It is hard to imagine more "compelling factual arguments" than the ones presented here. App. 6a. The Federal Circuit itself, through the guide it published for pro se litigants, misled Mr. Vocke and Mr. Fedora about the filing deadline. Pet. 7-8; Fedora Pet. 7-8. The record on this subject is clear and undisputed. Pet. 7-8 (reliance on *Pro Se Guide*); Fedora Pet. 7-8 (reliance on *Pro Se Guide*, in addition to mail delay). The government identifies no obstacles to review.[6] It does suggest that it "is far from clear" that petitioners ultimately will be entitled to equitable tolling. Opp. 29. But reasonable jurists disagree, Fedora App. 10a-11a (Plager, J.); Pet. App. 6a, and in any event, how to apply the correct legal rule is a question for another day.

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[6] Counsel in *Musselman*, however, have mused that *Fedora* (but not *Vocke*) "may" be a "mixed case" subject to § 7703(b)(2), thereby "raising questions" about jurisdiction. *Musselman* Reply 11 n.7. That is simply incorrect, *see* Fedora Pet. 7 n.2, as the government expressly has acknowledged. Fedora Opp. 3 n.2; Fedora App. 34a (Federal Circuit order).

The government also suggests that the Court's attention is not needed because the Federal Circuit has corrected the erroneous instruction in its *Pro Se Guide*. Opp. 29. That the Federal Circuit has stopped affirmatively misleading pro se claimants does not fix that court's erroneous legal rule, or prevent its future application to other meritorious litigants. *Cf. Pinat v. OPM*, 931 F.2d 1544, 1546 (Fed. Cir. 1991) (the jurisdictional nature of § 7703(b)(1) precluded equitable relief despite "disastrous typhoons"); NVLSP Br. 14-18 (explaining the difficulties veterans "disproportionately … face" in meeting the § 7703(b)(1) time bar).

Most fundamentally, the question whether § 7703(b)(1)'s timing provision is jurisdictional is "exceptionally important." Fedora App. 38a (Wallach, J.). The government does not dispute that it potentially affects millions of federal employees, or that it governs their only opportunity to obtain Article III review of arbitrary administrative action. NVLSP Br. 2; NTEU Br. 1-2; Am. Fed'n of Gov't Emps. Br. 1-3. Nor does the government dispute that § 7703(b)(1) applies to multiple statutes in addition to the CSRA, *see* Pet. 23 n.5—including actions to protect the rights of the half-million military veterans in federal service. NVLSP Br. 2-5. And because the Federal Circuit has exclusive appellate jurisdiction over numerous administrative bodies and Article I courts, its categorical rule threatens to curtail review well beyond the MSPB, *see* Fed. Circuit Bar Ass'n (FCBA) Br. 15-16—a concern the government answers with silence.

Now is the appropriate time to address this issue, and this case is ideally suited for doing so. The government itself notes that, in *Fedora*, the Federal Circuit applied the same approach it has used "for over 30 years," Opp. 29, as though foolish consistency were a virtue. What it signals is that this Court's instructions are being ignored. The Federal Circuit has given its definitive ruling, unmoved by decades of intervening precedents, four months of en banc consideration, and multiple impassioned dissents. Nothing will change unless and until the Court steps in.

## CONCLUSION

For the foregoing reasons, the Court should grant the petitions in this case and in *Fedora*, or alternatively hold this petition pending resolution of *Fedora*.

Respectfully submitted,

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