**No. 23-21**

*In the Supreme Court of the United States*

STUART R. HARROW,

*Petitioner,*

v.

DEPARTMENT OF DEFENSE,

*Respondent.*

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

# REPLY BRIEF IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**CASES**

**RULES AND STATUTES**

## ARGUMENT

Respondent does not dispute that the jurisdictional character of Section 7703(b)(1)(A)'s deadline is an important question of law that warrants this Court's resolution.

Instead, Respondent makes three arguments: (A) on the merits, Section 7703(b)(1)(A)'s deadline is jurisdictional; (B) the Federal Circuit's rule does not conflict with any other decisions; and (C) this case is a poor vehicle for resolving the question presented. Respondent is mistaken on all three points.

### A. Section 7703(b)(1)(A)'s Deadline Is Nonjurisdictional Under this Court's Precedents.

1. On the merits, Respondent argues that the deadline is jurisdictional. (BIO at 8.) To the contrary, this Court's precedents establish that Section 7703(b)(1)(A)'s deadline is nonjurisdictional.

Recognizing a history of loose use of the term "jurisdiction," this Court has "endeavored to bring some discipline to use of the jurisdictional label," *Boechler v. Commissioner*, 142 S. Ct. 1493, 1497 (2022) (internal quotations omitted). That discipline focuses on "the distinction between limits on the classes of cases a court may entertain (subject-matter jurisdiction) and nonjurisdictional claim-processing rules, which seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times." *Wilkins v. United States*, 598 U.S. 152, 157 (2023) (internal quotations omitted).

To police the line between jurisdictional classifications and nonjurisdictional claim-processing

rules, this Court treats a requirement as jurisdictional "only if Congress clearly states that it is." *Id.* at 876 (internal quotations omitted). "Congress need not use 'magic words,'" but "the statement must indeed be clear; it is insufficient that a jurisdictional reading is 'plausible' or even 'better,' than nonjurisdictional alternatives." *MOAC Mall Holdings LLC v. Transform HoldCo LLC*, 598 U.S. 288, 298 (2023) (quoting *Boechler*, 142 S. Ct. at 1499).

In applying this clear statement rule, this Court "ha[s] made plain that most time bars are nonjurisdictional." *United States v. Wong*, 575 U.S. 402, 410 (2015); *see also Musacchio v. United States*, 577 U.S. 237, 246 (2016) ("[F]iling deadlines ordinarily are not jurisdictional." (internal quotations omitted)). Congress can make a time bar jurisdictional, "[b]ut to be confident Congress took that unexpected tack, we would need unmistakable evidence, on par with express language addressing the court's jurisdiction." *Santos-Zacaria v. Garland*, 598 U.S. 411, 418 (2023).

"Start[ing] with the text," *MOAC Mall*, 598 U.S. at 299, the deadline provision in Section 7703(b)(1)(A) "does not expressly refer to subject-matter jurisdiction or speak in jurisdictional terms," *Musacchio*, 577 U.S. at 246. Rather, it "speaks only to a [petition's] timeliness, not to a court's power." *Wong*, 575 U.S. at 410. The text "simply instruct[s] 'parties [to] take certain procedural steps at certain specified times.'" *Boechler*, 142 S. Ct. at 1497 (quoting *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011)). The text is jurisdictionally indistinguishable from the language of review deadlines held nonjurisdictional in other cases. *E.g.*, *id.* at 1497–98, 1501; *Sebelius v. Auburn Reg'l*

*Med. Ctr.*, 568 U.S. 145, 155 (2013); *Henderson*, 562 U.S. at 438–39.

Unable to contest this point, Respondent focuses instead on statutory structure, arguing that 28 U.S.C. § 1295(a)(9), which gives the Federal Circuit "exclusive jurisdiction" over "an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d)," contains an "express cross-reference" linking the jurisdictional language of Section 1295(a)(9) to the deadline in Section 7703(b)(1)(A). (BIO at 10.)

But this Court has held that mere cross-reference is not enough to bring a requirement within the jurisdictional fold. *See Fort Bend County v. Davis*, 139 S. Ct. 1843, 1851 n.3 (2019) ("[A] nonjurisdictional provision does not metamorphose into a jurisdictional limitation by cross-referencing a jurisdictional provision."); *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012) (noting that a requirement can be nonjurisdictional "even though it too cross-references . . . and is cross-referenced by" jurisdictional provisions).

At most, the first sentence of Section 7703(b)(1)(A), providing that "a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit," is jurisdictional because it, like similar language of Section 1295(a)(9), identifies the appropriate court for such petitions. *See Lindahl v. OPM*, 470 U.S. 768, 792 (1985) (quoting this first sentence and stating that "Sections 1295(a)(9) and 7703(b)(1) together appear to provide for exclusive jurisdiction over MSPB decisions in the Federal Circuit").

But even if the first sentence of Section 7703(b)(1)(A) is jurisdictional (and Petitioner doubts that it is), that does not make the deadline contained in the second sentence jurisdictional too. *Boechler*, 142 S. Ct. at 1498 (holding the deadline to appeal an IRS determination to the Tax Court to be nonjurisdictional even though it appeared in the same sentence as language providing that "the Tax Court shall have jurisdiction with respect to such matter"); *Gonzalez*, 565 U.S. at 146 ("Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle.").

Rather than proximity or cross-references, the text must clearly show that Congress meant to "condition[]" the jurisdictional grant on compliance with the deadline. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 165 (2010). This Court has illustrated conditional language with terms like "where," "unless," and "if." *Fort Bend County*, 139 S. Ct. at 1849; *Boechler*, 142 S. Ct. at 1498–99. Less conditional language is insufficient. In *Boechler*, it was not enough that the statute provided for a deadline and, in the same sentence, granted "jurisdiction with respect to such matter." *Boechler*, 142 S. Ct. at 1498.

Respondent has not pointed to any language in the deadline of Section 7703(b)(1)(A) that creates a conditional link to a jurisdictional grant. Respondent relies entirely upon the phrase "pursuant to" in Section 1295(a)(9), but that language is a mere cross-reference, no more conditional than "with respect to." Thus, the deadline is not a jurisdictional condition but rather is an ordinary, claim-processing filing deadline.

2. Instead of analyzing these cases, Respondent anchors its argument to statements in the 1985 case *Lindahl* that generally characterize Section 7703(b)(1) as jurisdictional. (BIO at 8–10.) Although this Court "will not undo a definitive earlier interpretation of a statutory provision as jurisdictional without due regard for principles of *stare decisis*," the decision must "turn[] on that characterization." *Wilkins*, 598 U.S. at 159–60 (internal quotation marks omitted). If it does not, the decision is a "drive-by jurisdictional ruling[]" entitled to "no precedential effect." *Id.* at 160.

*Lindahl* cannot meet the standard of a "definitive earlier interpretation." The Federal Circuit, in its opinions interpreting the jurisdictional character of Section 7703(b)(1)(A), has never once relied on *Lindahl*, and for good reason. As Respondent concedes, "*Lindahl* did not specifically discuss Section 7703(b)(1)'s timing requirement." (BIO at 9.) Nor is there any indication in the Court's opinion that the deadline "is necessarily one of the 'jurisdictional perimeters' that *Lindahl* recognized." (*Id.*) *Lindahl* pertains only to the first sentence of Section 7703(b)(1)(A): where certain cases must be filed. *Lindahl*, 470 U.S. at 792–93. Because nothing in *Lindahl* turns on the deadline or its jurisdictional character, *Lindahl* cannot control here. *Cf. Wilkins*, 598 U.S. at 165 (rejecting "the Government's method of divining definitive interpretations from stray remarks").

3. Respondent also points to lower courts' jurisdictional interpretations of the deadline in Section 7703(b)(1)(A) and the deadline in the Hobbs Act. (BIO at 11–12.) But this Court has consistently rejected arguments based on lower-court treatment,

even if uniform. *See MOAC Hall*, 598 U.S. at 304; *Boechler*, 142 S. Ct. at 1500; *Reed Elsevier*, 559 U.S. at 160 n.2.[1] What is important is the characterization that *this Court* has given, *Fort Bend County*, 139 S. Ct. at 1849; *Reed Elsevier*, 559 U.S. at 167–68, and this Court has never characterized the deadline in Section 7703(b)(1)(A) as jurisdictional.

### B. The Federal Circuit's Rule Conflicts with Other Courts.

1. The Petition showed that the Federal Circuit's interpretation of *Bowles* to set a categorical rule that "[a]ppeal periods to Article III courts" are jurisdictional, *Fedora v. Merit Sys. Protection Bd.*, 848 F.3d 1013, 1014 (Fed. Cir. 2017), is a misinterpretation of *Bowles* and conflicts with *Bowen v. City of New York*, 476 U.S. 467 (1986) (holding nonjurisdictional the 60-day deadline for seeking judicial review of a final decision of the Social Security Administration in federal district court).

Respondent attempts to distinguish *Bowen* on the ground that Congress provided for agency review in the district court instead of in the courts of appeals. (BIO at 15.) That is a distinction without a difference. No opinion from this Court has ever suggested that deadlines for agency review are jurisdictionally special when they lodge review in the courts of appeals.

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[1] Even were lower-court treatment of the Hobbs Act's deadline relevant, Respondent has misstated the uniformity of that treatment. *E.g.*, *Brotherhood of Locomotive Eng'rs & Trainmen v. Fed. R. Admin.*, 972 F.3d 83, 103 (D.C. Cir. 2020) (stating that "we have recognized exceptions to the limitations period" in the Hobbs Act); *Carpenter v. Dep't of Transp.*, 13 F.3d 313, 315 (9th Cir. 1994) (assuming that equitable tolling could apply to the Hobbs Act deadline).

Respondent also distinguishes *Bowen* on grounds that social-security appeals are different from MSPB appeals. (*Id.*) Without conceding the point, Petitioner points out that *Fedora*'s categorical interpretation of *Bowles* admits of no such distinctions. *Fedora*'s rule conflicts with *Bowen* whether social-security appeals are different or not.

2. The Petition showed that the characterization of Section 7703(b)(1)(A)'s deadline as jurisdictional conflicts with decisions holding Section 7703(b)(2)'s deadline to be nonjurisdictional. Respondent contends that Section 7703(b)(2)'s deadline is different because *Lindahl* did not address it (BIO at 17–18), but, as Respondent acknowledges, *Lindahl* did not address Section 7703(b)(1)(A)'s deadline, either. The two deadlines are textually indistinguishable, and nothing in their statutory structures gives one more jurisdictional heft than the other.

**C. This Case Warrants Review.**

1. Respondent does not dispute that the jurisdictional character of Section 7703(b)(1)(A)'s deadline is an important legal issue. Instead, Respondent argues that this case is a poor vehicle for resolving the issue because, even if nonjurisdictional, the deadline would not be subject to equitable tolling anyway. (BIO at 18–20.) Respondent's assurances are overstated and premature.

That equitable tolling may or may not be available has not stopped this Court from granting certiorari to review a deadline's jurisdictional character. *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 22 (2017) (remanding for consideration of equitable tolling); *Henderson*, 562 U.S. at 442 (remanding for consideration of any exceptions to a nonjurisdictional

deadline); *cf. MOAC Mall*, 598 U.S. at 305 & n.10 (holding only that the requirement is nonjurisdictional and remanding for other questions bearing on the requirement's meaning and scope); *Reed Elsevier*, 559 U.S. at 171 (holding a statutory condition nonjurisdictional but declining to address whether it is mandatory). That is because, without a determination of nonjurisdictionality, equitable tolling cannot be evaluated in the first instance by the lower courts.

Respondent contends that Rule 26(b) of the Federal Rules of Appellate Procedure prohibits equitable tolling of Section 7703(b)(1)(A)'s deadline (BIO at 19–20), but this Court has never so held, and the Federal Circuit has not had the opportunity to consider Rule 26's independent applicability. In the decision below, the Federal Circuit's "cf" cite to Rule 26 indicates that any reliance on Rule 26 is dependent upon its primary holding that the deadline is jurisdictional. (Pet. App. at 2a.)

Whether Rule 26 supplies an independent basis for prohibiting equitable tolling of Section 7703(b)(1)(A)'s deadline in the face of this Court's precedents presuming equitable tolling for nonjurisdictional deadlines, *e.g.*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95–96 (1990); *see also Fedora v. Merit Sys. Protection Bd.*, 868 F.3d 1336, 1339 (Fed. Cir. 2017) (en banc) (Wallach, J., dissenting) (arguing that *Irwin*'s presumption of equitable tolling should apply if the deadline is nonjurisdictional), is a question that the parties can brief on the merits before this Court (if this Court so wishes) or on remand before the Federal Circuit.

2. Respondent also argues that, even if equitable tolling is available, Petitioner would not be entitled to it on the facts. (BIO at 20.) That issue has never been litigated in any lower court or agency proceeding, and Respondent's prediction here—without the benefit of any factual development or legal argument—should carry no weight. *Cf. Boechler*, 142 S. Ct. at 1501 (stating that whether equitable tolling applies to the facts of the case "should be determined on remand").

3. The Petition set out the need for this Court's intervention to correct the Federal Circuit's repeated, summary invocation of a lack of jurisdiction to avoid considering petitions filed out of time, largely by pro se employees. (Pet. at 14–15.) Unlike prior employees afflicted by the Federal Circuit's rule, this employee has counsel. This employee has the will to litigate the issue vigorously before this Court. The Petition squarely raises the questions presented, no antecedent issues impede this Court's review, and the question presented can be answered clearly. This case is not a poor vehicle for resolving the jurisdictional character of Section 7703(b)(1)(A)'s deadline. It is the ideal vehicle.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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