No. 23-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a federal employee petitions the U.S. Court of Appeals for the Federal Circuit to review a final decision of the Merit Systems Protection Board, 5 U.S.C. § 7703(b)(1)(A) provides: "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." In the decision below, the Federal Circuit relied on settled circuit precedent holding this filing deadline to be jurisdictional, despite recent opinions from other Circuits and this Court holding analogous filing deadlines to be nonjurisdictional.

The question presented is whether the 60-day deadline in Section 7703(b)(1)(A) is jurisdictional.

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The per curiam decision of the Federal Circuit denying rehearing (App. B) is not reported in the Federal Reporter.

The decision of the Merit Systems Protection Board (App. C), Docket No. PH-0752-13-3305-I-1, is not reported but is available at 2022 WL 1495611.

JURISDICTION

The Federal Circuit entered judgment on February 14, 2023 and denied rehearing on April 17, 2023. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in Appendix D to this petition.

STATEMENT OF THE CASE

A. Legal Background

Federal employees aggrieved by an adverse employment action taken against them by their agency employer may challenge that action by appealing the agency decision to the Merit Systems Protection Board ("Board"). *See* 5 U.S.C. § 7701(a). For certain kinds of challenges, employees unsuccessful before the Board then may seek review of the Board's decision with the U.S. Court of Appeals for the Federal

Circuit. *Id.* § 7703(b)(1)(A). Congress provided that "any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board." *Id.*

In *Fedora v. MSPB*, 848 F.3d 1013 (Fed. Cir. 2017), the Federal Circuit held this deadline to be jurisdictional. The court noted that it had previously held that the statutory deadline was "'mandatory [and] jurisdictional.'" *Fedora*, 848 F.3d at 1014 (quoting *Monzo v. Dep't of Transp.*, 735 F.2d 1335, 1336 (Fed. Cir. 1984)). Although recognizing that several intervening decisions from this Court had held analogous filing deadlines to be nonjurisdictional, the court instead relied on *Bowles v. Russell*, 551 U.S. 205 (2007), which held 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. *Bowles*, 551 U.S. at 209. The Federal Circuit in *Fedora* reasoned: "Appeal periods to Article III courts, such as the period in § 7703(b)(1), are controlled by the Court's decision in *Bowles*." *Fedora*, 848 F.3d at 1014. Accordingly, *Fedora* held the filing deadline in Section 7703(b)(1)(A) to be jurisdictional. *Id.* at 1016.

B. Facts

Stuart R. Harrow, a longtime employee of the Department of Defense, was subject to a furlough in 2013 during the sequestration of funds mandated by amendments to the Balanced Budget and Emergency Deficit Control Act. Proceeding pro se, he challenged his furlough before an administrative judge, who affirmed the agency's decision. Still pro se, Harrow timely appealed to the Board. (App. C at 2c.)

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. Merit Systems Protection Board, *Congressional Budget Justification FY 2022*, at 1 (May 2021), https://www.mspb.gov/about/budget/FY_2022_Congressional_Budget_Justification.pdf.

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. (App. C.) In the several years that Harrow's appeal was pending before the Board, the Department of Defense changed email servers, and Harrow failed to notify the Board of his changed email address. Because the Board served Harrow with its final decision only via email, he did not receive notice of the Board's final action on May 11, 2022. (App. A at 2a.) Instead, Harrow discovered the Board's final action on August 30, 2022. 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.*)

Relying solely on *Fedora*, the Federal Circuit dismissed his petition for review on the ground that Harrow had not filed his petition within the 60-day deadline prescribed by Section 7703(b)(1)(A). The court held: "The timely filing of a petition from the Board's final decision is a jurisdictional requirement and 'not subject to equitable tolling.'" (*Id.* (quoting *Fedora*, 848 F.3d at 1016)). In response to Harrow's argument "that his failure to timely file his petition for review is excusable," the court stated that "[w]hile we may be sympathetic to Mr. Harrow's situation, this court can only consider whether the petition was timely filed and cannot excuse a failure to timely file based on individual circumstances." (*Id.*)

Harrow's timely petition for rehearing was denied on April 17, 2023. (App. B.) Harrow secured counsel and timely petitioned this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for certiorari for three reasons.

First, the jurisdictional character of Section 7703(b)(1)(A) is important because hundreds of federal employees each year, many proceeding pro se, face an anomalous jurisdictional deadline that the Federal Circuit has repeatedly used to keep claims of unlawful agency personnel actions out of federal court.

Second, the Federal Circuit's settled precedent interpreting Section 7703(b)(1)(A) conflicts with decisions of other circuits and of this Court.

Third, this Court's intervention is the only realistic judicial avenue left for resolving the conflicts.

A. The Jurisdictional Character of Section 7703(b)(1)(A) Is an Important Issue of Federal Law.

The Federal Circuit's jurisdictional characterization of Section 7703(b)(1)(A) is an important issue warranting this Court's review because it blindsides federal employees, often pro se, who understand deadlines to be subject to flexibility.

The system set up by the Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (1978), as amended, is designed to ensure protection of federal employees' rights against unlawful agency employment practices. Cong. Res. Serv., *Merit Systems Protection Board (MSPB): A Legal Overview*, R45630, at 2 (Mar. 25,

2019), https://crsreports.congress.gov/product/pdf/R/R45630. Central to that design is the Board, a quasi-judicial independent agency "charged with protecting federal employees against improper employment-related actions." *Id.* at summary. The Board works to ensure that federal employees are protected from arbitrary action, favoritism, whistleblower reprisals, discrimination, and other prohibited personnel practices. *Id.*

Thousands of appeals are filed with the Board every year. For the 2022 fiscal year, administrative judges in the regional offices and field offices issued 4,867 decisions. U.S. Merit Systems Protection Board, *Annual Report for FY 2022*, at 1 (Apr. 18, 2023), https://www.mspb.gov/about/annual_reports/MSPB_FY_2022_Annual_Report_2022671.pdf. Generally, "about 50%" of appellants are pro se. MSPB, *Congressional Budget Justification*, *supra*, at 18.

Because of the frequency of pro se status, the Board's *Judges' Handbook* states: "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." U.S. Merit Systems Protection Board, *Judges' Handbook*, ch. 2, § 7, at 11 (Oct. 2019), https://www.mspb.gov/appeals/files/ALJHandbook.pdf.

Consistent with that policy, the procedural deadlines governing adjudication before the Board are flexible to accommodate employees who often proceed without counsel. The deadline to file an appeal of most agency decisions with the Board is 30 days. 5 C.F.R. § 1201.22(b)(1) ("[A]n appeal must be filed no later

than 30 days after the effective date, if any, of the action being appealed, or 30 days after the date of the appellant's receipt of the agency's decision, whichever is later."). This deadline is nonjurisdictional, and noncompliance may be excused for good cause. *Lacy v. Dep't of the Navy*, 78 M.S.P.R. 434, 436–39 (1998). And when an appeal is dismissed without prejudice, and the appellant misses the refiling deadline, the Board may waive the refiling deadline for good cause, 5 C.F.R. § 1201.29(d), and the appellant's pro se status is a factor supporting a finding of good cause, *Gaddy v. Dep't of the Navy*, 100 M.S.P.R. 485, 489 (2005). Finally, Board decisions are final unless a party "petitions the Board for review within 30 days after receipt of the decision," but this statutory deadline is flexible and nonjurisdictional, and "[t]he Board, for good cause shown, may extend the 30-day period." 5 U.S.C. § 7701(e)(1).

Federal employees seeking recourse for unlawful employment actions, which Congress afforded them through appeal to the Board, proceed through Board adjudication with all the solicitude afforded them under the Board's procedures. But then, to ultimately have their case heard in federal court, they confront a filing deadline, no different in wording than any other, that anomalously has been declared jurisdictional by the Federal Circuit. Relying on that jurisdictional characterization, the Federal Circuit repeatedly has deprived federal employees, usually proceeding pro se, of judicial review of their employment rights by summarily dismissing untimely appeals. Whether the Federal Circuit has correctly characterized that deadline is therefore important to the effective vindication of Congress's statutory scheme to protect federal employees' rights.

B. The Federal Circuit's Interpretation of Section 7703(b)(1)(A) as Jurisdictional Conflicts with Decisions from Other Circuits and This Court.

1. Because the Federal Circuit has exclusive jurisdiction to hear appeals falling under the deadline in Section 7703(b)(1)(A), no other court has had occasion to disagree with *Fedora*. However, the Federal Court's decision is inconsistent with other courts' decisions regarding the related and similarly worded deadline in Section 7703(b)(2) for seeking judicial review of decisions of the Board in discrimination cases.

The deadlines in Section 7703(b)(1)(A) and Section 7703(b)(2) both govern filing deadlines for review of a Board decision by an Article III court. Both deadlines use similar language. *Compare* 5 U.S.C. § 7703(b)(1)(A) (directing that a petition for review "shall be filed within 60 days"), *with id.* § 7703(b)(2) (providing that a discrimination case "must be filed within 30 days"). And the rule espoused in *Fedora*—that appellate deadlines to Article III courts are jurisdictional—applies equally to Section 7703(b)(2).

Yet at least three U.S. Courts of Appeals have held the deadline of Section 7703(b)(2) to be nonjurisdictional. *See, e.g.*, *Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002); *Blaney v. United States*, 34 F.3d 509, 512–13 (7th Cir. 1994); *Nunnally v. MacCausland*, 996 F.2d 1, 4 (1st Cir. 1993).

Further, in *Kloeckner v. Solis*, 568 U.S. 41 (2012), this Court rejected the Government's contention that Section 7703(b)(2) "add[ed] a requirement for a case to fall within the exception to the Federal Circuit's jurisdiction," explaining: "But that sentence does no

such thing; it is nothing more than a filing deadline." *Kloeckner*, 568 U.S. at 52.

These interpretations of Section 7703(b)(2) as nonjurisdictional conflict with the Federal Circuit's interpretation of Section 7703(b)(1)(A), in *Fedora* and in the decision below, to be jurisdictional.

2. The decision below relied entirely upon *Fedora*. *Fedora*, in turn, interpreted *Bowles* to set a categorical rule that "[a]ppeal periods to Article III courts" are jurisdictional. *Fedora*, 848 F.3d at 1014. *Fedora*'s interpretation of *Bowles* is inconsistent with this Court's precedent.

In *Bowen v. City of New York*, 476 U.S. 467 (1986), this Court considered whether the 60-day deadline in 28 U.S.C. § 405(g) for seeking judicial review of a final decision of the Social Security Administration to federal district court was jurisdictional. That statutory deadline reads, in full:

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

28 U.S.C. § 405(g). This Court reaffirmed "that the 60-day requirement is not jurisdictional, but rather constitutes a period of limitations." *Bowen*, 476 U.S. at 478. *Fedora*'s categorical rule—that appellate deadlines to Article III courts are jurisdictional—is inconsistent with *Bowen*.

Further, *Bowles* itself does not support *Fedora*'s categorical rule. *Bowles* involved an appeal *between*

Article III courts, as this Court has repeatedly emphasized. *Henderson v. Shinseki*, 562 U.S. 428, 436 (2011) ("*Bowles* concerned an appeal *from one court to another court*." (emphasis added)); *id.* at 438 (citing *Bowles* for the proposition that "the time for taking an appeal *from a district court to a court of appeals* in a civil case has long been understood as jurisdictional" (emphasis added)); *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 20 (2017) (citing *Bowles* for the proposition that if "a time prescription governing the transfer of adjudicatory authority *from one Article III court to another* appears in a statute, the limitation is jurisdictional" (emphasis added)); *see also Fort Bend County, Texas v. Davis*, 139 S. Ct. 1843, 1850 n.6 (2019) (same, quoting *Hamer*). Thus, *Bowles* does not stand for the categorical rule that *Fedora* developed for cases involving appeals from the Board.

In fact, *Bowles* sets no categorical rule at all. Rather, as this Court has confirmed, "*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." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 167–68 (2010). *Bowles* properly belongs within this Court's larger framework for resolving a deadline's jurisdictional character.

That larger framework is built around a presumption *against* jurisdiction. Courts may "'treat a procedural requirement as jurisdictional only if Congress "clearly states" that it is.'" *Wilkins v. United States*, 143 S. Ct. 870, 876 (2023) (quoting *Boechler v. Commissioner of Internal Revenue*, 142 S. Ct. 1493, 1497 (2022)). For a deadline to be ranked as jurisdictional, Congress's intent "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*, 143 S. Ct. 927, 936 (2023) (quoting *Boechler*, 142 S. Ct. at 1497, 1499)).

Under the clear-statement framework, 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) ("Statutes of limitations and other filing deadlines 'ordinarily are not jurisdictional.'" (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013)). Of course, Congress could make a time bar jurisdictional. "But 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*, 143 S. Ct. 1103, 1113 (2023).

In applying the clear-statement test, "'traditional tools of statutory construction'" are employed. *MOAC Mall*, 143 S. Ct. at 936 (quoting *Boechler*, 142 S. Ct. at 1499)). The test "[s]tart[s] with the text," *id.* at 937, to determine if the language "expressly refer[s] to subject-matter jurisdiction or speak[s] in jurisdictional terms," *Musacchio*, 577 U.S. at 246. If a deadline "speaks only to a [petition's] timeliness, not to a court's power," *Wong*, 575 U.S. at 410, or if it "simply instruct[s] 'parties [to] take certain procedural steps at certain specified times' without conditioning a court's authority to hear the case on compliance with those steps," *Boechler*, 142 S. Ct. at 1497 (quoting *Henderson*, 562 U.S. at 435), then Congress likely did not intend for it to be jurisdictional.

In addition to the text, the statutory context is also relevant to whether Congress intended a deadline to be jurisdictional. *Bowles* is a part of this context. *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 County*, 139 S. Ct. at 1849 (citing *Bowles*, 551 U.S. at 209–11). *Bowles* stands for the principle that Congress's refusal to alter such a longstanding interpretation can suggest an intent to make the statutory limit jurisdictional.

In holding *Bowles* instead to set a categorical rule, the Federal Circuit has misapprehended *Bowles*. And even properly understood, *Bowles* does not support a jurisdictional characterization here. No "long line" of this Court's decisions has attached a jurisdictional label to the kind of deadline in Section 7703(b)(1)(A). In fact, this Court has never attached the jurisdictional label to any deadline in Section 7703. Further, other courts have construed deadlines in Section 7703 to be nonjurisdictional. *Supra* at 7 (citing three circuit decisions). This is not the kind of longstanding and consistent historical context that would justify an inference that Congress has clearly intended a jurisdictional interpretation of an ordinarily filing deadline.

Fedora fails to analyze any features of this Court's extensive clear-statement test and, instead, misattributes to *Bowles* a categorical rule that *Bowles* does not endorse. Properly applied, *Bowles* does not support a jurisdictional characterization. Accordingly, the Federal Circuit has both misapplied and mischaracterized this Court's decision in *Bowles*.

3. In *Fed. Educ. Ass'n—Stateside Reg. v. Dep't of Defense, Domestic Dependent Elem. & Secondary Schs.*, 898 F.3d 1222 (Fed. Cir. 2018), the Federal Circuit reaffirmed *Fedora* and offered a different rationale for the jurisdictional character of the deadline in Section 7703(b)(1)(A). The Federal Circuit pointed to 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 section 7703(b)(1) and 7703(d)." 28 U.S.C. § 1295(a)(9). Solely because of Section 1295(a)(9)'s reference to Section 7703(b)(1), the Federal Circuit held that Congress clearly meant the deadline in Section 7703(b)(1)(A) to be jurisdictional. *Fed. Educ. Ass'n*, 898 F.3d at 1225–26. That rationale conflicts with this Court's precedent just as much as *Fedora*'s rationale.

This Court has made clear that "a nonjurisdictional provision does not metamorphose into a jurisdictional limitation by cross-referencing a jurisdictional provision." *Fort Bend County*, 139 S. Ct. at 1851 n. 8. *See also Gonzalez v. Thaler*, 565 U.S. 134, 147 (2012) ("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.

Rather than proximity or references, the key is whether Congress has "condition[ed]" the jurisdictional grant on compliance with the deadline. *Reed Elsevier*, 559 U.S. at 165. This Court has illustrated the kind of language that conditions jurisdiction on a statutory requirement. For example, Congress conditioned diversity jurisdiction on an amount-in-controversy requirement by giving the district courts "original jurisdiction of all civil actions *where* the matter in controversy exceeds the sum or value of $ 75,000." *Fort Bend County*, 139 S. Ct. at 1849 (quoting 28 U.S.C. § 1332(a) (emphasis added))). Likewise, in *Boechler*, the Court recognized that Congress could condition the Tax Court's jurisdiction upon the filing of a timely appeal using this language: "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)." *Boechler*, 142 S. Ct. at 1499 (emphasis added). *See also id.* at 1498–99 (illustrating the same principle with the language "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)).

In contrast to these examples, the 60-day deadline in Section 7703(b)(1)(A) is a stand-alone complete sentence that is independent of and lacks any conditional link to a jurisdictional grant. The 60-day deadline is not a jurisdictional condition but rather is an ordinary, claim-processing filing deadline. The Federal Circuit's precedent to the contrary thus conflicts with this Court's precedents.

C. This Court's Intervention Is the Only Realistic Judicial Avenue to Correct the Federal Circuit.

Fedora, now settled precedent in the Federal Circuit, originally generated a panel dissent. *Fedora*, 848 F.3d at 1025 (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). To no avail, Judge Wallach's en banc dissent characterized the opportunity to reconsider *Fedora* as "exceptionally important" because the issue "more often affects pro se litigants than others" and [b]ecause we are the only circuit with subject matter jurisdiction over appeals from final orders of the MSPB." *Id.* at 1340 (Wallach, J., dissenting).

A year later, the Federal Circuit, relying on *Fedora*, reaffirmed the jurisdictional character of Section 7703(b)(1)(A) in *Federal Education Association*. The court again denied rehearing and rehearing en banc, over the dissents of four judges. *Fed. Educ. Ass'n—Stateside Reg. v. Dep't of Defense, Domestic Dependent Elem. & Secondary Schs.*, 909 F.3d 1141 (Fed. Cir. 2018). Judge Plager's dissent lamented:

> In denying panel rehearing, we failed to apply binding Supreme Court precedent to a matter of fundamental, threshold importance—this court's jurisdiction to hear cases brought by aggrieved federal employees. Now the full court, after some going back and forth, has denied *en banc* review. Thus, regrettably, we once again invite the Supreme Court to correct our errors.

Id. at 1147 (Plager, J., dissenting).

Since then, the Federal Circuit has consistently relied upon *Fedora* in summarily dismissing untimely appeals. In the span of roughly nine weeks, from February 13, 2023, to April 21, 2023, the Federal Circuit relied on *Fedora* to summarily dismiss at least six appeals, all brought by pro se appellants. *Hobson v. Dep't of Defense*, 2023 WL 3033467 (Fed. Cir. Apr. 21, 2023); *Castillejos v. Off. of Personnel Mgmt.*, 2023 WL 2808067 (Fed. Cir. Apr. 6, 2023); *Edwards v. Off. of Personnel Mgmt.*, 2023 WL 2641135 (Fed. Cir. Mar. 27, 2023); *Novilla v. Dep't of Agriculture*, 2023 WL 2321985 (Fed. Cir. Mar. 2, 2023); *Casillas v. Dep't of Veterans Affairs*, 2023 WL 2029130 (Fed. Cir. Feb. 16, 2023); *Harrow v. Dep't of Defense*, 2023 WL 1987934 (Fed. Cir. 2023). No judge dissented from any of these opinions, despite the participation of judges, like Judge Wallach, who dissented in both *Fedora* and *Federal Education Association*.

Because the Federal Circuit is the only court to whom the deadline in Section 7703(b)(1)(A) applies, and because, as in the decision below, the Federal Circuit has repeatedly relied upon *Fedora* as settled precedent characterizing Section 7703(b)(1)(A) as jurisdictional, this Court is the only realistic judicial recourse for correcting the Federal Circuit.

CONCLUSION

The Federal Circuit's precedent holding the 60-day deadline in Section 7703(b)(1)(A) to be jurisdictional is unfair to federal employees, is inconsistent with decisions from this Court and other courts and necessitates this Court's corrective intervention.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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