No. 23-21

IN THE

Supreme Court of the United States

STUART R. HARROW,

Petitioner,

v.

DEPARTMENT OF DEFENSE,

Respondent.

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the 60-day filing deadline in 5 U.S.C. § 7703(b)(1)(A) is jurisdictional.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES AND STATUTES

OTHER

INTRODUCTION

For some twenty years, this Court has applied a "readily administrable bright line" test to distinguish between jurisdictional statutes and nonjurisdictional claim-processing rules. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006). To rank as jurisdictional, a statute must contain jurisdictional terms, speak to the power of the court, or contain an express condition on a grant of jurisdiction. In the absence of those features, unless there is a definitive earlier treatment of the statute that holds otherwise, the provision is deemed nonjurisdictional.

The Federal Circuit nevertheless held that the 60-day deadline for filing an appeal from a decision of the Merit Systems Protection Board (MSPB) is jurisdictional, even though the statutory provision at issue does not satisfy any of those criteria. 5 U.S.C. § 7703(b)(1)(A). To reach that conclusion, the court eschewed a textual analysis of Section 7703(b)(1)(A) altogether, instead relying on a supposed analogy to an unrelated appellate deadline. The lower court's approach—not to mention the outcome—was plainly wrong. This Court has repeatedly admonished that filing deadlines are ordinarily not jurisdictional, and both the text and the structure of Section 7703(b)(1)(A) confirm that this deadline is of the ordinary type.

That conclusion is consistent with the rest of the statutory scheme, which Congress designed to be especially solicitous toward employees. The MSPB hears challenges by federal employees to actions by their agency employers. Employees are often pro se, and the federal agency bears special burdens of notice and proof. A rigid, jurisdictional deadline would clash sharply with that scheme.

The facts of this case illustrate the point. Petitioner Stuart R. Harrow brought a furlough claim against his employer, Respondent Department of Defense. Harrow diligently pursued his claim, pro se, before the MSPB. But when the Board lost a quorum, his case stalled for more than five years. And when the Board finally acquired a quorum, it notified Harrow of its decision using only his old email address, which the agency had stopped forwarding to him. Upon discovering the Board's decision 109 days later, Harrow promptly sought review in the Federal Circuit. The Government did not contest the timeliness of Harrow's petition for review. Instead, the Federal Circuit, acting *sua sponte*, dismissed Harrow's petition on the ground that the 60-day filing deadline contained in Section 7703(b)(1)(A) is jurisdictional.

The decision below was incorrect under this Court's precedents. The statutory deadline is nonjurisdictional, and the Federal Circuit's judgment dismissing Harrow's petition should be reversed.

OPINIONS BELOW

The unpublished per curiam panel opinion of the Federal Circuit is available at 2023 WL 1987934 and is reproduced in Appendix A to the petition for a writ of certiorari.

The unpublished per curiam decision of the Federal Circuit denying rehearing is reproduced in Appendix B to the petition for a writ of certiorari.

The unpublished decision of the Merit Systems Protection Board, No. PH-0752-13-3305-I-1, is available at 2022 WL 1495611 and is reproduced in Appendix C to the petition for a writ of certiorari.

JURISDICTION

The Federal Circuit entered judgment on February 14, 2023, and denied rehearing on April 17. The petition for a writ of certiorari was filed on July 3 and granted on December 8. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

5 U.S.C. § 7703(b)(1)(A) provides:

> Except as provided in subparagraph (B) and paragraph (2) of this subsection, 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. 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.

Other relevant statutory provisions are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

1. Since 1883, Congress has attempted to assure good government by regulating federal personnel practices. *See* An Act to Regulate and Improve the Civil Service of the United States, Pub. L. No. 47-27, 22 Stat. 403 (1883). In 1978, Congress comprehensively reformed and expanded that regulatory regime in the Civil Service Reform Act (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (1978).

The CSRA established the Merit Systems Protection Board (MSPB), an independent agency

"charged with protecting federal employees against improper employment-related actions." Cong. Rsch. Serv., *Merit Systems Protection Board (MSPB): A Legal Overview*, R45630, at summary (2019), https://crsreports.congress.gov/product/pdf/R/R45630.

The MSPB fulfills that mission primarily by resolving federal employment disputes. Federal employees aggrieved by an agency's adverse employment action may appeal the agency decision to the MSPB. 5 U.S.C. § 7701(a). Although employees have a right to appear through counsel or other nonlawyer representative before the MSPB, "about 50%" proceed pro se. U.S. Merit Sys. Prot. Bd., *Congressional Budget Justification FY 2022*, at 18 (2021), https://www.mspb.gov/about/budget/FY_2022_Congressional_Budget_Justification.pdf.

MSPB adjudication is quasi-judicial. At a high level of generality, the process resembles the structure of American litigation, including discovery, written motions, adversarial hearings before administrative judges, and appeals to the Board. *See Spithaler v. Off. of Pers. Mgmt.*, 1 M.S.P.R. 587, 589 (1980).

But in the details, the process exhibits an unusual solicitude for federal employees. As Congress noted, "The Board uses less formal procedures, discovery, and rules of evidence than federal courts, adapted for the fact that most employees appearing before the Board are not represented by counsel." S. Rep. No. 112-155, at 26 (2012).

For example, the MSPB's regulations require detailed notification rights to federal employees. 5 C.F.R. § 1201.21. The agency must respond to an appeal with a statement identifying the agency action, the reasons for the action, all documents contained in

the agency record of the action, and any other documents or responses requested by the MSPB. *Id.* § 1201.25. The agency bears the burden of proof that its employment action was lawful. *Id.* § 1201.56(b). And rules governing discovery and the presentation of evidence are simplified. *Id.* § 1201.71–.75.

These special, employee-friendly procedures advance Congress's aims of ferreting out and rectifying unlawful employment practices by ensuring that often-unrepresented employees are not stymied by unduly rigid procedures. *Cf.* U.S. Merit Sys. Prot. Bd., *Judges' Handbook*, ch. 2, § 7 (2019), https://www.mspb.gov/appeals/files/ALJHandbook.pdf ("The MSPB's policy is to make special efforts to accommodate pro se appellants. . . . Generally, the AJ should not reject filings by pro se appellants for failing to comply with technical requirements, unless the violations are repeated after a clear warning.").

That solicitude for federal employees extends to filing deadlines. The 30-day deadline to file an appeal of most agency decisions with the MSPB, 5 C.F.R. § 1201.22(b)(1), is nonjurisdictional and may be excused for good cause, *Lacy v. Dep't of the Navy*, 78 M.S.P.R. 434, 436–39 (1998). When an appeal is dismissed without prejudice, and the employee misses the refiling deadline, the MSPB may waive the deadline for good cause, 5 C.F.R. § 1201.29(d), and the employee's pro se status is a factor in support, *Gaddy v. Dep't of the Navy*, 100 M.S.P.R. 485, 489 (2005). MSPB decisions are final unless a party "petitions the Board for review within 30 days after receipt of the decision," but this statutory deadline may be extended by the Board. 5 U.S.C. § 7701(e)(1).

Aggrieved employees whose claims are rejected by the MSPB may seek judicial review in federal court. *Id.* § 7703(a)(1). For cases not involving discrimination or whistleblower retaliation, a petition to review a final MSPB decision must be filed in the Federal Circuit. The petition "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. In *Fedora v. MSPB*, 848 F.3d 1013, 1016 (Fed. Cir. 2017), a divided panel of the Federal Circuit held this 60-day deadline to be jurisdictional. Despite decisions from this Court holding other filing deadlines to be nonjurisdictional, the majority interpreted *Bowles v. Russell*, 551 U.S. 205, 209 (2007) (holding the statutory deadline to file a notice of appeal from a district court to a court of appeals in a civil case to be jurisdictional), to categorically control *all* appeal periods to Article III courts. *Fedora*, 848 F.3d at 1015 ("Appeal periods to Article III courts, such as the period in § 7703(b)(1), are controlled by the Court's decision in *Bowles* . . . .").

On this premise alone, the majority held the filing deadline in Section 7703(b)(1)(A) to be jurisdictional. *Id.* at 1016. And relying on that jurisdictional holding, the majority concluded that "the jurisdictional nature of the timeliness requirement precludes equitable exceptions." *Id.*; *see also id.* at 1017 (citing *Bowles* to conclude that "we do not have the authority to equitably toll the filing requirements").

Judge Plager dissented from the panel decision in *Fedora*. After recounting in detail this Court's presumption of equitable tolling in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), and this Court's more recent decisions on

nonjurisdictional deadlines, Judge Plager rejected categorical reliance on *Bowles* and instead urged consideration of "whether Congress has, in some clear manner, rebutted the presumption of the availability of equitable tolling." *Fedora*, 848 F.3d at 1025 (Plager, J., dissenting). Judge Plager also emphasized the "considerable support for the proposition that MSPB proceedings are intended to be specially protective of claimants." *Id.* at 1026 (Plager, J., dissenting).

The Federal Circuit then denied rehearing and rehearing en banc, over the dissent of five judges. *Fedora v. MSPB*, 868 F.3d 1336 (Fed. Cir. 2017) (per curiam). Judge Wallach's dissent from denial of en banc review distinguished *Bowles* as controlling only appeals *between* Article III courts, agreed with Judge Plager's conclusion that the court should determine if Congress clearly rebutted the presumption in favor of equitable tolling, and characterized the opportunity to rehear *Fedora* as "exceptionally important" because the issue "more often affects pro se litigants than others." *Id.* at 1338–40 (Wallach, J., dissenting).

Since then, the Federal Circuit has consistently relied upon *Fedora* to summarily dismiss untimely petitions for lack of jurisdiction. In the span of roughly nine weeks, from February 13, 2023, to April 21, 2023, the Federal Circuit relied on *Fedora* to summarily dismiss six petitions, all brought pro se. *Hobson v. Dep't of Def.*, No. 23-1258, 2023 WL 3033467 (Fed. Cir. Apr. 21, 2023); *Castillejos v. Off. of Pers. Mgmt.*, No. 23-1207, 2023 WL 2808067 (Fed. Cir. Apr. 6, 2023); *Edwards v. Off. of Pers. Mgmt.*, No. 22-2245, 2023 WL 2641135 (Fed. Cir. Mar. 27, 2023); *Novilla v. Dep't of Agric.*, No. 23-1118, 2023 WL 2321985 (Fed. Cir. Mar. 2, 2023); *Casillas v. Dep't of Veterans Affs.*, No. 22-

2264, 2023 WL 2029130 (Fed. Cir. Feb. 16, 2023); *Harrow v. Dep't of Def.*, No. 22-2254, 2023 WL 1987934 (Fed. Cir. Feb. 14, 2023).

3. Petitioner Stuart R. Harrow, a longtime employee of the Department of Defense, was furloughed in 2013. Proceeding pro se, he challenged his furlough on grounds of financial hardship before an administrative judge at the MSPB, who affirmed the agency's decision. Still pro se, Harrow timely appealed to the Board. Pet. App. 2c–3c.

While Harrow's appeal was pending, on January 8, 2017, the Board lost its quorum of members; without a quorum, the Board could not resolve any appeals. *See* U.S. Merits Sys. Prot. Bd., *Congressional Budget Justification*, *supra*, at 1. More than five years later, on May 11, 2022, after finally obtaining a quorum, the Board issued a final action in Harrow's appeal, affirming the administrative judge's decision. Pet. App. 1c–16c.

During the several years that Harrow's appeal was pending before the Board, the Department of Defense changed email servers. Harrow did not notify the Board of his changed email address because he mistakenly believed that the emails sent to his old address would continue to be forwarded to his new email address. Consequently, he did not receive notice of the Board's final action on May 11, 2022, because the Board served him only via his old email address. Pet. App. 2a.

Harrow discovered the Board's final action on August 30, 2022. *Id.* Continuing pro se, he promptly filed his petition for review of the Board's decision with the Federal Circuit seventeen days later, on September 16, 2022. *Id.* The Government did not

contest the timeliness of Harrow's petition. Instead, on November 21, the Federal Circuit issued a *sua sponte* order directing the parties to show cause why the case should not be dismissed. Dkt. No. 7 in Case No. 22-2254 (Fed. Cir.). Harrow responded to the order, but the Government did not. *See* Dkt. No. 8.

On February 14, 2023, in a per curiam order, the Federal Circuit dismissed Harrow's petition for review on the ground that he had not filed his petition within Section 7703(b)(1)(A)'s 60-day deadline. Pet. App. 1a–3a. The court indicated that it was "sympathetic to Mr. Harrow's situation," but, relying on *Fedora*, held that "[t]he timely filing of a petition from the Board's final decision is a jurisdictional requirement." *Id.* at 2a. On March 30, still proceeding pro se, Harrow filed a petition for panel rehearing, which the Federal Circuit denied on April 17, 2023. Pet. App. 1b–2b.

4. Harrow secured counsel and petitioned for a writ of certiorari to decide a single question: "whether the 60-day deadline in Section 7703(b)(1)(A) is jurisdictional." Pet. at i. This Court granted the petition.

SUMMARY OF ARGUMENT

The 60-day deadline in Section 7703(b)(1)(A) is not jurisdictional. A requirement is jurisdictional "only if Congress clearly states that it is." *Wilkins v. United States*, 598 U.S. 152, 157 (2023) (quotation marks omitted). For filing deadlines, such a clear statement requires "unmistakable evidence, on par with express language addressing the court's jurisdiction." *Santos-Zacaria v. Garland*, 598 U.S. 411, 417 (2023).

Nothing in the deadline's text provides such clear and unmistakable evidence. The deadline neither speaks in jurisdictional terms nor refers to the power of the court. It is a run-of-the-mill filing deadline, no different from other deadlines this Court has held to be nonjurisdictional.

Nor does statutory context provide the required clear and unmistakable evidence. Congress has not "conditioned" any jurisdictional grant on compliance with the deadline. *United States v. Wong*, 575 U.S. 402, 418 (2015). Nor has this Court long treated such deadlines as jurisdictional. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 167–68 (2010). The deadline is part of a remedial scheme unusually protective of claimants like Harrow. Under these circumstances, the clear-statement test is not met.

In addition, this Court has never issued a "definitive earlier interpretation of [the] statutory provision as jurisdictional." *Wilkins*, 598 U.S. at 159 (quotation marks omitted). Such a "definitive earlier interpretation" must do more than merely mention the section that houses the deadline but must instead address the deadline "specifically." *Santos-Zacaria*, 598 U.S. at 421–22. This Court has never specifically construed the deadline in Section 7703(b)(1)(A).

Because the Federal Circuit erred in holding the deadline to be jurisdictional, this Court should reverse its judgment dismissing Harrow's petition.

ARGUMENT

A. No Unmistakable Evidence of a Clear Statement Establishes that the Deadline in Section 7703(b)(1)(A) Is Jurisdictional.

1. 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. Comm'r*, 596 U.S. 199, 203 (2022) (quotation marks 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*, 598 U.S. at 157 (quotation marks omitted).

The distinction is key because jurisdictional rules carry "unique and sometimes severe consequences," *MOAC Mall Holdings LLC v. Transform HoldCo LLC*, 598 U.S. 288, 297 (2023), that "alter[] the normal operation of our adversarial system," *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). "Jurisdictional requirements cannot be waived or forfeited, must be raised by courts *sua sponte*, and . . . do not allow for equitable exceptions." *Boechler*, 596 U.S. at 203.

To prevent those harsh and unusual consequences from being attributed to nonjurisdictional claim-processing rules contrary to congressional intent, this Court treats a requirement as jurisdictional "only if Congress clearly states that it is." *Wilkins*, 598 U.S. at 157 (quotation marks 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*, 598 U.S. at 298 (quoting *Boechler*, 596 U.S. at 206).

Under this test, this Court "ha[s] made plain that most time bars are nonjurisdictional." *Wong*, 575 U.S. at 410; *see also Musacchio v. United States*, 577 U.S. 237, 246 (2016) ("[F]iling deadlines ordinarily are not jurisdictional." (quotations omitted)); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013) ("Key to our decision, we have repeatedly held that filing deadlines ordinarily are not jurisdictional[.]"); *Henderson*, 562 U.S. at 435 ("Filing deadlines . . . are quintessential claim-processing rules."); *Arbaugh*, 546 U.S. at 510 ("[T]ime prescriptions, however emphatic, are not properly typed jurisdictional." (quotation marks omitted)).

"When faced with a type of statutory requirement that ordinarily is not jurisdictional, we naturally expect the ordinary case, not an exceptional one." *Santos-Zacaria*, 598 U.S. at 417 (alterations and quotation marks omitted). Congress can make a deadline 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." *Id.* at 418; *see also Wong*, 575 U.S. at 410 ("Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it.").

2. "Start[ing] with the text," *MOAC Mall*, 598 U.S. at 299, the deadline provision at issue states:

> [A]ny 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).

Nothing in that provision clearly and unmistakably marks the deadline as jurisdictional. It "does not expressly refer to subject-matter jurisdiction or speak in jurisdictional terms." *Musacchio*, 577 U.S. at 246. Nor does it refer to "the power of the court," *Reed Elsevier*, 559 U.S. at 161, or purport to "set[] the bounds of the court's adjudicatory authority," *Santos-Zacaria*, 598 U.S. at 416 (quotation marks omitted). Rather, this language "simply instruct[s] parties to take certain procedural steps at certain specified times." *Boechler*, 596 U.S. at 203 (alterations and quotation marks omitted). It "reads like an ordinary, run-of-the-mill statute of limitations, spelling out a litigant's filing obligations without restricting a court's authority." *Wong*, 575 U.S. at 411 (quotation marks omitted). This is not the language Congress is expected to use to mark a deadline as jurisdictional.

Section 7703(b)(1)(A)'s text is indistinguishable from the language of deadlines held nonjurisdictional in other cases. For example, this Court has held that the following language "provides no clear indication that Congress wanted that provision to be treated as having jurisdictional attributes":

> "[A] person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed . . . ."

Henderson, 562 U.S. at 438–39 (quoting 38 U.S.C. § 7266(a)). Time and again, this Court has held similarly worded deadlines nonjurisdictional. *See, e.g.*, *Boechler*, 596 U.S. at 204, 211 (holding statutory language providing that a "person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination" to be "an

ordinary, nonjurisdictional deadline"); *Sebelius*, 568 U.S. at 154 (holding a statutory directive for a provider to "file[] a request for a hearing within 180 days after notice of the intermediary's final determination" to not speak in jurisdictional terms). Like these examples, the text of Section 7703(b)(1)(A)'s deadline contains no clear statement of jurisdictionality.

3. In addition to text, nothing in the statutory context clearly indicates that Congress meant to rank the 60-day deadline as jurisdictional.

a. No part of Section 7703 speaks expressly to jurisdiction. Congress's express grant of jurisdiction to the Federal Circuit appears in a different title of the United States Code. *See* 28 U.S.C. § 1295(a). As this Court has noted repeatedly, "Congress's separation of a filing deadline from a jurisdictional grant indicates that the time bar is not jurisdictional." *Wong*, 575 U.S. at 411; *see also, e.g.*, *Reed Elsevier*, 559 U.S. at 164.

Section 1295(a)(9) does give the Federal Circuit exclusive jurisdiction over "an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to section 7703(b)(1) and 7703(d)." But this reference does not make the deadline in Section 7703(b)(1)(A) also jurisdictional.

A mere cross-reference is not enough to bring a requirement within the jurisdictional fold. *See Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1851 n.8 (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).

Instead, the text must clearly show that Congress meant to "condition[]" the jurisdictional grant on compliance with the deadline. *Wong*, 575 U.S. at 412; *Reed Elsevier*, 559 U.S. at 165. The term "where" can establish such a condition. For example, Congress conditioned diversity jurisdiction on an amount in controversy using "where." 28 U.S.C. § 1332(a) (giving district courts "original jurisdiction of all civil actions *where* the matter in controversy exceeds the sum or value of $75,000") (emphasis added)); *Fort Bend Cnty.*, 139 S. Ct. at 1849 (casting Section 1332 as illustrative conditional language).

Likewise, Congress can condition jurisdiction upon the filing of a timely appeal using "unless" or "if." *Boechler*, 142 S. Ct. at 1499 ("The Tax Court shall have no jurisdiction under this paragraph to enjoin any action or proceeding *unless* a timely appeal has been filed under subsection (d)(1)." (emphasis added)). *id.* at 1498–99 ("The individual may petition the Tax Court (and the Tax Court shall have jurisdiction) . . . *if* such petition is filed during the 90-day period." (emphasis added)); *Gonzalez*, 565 U.S. at 142 ("*Unless* a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals." (emphasis added)).

Had Congress wished to condition Section 1295(a)'s grant of jurisdiction on all the operational details of Section 7703(b)(1), it would have used language clearly doing so, such as by granting jurisdiction "of an appeal from a final order or final decision of the Merit Systems Protection Board *when filed within the time and in the manner prescribed by* section 7703(b)(1)." Congress knows how to use that language; it did so in granting the Federal Circuit jurisdiction over appeals

from the Veterans Court. *See* 38 U.S.C. § 7292(a) ("Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims *within the time and in the manner prescribed* for appeal to United States courts of appeals from United States district courts." (emphasis added)); *Henderson*, 562 U.S. at 438 (discussing this language).

In contrast, neither Section 1295(a)(9) nor Section 7703(b)(1) uses conditional terms. Section 1295(a)(9) instead uses the mundane phrase "pursuant to," set off by a comma, which does not suggest a condition on the jurisdictional grant. Instead, the phrase here most naturally means "[a]s authorized by; under," as in "pursuant to Rule 56, the plaintiff moves for summary judgment." *Pursuant To*, Black's Law Dictionary (11th ed. 2019). "Pursuant to" is used this way not as a conditional reference but as an *identifying* reference, which is to say, a cross-reference. Section 1295(a)(9) simply extends the Federal Circuit's exclusive jurisdiction to certain MSPB appeals, as authorized by or under Sections 7703(b)(1) and 7703(d).

"Under" or its equivalent is not enough. In *Fort Bend County*, Fort Bend argued that Title VII's jurisdictional provision, which granted jurisdiction over "actions brought under this subchapter," made the charge-filing requirement in that subchapter jurisdictional. 139 S. Ct. at 1851 n.8. This Court rejected that argument because that textual link was no more than a cross-reference. *Id.*

The same logic applies here. As in Title VII, nothing clearly indicates that the operational specifics of Section 7703(b)(1)—*i.e.*, compliance with the 60-day deadline—serve as conditions on the jurisdictional

grant in Section 1295(a). Rather, the reference to Section 7703(b)(1) is just a cross-reference, which this Court has repeatedly held not meet the clear-statement test. Section 7703(b)(1)(A)'s deadline is not a condition on Section 1295(a)'s jurisdictional grant.

b. Nor does Section 7703(b)(1)(A)'s first sentence suggest that its second sentence—containing the deadline—is jurisdictional. The first sentence states:

> Except as provided in subparagraph (B) and paragraph (2) of this subsection, 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.

5 U.S.C. § 7703(b)(1)(A). It is doubtful that this first sentence is jurisdictional under this Court's clear-statement test because it speaks to what a litigant must do and "does not contain . . . jurisdictional terms." *Gonzalez*, 565 U.S. at 143. *But see Lindahl v. Off. of Pers Mgmt.*, 470 U.S. 768, 792–99 (1985) (using jurisdictional language to describe the first sentence of Section 7703(b)(1)).

But even were the first sentence of Section 7703(b)(1)(A) jurisdictional, that would not make the second sentence also jurisdictional. They are "two separate sentences" that "perform separate roles." *Fed. Educ. Ass'n—Stateside Region v. Dep't of Def., Domestic Dependents Elementary & Secondary Schs.*, 898 F.3d 1222, 1231 (Fed. Cir. 2018) (Plager, J., dissenting). Nothing other than proximity links them. And proximity is not enough. *Gonzalez*, 565 U.S. at 147 ("Mere proximity will not turn a rule that speaks in nonjurisdictional terms into a jurisdictional hurdle."); *Sebelius*, 568 U.S. at 155 ("A requirement we would otherwise classify as nonjurisdictional, we held,

does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions."). In *Boechler*, this Court found 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." *Boechler*, 142 S. Ct. at 1498.

The deadline in Section 7703(b)(1)(A) is a stand-alone complete sentence independent of and lacking any conditional link to a jurisdictional grant. The deadline is not a jurisdictional condition but rather is an ordinary, claim-processing filing deadline.

Supporting that conclusion is this Court's decision in *Kloeckner v. Solis*, 568 U.S. 41 (2012). There, the Court considered Section 7703(b)(2), which has similar wording and structure. Section 7703(b)(2) reads:

> Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under [applicable antidiscrimination statutes]. 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.

5 U.S.C. § 7703(b)(2).

In *Kloeckner*, the Government argued that the 30-day deadline in the section's second sentence qualified which cases were eligible for district court under the section's first sentence. This Court rejected that argument. The second sentence is "nothing more than a filing deadline. . . . What it does not do is to further define *which* timely-brought cases belong in district

court." *Kloeckner*, 568 U.S. at 52–53; *see also Robinson v. Dep't Homeland Sec. Off. of Inspector Gen.*, 71 F.4th 51, 55–58 (D.C. Cir. 2023) (holding the deadline in Section 7703(b)(2) to be nonjurisdictional). If the separate-sentence deadline in Section 7703(b)(2) is not a condition on jurisdiction, then neither is the separate-sentence deadline in Section 7703(b)(1)(A).

c. The clear-statement analysis includes *Bowles*, which "stands for the proposition that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." *Reed Elsevier*, 559 U.S. at 167–68.

Bowles was the "exceptional" case, *Sebelius*, 568 U.S. at 155, in which "'a long line of [Supreme] Cour[t] decisions left undisturbed by Congress' attached a jurisdictional label to the prescription," *Fort Bend Cnty.*, 139 S. Ct. at 1849 (citing *Bowles*, 551 U.S. at 209–11). Congress's refusal to alter that longstanding construction was indicative, though not dispositive, of Congress's intent. *Reed Elsevier*, 559 U.S. at 168–69.

Here, no "long line" of this Court's decisions has attached a jurisdictional label to deadlines for seeking review of agency employment-action decisions in the federal courts. The MSPB was not even created until 1978, and the Federal Circuit was not created until 1982. Unlike the long historical practice recognized in *Bowles*, this Court has never expressly construed the jurisdictional character of any of the deadlines in Section 7703.

The closest this Court has come is in *Kloeckner*, which, as discussed above, suggested that the similarly worded and structured deadline in Section 7703(b)(2) is *nonjurisdictional*. If a "long line"

of cases had attached a jurisdictional label to such deadlines, the Court's statement that it was "nothing more than a filing deadline," *Kloeckner*, 568 U.S. at 52, would have been incongruous.

No longstanding and consistent historical context supplies unmistakable evidence that Congress clearly intended the deadline in Section 7703(b)(1)(A) to be jurisdictional. The statutory context confirms that it is an ordinary, nonjurisdictional filing deadline.

4. In determining whether Congress clearly has imbued a limit with jurisdictional characteristics, this Court has considered whether a jurisdictional characterization is consistent with the solicitude that the statutory scheme provides to claimants.

In *Henderson*, in which this Court held nonjurisdictional the 120-day deadline for a veteran to appeal a denial of federal benefits by the Board of Veterans' Appeals to the Court of Appeals for Veterans Claims, this Court emphasized that "[t]he VA's adjudicatory process is designed to function throughout with a high degree of informality and solicitude for the claimant," including in matters of timing and proof. *Henderson*, 562 U.S. at 431 (quotation marks omitted). Even though proceedings before the Veterans Court are "adversarial," and the court's scope of review "is similar to that of an Article III court," *id.* at 432 & n.2, this Court found that "[r]igid jurisdictional treatment of the 120-day period for filing a notice of appeal in the Veterans Court would clash sharply with th[e] scheme" that Congress had set out for claimants before the agency. *Id.* at 441.

Here, the CSRA creates a dispute-resolution scheme that is solicitous of federal employees, half of whom proceed pro se. Although MSPB proceedings are

adversarial, they are informal, with mandatory notification rights given to employees and mandatory evidentiary disclosures imposed on the Government. Recognizing that employees generally are unsophisticated, deadlines in proceedings before the MSPB are flexible, and technical requirements are routinely excusable. *See supra* Statement of the Case.

Rigid jurisdictional treatment of the deadline in Section 7703(b)(1)(A) would "clash sharply with this scheme." *Henderson*, 562 U.S. at 441; *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982) (deeming rigid jurisdictional treatment of deadlines "particularly inappropriate" when "laymen, unassisted by trained lawyers, initiate the process"). It would be anomalous for Congress to funnel unsophisticated claimants into this accommodating process only to surprise them with an unforgiving, jurisdictional deadline at the end of it.

That anomaly, joined with all the other textual and contextual evidence, demonstrates the lack of any clear statement that Congress intended the deadline in Section 7703(b)(1)(A) to be jurisdictional.

B. This Court Has Never Issued a Definitive Earlier Interpretation of the Deadline's Jurisdictional Character.

1. Notwithstanding the clear-statement approach, "[t]his Court has made clear that it will not undo a 'definitive earlier interpretation' of a statutory provision as jurisdictional without due regard for principles of *stare decisis*." *Wilkins*, 598 U.S. at 159 (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 138 (2008)).

For a "definitive earlier interpretation" to control, two conditions must be met. First, the definitive earlier interpretation must be *of the precise provision at issue*. It is not enough that a prior ruling describes as jurisdictional the statutory section containing the provision. In *Santos-Zacaria*, a case about the jurisdictional character of an exhaustion requirement in the Immigration and Nationality Act, the Government pointed to two cases that had "described portions of the Immigration and Nationality Act" as "jurisdictional," but this Court refused to rely on them, in part because "neither case addressed the exhaustion requirement specifically" but instead "merely mentioned the section of the Immigration and Nationality Act that housed the exhaustion requirement." *Santos-Zacaria*, 598 U.S. at 421–22.

Second, the definitive earlier interpretation must be a jurisdictional holding that actually "turn[ed] on that characterization." *Wilkins*, 598 U.S. at 160 (quoting *Arbaugh*, 546 U.S. at 512). Decisions in which "this Court previously described something 'without elaboration' as jurisdictional," are instead "drive-by jurisdictional rulings" entitled to "'no precedential effect.'" *Id.* at 159–60 (quoting *Henderson*, 562 U.S. at 437, and *Arbaugh*, 546 U.S. at 511); *cf. Fort Bend Cnty.*, 139 S. Ct. at 1848 n.4 ("Passing references to Title VII's charge-filing requirement as 'jurisdictional' in prior Court opinions display the terminology employed when the Court's use of 'jurisdictional' was 'less than meticulous.'" (citations omitted)).

2. The only possible source for such a "definitive earlier interpretation" is the 1985 case *Lindahl*, but, on close inspection, *Lindahl* fails both conditions. There, a civilian security guard at a Navy shipyard

was retired by the Navy because of acute and chronic bronchitis. He sought a disability retirement annuity. The Office of Personnel Management denied his claim, and the MSPB affirmed. He then sought review of the MSPB's determination, and the Federal Circuit dismissed the appeal under 5 U.S.C. § 8347(c), which bars appellate review of certain disability issues. *Lindahl*, 470 U.S. at 775–76.

In this Court, the Government argued that "the Federal Circuit has no jurisdiction directly to review MSPB disability retirement decisions except as provided in § 8347(d)(2)." *Id.* at 791. In a wide-ranging discussion rejecting that argument, this Court did use the term "jurisdiction" several times to characterize Section 7703(b)(1). *Id.* at 792–99.

Whatever *Lindahl* may mean for other parts of Section 7703(b)(1), it cannot constitute a definitive interpretation of the deadline in Section 7703(b)(1)(A). That is because *Lindahl*'s discussion of Section 7703(b)(1) focuses entirely on its first sentence, which distinguishes cases subject to the Federal Circuit's exclusive jurisdiction under Section 1295(a)(9) from other MSPB appeals. *Id.* The question in *Lindahl* was not about timeliness—no one contended that the employee's filing was untimely—but about what issues and decisions the Federal Circuit could hear. *Lindahl* thus had no occasion to consider the timing deadline of Section 7703(b)(1)(A). *Lindahl* neither quotes nor refers to the deadline, and nothing in its reasoning turns on the deadline or its jurisdictional character. Perhaps for these reasons, the Federal Circuit, in its many opinions interpreting the jurisdictional character of the deadline in Section 7703(b)(1)(A), has never relied on *Lindahl*.

Respondent agrees that "*Lindahl* did not specifically discuss Section 7703(b)(1)'s timing requirement." Opp. 9. That should be the end of the matter. Because *Lindahl* does not "address[] the [deadline] requirement specifically" but only "mention[s] the section . . . that house[s] the [deadline] requirement," *Santos-Zacaria*, 598 U.S. at 421–22, *Lindahl* cannot control. And any implication that *Lindahl*'s jurisdictional references to Section 7703(b)(1) extend beyond the first sentence to the deadline provision in the second sentence must be dismissed as a "drive-by jurisdictional ruling" entitled to no precedential value. *Wilkins*, 598 U.S. at 159–60.

Because nothing in *Lindahl* turns on the deadline or its jurisdictional character, *Lindahl* cannot constitute a "definitive earlier interpretation" that would displace the clear-statement framework. Accordingly, the deadline in Section 7703(b)(1)(A) is nonjurisdictional.

CONCLUSION

The judgment of the Federal Circuit should be reversed and the case remanded for further proceedings.

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Respectfully submitted,

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APPENDIX

TABLE OF CONTENTS

28 U.S.C. § 1295 provides:

Jurisdiction of the United States Court of Appeals for the Federal Circuit

(a) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

. . .

(9) of an appeal from a final order or final decision of the Merit Systems Protection Board, pursuant to sections 7703(b)(1) and 7703(d) of title 5;

. . . .

5 U.S.C. § 7703 provides:

Judicial review of decisions of the Merit Systems Protection Board

(a)

(1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(2) The Board shall be named respondent in any proceeding brought pursuant to this subsection, unless the employee or applicant for employment seeks review of a final order or decision on the merits on the underlying personnel action or on a request for attorney fees, in which case the agency responsible for taking the personnel action shall be the respondent.

(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 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) A petition to review a final order or final decision of the Board that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D) shall be filed in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. 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.

(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.

(c) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conclusions found to be—

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(2) obtained without procedures required by law, rule, or regulation having been followed; or

(3) unsupported by substantial evidence;

except that in the case of discrimination brought under any section referred to in subsection (b)(2) of this section, the employee or applicant shall have the right to have the facts subject to trial de novo by the reviewing court.

(d)

(1) Except as provided under paragraph (2), this paragraph shall apply to any review obtained by the Director of the Office of Personnel Management. The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit if the Director determines, in the discretion of the Director, that

the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the Court of Appeals. The granting of the petition for judicial review shall be at the discretion of the Court of Appeals.

(2) This paragraph shall apply to any review obtained by the Director of the Office of Personnel Management that raises no challenge to the Board's disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D). The Director may obtain review of any final order or decision of the Board by filing, within 60 days after the Board issues notice of the final order or decision of the Board, a petition for judicial review in the United States Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction if the Director determines, in the discretion of the Director, that the Board erred in interpreting a civil service law, rule, or regulation affecting personnel management and that the Board's decision will have a substantial impact on

a civil service law, rule, regulation, or policy directive. If the Director did not intervene in a matter before the Board, the Director may not petition for review of a Board decision under this section unless the Director first petitions the Board for a reconsideration of its decision, and such petition is denied. In addition to the named respondent, the Board and all other parties to the proceedings before the Board shall have the right to appear in the proceeding before the court of appeals. The granting of the petition for judicial review shall be at the discretion of the court of appeals.