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 THE NATIONAL TREASURY EMPLOYEES UNION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JULIE M. WILSON*
General Counsel
PARAS N. SHAH
Deputy General Counsel
ALLISON C. GILES
Assistant Counsel
NATIONAL TREASURY
EMPLOYEES UNION
800 K St., N.W., Suite 1000
Washington, D.C. 20001
(202) 572-5500
Julie.Wilson@nteu.org

* Counsel of Record
Counsel for *Amicus Curiae*

Mosaic - (301) 927-3800 - Cheverly, MD

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INTEREST OF THE AMICUS[1]

The National Treasury Employees Union (NTEU) is a federal sector labor organization that represents employees in thirty-five federal agencies and departments nationwide. NTEU has often advocated before this Court for federal employee interests, as a party (*see*, *e.g.*, *United States v. NTEU*, 513 U.S. 454 (1995); *NTEU v. Von Raab*, 489 U.S. 656 (1989)) and as an *amicus* (*see*, *e.g.*, *Axon Enterprise, Inc. v. FTC*, 143 S. Ct. 890 (2023); *Babb v. Wilkie*, 140 S. Ct. 1168 (2020)).

NTEU and the employees it represents have a substantial interest in the resolution of the issue that this case presents: whether the U.S. Court of Appeals for the Federal Circuit was barred from considering a petition seeking review of a Merit Systems Protection Board (MSPB) decision where that petition was not filed within the timeframe that 5 U.S.C. § 7703(b)(1)(A) prescribes.

The statutory timeframe at issue here applies not only to appeals from the MSPB, but also to appeals from arbitration decisions involving the same personnel actions that can be appealed to the MSPB. *See* 5 U.S.C. § 7121(e)(1) (employees covered by collective bargaining agreements may use negotiated grievance-arbitration procedures to appeal adverse actions to arbitrators with their union's concurrence); *United States Postal Serv. v. Gregory*, 534 U.S 1, 5 (2001) (explaining that federal employees may appeal adverse actions to the MSPB or through a negotiated grievance procedure).

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and no person or entity other than *amicus* or its counsel made a monetary contribution to fund the preparation or submission of this brief.

NTEU routinely represents employees in adverse action appeals before the MSPB and arbitrators. The Federal Circuit's incorrect ruling threatens the statutory protections that Congress gave to these federal workers. It must be reversed for the reasons explained below.

SUMMARY OF ARGUMENT

The Federal Circuit used the wrong analytical framework for its ruling that the Civil Service Reform Act's (CSRA) 60-day deadline to seek judicial review of adverse action decisions cannot be equitably tolled. The Federal Circuit failed to properly apply this Court's holding that a rebuttable presumption of equitable tolling applies to suits against the federal government. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). That presumption can be rebutted only with a clear statement that Congress intended the time limit to be jurisdictional.

If the Federal Circuit had properly applied the *Irwin* presumption, it would have concluded that equitable tolling should be available here. Far from a clear statement from Congress that it intended the pertinent deadline to be jurisdictional, the CSRA's context evinces Congress's intent to provide federal employees with fair and meaningful redress for wrongful agency actions. That context underscores that equitable tolling should be available for Mr. Harrow and that the Federal Circuit's ruling to the contrary must be reversed.

ARGUMENT

This Court Should Reverse the Federal Circuit's Ruling Because the CSRA's Time Limit for Seeking Judicial Review of Adverse Action Decisions Is Subject to Equitable Tolling.

For over three decades, this Court has held that there is a rebuttable presumption of equitable tolling in suits against the government—one that can be overcome only with a clear statement from Congress that it intended the relevant time limit to be jurisdictional. *Irwin,* 498 U.S. at 95-96. The *Irwin* presumption combined with the CSRA's aim of providing federal employees with adequate due process show that the Federal Circuit's ruling that it cannot equitably toll the timeframe here cannot stand.

A. Time Limits for Federal Court Review of Suits Against the Government Are Presumptively Subject to Equitable Tolling.

The Federal Circuit failed to apply the analytical framework that this Court has prescribed to evaluating whether time limits are jurisdictional. In *Irwin*, this Court established a "general rule to govern the applicability of equitable tolling in suits against the Government," explaining that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Irwin*, 498 U.S. at 95-96.

In recent years, this Court has underscored that "*Irwin* . . . sets out the framework for deciding 'the applicability of equitable tolling in suits against the Government.'" *United States v. Kwai Fun Wong*, 575

U.S. 402, 407 (2015). *See Arellano v. McDonough*, 143 S. Ct. 543, 547 (2023) ("[W]e presume that federal statutes of limitations are subject to equitable tolling.") (citing *Irwin*).

Yet the Federal Circuit has disregarded *Irwin* and its progeny routinely in the last several years. Its decision below relied upon its earlier decision in *Fedora v. MSPB*, 848 F.3d 1013 (Fed. Cir. 2017). *Fedora* incorrectly held that *Bowles v. Russell*, 551 U.S. 205 (2007), established a rule that *all* statutory time limits involving judicial review in the federal courts are jurisdictional. *See Fedora*, 848 F.3d at 1015. But *Bowles* did not establish such a bright line rule. *Bowles* held, instead, that the statutory time limit in 28 U.S.C. § 2107(a) for filing appeals from federal district courts to appellate courts was jurisdictional. *Bowles*, 551 U.S. at 214 (5-4 decision). But neither *Bowles* nor any subsequent Supreme Court decision overruled or disavowed *Irwin*'s rebuttable presumption ruling.

Indeed, in this Court's unanimous decision in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), it emphasized that "*Bowles* did not hold that . . . all statutory conditions imposing a time limit should be considered jurisdictional. Rather, *Bowles* 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." *Id.* at 167-68.

One year after *Reed Elsevier*, this Court reiterated that *"Bowles* did not hold categorically that every deadline for seeking review in civil litigation is jurisdictional." *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011) (holding that statutory time limit on appeals to administrative appellate court was not jurisdictional). And, since *Bowles,* this Court has held that certain

time limits are not jurisdictional, even when enshrined in statute and even when they involve petitions for review filed in an Article III court. *See Kwai Fun Wong,* 575 U.S. at 420.

Even more recently, this Court left no doubt that, given the *Irwin* presumption, "[i]n cases *not* involving the timebound transfer of adjudicatory authority from one Article III court to another . . . *most* [statutory] time bars are nonjurisdictional." *Hamer v. Neighborhood Housing Serv. of Chicago*, 583 U.S. 17, 25 n.9 (2017) (emphasis added) (internal citations omitted) (holding that time limit in federal rule was not jurisdictional). In other words, this Court has drawn a distinction between analyzing whether a time limit for an appeal from "one Article III court to another" is jurisdictional, *id.*, and analyzing whether a time limit for an appeal from a non-Article III body to an Article III court (as in this case) is jurisdictional.

Fedora and the decisions that follow it, including the decision below, misapprehend the pertinent analysis regarding Section 7703(b)(1)(A)'s time limit. Like other courts of appeals, the Federal Circuit "tripped over [the Supreme Court's] statement in *Bowles* that 'the taking of an appeal within the prescribed time is mandatory and jurisdictional.'" *Hamer*, 583 U.S. at 26. *See Fedora,* 848 F.3d at 1015 (quoting *Bowles*'s "mandatory and jurisdictional" language and relying on it for its holding). As *Hamer* explained, this "'mandatory and jurisdictional' formulation is a characterization left over from days when we were 'less than meticulous' in our use of the term 'jurisdictional.'" 583 U.S. at 26-27. *See generally Santos-Zacaria v. Garland*, 143 S. Ct. 1103, 1115 (2023) ("[j]urisdiction . . . is a word of many, too many, meanings") (internal citations omitted).

In sum, the Federal Circuit failed to recognize that *Irwin*'s "rebuttable presumption" is the appropriate framework for deciding whether Section 7703(b)(1)(A) is jurisdictional. The Federal Circuit, consequently, failed to assess whether that presumption could be overcome with a "clear-statement" that Congress wanted the rule to be jurisdictional. *Hamer*, 583 U.S. at 25 n.9.[2]

B. The CSRA's "Context" Shows That the *Irwin* Presumption Cannot Be Rebutted Here.

To assess whether a "clear-statement" of congressional intent (*Hamer,* 583 U.S. at 25 n.9) exists to rebut the *Irwin* presumption that equitable tolling is available, the Federal Circuit should have examined the statutory provision's "text, context, and relevant historical treatment." *See Reed Elsevier*, 559 U.S. at 165. Had the Federal Circuit undertaken this required analysis, it would have concluded that no such clear statement exists. Instead, Congress's plain intent to protect federal employees' rights through the CSRA weighs in favor of allowing equitable tolling of Section 7703(b)(1)(A)'s time limit for seeking judicial review.

1. As an initial matter, nothing in the text of Section 7703 indicates that Congress intended its time limit in subsection (b)(1)(A) to be jurisdictional. The Federal Circuit's divided panel decision in *Fedora* is not to the contrary; the two-judge majority did not attempt to argue that the provision explicitly evoked jurisdiction. *See generally Fedora*, 848 F.3d at 1013-17.

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[2] *See also Santos-Zacaria* 143 S. Ct. at 1113 ("to be confident" that Congress intended for a rule to be jurisdictional, the Court requires "unmistakable evidence, on par with express language addressing the court's jurisdiction").

Cf. Santos-Zacaria, 143 S. Ct. at 1113 (in some statutes that set jurisdictional limits, "Congress specified that 'no court shall have jurisdiction' to review certain matters").

The focus must then shift, as *Irwin* and *Reed Elsevier* instruct, to the CSRA's "context." *See Reed Elsevier*, 559 U.S. at 165. Namely, a court must examine the CSRA's purpose and Congress's intent in enacting it.

This Court has repeatedly considered the remedial nature of a statute when interpreting a statute's context and whether a time limit is jurisdictional. In *Henderson*, for example, this Court recognized that veterans' benefits programs were aimed at protecting claimants and held that a statutory time limit on filing appeals with the U.S. Court of Appeals for Veterans Claims was not jurisdictional. 562 U.S. at 437. While *Henderson* involved an appeal to an Article I, and not Article III, court, it remains instructive here—in particular, its holding, echoed in other Supreme Court decisions, that context matters in assessing whether a statutory time limit is jurisdictional.

On this same point, the Court held in *Zipes v. Trans World Airlines*, that the time limit for filing Title VII discrimination claims with an administrative agency was not jurisdictional. 455 U.S. 385, 398 (1982). In so ruling, it "honor[ed] the remedial purpose of the legislation as a whole." *Id.* And, in *Dolan v. United States*, this Court interpreted the time limit for victims to receive restitution expansively in light of the basic purpose of the Mandatory Victims Restitution Act which was to help crime victims. 560 U.S. 605, 613-14 (2010).[3]

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[3] *See also Irwin*, 498 U.S. at 102 (Stevens, J.) (concurring in part, dissenting in part) (Title VII is a remedial statute, the provisions of which "should be construed in favor of those whom the

What cuts across this Court's jurisprudence is the repeated recognition that "context . . . is relevant," *see Reed Elsevier*, 559 U.S. at 167-68, in resolving whether a statutory time limit is jurisdictional.[4] And the important context here is that the CSRA's text and legislative history, discussed below, demonstrate that it is a statute with significant remedial attributes. Accordingly, its time limits should be construed favorably towards the employees it was designed to protect and should be subject to equitable tolling.

2. Turning to the CSRA's context, it is indisputable that protecting federal employees was an important purpose of the statute. President Jimmy Carter stressed the protective nature of civil service reform legislation when he initially proposed it and when he signed the final bill into law several months later. *See* H.R. Doc. No. 95-299 (Mar. 2, 1978) *(Message from President Jimmy Carter to Congress Regarding Comprehensive Program to Reform the Federal Civil Service System*) (objective of reform is "[t]o strengthen the protection of legitimate employee rights"); *Statement of Jimmy Carter on Signing S. 2640 Into Law* (Oct. 13, 1978) (new system will provide "better protection for employees against arbitrary actions and abuses").

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legislation was designed to protect"); *Bowen v. New York*, 476 U.S. 467, 481 (1986) (equitable tolling of a filing deadline is appropriate given the purpose of the social security disability statute); *Honda v. Clark*, 386 U.S. 484, 495 (1967) (statutory deadline for filing claims was tolled in light of the statute's purpose to fairly distribute assets owned by an enemy government to American residents).

[4] The government may contend that these cases are distinguishable because they involve "claims processing" statutes. But categorizing a statute as "claims processing" rather than "jurisdictional" is simply a conclusion, not a method for analysis.

Indeed, the CSRA's core merit systems principles specifically include protecting employees "against arbitrary action, personal favoritism, or coercion for partisan political purposes" and "against reprisal for lawful disclosures" of violations of law or mismanagement. 5 U.S.C. §§ 2301(b)(8), (9). The stated purpose of the final bill was to further the United States's policy that "[f]ederal employees should receive appropriate protection[.]" Pub. L. No. 95-454, Sec. 3(3), *codified at* 5 U.S.C. § 1101 note (1978). *See* H.R. Rep. No. 95-1403 at 405 (1978) (*Additional Views of Five Minority Members of House Committee on Post Office and Civil Service*) (federal employees "must be protected as the Congress attempts to evaluate and change the present system").

The CSRA's provisions reflect Congress's clear intent to provide federal employees fair treatment through meaningful due process and understandable and accessible procedures. *See* 5 U.S.C. § 2301(b)(2) ("[a]ll employees and applicants . . . should receive fair and equitable treatment . . ."). The CSRA thus requires a valid reason, such as cause or unacceptable performance, to terminate a tenured employee, and it affords such an employee procedures through which he or she can challenge a proposed removal or other serious, adverse actions. *See* 5 U.S.C. §§ 4303, 7511-7513. *See also Stone v. FDIC*, 179 F.3d 1368, 1375 (Fed. Cir. 1999) ("In this case, the federal statutory employment scheme plainly creates a property interest in continued employment.").

This intent to provide fair and adequate process to federal employees is further reflected throughout the CSRA's legislative history. *See, e.g.,* S. 2640, 95th Cong. § 7201(c) (1978) ("It is the purpose of this subchapter to prescribe certain rights and obligations of the employees of the Federal Government . . . ."); H.R.

Doc. No. 95-299 (Mar. 2, 1978) (*Message from President Jimmy Carter to Congress Regarding Comprehensive Program to Reform the Federal Civil Service System*) (previous civil service system was a "bureaucratic maze which . . . permit[ed] abuse of legitimate employee rights . . ."); 123 Cong. Rec. E5566 (daily ed. Sept. 14, 1977) (statement of Rep. William Clay) (existing procedures for the resolution of employee disputes were "unwieldly"); *United States v. Fausto*, 484 U.S. 439, 444 (1988) ("A leading purpose of the CSRA was to replace the haphazard arrangements for administrative and judicial review of personnel action . . .").[5]

It would be incongruous with the CSRA's design to view Section 7703(b)(1)(A) as an unyielding jurisdictional time deadline, as the Federal Circuit has, where there is no indication that Congress intended that result. On the contrary, like the statutory schemes in *Irwin* and *Henderson*, it was an important element of the CSRA to make its remedial appeal provisions accessible. Viewing Section 7703(b)(1)(A) as non-jurisdictional would be consistent with this principle, and consistent with this Court's precedent. Doing so would permit employees to advance equitable arguments relating to a late-filed petition, and thereby keep the courthouse door open in appropriate circumstances.[6]

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[5] This Court has considered the CSRA's legislative history in interpreting its provisions. *See Cornelius v. Nutt*, 472 U.S. 648, 661 (1985) (reviewing Senate and House reports in deciding what standards arbitrators should apply in deciding grievances).

[6] *See Bennett v. Nat'l Gallery of Art*, 1997 U.S. App. LEXIS 22565, at *2 (Fed. Cir. July 31, 1997) (petition for review of arbitration decision dismissed as untimely notwithstanding confusing letter petitioner received from the court); *Pinat v. Office of Pers. Mgmt.,* 931 F.2d 1544, 1546 (Fed. Cir. 1991) (petition dismissed as untimely notwithstanding petitioner's claim of "disastrous typhoons" in his home country from where he was filing).

So that employees may fully exercise the appeal rights that Congress intended for them to have, this Court should rule that the Federal Circuit may consider petitions that are untimely filed due to unusual, unfair circumstances like Mr. Harrow's.

CONCLUSION

For the foregoing reasons and those set forth in petitioner's brief, NTEU respectfully requests that the Court reverse the Federal Circuit's decision below.

Respectfully submitted,

JULIE M. WILSON*
General Counsel
PARAS N. SHAH
Deputy General Counsel
ALLISON C. GILES
Assistant Counsel
NATIONAL TREASURY
EMPLOYEES UNION
800 K St., N.W., Suite 1000
Washington, D.C. 20001
(202) 572-5500
Julie.Wilson@nteu.org

* Counsel of Record
Counsel for *Amicus Curiae*

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