No.

IN THE

Supreme Court of the United States

LAURENCE M. FEDORA,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD AND
UNITED STATES POSTAL SERVICE,

Respondents.

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

In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), the Court adopted a rebuttable presumption that filing deadlines in suits against the government are non-jurisdictional and can be equitably tolled. In *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015), the Court reiterated that, under *Irwin*, a clear statement by Congress is required before a time limit will be treated as jurisdictional.

Separately, the Court has held (in *Bowles v. Russell*, 551 U.S. 205 (2007)) that the statutory deadline for appealing from a district court to a court of appeals is jurisdictional and cannot be tolled.

In the decision below, the Federal Circuit held (over the dissent of five judges) that the 60-day period to seek review of an agency decision (the Merit Systems Protection Board) by the Federal Circuit is governed by *Bowles* rather than *Irwin*—i.e., that this review period is jurisdictional. It did so without looking for or finding a clear statement by Congress. As a consequence, the panel majority held the courthouse doors are closed to pro se litigants who followed the Federal Circuit's own erroneous instructions about filing deadlines.

The question presented is:

Whether the time period for a federal employee to seek Federal Circuit review of a final order of the Merit Systems Protection Board is jurisdictional and therefore cannot be equitably tolled under any circumstances.

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INTRODUCTION

The Court has "tried in recent cases to bring some discipline to the use of th[e] term" "jurisdictional" because of the "drastic" consequences flowing from that label. *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011). To that end, it repeatedly has granted review—more than a dozen times in recent years—to consider whether particular statutory deadlines are "jurisdictional" and therefore never subject to exception. *See, e.g.*, *id.* (listing seven of those cases). That same supervisory authority is desperately needed to right the "jurisdictional" holding here. This case involves the final and definitive ruling of the Federal Circuit about a timing provision, 5 U.S.C. § 7703(b)(1)(A), over which that court has exclusive subject-matter jurisdiction. The issues have been aired in a published decision and the dissents of five judges. And while the Federal Circuit has exclusive subject-matter jurisdiction over this provision, notably a neighboring provision with materially indistinguishable language is the subject of a mature circuit split. The decision also takes sides in a persistent division of authority among the circuits about whether time limits governing appeals from agencies to federal appellate courts necessarily are "jurisdictional." And the case for review could not be any more compelling: It was the Federal Circuit's own erroneous instructions that caused Laurence Fedora to miss the deadline it then enforced against him in unyielding fashion.

Mr. Fedora was a long-time federal employee who alleged that he was fired for illegal, arbitrary reasons. Unable to afford a lawyer, he proceeded pro se under

the civil service laws, which involve multiple layers of administrative and judicial review. The Merit Systems Protection Board (MSPB) dismissed his case without addressing the merits. Hoping to finally have his day in an Article III court, he "fully follow[ed] the official printed instructions provided by" the Federal Circuit about when to petition for review of an MSPB decision. Pet. App. 11a (Plager, J., dissenting). But the Federal Circuit had given erroneous instructions to pro se litigants like Mr. Fedora. Its *Guide for Pro Se Petitioners* stated that a petition must be filed within 60 days of *receiving* an MSPB decision, whereas § 7703(b)(1)(A) requires the petition to be filed within 60 days after the decision's *issuance*. As a result, Mr. Fedora's petition missed the deadline by a few days.

In the decision below, the Federal Circuit held that the minor glitch it caused instead was a fatal flaw. A sharply divided panel held that the time limit set forth in § 7703(b)(1)(A) is "jurisdictional"—and therefore absolute—and so cannot ever be equitably tolled. It reasoned in categorical fashion that, after *Bowles v. Russell*, "[a]ppeal periods to Article III courts" are jurisdictional. Pet. App. 4a. In dissent, Judge Plager lamented that the panel majority's analysis "does not do justice to the complexities of the issue Mr. Fedora presents, is inconsistent with current Supreme Court guidance, and … results in a wrong conclusion that is based neither on good law nor fundamental fairness." Pet. App. 10a-11a (Plager, J., dissenting). Four more judges dissented from the court's decision to deny rehearing of this "debatable and exceptionally important" issue. Pet. App. 38a (Wallach,

J., dissenting from denial of rehearing en banc, Newman, J. and O'Malley, J., joining); Pet App. 33a (Stoll, J.).

Review is warranted to clear up the persistent confusion that led to this grossly inequitable result. What the Federal Circuit should have done was examine the statute "'to see if there is any clear indication that Congress wanted the rule to be jurisdictional.'" Pet. App. 41a (Wallach, J.) (quoting *Henderson*, 562 U.S. at 436). Had it done so, it would have found that "nothing in § 7703(b)(1)(A) speaks in jurisdictional terms, there is no long-standing line of decisions on MSPB appeals to [a] court that suggests congressional acquiescence, and this is an appeal from an administrative agency to a court, with considerable support for the proposition that MSPB proceedings are intended to be specially protective of claimants." Pet. App. 30a (Plager, J.).

The Federal Circuit is not the only court to take this mistaken approach. The circuits are deeply divided about whether *Bowles* means that time limits governing federal appellate review of agency decisions always are jurisdictional—and that, therefore, *Irwin*'s presumption against jurisdictional treatment does not apply, and text, context, and history can be ignored.

Review is appropriate now and in this case. Even were it not for the multiple circuit splits that demonstrate the need for clarification, this decision would merit review on its own terms. Over a million federal employees fall within the MSPB's jurisdiction. When they litigate claims under the civil service laws, most

are pro se, and their opportunity for Article III judicial review is governed by § 7703(b)(1)(A). Due to the Federal Circuit's exclusive jurisdiction over cases subject to § 7703(b)(1)(A), the decision below has broad, nationwide effect. Left uncorrected, it will deprive countless federal employees of "a full opportunity to lawful relief" from unlawful, adverse action. Pet. App. 43a (Wallach, J.).

For these vital and important reasons, the petition should be granted.

OPINIONS AND ORDERS BELOW

The initial decision of the MSPB administrative judge dismissing the case is reprinted at C.A. App. A189-A207.[1] The final order of the MSPB dismissing the case is available at 2014 WL 5421525 and reprinted at C.A. App. A30-A38. The Federal Circuit's decision dismissing Mr. Fedora's petition for review is reported at 848 F.3d 1013 and reprinted at Pet. App. 1a-31a. The order denying rehearing en banc is reported at 868 F.3d 1336 and reprinted at Pet. App. 32a-44a.

JURISDICTION

The Federal Circuit entered judgment on February 16, 2017, Pet. App. 1a-31a, and denied a timely petition for rehearing on July 20, 2017, Pet. App. 32a-

[1] "C.A. App." refers to the appendix that the United States Postal Service filed in the Court of Appeals, No. 15-3039, Dkt. 28-2.

44a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

5 U.S.C. § 7703(b) provides:

(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) During the 5-year period beginning on the effective date of the Whistleblower Protection Enhancement Act of 2012, 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.

STATEMENT OF THE CASE

Mr. Fedora Diligently Follows The Erroneous Filing Instructions That The Federal Circuit Provided To Pro Se Litigants

The dispute in this case arises from Laurence Fedora's efforts to obtain judicial review of an adverse decision of the MSPB—which were derailed when the Federal Circuit gave Mr. Fedora and other pro se litigants incorrect advice about the filing deadline, causing him to narrowly miss it.

Mr. Fedora is a Vietnam-era veteran and longtime federal employee. No. 15-3039, Dkt. 52 at 1. He alleges that the United States Postal Service (USPS) constructively discharged him from his position as a mail handler in violation of the civil service laws—that he was singled out for harassment on the job and that, without cause, USPS threatened to terminate him and revoke his pension, which he had earned over 36 years of federal service (32 with USPS and 4 with the Army). *Id.*; Pet. App. 2a-3a. That pension was Mr. Fedora's only means of supporting himself and his wife—who is severely disabled—in their old age, and

so Mr. Fedora was forced out of USPS to protect it, as well as his mental and physical health. No. 15-3039, Dkt. 52 at 1, 3, 6. An MSPB administrative judge dismissed his claims, and Mr. Fedora appealed to the full MSPB. Pet. App. 3a. On August 15, 2014, it issued a final decision dismissing his claims, which he received on August 19, 2014. C.A. App. A19, A30.

Proceeding pro se, Mr. Fedora then sought review from the Federal Circuit, which has exclusive subject-matter jurisdiction over appeals like this one. 28 U.S.C. § 1295(a)(9).[2] To ensure that he filed on time, he consulted the Federal Circuit's official *Guide for Pro Se Petitioners (Guide)*, as the MSPB's order directed him to do. C.A. App. A3-A5, A36. The *Guide* is part of the Federal Circuit's Rules of Practice, which was published on the Court's website and distributed in hard copy by the clerk's office. *See* U.S. Court of Appeals for the Federal Circuit, *Guide for Pro Se Petitioners and Appellants*, Rules of Practice 165 (June 1, 2011). The *Guide* advised Mr. Fedora that "[w]hen the [MSPB] issues a decision, you may file a petition for review in this court within 60 days *of receipt* of the Board's decision." C.A. App. A5 (emphasis added). Mr. Fedora called the Federal Circuit to verify this understanding, which the clerk's office confirmed. C.A. App. A3. He even sent a test letter to verify how long it would take mail to arrive at the court, and then made

[2] The Court's recent decision in *Perry v. MSPB*, 137 S. Ct. 1975 (2017), issued while Mr. Fedora's case was pending before the Federal Circuit, has no effect here. Mr. Fedora is not pursuing any discrimination claims that would render his case a "mixed" one, which is what *Perry* addressed. Pet. App. 34a.

sure to mail his actual petition for review even earlier. C.A. App. A4. None of this is in dispute.

It also is undisputed that, in accordance with the court's advice, Mr. Fedora filed his petition within 60 days of receiving the MSPB's decision. Pet. App. 3a; C.A. App. A13, A30. But the Federal Circuit's instructions were wrong. Section 7703(b)(1)(A) of title 5 provides that the petition must be filed "within 60 days after the Board *issues notice* of the final order." 5 U.S.C. § 7703(b)(1)(A) (emphasis added). So Mr. Fedora's petition, filed within 60 days of *receiving* the MSPB decision, was deemed untimely because it was received at the court 66 days after that decision was issued. C.A. App. A13.

The Federal Circuit clerk initially returned Mr. Fedora's petition as untimely without docketing it or referring it to a panel. C.A. App. A13. When Mr. Fedora wrote back and established that his petition was in fact timely under the *Guide*'s directions, C.A. App. A3, the clerk docketed it. Pet. App. 3a; No. 15-3039, Dkt. 1-1.[3] A motions panel subsequently denied Mr. Fedora's request for appointed counsel. No. 15-3039, Dkt. 26.

[3] Mr. Fedora corresponded with the clerk's office about the *Guide* in November 2014. C.A. App. A3. The *Guide* was finally corrected in December 2016. *See* U.S. Court of Appeals for the Federal Circuit, *Guide for Pro Se Petitioners and Appellants*, http://www.cafc.uscourts.gov/rules-of-practice/pro-se (listing "[c]hanges of December 1, 2016").

A Divided Panel Dismisses Mr. Fedora's Petition As Jurisdictionally Untimely

A. A divided majority of the Federal Circuit panel dismissed Mr. Fedora's petition in a published decision. It recognized that "this court's 'Guide for Pro Se Petitioners,' … incorrectly instructed that" the petition was due 60 days from *receipt* of the MSPB's order. Pet. App. 8a. The panel majority mustered little sympathy, however. It intimated that—notwithstanding the plainly incorrect advice contained in the *Guide*—Mr. Fedora should have followed language elsewhere in the MSPB's order and that, "[u]nfortunately," Mr. Fedora "failed to follow these instructions." Pet. App. 9a. Mr. Fedora's pro se status apparently was not of concern. And ultimately, the majority concluded, it "d[id] not have the authority to equitably toll the filing requirements of § 7703(b)(1)(A)," because the provision "is jurisdictional." Pet. App. 4a, 8a.

In reaching that conclusion, the majority followed Federal Circuit precedent holding "that the requirements of [§ 7703(b)(1)(A)] are 'statutory, mandatory, [and] jurisdictional.'" Pet. App. 4a. It acknowledged that this Court has issued intervening decisions reaffirming its general approach to assessing when statutory filing deadlines are jurisdictional. *Id.* (citing *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015); *Henderson v. Shinseki*, 562 U.S. 428 (2011); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010)). But it dismissed those decisions as inapplicable because "[t]hose cases do not concern appeal periods." *Id.* Rather, it reasoned, "[a]ppeal periods to Article III courts, such as the period in § 7703(b)(1)," are jurisdictional under *Bowles v. Russell*, 551 U.S. 205 (2007),

which gave jurisdictional treatment to the statutory time period for filing an appeal from a federal district court to a federal court of appeals. Pet. App. 4a-5a.

B. Judge Plager vigorously dissented. He chastised the majority for "decid[ing] this case by invoking the old shibboleth that the time bar is 'mandatory [and] jurisdictional'" without "do[ing] justice to the complexities of the issue [or] … current Supreme Court guidance." Pet. App. 10a-12a. As he explained, "the Supreme Court itself has recently emphasized" that when the term "jurisdiction" is "used correctly," it "refers to … the authority of a court to exercise judicial power over a case before it." Pet. App. 12a. The Court has rejected using the term as "a shorthand way of saying that the court had had its power to adjudicate *this particular case* withdrawn" based on a missed filing deadline. Pet. App. 16a.

In particular, Judge Plager explained, the majority failed to take proper account of this Court's recent treatment of equitable tolling. He began with *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), which adopted a rebuttable presumption that equitable tolling is available in suits against the government. Under *Irwin*, "once Congress authorized a suit against the Federal Government in a particular subject-matter area, the statutory conditions placed on that suit in the form of a time bar … [are] presumed to be subject to equitable relief … unless Congress specifically indicated otherwise." Pet. App. 18a; *see also* Pet. App. 20a-21a (discussing *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510 (2006) (internal quotation marks omitted), in which the Court reiterated that "time prescriptions, however emphatic, are not

properly typed jurisdictional" absent a clear statement by Congress).

Subsequently, this Court decided *Bowles*, which, considered in isolation, "seemed to refute *Irwin* and *Arbaugh*" because it made no mention of the *Irwin* presumption and did not apply the clear statement rule. Pet. App. 22a (Plager, J.). But, Judge Plager explained, this "stark contrast … did not remain unaddressed very long." *Id.* Three years later, *Reed Elsevier* clarified that *Bowles* stands for the proposition that the long-standing historical treatment of a particular time bar as jurisdictional supplies "context" for assessing Congress's intent. Pet. App. 22a-23a (discussing 559 U.S. 154 (2010)). And *Henderson* subsequently rejected a categorical application of *Bowles* to appeal periods. Pet. App. 24a-25a (discussing 562 U.S. 428 (2011)). Finally, in *Kwai Fun Wong*, this Court made clear that "*Irwin* … 'sets out the framework for deciding the applicability of equitable tolling in suits against the Government.'" Pet. App. 27a (quoting 135 S. Ct. at 1630-31). Under that framework, "'most time bars are nonjurisdictional,'" and courts must "examine[] the [particular] statutory context, looking for a clear indication that Congress intended that the *Irwin* presumption of … equitable tolling … be … rebutted." Pet. App. 27a-29a (quoting 135 S. Ct. at 1632-33).

Thus, Judge Plager explained, the "majority demonstrate[d] insufficient understanding of these recent cases from the Supreme Court," and disregarded the "substantial case for the availability of equitable relief" from the time bar in § 7703(b)(1)(A)—which contains no indication that Congress intended

to impart harsh jurisdictional consequences. Pet. App. 15a-16a, 30a. Given "the significance of this issue, and because [the Federal Circuit's] precedents have not recognized the current state of Supreme Court law on the subject," Judge Plager called for rebriefing before an en banc court "with competent opposing counsel." Pet. App. 30a-31a.

The Federal Circuit Denies Rehearing En Banc Over The Dissents Of Five Judges

After securing pro bono counsel, Mr. Fedora sought rehearing en banc, which the MSPB "d[id] not oppose" (although the intervenor, USPS, did). No. 15-3039, Dkts. 70, 71. The Federal Circuit denied rehearing over the dissents of five judges. Judge Wallach authored an opinion dissenting from the denial of rehearing en banc, which Judges Newman and O'Malley joined. Pet. App. 36a-43a. Judge Plager (who has senior status) dissented from the denial of panel rehearing, reiterated his panel dissent, and stated his agreement with Judge Wallach. Pet. App. 44a. Judge Stoll dissented without opinion. Pet. App. 33a.

According to the dissenters, the Federal Circuit had erred by failing to review this "debatable and exceptionally important" issue. Pet. App. 38a (Wallach, J.). Judge Wallach agreed with Judge Plager that "*Bowles* is not dispositive" and that the panel majority had "applied an incomplete framework for review of the jurisdictional question." *Id*. He discussed at length the errors in the panel majority's approach. Pet. App. 38a-42a. And, he explained, "[b]ecause [the Federal Circuit is] the only circuit with subject[-]matter jurisdiction over appeals from final orders of the

MSPB," review is necessary "both to ensure the viability of [its] holdings and to guarantee litigants a full opportunity to lawful relief." Pet. App. 43a. Because Federal Circuit precedents do not reflect the current state of the law, it is time "to reconsider this line of cases." Pet. App. 42a. The Federal Circuit did not do so, and this Court now should.

REASONS FOR GRANTING THE PETITION

The petition should be granted to clarify the relationship between *Bowles* and *Irwin* when a party seeks review of an agency decision. That clarity is needed for at least two critical reasons that militate strongly in favor of this Court's review. *First*, in treating 5 U.S.C. § 7703(b)(1)(A) as jurisdictional, the decision below conflicts with this Court's precedents indicating that the *Irwin* framework applies to all filing deadlines. And because of the Federal Circuit's exclusive jurisdiction, its erroneous decision will be the final word on this question unless and until the Court intervenes. This is an important and recurring issue. It affects not just Mr. Fedora and the other litigants whose claims the Federal Circuit has rejected on this same basis, but the million-plus federal employees whose claims are subject to this provision. As Judge Wallach explained, cases rarely present this issue as cleanly as it is presented here. Pet. App. 43a. The Federal Circuit's decision is fundamentally wrong and unfair, and should not be allowed to stand. *Infra* § I.

Second, the Court should grant review because the decision below is emblematic of broad confusion among the courts of appeals about whether *Bowles*

categorically renders all time limits on appeals to Article III courts jurisdictional. That is how the decision below treated *Bowles*, and three other courts of appeals have reasoned similarly. But this question is the source of persistent disagreement. Four other courts of appeals have reached the opposite conclusion, instead applying *Irwin*'s presumption that limitations are not jurisdictional, and its direction that a statute's full context must be considered in weighing whether the presumption has been overcome. These varying approaches have yielded at least three acknowledged circuit splits on similar statutory timing provisions, including one that is materially indistinguishable from the provision at issue here. Only the Court can resolve this confusion over whether *Bowles* or the *Irwin* framework governs federal appellate court review of agency decisions. *Infra* § II.

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

A. The *Irwin* presumption and clear statement rule govern here, not *Bowles*.

The five dissenting judges got it right. Not only does the decision below defy "fundamental fairness," the Federal Circuit's "precedents have not recognized the current state of Supreme Court law on the subject." Pet. App. 11a, 30a-31a (Plager, J.). As the dissenters explained, it is *Irwin* that establishes the framework for analyzing whether a statutory provision is jurisdictional such that it forecloses equitable tolling. Thus, "[t]o do justice to Mr. Fedora's case, at a minimum the time bar has to be examined to determine whether Congress has, in some clear manner,

rebutted the presumption of the availability of equitable tolling." Pet. App. 29a (Plager, J.); *see also* Pet. App. 41a-42a (Wallach, J.).

The panel majority, however, disregarded this framework. It made no mention of *Irwin*'s presumption that deadlines are non-jurisdictional or *Irwin*'s clear statement rule—the framework that the Court repeatedly has applied, including after *Bowles*. *See, e.g.*, *Kwai Fun Wong*, 135 S. Ct. at 1630; *Henderson*, 562 U.S. at 437-38; *Reed Elsevier*, 559 U.S. at 161. Instead of examining the statute's text and context, the majority relied on *Bowles* to apply a categorical rule that "appeal periods to Article III courts are jurisdictional." Pet. App. 7a. That approach was not faithful to the Court's precedents. As Judge Plager explained, "[e]ven the author of *Bowles* seems to have retreated from [the] proposition" that that decision might sweep so broadly. Pet. App. 30a; *see Reed Elsevier*, 559 U.S. at 167-68 ("*Bowles* stands [only] 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."). Contrary to the decision below, it is the *Irwin* presumption that establishes the "general approach to distinguish[ing] 'jurisdictional' conditions" (which may not be tolled) "from claim-processing requirements" (which may be). *Reed Elsevier*, 559 U.S. at 161; *see also Kwai Fun Wong*, 135 S. Ct. at 1637. The decision below erroneously disregards this "newer thinking about jurisdiction." Pet. App. 21a (Plager, J.); *see also* Pet. App. 40a-42a (Wallach, J.).

As the dissenters further demonstrated, the decision below similarly conflicts with *Henderson*—another recent case in which the Federal Circuit erroneously treated a time period as jurisdictional and this Court reversed. *Henderson* rejected the very argument that the panel majority accepted here: "that *Bowles* mean[s] that all statutory deadlines for taking appeals in civil cases are jurisdictional." Pet. App. 24a (Plager, J.); *see also* Pet. App. 39a (Wallach, J.). In *Henderson*, the Federal Circuit had read *Bowles* to establish a "line between statutes of limitations and time of review provisions," and relied on that distinction to foreclose tolling of the time to file a "notice of appeal" from the Board of Veterans' Appeals to the Court of Appeals for Veterans Claims. *Henderson v. Shinseki,* 589 F.3d 1201, 1203, 1216 (Fed. Cir. 2009) (en banc). This Court reversed, and "reject[ed] the major premise of this syllogism." *Henderson*, 562 U.S. at 436. "*Bowles*," it explained, "did not hold categorically that every deadline for seeking judicial review in civil litigation is jurisdictional. Instead, *Bowles* concerned an appeal from one court to another court. The 'century's worth of precedent and practice in American courts' on which *Bowles* relied involved appeals of that type." *Id.* Thus, contrary to the decision below, *Henderson* found no "categorical rule regarding review of administrative decisions." Rather, it applied the framework established by *Irwin*—searching the statute for a clear statement that Congress intended to foreclose tolling (and ultimately finding none). *Id.* at 437-38.

The panel majority reasoned that *Henderson* had left open whether the *Irwin* framework applies to time limits on appeals from administrative agencies

to Article III courts (as opposed to Article I courts). But that is more reason, not less, to grant review: This case presents an ideal opportunity to dispel the misperception that *Henderson* is limited to appeals to Article I courts. Eliminating any such ambiguity would resolve the multiple circuit splits discussed below (§ II). And the rule that the panel majority adopted—that time limits governing appeals from agencies to Article III courts are, categorically, jurisdictional—runs counter to the *Irwin* presumption favoring equitable tolling, and the Court's long-standing presumption that administrative action is judicially reviewable. *E.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) ("[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Here—unlike in *Bowles*—"there is no long-standing line of decisions" treating such time limits as jurisdictional. Pet. App. 30a (Plager, J.). Never has the Court said that "an appeal from an administrative tribunal to an Article III appeals court" is "equivalent" to "an appeal from an Article III district court to an Article III appeals court." Pet. App. 39a (Wallach, J.).

Indeed, the opposite is true: The Court has a long history of treating time limits on review of administrative action as *non*-jurisdictional. For example, in *Bowen v. City of New York*, 476 U.S. 467 (1986), the Court tolled the "deadline to obtain review of an administrative agency's Social Security benefits decisions in federal district court." Pet. App. 39a (Wallach, J.). *Bowen* of course remains good law; numerous

courts have applied *Bowen* after *Bowles*.[4] Yet "*Fedora* does not mention *Bowen*," and thus, Judge Wallach explained, "I do not think *Bowles* can control[] the inquiry." Pet. App. 40a.

Bowen is just one of many cases in which the Court has held equitable tolling to be available for a timing provision that—like § 7703(b)(1)(A)—establishes the period for filing in an Article III court after an administrative agency rejects a claim. *E.g.*, *Kwai Fun Wong*, 135 S. Ct. at 1638 (deadline for filing Federal Tort Claims Act claim in federal court after presenting it to agency is non-jurisdictional); *Irwin*, 498 U.S. at 95-96 (deadline for filing Title VII employment discrimination claims in federal court after the EEOC's rejection of a claim can be equitably tolled); *Honda v. Clark*, 386 U.S. 484, 500 (1967) (deadline for seeking judicial review of Attorney General's schedule of claimants under the Trading with the Enemy Act is non-jurisdictional); *Reconstruction Fin. Corp. v. Prudence Sec. Advisory Grp.*, 311 U.S. 579, 582 (1941) (deadline for appealing a bankruptcy compensation order is non-jurisdictional).

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[4] *See Walker-Butler v. Berryhill*, 857 F.3d 1, 7 (1st Cir. 2017); *Olson v. Colvin*, 638 F. App'x 562, 563 (8th Cir. 2016); *Williams v. Comm'r, Soc. Sec. Admin.*, 664 F. App'x 763, 765 (11th Cir. 2016); *Kramer v. Comm'r of Soc. Sec.*, 461 F. App'x 167, 169 (3d Cir. 2012); *Liranzo v. Comm'r of Soc. Sec.*, 411 F. App'x 390, 391 (2d Cir. 2011); *Collier-Fluellen v. Comm'r of Soc. Sec.*, 408 F. App'x 330, 330 (11th Cir. 2011); *Phuong Doan v. Astrue*, 464 F. App'x 643, 646 (9th Cir. 2011); *Kellum v. Comm'r of Soc. Sec.*, 295 F. App'x 47, 48 (6th Cir. 2008).

B. Congress did not clearly intend § 7703(b)(1)(A) to be jurisdictional.

The categorical rule adopted by the panel majority conflicts with the Court's precedents, for all of the reasons just set forth. And, under the framework that this Court has articulated and that the panel should have followed, there is no clear indication that Congress intended § 7703(b)(1)(A) to be jurisdictional. As Judge Wallach explained, to determine whether "there is any clear indication that Congress wanted the [time bar] to be jurisdictional," courts must "look[] 'to the condition's text, context, and relevant historical treatment,'" as well as "the sophistication of the average petitioner and Congress's intent in enacting the statutory scheme." Pet. App. 41a (Wallach, J.) (quoting *Reed Elsevier*, 559 U.S. at 166). Here, however, none of those factors indicates that Congress intended this provision to be jurisdictional.

First and foremost, "nothing in § 7703(b)(1)(A) speaks in jurisdictional terms[.]" Pet. App. 30a (Plager, J.). "Whereas [§ 7703(b)(1)(A)] houses the … time limitations, a different section of Title 28 confers power … to hear … claims." *Kwai Fun Wong*, 135 S. Ct. at 1633. It is 28 U.S.C. § 1295(a)(9), not § 7703, that gives the Federal Circuit "*subject-matter jurisdiction* to review final decisions rendered by the Board." Pet. App. 12a (Plager, J.) (emphasis in original). Nor is there any long-standing treatment of MSPB-to-court time limits as jurisdictional.

Further weighing against jurisdictional treatment is the fact that § 7703(b)(1)(A) is part of "a statute that Congress designed to be unusually protective

of claimants." *Bowen*, 476 U.S. at 480 (internal quotation marks omitted); *see also Henderson*, 562 U.S. at 437. Congress established the MSPB—and provided for judicial review of its decisions—in the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1111 (1978), to "protect[] [federal employees] against arbitrary action, personal favoritism, or coercion for partisan purposes." 5 U.S.C. § 2301(b)(8)(A). It sought to reform "a bureaucratic maze which … permits abuse of legitimate employee rights[] and mires every personnel action in red tape, delay, and confusion." H.R. Rep. No. 95-1403, at 2-3 (1978); *see also* S. Rep. No. 95-969, at 3 (1978) (decrying "the complicated rules and procedures that ha[d] developed" and "the welter of inflexible strictures that … threaten[] to asphyxiate the merit principle itself"). Congress designed this remedial statute to protect federal employees, and it wanted to ensure that their rights are not vitiated by arcane procedural rules. *See* Pet. App. 30a (Plager, J.) ("[There is] considerable support for the proposition that MSPB proceedings are intended to be specially protective of claimants[.]"); *Perry v. MSPB*, 137 S. Ct. 1975, 1980 (2017) ("[W]e are mindful that [CSRA] review rights should be read not to protract proceedings, increase costs, and stymie employees, but to secure expeditious resolution of the claims employees present.").

Congress did not intend § 7703(b)(1)(A) to be a trap for the unwary, and it certainly did not *clearly state* that § 7703(b)(1)(A) is jurisdictional.

C. Whether the time period in § 7703(b)(1)(A) can be equitably tolled is a recurring and important question.

As set forth below (§ II), the question whether deadlines for seeking Article III judicial review of agency decisions categorically are jurisdictional has given rise to multiple circuit splits—both on that general question and with regard to multiple particular statutes. But even were that not so, the proper treatment of § 7703(b)(1)(A) itself is an "exceptionally important" question meriting review. Pet. App. 38a (Wallach, J.).

The Court repeatedly has granted review to assess whether particular statutory provisions are "jurisdictional" in nature. *E.g.*, *Henderson*, 562 U.S. at 435 (collecting cases). It has done so even in the absence of circuit splits. *E.g.*, *id.* at 433-34; *Reed Elsevier*, 559 U.S. at 159. And of particular relevance, the Court repeatedly has determined that questions about the proper avenue for seeking judicial review of MSPB decisions are worthy of the Court's attention. *E.g.*, *Perry*, 137 S. Ct. 1975 (2017); *Kloeckner v. Solis*, 568 U.S. 41 (2012); *Elgin v. Dep't of Treasury*, 567 U.S. 1 (2012). That is equally true here.

The question presented is "not merely semantic but one of considerable practical importance for judges and litigants." *Henderson*, 562 U.S. at 434. "Currently, there are approximately 1.7 million Federal employees over whom the [MSPB] has jurisdiction." U.S. Merit Systems Protection Board, *Congressional Budget Justification FY 2018* (MSPB

FY18 Budget) (May 2017), *available at* https://tinyurl.com/mspbfy2018. For the vast majority, a petition for review subject to the time limit in § 7703(b)(1)(A) is their only route to have an employment-related claim heard by an impartial Article III court. *See Elgin*, 567 U.S. at 5 (even federal employees' constitutional claims against the government fall exclusively within the CSRA's judicial review provisions). Their claims arise under numerous federal statutes in addition to the CSRA.[5] But because the Federal Circuit has exclusive jurisdiction over cases subject to § 7703(b)(1)(A), *see* 28 U.S.C. § 1295(a)(9), the decision below has broad, nationwide effect.

The importance of this issue is magnified by the fact that more than half of the cases heard by the MSPB are brought pro se. *See* MSPB FY18 Budget at 12. These pro se litigants "do not generally have equal knowledge of the case filing process or equal access to

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[5] In addition to the CSRA, 5 U.S.C. § 1101 *et seq.*, the MSPB also hears claims subject to § 7703(b)(1) under the Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. No. 103-353, 108 Stat. 3149 (codified at 38 U.S.C. § 4301 *et seq.*); the Veterans Employment Opportunities Act of 1998, Pub. L. No. 105-339, 112 Stat. 3182 (codified in scattered sections of 2, 3, 5, 10, 28, 31, 38, and 49 U.S.C.); the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified in scattered sections of 5 and 22 U.S.C.); and the Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (codified in scattered sections of 5 U.S.C.). *See Deadlines for MSPB Appeals Chart*, Practical Law Checklist 4-618-2233 (West 2017). The decision below renders tolling of the filing deadline (as well as waiver and forfeiture) unavailable whenever a federal employee seeks Federal Circuit review of an MSPB decision involving any of these statutes.

the information available, especially if they are stationed overseas." *Id.*

The question presented, therefore, is frequent and recurring (although rarely presented as cleanly as it is here, as Judge Wallach noted, Pet. App. 43a). The Federal Circuit has already dismissed three more federal employees' appeals—all in unpublished orders; all involving employees who appeared pro se before the MSPB—just since *Fedora* was decided. It dismissed the case of Robert Vocke, who, like Mr. Fedora, narrowly missed the § 7703(b)(1)(A) deadline because he relied on the Federal Circuit's erroneous *Guide for Pro Se Petitioners*. *Vocke v. MSPB*, 680 F. App'x 944, 945 (Fed. Cir. 2017).[6] It denied initial en banc review in the case of Jeffrey Musselman on the question whether § 7703(b)(1) is subject to tolling. *Musselman v. Dep't of Army*, 868 F.3d 1341, 1342 (Fed. Cir. 2017). And it dismissed a third case, relying on *Fedora*'s holding that § 7703(b)(1) is "jurisdiction[al]." *Brenndoerfer v. USPS*, No. 2017-1085, 2017 WL 2471273, at *2 (Fed. Cir. June 8, 2017) (unpublished). In future cases, there may be no court order at all, given the court's practice of having the clerk return to the sender, rather than docket, ostensibly untimely petitions. *See supra* p. 8; *see also* C.A. App. A6; U.S. Court of Appeals for the Federal Circuit, *Guide for Pro Se Petitioners and Appellants, Rules of Practice* (Dec. 1, 2016), https://tinyurl.com/cafcprosecurrent.

Left uncorrected, the decision below will deprive countless federal employees of their only opportunity

[6] Undersigned counsel also represent Mr. Vocke and will be filing a substantively similar petition for certiorari in that case.

for Article III judicial review of arbitrary and unlawful employment actions by the government—no matter how meritorious their claims may be and no matter the inequity that may result. This Court should not countenance the Federal Circuit's fundamentally incorrect and unfair decision, and it should grant review in this case.

II. The Courts Of Appeals Are Irreconcilably Divided Over Whether The Time To Seek Judicial Review Of Agency Decisions Is A Jurisdictional Limitation.

As the Federal Circuit dissenters explained, to prevent "profligate … use of the term ['jurisdiction']," Pet. App. 21a (quoting *Arbaugh*, 546 U.S. at 510), this Court has sought to adopt "'readily administrable bright line' rule[s] for deciding" whether a statutory limitation is jurisdictional. Pet. App. 24a (quoting *Henderson*, 562 U.S. at 435).

The lines, however, have been anything but bright. Courts have been particularly confused about the relationship between *Irwin* and *Bowles*. On the one hand, the Court has explained repeatedly that the *Irwin* framework—its presumption that equitable tolling is available and its clear statement rule—reflects the "general approach to distinguish[ing] 'jurisdictional' conditions from claim-processing requirements." *Reed Elsevier*, 559 U.S. at 161; *see also Kwai Fun Wong*, 135 S. Ct. at 1637. But on the other hand, in *Bowles*, the Court held that the time to appeal from a district court to a court of appeals cannot be equitably tolled, given the "longstanding treatment

of statutory time limits for taking an appeal as jurisdictional." 551 U.S. at 210, 214.

The courts of appeals are intractably divided about how to reconcile those two rules—and in particular, what they mean for appeals from agencies to federal courts of appeals. This debate about *Bowles* has played out across the circuits in multiple statutory contexts much like § 7703(b)(1)(A). First, and directly relevant here, there is a mature and persistent division of authority as to whether, under *Bowles*, time limits for seeking Article III review of agency action are, as a category, jurisdictional. The decision below deepens that split. Second, there could be no clearer illustration of that widespread confusion, and the need for the Court's intervention, than the fact that there are at least three acknowledged circuit splits over whether particular such time limits are jurisdictional.

A. The circuits are split over how to apply *Bowles* to the time for seeking judicial review of administrative agency action.

In the decision below, a divided Federal Circuit held that time limits on appealing to an Article III court are always jurisdictional. Pet. App. 4a. According to the panel majority, "[a]ppeal periods to Article III courts, such as the period in § 7703(b)(1), are controlled by the Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007)," and therefore the court "do[es] not have the authority to equitably toll the filing requirements of § 7703(b)(1)(A)." Pet. App. 4a, 8a. Under that broad reading of *Bowles*, the key "distinction [is] between statutory time limits for filing appeals,"

which are jurisdictional, "and time limits or other requirements in non-appeal contexts," which may sometimes be tolled. Pet. App. 5a; *see also* Pet. App. 6a-7a (holding *Henderson* inapplicable because it involved an appeal to an Article I court, and "[s]ince this case concerns the timeliness of Fedora's appeal to [the Federal Circuit], an Article III court, *Bowles*—not *Henderson*—is the governing authority").

In adopting this categorical rule, the Federal Circuit joins three other courts of appeals that have likewise applied *Bowles* to time limits on judicial review of administrative action. The First and Second Circuits, for example, have reasoned that "in *Bowles* … [t]he Court ruled that when examining a 'party's time period for filing an appeal beyond the period allowed by statute,' [the Court] has 'long and repeatedly held that the time limits for filing a notice of appeal are jurisdictional in nature.'" *Ruiz-Martinez v. Mukasey*, 516 F.3d 102, 118 (2d Cir. 2008); *Guedes v. Mukasey*, 317 F. App'x 16, 17 (1st Cir. 2008) (adopting *Ruiz-Martinez*'s reasoning). They accordingly deem the statutory time limit for seeking judicial review of a Board of Immigrations Appeals (BIA) removal order to be jurisdictional—without consideration of the *Irwin* presumption of tolling or the statute's text, context, or history. *See Guedes*, 317 F. App'x at 17; *Ruiz-Martinez*, 516 F.3d at 118; *see also Luna v. Holder*, 637 F.3d 85, 92 (2d Cir. 2011) (following *Ruiz-Martinez*).

The D.C. Circuit has articulated this same conclusion in the wake of *Bowles* (in the particular context of the Clean Air Act). *Okla. Dep't of Envtl. Quality v. EPA*, 740 F.3d 185, 191 (D.C. Cir. 2014) (time limit on

petition for review under Clean Air Act is "jurisdictional"); *Med. Waste Inst. v. EPA*, 645 F.3d 420, 427 (D.C. Cir. 2011) (same). Notably, however, multiple judges of that court have questioned its treatment of such deadlines as "jurisdictional." *E.g.*, *Util. Air Regulatory Grp. v. EPA*, 744 F.3d 741, 751 (D.C. Cir. 2014) (Kavanaugh, J., concurring) ("I note simply that the … [Clean Air Act] rule we describe today likely should not be considered jurisdictional under the Supreme Court's recent cases that have tightened the definition of when a rule is considered jurisdictional."); *Mendoza v. Perez*, 754 F.3d 1002, 1018 & n.11 (D.C. Cir. 2014) (citing multiple additional cases; questioning "the continuing viability of" prior cases holding that the statute of limitations applicable to Administrative Procedure Act (APA) cases is jurisdictional "in light of recent Supreme Court decisions"), *reh'g denied*, slip op. (D.C. Cir. Aug. 11, 2014).

And, indeed, at least four circuits have rejected the approach embraced by the Federal Circuit here. Those courts have expressly rejected the view that *Bowles* articulates a categorical rule. They correctly presume that deadlines for appealing administrative decisions to Article III courts are *non*-jurisdictional. They hold that the *Irwin* presumption and clear statement rule—not *Bowles*—govern, and that filing deadlines regarding appeals of administrative action to Article III courts may accordingly be subject to equitable tolling.

The Seventh Circuit, for example, has explained that "most filing deadlines are [non-jurisdictional] statutes of limitations or claim-processing rules," and that while *Bowles* provides "an exception when it

comes to appeals from district courts," *Henderson* later "rejected arguments that other [appellate] filing deadlines are jurisdictional." *Clean Water Action Council of Ne. Wisc., Inc. v. EPA*, 765 F.3d 749, 751-52 (7th Cir. 2014). Thus, with respect to the time limit for seeking Article III judicial review of an administrative decision, "[t]he Court's recent cases require a 'clear statement' or 'clear indication' from Congress before a statute prescribing a precondition to bringing suit will be construed as jurisdictional." *Id.* at 752 (quotation marks omitted).

The Sixth Circuit similarly has declined to give *Bowles* the breadth that the panel majority did here. In *Herr v. U.S. Forest Service*, it held that *Bowles* does not foreclose tolling the time limit for judicial review of administrative action under the APA. 803 F.3d 809, 813-14 (6th Cir. 2015). Instead, the Sixth Circuit explained, under "the Supreme Court's recent cases limiting the concept of jurisdiction"—including *Henderson* and *Kwai Fun Wong*—"[b]efore the courts will assume that Congress has imposed such a limit on its power, they require the legislature to 'clearly state[]' that a given statute implicates the judiciary's subject-matter jurisdiction." *Id.* at 814, 818.

The Fifth Circuit likewise has reasoned that *Bowles* applies only to "ordinary civil appeals from Article III courts," and does not apply in categorical fashion to appeals from administrative bodies. In *A.I.M. Controls, L.L.C. v. Comm'r of Internal Revenue*, therefore, it understood the need to consider the text, structure, and context of the statute before determining that the clear statement requirement had been met. 672 F.3d 390, 393-94 (5th Cir. 2012) (considering

the time limit for filing in district court a petition for review of certain IRS decisions). Not surprisingly, however, given the confusion that reigns, another panel of the Fifth Circuit has issued a drive-by ruling that treats such a deadline as jurisdictional. *See Ramos-Lopez v. Lynch*, 823 F.3d 1024, 1027 (5th Cir. 2016) (holding time period for seeking judicial review of BIA order jurisdictional).

The Tenth Circuit's approach to *Bowles* confirms the confused state of affairs. First, it held a time limit on judicial review of administrative action to be jurisdictional under *Bowles*. *Utah Dep't of Envtl. Quality, Div. of Air Quality v. EPA*, 750 F.3d 1182, 1184, 1186 (10th Cir. 2014). But then, on petition for rehearing, the panel changed its tune. It denied rehearing without amending its published opinion relying on *Bowles*. But at the same time, and notwithstanding the reliance on *Bowles*, it explained that under this Court's more recent precedents, "filing deadlines can be jurisdictional or non jurisdictional" and the clear statement rule *does* apply. *Utah Dep't of Envtl. Quality, Div. of Air Quality v. EPA*, 765 F.3d 1257, 1258-1261 (10th Cir. 2014). It went on to find that the statute exhibited the requisite statement of clear congressional intent to foreclose tolling. *Id.*

In short, the courts of appeals are in a state of disarray. Unless and until the Court clarifies the relationship between *Bowles* and *Irwin*, this jurisdictional uncertainty will persist.

B. The conflict over *Bowles* has yielded three acknowledged circuit splits about particular timing provisions.

There could be no better evidence of this disarray than the fact that there are at least three acknowledged circuit splits about whether timing provisions governing review of agency decisions—like § 7703(b)(1)(A)—are jurisdictional.

First, and most directly relevant here, there is a 4-2 split about whether the time limit in 5 U.S.C. § 7703(b)(2) is jurisdictional. That provision is adjacent and materially identical to the provision at issue here, § 7703(b)(1)(A), and the same Congress enacted both. It governs judicial review of MSPB decisions in so-called "mixed" cases—i.e., those that also include an allegation of discrimination. Petitions under subsection (b)(2) go to the regional circuits, and the result has been what we undoubtedly would see if petitions under subsection (b)(1)(A) petitions were not entrusted exclusively to the Federal Circuit: a persistent conflict of authority.

Four courts of appeals have held this time limit to be non-jurisdictional, in serious tension—if not direct conflict—with the decision below. *See Nunnally v. MacCausland*, 996 F.2d 1, 4 (1st Cir. 1993); *Blaney v. United States*, 34 F.3d 509, 513 (7th Cir. 1994); *Williams-Scaife v. Dep't of Defense Dependent Sch.*, 925 F.2d 346, 348 & n.4 (9th Cir. 1991); *Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002). In direct conflict, two other courts have treated that provision as establishing a jurisdictional deadline. *See King v. Dole*, 782

F.2d 274 (D.C. Cir. 1986) (per curiam); *Dean v. Veterans Admin. Reg'l Office*, 943 F.2d 667, 669 (6th Cir. 1991) (jurisdictional), *vacated and remanded on other grounds*, 503 U.S. 902 (1992); *see also Felder v. Runyon*, 230 F.3d 1358 (6th Cir. 2000) (table) (following *Dean*). This conflict turns on the same fundamental question that is at issue here: whether *Irwin*'s presumption of tolling and clear statement rule apply in the context of judicial review of MSPB decisions. *See, e.g.*, *Dean*, 943 F.2d at 669 (rejecting petitioner's contention that *Irwin* applies to (b)(2)).

Second, there is a 4-4 split concerning the proper treatment of the time limit governing judicial review of administrative action under the APA, 28 U.S.C. § 2401(a). Four courts hold the provision to be nonjurisdictional. *See Bertin v. United States*, 478 F.3d 489, 494 n.3 (2d Cir. 2007); *Clymore v. United States,* 217 F.3d 370, 374 (5th Cir. 2000); *Herr v. U.S. Forest Serv.*, 803 F.3d 809, 817-18 (6th Cir. 2015); *Cedars-Sinai Med. Ctr. v. Shalala,* 125 F.3d 765, 770 (9th Cir. 1997). Four courts have reached a directly contrary conclusion. *See Konecny v. United States*, 388 F.2d 59, 61-62 (8th Cir. 1967); *Ctr. for Biological Diversity v. Hamilton*, 453 F.3d 1331, 1334 (11th Cir. 2006) (per curiam); *Mendoza v. Perez*, 754 F.3d 1002, 1018 (D.C. Cir. 2014), *reh'g denied*, slip op. (D.C. Cir. Aug. 11, 2014); *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988). The Sixth Circuit acknowledged the "split" and explained that it stemmed from the same persistent confusion discussed throughout this petition: Other courts failed to apply the rule that Congress must speak clearly to preclude tolling. *Herr*, 803 F.3d at 814-18.

Third, there is yet another circuit conflict over the proper treatment of the time limit for filing a petition for review under the Clean Water Act, 42 U.S.C. § 7607(b). Two courts treat the limitation as jurisdictional. *Utah Dep't of Envtl. Quality, Div. of Air Quality v. EPA*, 750 F.3d 1182, 1184, 1186 (10th Cir. 2014), *reh'g denied*, 765 F.3d 1257 (10th Cir. 2014); *Oklahoma Dep't of Envtl. Quality v. E.P.A.*, 740 F.3d 185, 191 (D.C. Cir. 2014), *reh'g denied*, slip op. (D.C. Cir. Apr. 25, 2014). The Seventh Circuit disagrees. *Clean Water Action Council*, 765 F.3d at 753. The Seventh Circuit recognized that its reading of *Bowles* was causing it to "create[] a conflict among the circuits," but proceeded nonetheless because, it explained, the prior decisions on the other side of the divide failed to apply the clear statement rule prescribed by the Court. *Id.* at 752-53.

As these examples illustrate, the courts of appeals are in a state of entrenched confusion. It is difficult to think of many areas this side of the Armed Career Criminal Act where so many divisions of authority exist. Where questions of jurisdiction are concerned, this is simply intolerable. The Court should intercede to provide clarity, as it has in other such cases.

III. This Case Is An Ideal Vehicle For Resolving The Question Presented.

Never will there be a better case for addressing whether the time limit in § 7703(b)(1)(A) is jurisdictional. The Federal Circuit has given its final word on the question. It undertook an en banc process that lasted nearly four months and involved the simulta-

neous consideration of en banc petitions in three separate cases. (This one, *Vocke,* and *Musselman*.) The court nonetheless denied further review, over two impassioned dissents reflecting the views of five Federal Circuit judges. It issued a published decision, but probably for the last time; the court's treatment of subsequent cases indicates that further dispositions will be summary orders, if not ministerial actions by the clerk's office. *See supra* p. 23. The panel majority squarely addresses—and indeed turns on—the doctrinal relationship between *Bowles* and *Irwin*. The issues have been aired thoroughly, and there is no reasonable prospect that the Federal Circuit will reconsider the question.

This case also presents a uniquely suitable vehicle for addressing whether § 7703(b)(1)(A) is subject to tolling. It is "rare for the issue …, which more often affects pro se litigants than others, to come to the court fully briefed with the aid of counsel and with the views of the interested governmental agencies." Pet. App. 43a (Wallach, J.).

Finally, it is hard to imagine a better factual vehicle to address these important issues, involving more compelling circumstances, than this case. If ever there were a case for a court to exercise its equitable powers to prevent injustice, it is this one. The Federal Circuit undisputedly gave manifestly erroneous filing instructions specifically addressed to pro se litigants. Then, when Mr. Fedora painstakingly followed those instructions, causing him to miss the real deadline, the Federal Circuit held his case jurisdictionally barred forever, depriving him of his only opportunity for judicial review of his claim that the government

unlawfully terminated him after decades of service. Far from a necessary evil, that "jurisdictional" holding contravened this Court's precedents. The decision below is both incorrect and unjust, and presents an excellent vehicle for resolving this important issue.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Dated October 6, 2017

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LAURENCE M. FEDORA,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

UNITED STATES POSTAL SERVICE,
Intervenor

2015-3039

Petition for review of the Merit Systems Protection Board in No. SF-0752-13-0433-I-1.

Decided: February 16, 2017

LAURENCE M. FEDORA, Portland, OR, pro se.

LINDSEY SCHRECKENGOST, Office of the General Counsel, Merit Systems Protection Board, Washington, DC, for respondent. Also represented by BRYAN G. POLISUK.

RUSSELL JAMES UPTON, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, for intervenor. Also represented by BENJAMIN C. MIZER, ROBERT E. KIRSCHMAN, JR., PATRICIA M. MCCARTHY.

Before DYK, PLAGER, and REYNA, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* DYK.

Dissenting opinion filed by *Circuit Judge* PLAGER.

DYK, *Circuit Judge*.

Laurence Fedora petitions for review of a final order of the Merit Systems Protection Board ("Board") dismissing his appeal for lack of jurisdiction. Because Mr. Fedora failed to timely file his petition for review with this court within 60 days after the Board issued notice of its final order, we dismiss his petition for review for lack of jurisdiction. *See* 5 U.S.C. § 7703(b)(1)(A).

BACKGROUND

Mr. Fedora began his employment with the United States Postal Service in 1980. He was employed as a Mail Handler in the Portland Processing and Distribution Center at the time of his retirement on August 31, 2012. On April 27, 2013, Mr. Fedora filed an appeal with the Board alleging that his retirement was involuntary and amounted to constructive discharge. He claimed that he was forced to perform work in violation of his medical restrictions, was

harassed, and was improperly threatened with removal and loss of his pension.

On August 12, 2013, the administrative judge ("AJ") found that Mr. Fedora had failed to make a non-frivolous allegation that his retirement was involuntary and dismissed his appeal for lack of jurisdiction. Mr. Fedora then filed a petition for review by the Board.

On August 15, 2014, the Board issued a final order affirming the initial decision by the AJ. The Board's final order stated that Mr. Fedora had "the right to request review of [its] final decision by the United States Court of Appeals for the Federal Circuit" and that the "court must receive [his] request for review no later than 60 calendar days after the date of [the Board's] order." App. 36. He filed a petition for review in this court on October 20, 2014. His petition for review was filed within 60 days of his receipt of the order (August 19, 2014),[1] but not within 60 days of issuance of the notice (August 15, 2014).

DISCUSSION

I

This court has jurisdiction to review final decisions by the Board pursuant to 28 U.S.C. § 1295(a)(9) and 5 U.S.C. § 7703(b)(1)(A). However, this jurisdiction is circumscribed by the terms of § 7703(b)(1)(A), which

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[1] Since 60 days from August 19, 2014 would end on October 18, 2014, a Saturday, the period would run until Monday, October 20, 2014. *See* Fed. R. App. P. 26(a)(1).

provides: "[n]otwithstanding 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." We have previously held that the requirements of this provision are "statutory, mandatory, [and] jurisdictional," *Monzo v. Dep't of Transp.*, 735 F.2d 1335, 1336 (Fed. Cir. 1984), and that "[c]ompliance with the filing deadline of 5 U.S.C. § 7703(b)(1) is a prerequisite to our exercise of jurisdiction," *Oja v. Dep't of the Army*, 405 F.3d 1349, 1360 (Fed. Cir. 2005).

The dissent suggests that these cases are no longer good law because the Supreme Court in recent years has recognized that not all statutory time limits are properly characterized as jurisdictional. We think that those cases do not undermine our holdings that the appeal period of § 7703(b)(1) is jurisdictional. Many of the Supreme Court's cases cited by the dissent hold generally that limitations periods ("claims-processing rules") are not jurisdictional. *See, e.g.*, *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1638 (2015) (holding that the time limits for filing a claim against the United States under the Federal Tort Claims Act "are nonjurisdictional and subject to equitable tolling"); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990) (holding that there is a rebuttable presumption that the statutory time limit for filing a Title VII suit against the United States after final agency action is subject to equitable tolling). Those cases do not concern appeal periods. Appeal periods to Article III courts, such as the period in § 7703(b)(1), are controlled by the Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007).

In *Bowles*, the Supreme Court reaffirmed that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" 551 U.S. at 209 (quoting *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982)). The Court recognized that "several … recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, [but concluded that] none of them calls into question [the Court's] longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 210. Accordingly, the Court held that compliance with the appeal period prescribed in 28 U.S.C. § 2107(c) is jurisdictional and not subject to equitable tolling or the unique circumstances doctrine. *Id.* at 212-14.

The Supreme Court's subsequent opinion in *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), explicitly recognized the distinction between statutory time limits for filing appeals and time limits or other requirements in non-appeal contexts. There, the Court stated:

> In *Bowles*, we considered 28 U.S.C. § 2107, which requires parties in a civil action to file a notice of appeal within 30 days …. After analyzing § 2107's specific language and this Court's historical treatment of the type of limitation § 2107 imposes (i.e., statutory deadlines for filing appeals), we concluded that Congress had ranked the statutory condition as jurisdictional …. *Bowles* emphasized that this Court had long treated such conditions as jurisdictional, including in statutes *other* than

> § 2107, and specifically in statutes that predated the creation of the courts of appeals.

Id. at 168 (citations omitted).

Relying on *Henderson v. Shinseki*, 562 U.S. 428 (2011), which concerned the time limit for filings appeals to the Court of Appeals for Veterans Claims, an Article I court, the dissent suggests that *Bowles* does not govern "judicial review of administrative decisions." *Id.* at 437. In *Henderson*, the Court held that the appeal period was not jurisdictional because of the "unique administrative scheme" that is "unusually protective of claimants." *Id.* at 437-38 (internal quotation marks omitted). To be sure, *Henderson* initially distinguished *Bowles* on the ground that it "concerned an appeal from one court to another court [and t]he 'century's worth of precedent and practice in American courts' on which *Bowles* relied involved appeals of that type." *Id.* at 436 (quoting *Bowles*, 551 U.S. at 209-10). But the Court went on to discuss at length judicial review of administrative agencies, citing to *Stone v. INS*, 514 U.S. 386, 405 (1995), which held that the deadline for seeking judicial review of final removal orders by the Board of Immigration Appeals is jurisdictional. The *Henderson* Court also noted that lower courts uniformly treat the time limit for review of certain final agency decisions under the Hobbs Act as jurisdictional. *Henderson*, 562 U.S. at 437. The Court eventually concluded that none of its prior cases required that the appeal period from the Veterans Administration to an Article I court be jurisdictional since "[a]ll of those cases involved *review by Article III courts*." *Id.* (emphasis added). The *Henderson* Court

thus made clear that appeal periods to Article III courts are jurisdictional.

Since this case concerns the timeliness of Fedora's appeal to this court, an Article III court, *Bowles*—not *Henderson*—is the governing authority. Accordingly, this court lacks jurisdiction over petitions for review that fail to comply with the requirements of § 7703(b)(1)(A).

As the Supreme Court also made clear in *Bowles*, the jurisdictional nature of the timeliness requirement precludes equitable exceptions. 551 U.S. at 213-14. Our own prior decisions have likewise held that § 7703(b)(1) is not subject to equitable tolling. *Oja*, 405 F.3d at 1357-60; *see also Marandola v. United States*, 518 F.3d 913, 914-15 (Fed. Cir. 2008) (holding that the filing requirements of 28 U.S.C. § 2107(b), Fed. R. App. P. 4(a)(1)(B), and R. Fed. Cl. 58.1 are "mandatory and jurisdictional" and cannot be waived or equitably tolled).

II

A prior version of § 7703(b)(1) provided that "any petition for review must be filed within 60 days after the date the petitioner *received* notice of the final order or decision of the Board." *See* 5 U.S.C. § 7703(b)(1) (1998) (emphasis added). But, in 2012, this provision was amended to require "fil[ing] *within 60 days after the Board issues notice of the final order or decision of the Board*." Whistle-blower Protection Enhancement Act of 2012, Pub. L. No. 112-199, § 108(a), 126 Stat. 1465, 1469 (2012) (emphasis added). By its plain terms, § 7703(b)(1)(A) as

amended begins the 60-day clock on the date the Board issues notice of its final order, not the date the petitioner receives notice of that decision. Here, notice of the final decision was issued on August 15, 2014. This court did not receive the petition until October 20, 2014, 6 days after the 60-day period had run.

III

Mr. Fedora thus failed to timely file his petition for review within the 60-day period required by § 7703(b)(1)(A). Under § 7703(b)(1)(A) Mr. Fedora was required to file his petition for review "within 60 days after" August 15, 2014—i.e., by October 14, 2014. Since filing requires actual receipt by the court, not just timely mailing, *see Pinat v. Office of Pers. Mgmt.*, 931 F.2d 1544, 1546 (Fed. Cir. 1991); Fed. R. App. P. 25(a)(2)(A), Mr. Fedora missed the October 14, 2014 filing deadline.[2]

Mr. Fedora points out that the Board's final order directed him to this court's "Guide for Pro Se Petitioners and Appellants," which incorrectly instructed that a petitioner "may file a petition for review in this court within 60 days of receipt of the Board's decision." App. 5. Mr. Fedora claims to have relied on this guidance in filing his petition for review. But as previously stated, we do not have the authority to equitably toll the filing requirements of § 7703(b)(1)(A). *See Bowles*, 551 U.S. at 213-14; *Oja*, 405 F.3d at 1357-60. Moreover, the Board's final order

[2] The fact that Mr. Fedora mailed his petition on October 11, 2014, within the 60-day period, is irrelevant since the court did not receive it until October 20, 2014.

gave notice to Mr. Fedora regarding his rights for further review and specifically stated that the 60-day period would begin on the date the final order was issued. It imparted the importance of the filing deadline, cautioning to "be very careful to file on time" since the "court must receive [the] request for review no later than 60 calendar days after the date of [the] order." App. 36 (citing 5 U.S.C. § 7703(b)(1)(A) and noting the revision effective December 27, 2012). Unfortunately for Mr. Fedora, he failed to follow these instructions and missed the October 14, 2014 deadline.

DISMISSED

COSTS

No costs.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LAURENCE M. FEDORA,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

UNITED STATES POSTAL SERVICE,
Intervenor

2015-3039

Petition for review of the Merit Systems Protection Board in No. SF-0752-13-0433-I-1.

PLAGER, *Circuit Judge*, dissenting.

In the case before us, the majority, having labelled the time bar "mandatory and jurisdictional," proceeded to rule that "this court lacks jurisdiction over petitions for review that fail to comply with the [statutory deadline for filing]." Because that conclusion does not do justice to the complexities of the issue Mr. Fedora presents, is inconsistent with current Supreme Court guidance, and in my view probably results in a wrong conclusion that is based

neither on good law nor fundamental fairness, I respectfully dissent.

1.

Mr. Fedora asks this court to review a decision of the Merit Systems Protection Board ("MSPB" or "Board"). In that decision, the MSPB affirmed a determination by its administrative judge that Mr. Fedora had failed to state a Board-reviewable claim of involuntary, i.e., forced, retirement from the Postal Service, and that therefore the MSPB could not help him. Upon receipt of the Board's order, Mr. Fedora's attempt to appeal to this court for review of that decision ran into two procedural hurdles. First, by fully following the official printed instructions, provided by this appellate court, regarding filing deadlines, he missed the statutory deadline for filing his petition for review by several days—the instructions were in error. Second, by using the Postal Service to send in his petition as our procedures authorize, his former employer, in a bit of irony, apparently delivered his petition to the court in Washington after an unexplained delay—it was stamped received by this court nine days after it was mailed from Portland. As a result, his appeal petition was considered received six days late. The question is whether there is anything that can be done about the fact of his late filing, which would otherwise preclude his appeal.

Citing a 1984 decision of this court, *Monzo v. Department of Transportation*, 735 F.2d 1335 (Fed. Cir. 1984), the majority decides this case by invoking the old shibboleth that the time bar is "mandatory

[and] jurisdictional." As the Supreme Court itself has recently emphasized, see the discussion below, the term "jurisdiction" is one of the most misused and ambiguous terms in the legal vocabulary.

When used correctly, the term "jurisdiction," for example when used in the phrase "subject-matter jurisdiction," refers to a well-understood characteristic of judicial process: the authority of a court to exercise judicial power over a case before it. To illustrate: by statute this court has *subject-matter jurisdiction* to review final decisions rendered by the Board. *See* 28 U.S.C. § 1295(a)(9) ("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 ….").[1] Indeed, our subject-matter jurisdiction over this class of decisions is exclusive—no other court of appeals may hear and decide these appeals.

When used in other contexts, the term "jurisdiction" can be used as a conclusory label to support a result, often with little if any analysis. An example is the lead case the majority cites as authority for the outcome in this case. *Monzo*, like this case, involved a petition for review of an MSPB decision adverse to the petitioner. The statute at issue provided that any petition for review "must be filed

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[1] Another necessary ingredient for the exercise of judicial power in a given case is *personal jurisdiction* over the parties. This involves quite different considerations from those affecting subject-matter jurisdiction, and is not at issue in this case. *See, e.g.*, *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

within 30 days after the date the petitioner received notice of the final order or decision of the Board." 5 U.S.C. § 7703(b)(1) (1982). The evidence in the case indicated that petitioner received notice of the decision on October 11, 1983, and his attorney received it on October 14. The petition for review was received by the court on November 14. The court held that the date the attorney received notice was irrelevant; the statute refers only to the petitioner. The court in a one paragraph Order announced that "[t]he 30-day period for appeal is statutory, mandatory, jurisdictional, and bars the claim here." 735 F.2d at 1336.

The only explanation offered for that conclusion was a cite to *Ramos v. United States*, 683 F.2d 396 (Ct. Cl. 1982), in which the Claims Court held that receipt by petitioner's wife of the decision of the Board constituted notice to petitioner within the meaning of the statute. The *Ramos* majority emphasized that "statutes of limitations" are a condition on the sovereign's consent to suit, and must be strictly construed. The concurring judge suggested he would not construe the statute so strictly if given "any reasonable handle for doing so," but since Mr. Ramos did not offer one, he concluded his only alternative was "a weary shrug and a turn aside to more agreeable objects of contemplation." *Id*. at 399.

The second case on which the majority bases its result here is the more recent case of *Oja v. Department of the Army*, 405 F.3d 1349 (Fed. Cir. 2005). Mr. Oja sought enforcement by the MSPB of a settlement agreement he had with the Army Corps of Engineers, the outcome of a contentious dispute

involving his performance and subsequent removal from his office in the Corps. The Federal Circuit's opinion is considerably more detailed than *Monzo*; as the opinion noted, the case came to this court by way of "a tangled procedural path—first to the MSPB, then to the EEOC, then to the district court, and now to this court." *Id.* at 1354.

The opinion discusses at length a number of issues raised by this 'tangled procedural path,' but for purposes of our case here, the only relevant point is that the *Oja* majority concluded that, "even if … the filing limit of section 7703(b)(2) [is] subject to equitable tolling, an issue we need not decide, [that] … does not likewise affect section 7703(b)(1) and does not change this court's binding holding in *Monzo* that section 7703(b)(1) is not subject to equitable tolling." *Id.* at 1361. The court then dismissed the appeal for "lack of jurisdiction." *Id.* (I note in passing that *Oja* was decided before any of the Supreme Court's later opinions discussed below.)

Oja's reliance on *Monzo* for the proposition that the statute at issue is not "subject to equitable tolling" is curious, since the words "equitable tolling" do not appear in the *Monzo* opinion; its legal point was limited to the statement that the statute was "mandatory [and] jurisdictional." Which raises the interesting question—what is the relationship between jurisdiction and equitable tolling?

2.

The answer to that question is that these are two separate and distinct legal issues. Subject-matter

jurisdiction is granted by Congress to courts it creates under Article III of the Constitution, pursuant to Congress's Constitutional powers.[2] Subject-matter jurisdiction describes the kinds of disputes a particular court is empowered to decide. Constitutionally, if a court lacks subject-matter jurisdiction over a case, the court is without power to grant any remedy, no matter how warranted; that necessarily includes equitable tolling of a statutory deadline.[3]

Assuming, however, that a court has subject-matter jurisdiction over the cause, the question of whether a statutory condition, such as a time bar, is "jurisdictional," and thus determinative of eligibility for equitable tolling of an otherwise apparently mandatory deadline, is a question the Supreme Court's cases have wrestled with in the last decade or so. And this is a question on which I find the majority

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[2] This statement is strictly true only for the lower federal courts, the district and appellate courts created by congressional act. With the exception of the Supreme Court, federal courts, both trial and appeal, are dependent on congressional authorization for their structure and subject-matter jurisdiction. The Supreme Court, established by the Constitution itself, has assigned to it by the Constitution certain exclusive subject-matter areas. *See generally* U.S. Const. art. III.

[3] In the felicitous phrasing of Justice Breyer, concurring in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 111 (1998), determining a court's subject-matter jurisdiction at the outset of a case "helps better to restrict the use of the federal courts to those adversarial disputes that Article III defines as the federal judiciary's business."

demonstrates insufficient understanding of these recent cases from the Supreme Court.

As the comment from the *Ramos* case, *supra*, indicated, at an earlier time the general view espoused by the Supreme Court among others was that if Congress imposed a statutory deadline for seeking judicial relief, Congress intended that deadline to be strictly enforced. Hence the almost religious repetition in the early cases of the phrase about "mandatory and jurisdictional."

"Jurisdictional" in that context did not mean that the court somehow lost subject-matter jurisdiction, i.e., the authority to decide the kind of dispute at issue. Instead, it was a shorthand way of saying that the court had had its power to adjudicate *this particular case* withdrawn, because Congress intended that the adjudicative power be withdrawn when the time-filing requirement was not met. That was then; then came *Irwin*.

In 1990, *Irwin v. Department of Veterans Affairs*[4] turned the law of "mandatory and jurisdictional" and its concomitant equitable tolling doctrine on its head, or so it was thought. Shirley Irwin was fired from his job with the Veterans Administration. Pursuant to the Civil Rights Act of 1964[5] ("the Act"), he first sought help from the Equal Employment Opportunity Commission ("EEOC"), alleging an unlawful discharge based on race and disability. After getting

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[4] 498 U.S. 89 (1990).

[5] Pub. L. 88-352, 78 Stat. 241 (1964), as amended.

a letter from the EEOC affirming his dismissal, he filed a complaint in the district court, as provided by the Act. However, his complaint was not filed within 30 days of the EEOC's decision, which was the time deadline stated in the Act.

At the Government's urging, the district court held it was without jurisdiction, a holding affirmed by the Fifth Circuit Court of Appeals. *Id*. at 91. The court of appeals reasoned that the 30-day period operated as an absolute jurisdictional limit, and that the district court could not excuse Irwin's late filing because federal courts lacked "jurisdiction" over his untimely claim. *Id*.

The Supreme Court reversed. The Court first recited, with due citation, the traditional doctrine that congressional waivers of sovereign immunity (the doctrine, inherited from the Kings of England, that the sovereign, here the Federal Government, generally is immune from suit for its wrongful acts) must be strictly construed, and that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.

But then the Court announced that, once Congress has made such a waiver—presumably by granting federal courts subject-matter jurisdiction over a particular class of cases against the Government—the question of equitable tolling applicable to statutory time bars in a given case would be decided "in the same way that it is applicable to private suits …. We therefore hold that the same rebuttable presumption of equitable tolling applicable to suits against private

defendants should also apply to suits against the United States." *Id.* at 95.

Irwin was thus understood to say that once Congress authorized a suit against the Federal Government in a particular subject-matter area, the statutory conditions placed on that suit in the form of a time bar in which suit must be filed were to be presumed to be subject to equitable relief for the same reasons they would be in private litigation. Thus, unless Congress specifically indicated otherwise, such time limits were no longer to be considered "jurisdictional," that is, intended by Congress to be automatic and unwaivable withdrawals of a court's power to adjudicate.

Two issues have emerged in the cases, discussed next, following *Irwin*—first, has Congress expressed a clear intention to make a stated condition in a suit against the Government—such as the time within which a plaintiff must file the suit in court—a bar to a court's exercise of power over a particular case, i.e., a "jurisdictional" bar? If not, the *Irwin* presumption is not rebutted, and the stated condition or bar is subject to equitable relief.

Second, assuming the condition is one subject to equitable relief, is such relief available for a particular plaintiff in the particular case? That depends on the particular facts. For example, in the *Irwin* case itself, this reversal of long-standing doctrine dealing with 'jurisdiction' did not help Mr. Irwin. The Court explained that federal courts "have typically extended equitable relief only sparingly," and gave illustrations: a plaintiff who

diligently pursued his remedies by filing within the time limit, but filed a defective pleading; and a complainant who "has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass." *Id.* at 90.[6]

Concluding that Mr. Irwin's failure to file timely because his lawyer was away was "at best a garden variety claim of excusable neglect," it was not entitled to equitable intervention. *Id.* at 96. The judgment of the court of appeals was affirmed. *Id.*

Since the *Irwin* decision, the Supreme Court, as well as the lower courts, have wrestled primarily with the first of these two questions: in a given statutory setting, has Congress somehow expressed a clear enough intention to make the failure to comply with a condition to judicial relief against the Government's conduct, such as a filing deadline, an absolute bar? To put it in terms applicable here, has the "rebuttable presumption of equitable tolling" of the time bar in this case been rebutted by a clear congressional expression of its intention to the contrary?

In reality, Congress is not known to address this issue in the specific terms of jurisdictional bar vs. equitable relief. The resolution of the issue has become one of construing the phrases in which the condition, the time bar for example, is expressed. This may be seen in such indicators as where in a complex of statutory provisions the bar appears vis-à-vis where the court's basic subject-matter authorization

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[6] *See Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998) (en banc) for a discussion of factors entitling a petitioner to equitable tolling.

appears, how the particular bar is stated, and even how often a court has addressed the issue without congressional reaction.

The Supreme Court's recent cases, despite *Irwin*'s stated desire to no longer decide these cases in an *ad hoc* manner but rather to "adopt a more general rule to govern the applicability of equitable tolling suits against the Government," *id*. at 95, have flipped back and forth based on the various factors the particular opinion seemed to consider relevant.

3.

The question of jurisdictional vs. nonjurisdictional statutory conditions to judicial relief has come before the Supreme Court in both time bar and other statutory contexts. *Arbaugh v. Y&H Corp*., 546 U.S. 500 (2006) raised a somewhat different bar, in that the condition at issue was not a time-bar regarding filing of an appeal, but rather a condition on whether the statute at issue was applicable to the defendant employer. The case arose under Title VII of the Civil Rights Act of 1964 (the "Act"). The Act required that an employer subject to the Act have 15 or more employees. The defendant had not raised the issue of whether the employer had the requisite number of employees—and when later raised there was a disputed question regarding the issue—until the case was on appeal. If the issue was simply an element in the plaintiff's claim for relief, the employer's attempt to raise the issue as a defense at the appellate stages of the case would be barred. *See* Fed. R. Civ. Proc. 12(h)(2) (an objection under Rule 12(b)(6) may not be asserted post-trial). On the other hand, if the

numerosity requirement went to the court's real "jurisdiction," that would be an issue that is not too late to raise on appeal, *see* Fed. R. Civ. P. 12(h)(3), and indeed since it went to the court's power to decide the case, it is one the court must attend to even if the parties do not. *Arbaugh*, 546 U.S. at 514.

The Court recapped the newer thinking about jurisdiction. Justice Ginsburg, writing for a unanimous court, said: "'Jurisdiction,' this Court has observed, 'is a word of many, too many meanings.' This Court, no less than other courts, has sometimes been profligate in its use of the term. For example, this Court and others have occasionally described a nonextendable time limit as 'mandatory and jurisdictional.' But in recent decisions, we have clarified that time prescriptions, however emphatic, 'are not properly typed "jurisdictional."'" *Id*. at 510 (citations omitted).

The Court described contrary decisions as "unrefined dispositions," "'drive-by jurisdictional rulings'" that "should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Id*. at 511 (quoting *Steel Co*., 523 U.S. at 91). The Court acknowledged that Congress could have made the employee-numerosity requirement "jurisdictional," but noted that "the 15-employee threshold appears in a separate provision that 'does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.'" *Id*. at 515 (citation omitted). The Court held the numerosity provision to be an element of a plaintiff's claim for relief, not a jurisdictional issue.

In *Bowles v. Russell*, 551 U.S. 205 (2007), decided but a year after *Arbaugh*, the Court came to the opposite conclusion. *Bowles* arose in a murder case, involving the late filing of an appeal from an adverse district court decision in a habeas appeal. An attempt had been made to extend the defendant's time for appeal pursuant to court rule, but the filing did not comply with the time limit provided in the statute on which the rule was based. The court of appeals held that it lacked jurisdiction to hear the case, holding that the provision allowing a district court to extend the filing period for fourteen days for reopening of a case was "jurisdictional."

The Supreme Court affirmed, in an opinion that seemed to refute *Irwin* and *Arbaugh*. Justice Thomas, writing for a five Justice majority, stated that, "Although several of our recent decisions have undertaken to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our longstanding treatment of statutory time limits for taking an appeal as jurisdictional." *Id.* at 210. The *Irwin* presumption was not mentioned or considered; *Arbaugh* was distinguished: "Nor do[es] *Arbaugh* … aid petitioner. In *Arbaugh*, the statutory limitation was an employee-numerosity requirement, not a time limit." *Id.* at 211 (citations omitted). The court of appeals was affirmed.

The stark contrast between the approach taken in *Arbaugh* and that in *Bowles* did not remain unaddressed very long. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010), decided the following year, turned on a somewhat arcane issue—whether a

provision of the Copyright Act regarding registration precluded appeal in a case arising from claims of infringement of unregistered works. In terms relevant here, the issue was whether the requirements of the statute were to be treated as "jurisdictional," and thus a bar to the appeal. The Court stated the question as "whether § 411(a) 'clearly states' that its registration requirement is 'jurisdictional.'" *Id*. at 163 (quoting *Arbaugh*, 559 U.S. at 515). The Court answered, "It does not." *Id*.

The Court then explained its decision in *Bowles*: "*Bowles* did not hold that any statutory condition devoid of an express jurisdictional label should be treated as jurisdictional simply because courts have long treated it as such. Nor did it 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. The court of appeals was reversed; the statutory provision was held nonjurisdictional. It is worth noting that *Reed Elsevier*, with its explanation of *Bowles*, was written by the same justice who authored *Bowles*.

In an opinion concurring in part, Justice Ginsburg, the authoring Justice in *Arbaugh*, offered a further explanation: "*Bowles* and *Arbaugh* can be reconciled without distorting either decision, however, on the ground that *Bowles* rel[ied] on a long line of this Court's decisions left undisturbed by Congress." *Id*. at 173.

Subsequently, in *Henderson v. Shinseki*, 562 U.S. 428 (2011), the Court addressed directly a statutory time bar on review from this court. The case involved an appeal from the Board of Veterans Appeals to the Court of Appeals for Veterans Affairs. To appeal to the Veterans Court, the appellant must file a notice of appeal with the court within 120 days after the date when the Board's final decision is mailed. 38 U.S.C. § 7266(a). As the Supreme Court saw it, "[t]he case presents the question whether a veteran's failure to file a notice of appeal within the 120-day period should be regarded as having 'jurisdictional' consequences." *Id.* at 431. This court had held that it should be so regarded; the Supreme Court replied: "We hold that it should not." *Id.*

The Court explained: "The question here … is whether Congress mandated that the 120-day deadline be 'jurisdictional.' In *Arbaugh*, we applied a 'readily administrable bright line' rule for deciding such questions. Under *Arbaugh*, we look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.' This approach is suited to capture Congress' likely intent and also provides helpful guidance for courts and litigants, who will be 'duly instructed' regarding a rule's nature." *Id.* at 435-36 (citations omitted).

The Court then took note of the Government's argument that *Bowles* meant that all statutory deadlines for taking appeals in civil cases are jurisdictional, and since this is a civil case, the 120-day rule is jurisdictional. Replied the Court: "We reject the major premise of this syllogism. *Bowles* did not hold categorically that every deadline for seeking

review in civil litigation is jurisdictional. Instead, *Bowles* concerned an appeal from one court to another court. The 'century's worth of precedent and practice in American courts' on which *Bowles* relied involved appeals of that type." *Id.* at 436.

In response to the Government's argument that *Bowles*' reasoning nevertheless should be applied to judicial review of administrative decisions generally, the Court rejected the comparison to mine-run Hobbs Act cases, instead analogizing veterans' cases to Social Security disability benefits cases, both involving special administrative procedures and both being 'unusually protective' to claimants.

Finally, the Court noted that the deadline-stating provision does not speak in jurisdictional terms or refer in any way to the jurisdiction of the Veterans Court. It contrasted the deadline-stating provision for appeals from the Veterans Court to this court, which is cast in the same language as the provision for appeals from the district courts to the courts of appeal, the latter having long been held 'jurisdictional.' The Court stated that if Congress intended the same result, it could have stated the provision in the same terms. The Court concluded that "we do not find any clear indication that the 120-day limit was intended to carry the harsh consequences that accompany the jurisdiction tag." *Id.* at 441. The case was remanded to the Federal

Circuit to determine whether it falls within any exception that calls for equitable tolling.[7]

An even more recent Supreme Court decision, again dealing with a time bar, must be added to the mix. In *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015), the issue was whether the statute for filing a claim under the Federal Tort Claims Act, 28 U.S.C. § 2401(b), was subject to tolling. The statute had two specified deadlines, one for notifying the appropriate federal agency of the claim—a two year time limit—and the other—a six month limit—for filing the claim in court if the agency made a negative decision on the claim.

Two cases were consolidated for Supreme Court review; in each of the cases the claimant missed one of the deadlines. The provisions had one thing in common—the statute was written to say that a tort claim against the United States "shall be forever barred" unless the deadlines are complied with. The Government argued that the time limits are not subject to tolling as they clearly are intended to be jurisdictional restrictions. However, on appeal to the Ninth Circuit, the court of appeals held that tolling was available in both cases.

In a split decision, the Supreme Court affirmed the court of appeals. Unlike all of the cases since *Irwin*

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[7] On remand, this court vacated the Veterans Court's decision and remanded. The Veterans Court appears to have dismissed for lack of jurisdiction because Mr. Henderson had died while his appeal was pending before the Supreme Court and no one sought to be substituted before the Veterans Court.

reviewed above, this time the Court began with a discussion of *Irwin*. *Irwin*, said the Court, "sets out the framework for deciding 'the applicability of equitable tolling in suits against the Government.' In *Irwin*, we recognized that time bars in suits between *private* parties are presumptively subject to equitable tolling. That means a court usually may pause the running of a limitations statute in private litigation when a party 'has pursued his rights diligently but some extraordinary circumstance' prevents him from meeting a deadline. We held in *Irwin* that 'the same rebuttable presumption of equitable tolling' should also apply to suits brought against the United States under a statute waiving sovereign immunity." *Id*. at 1630-31 (citations omitted).

The Court added, "the Government must clear a high bar to establish that a statute of limitations is jurisdictional. In recent years, we have repeatedly held that procedural rules, including time bars, cabin a court's power only if Congress has 'clearly state[d]' as much …. And in applying that clear statement rule, we have made plain that most time bars are nonjurisdictional. Time and again, we have described filing deadlines as 'quintessentially claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case. [citing, *inter alia*, *Henderson v. Shinseki*] … 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." *Id.* at 1632-33 (citations omitted).

After exhaustively reviewing other time bars, including those with phrases like "shall be forever barred," the Court concluded that the time bar applicable to these cases contained simply "mundane statute-of-limitations language," and that "neither this Court nor any other has accorded those words talismanic power to render time bars jurisdictional." *Id.* at 1634. In effect, because *Irwin* said so. There was a strong dissent, which argued that "[t]he statutory text, its historical roots, and more than a century of precedents show that this absolute bar is not subject to equitable tolling." *Id.* at 1639.

4.

I appreciate that this court's precedents, starting with *Monzo* back in 1984, support the outcome reached by the majority, and provide an easy pathway to the conclusion they reach. I also appreciate that an uncritical reading of the Supreme Court's opinion in *Bowles* supports that conclusion. But there is now a more nuanced understanding of the *Bowles* opinion, by the same authoring Justice writing in *Reed Elsevier*: "[n]or did [*Bowles*] hold that all statutory conditions imposing a time limit should be considered jurisdictional." 559 U.S. at 167. Add to this the Court's most recent case, in which a time bar designated by Congress as one in which a non-complying suit "shall be forever barred." The Court held it not a bar to equitable tolling. *Kwai Fun Wong*, 135 S. Ct. at 1634.

In my view, the totality of the Supreme Court's recent cases add up to a significant rethinking of the "jurisdictional" bar to equitable tolling. Attempts to

distinguish among the Court's opinions, on the basis that only some dealt with time bars while others required that different statutory conditions be met, is misguided. The basic issue is the same, and the Court itself did not make such background differences the controlling distinctions.

Rather, the Court examined the statutory context, looking for a clear indication that Congress intended that the *Irwin* presumption of the availability of equitable tolling should be considered rebutted. That is why in addressing the jurisdictional question, among other things, the Court asked about whether the statutory requirement "speak[s] in jurisdictional terms," *Arbaugh*, 546 U.S. at 515; whether the cases at issue are longstanding and left undisturbed by Congress, see the concurring opinion in *Reed Elsevier*, 559 U.S. at 173; and whether the case involves a time bar from one court to another (more likely to be seen as "jurisdictional") or whether it is from an administrative agency to a court, the latter possibly reflecting a program "'unusually protective' of claimants," *Henderson*, 562 U.S. at 436 (citation omitted).

Given this backdrop, how should the case before this court be decided? To do justice to Mr. Fedora's case, at a minimum the time bar has to be examined to determine whether Congress has, in some clear manner, rebutted the presumption of the availability of equitable tolling. The burden has been placed on the Government to convince the court that Congress intended that the rebuttable presumption is rebutted.

Finding congressional intent to rebut the presumption simply because the time bar is stated in a statute is no longer appropriate. Even the author of *Bowles* seems to have retreated from that proposition. What additional considerations will persuade that the presumption has or has not been rebutted depends on the context of a particular statute. Taking into consideration the criteria suggested in the Court's opinions, as outlined above, Mr. Fedora presents a substantial case for the availability of equitable relief—nothing in § 7703(b)(1)(A) speaks in jurisdictional terms, there is no long-standing line of decisions on MSPB appeals to this court that suggests congressional acquiescence, and this is an appeal from an administrative agency to a court, with considerable support for the proposition that MSPB proceedings are intended to be specially protective of claimants.[8]

But we should not rush to judgment. The case came to us as a pro se filing with only an informal brief of petitioner, and no oral argument. Neither the Government in its Respondent's brief nor the Intervenor, USPS, in its brief did more than repeat the "mandatory and jurisdictional" chant in support of their argument that we are without "jurisdiction" over Mr. Fedora's appeal because his filing was untimely.

Because of the significance of this issue, and because our court's precedents have not recognized

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[8] *See, e.g.*, 5 U.S.C. § 2301(b)(8) (under governing merit system principles, employees must be "protected against arbitrary action, personal favoritism, or coercion for partisan purposes").

the current state of Supreme Court law on the subject, a thorough examination with competent opposing counsel is called for. The case should be rebriefed before an en banc court on the timeliness filing question, with assigned counsel for Mr. Fedora, and an opportunity for the Government and Intervenor to address the question of whether there is any basis for a finding that the presumption under *Irwin* of equitable tolling regarding the bar in § 7703(b)(1)(A) has been rebutted.

The Government, in the words of the Supreme Court, "must clear a high bar to establish that a statute of limitations is jurisdictional," *Kwai Fun Wong*, 135 S. Ct. at 1632. Because the petitioner was pro se, the Government may not have appreciated the situation in which this case puts it. I respect the argument that the Government has had its day in court, and obviously failed to make its case, but in the interest of fairness I favor giving the Government an opportunity to attempt to clear that high bar. A well-argued case, with competent counsel on both sides, will help this court come to a correct conclusion regarding the law of the case, a conclusion giving full attention and respect to the opinions of the Supreme Court.

Accordingly, I respectfully dissent from any contrary disposition of this appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LAURENCE M. FEDORA,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

UNITED STATES POSTAL SERVICE,
Intervenor

2015-3039

Petition for review of the Merit Systems Protection Board in No. SF-0752-13-0433-I-1.

ON PETITION FOR REHEARING EN BANC

ERIC SHUMSKY, Orrick, Herrington & Sutcliffe LLP, Washington, DC, filed a petition for rehearing en banc for petitioner Laurence M. Fedora. Also represented by THOMAS MARK BONDY, HANNAH GARDEN-MONHEIT; CHRISTOPHER J. CARIELLO, New York, NY.

JEFFREY GAUGER, Office of the General Counsel, Merit Systems Protection Board, Washington, DC, filed a response to the petition for respondent Merit Systems Protection Board. Also represented by BRYAN G. POLISUK, KATHERINE M. SMITH.

RUSSELL JAMES UPTON, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, filed a response to the petition for intervenor United States Postal Service. Also represented by CHAD A. READLER, ROBERT E. KIRSCHMAN, JR., PATRICIA M. MCCARTHY.

Before PROST, *Chief Judge*, NEWMAN, PLAGER*, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

WALLACH, *Circuit Judge*, with whom NEWMAN and O'MALLEY, *Circuit Judges*, join, dissent from the denial of the petition for rehearing en banc.

STOLL, *Circuit Judge*, dissents without opinion from the denial of the petition for rehearing en banc.

PLAGER, *Circuit Judge*, dissents from the denial of panel rehearing.

PER CURIAM.

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* Circuit Judge Plager participated only in the decision on panel rehearing.

ORDER

Petitioner Laurence M. Fedora filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by intervenor United States Postal Service and respondent Merit Systems Protection Board. The court requested supplemental briefing in light of the Supreme Court's holding in *Perry v. Merit System Protection Board*, 137 S. Ct. 1975 (2017), regarding our jurisdiction to hear this appeal. Mr. Fedora responded, indicating that he elects to abandon his discrimination claims to avoid the jurisdictional concern addressed in that case. Pet'r's Resp. to Suppl. Authority, ECF No. 78. The government agrees that with this waiver, we have jurisdiction over his appeal.

The petition was first referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and the responses were referred to the circuit judges who are in regular active service. A poll was requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue on July 27, 2017.

FOR THE COURT

July 20, 2017
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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Petition for review of the Merit Systems Protection Board in No. SF-0752-13-0433-I-1.

WALLACH, *Circuit Judge*, with whom NEWMAN and O'MALLEY, *Circuit Judges*, join, dissenting from the denial of the petition for rehearing en banc.

The Supreme Court has recognized that its "recent cases evince a marked desire to curtail … drive-by jurisdictional rulings, which too easily can miss the critical differences between true jurisdictional conditions and nonjurisdictional limitations on causes of action." *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161 (2010) (internal quotation marks, brackets, and citations omitted); *see*

Scarborough v. Principi, 541 U.S. 401, 413 (2004) ("Courts, including this Court, … have more than occasionally misused the term jurisdictional to describe emphatic time prescriptions in claim processing rules …." (internal quotation marks, brackets, and citation omitted)). In *Monzo v. Department of Transportation*, a panel of this court stated that the predecessor statute to 5 U.S.C. § 7703(b)(1)(A) (2012) is "statutory, mandatory, [and] jurisdictional." 735 F.2d 1335, 1336 (Fed. Cir. 1984) (citation omitted). Nearly two decades later, we confirmed the jurisdictional nature of the statute, *see Oja v. Dep't of Army*, 405 F.3d 1349, 1356-60 (Fed. Cir. 2005), which provides that "any petition for review [to this court] must be filed within 60 days after the [Merit Systems Protection Board ("MSPB")] issues" its final decision, 5 U.S.C. § 7703(b)(1)(A). By holding that the statutory provision implicated this court's subject matter jurisdiction, the panel decision foreclosed the possibility of granting a petitioner equitable tolling of the filing deadline in appeals from MSPB final decisions. *See Oja*, 405 F.3d at 1356 ("The question [on whether the filing period of § 7703(b)(1) can be equitably tolled] was squarely addressed and decided … in *Monzo* …. ").

Laurence M. Fedora petitions this court to review en banc whether the filing deadline in § 7703(b)(1)(A) is properly defined as a jurisdictional requirement. *See Fedora v. Merit Sys. Prot. Bd.*, No. 2015-3039, Docket No. 63 at 9-20 (Fed. Cir. Mar. 27, 2017). A panel majority applied the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), and our decision in *Oja*, held that § 7703(b)(1)(A) is jurisdictional, and rejected Mr. Fedora's petition for

untimely filing. *See Fedora v. Merit Sys. Prot. Bd.*, 848 F.3d 1013, 1016 (Fed. Cir. 2017). Judge Plager dissented, summarizing the evolution of the Supreme Court case law on the distinction between jurisdictional and claims processing rules and offering strong reasons why review of *Monzo* and its progeny is warranted. *See id.* at 1017-26 (Plager, J., dissenting). Because this issue is sufficiently debatable and exceptionally important, *see* Fed. R. App. P. 35(a)(2); Fed. Cir. Internal Operating Procedure #13(2), I dissent from the court's refusal to reconsider it en banc.[1]

The *Fedora* majority errs because (1) *Bowles* is not dispositive; and (2) in stating that *Bowles* controls the inquiry, *Fedora* applied an incomplete framework for review of the jurisdictional question. I discuss these points in turn.

I. *Bowles* Is Not Dispositive

Fedora holds "[a]ppeal periods to Article III courts, such as the period in § 7703(b)(1), are controlled by the Court's decision in *Bowles*," 848 F.3d at 1015, which held that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional,'" *id.* (quoting *Bowles*, 551 U.S. at 209). Thus, *Fedora* distinguishes prior Supreme Court precedent solely on whether the case refers to "appeal

[1] My opinion here applies with equal force to the orders issued concurrently today denying en banc rehearing and initial hearing en banc in *Vocke v. Merit Systems Protection Board*, No. 2016-2390, and *Musselman v. Department of the Army*, No. 2016-2522, respectively.

periods to Article III courts" or to "time limits or other requirements in non-appeal contexts." *Id.* at 1016, 1015; *see id.* at 1015-16 (discussing *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1638 (2015); *Henderson v. Shinseki*, 562 U.S. 428, 436-38 (2011); *Reed Elsevier*, 559 U.S. at 168; *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990)). The distinctions may not be that simple.

Factually, *Fedora* presents a different scenario than Bowles. *Bowles* involved an appeal from an Article III district court to an Article III appeals court, 551 U.S. at 207; *Fedora* an appeal from an administrative tribunal to an Article III appeals court, 848 F.3d at 1014. Neither the Supreme Court nor this court have stated that they are equivalent. Indeed, the Federal Rules of Appellate Procedure contain one set of rules for appeals from district courts and another for appeals from administrative agencies. *Compare* Fed. R. App. P. 3-12 (discussing appeals from district courts), *with* Fed. R. App. P. 15-20 (discussing appeals from administrative agencies).

Legally, the Supreme Court has "reject[ed] the major premise of this syllogism" and has definitively stated that "*Bowles* did not hold categorically that every deadline for seeking judicial review in civil litigation is jurisdictional. Instead, *Bowles* concerned an appeal from one court to another court." *Henderson*, 562 U.S. at 436. Moreover, the Court in *Bowen v. City of New York* granted equitable tolling for a sixty-day deadline to obtain review of an administrative agency's Social Security benefits decisions in federal district court. 476 U.S. 467, 487

(1986). *Fedora* does not mention *Bowen*, and I do not think *Bowles* can controls the inquiry.

II. The Court Has Analyzed the Question Presented Using an Incomplete Framework

In 1990, the Supreme Court in *Irwin* "adopt[ed] a more general rule to govern the applicability of equitable tolling in suits against the Government" by "hold[ing] that the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95, 95-96. Subsequent cases have elaborated upon the means for rebutting this presumption and have employed a broader review of the jurisdictional/non-jurisdictional divide.[2] *Irwin* and cases following *Irwin* have laid out a more inclusive test that should be applied to the review of § 7703(b)(1)(A).[3]

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[2] *Oja* held that *Irwin* did not require concluding that the filing deadline in § 7703(b)(1)(A) is a claims processing rule (i.e., the deadline is non-jurisdictional). *See* 405 F.3d at 1357-60. As explained below, the Supreme Court's evolving statements on jurisdiction demonstrate that *Oja* did not afford the appropriate weight to *Irwin*.

[3] *Fedora* does not hold that *Bowles* overruled *Irwin*; rather, it distinguishes *Irwin* and other cases finding time limits non-jurisdictional because "[t]hose cases do not concern appeal periods." 848 F.3d at 1015. However, the Supreme Court has stated that its "decisions remain binding precedent until [it] see[s] fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) (citation omitted). Because the Supreme Court has stated that "seeking judicial review" does not determine whether language is jurisdictional or

To determine whether the presumption of equitable tolling has been rebutted, the Supreme Court "look[s] to see if there is any clear indication that Congress wanted the rule to be jurisdictional." *Henderson*, 562 U.S. at 436 (internal quotation marks and citation omitted). This review looks "to the condition's text, context, and relevant historical treatment." *Reed Elsevier*, 559 U.S. at 1246 (citation omitted). With respect to relevant historical treatment, one strong indicia that a statute is meant to be jurisdictional is "a long line of th[e] Court's decisions left undisturbed by Congress [that] has treated a similar requirement as jurisdictional." *Id*. at 436 (internal quotation marks and citation omitted). Courts also may consider the sophistication of the average petitioner and Congress's intent in enacting the statutory scheme. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982) (recognizing that Title VII contemplates a "statutory scheme in which laymen, unassisted by trained lawyers, initiate the process" in assessing a jurisdictional prerequisite (internal quotation marks and citation omitted)); *see also Henderson*, 562 U.S. at 437 (noting certain administrative schemes that were "unusually protective of claimants" (internal quotation marks and citation omitted)); *Irwin*, 498 U.S. at 102 (discussing scheme in which "remedial statute[ ] should be construed in favor of those whom the legislation was designed to protect").

The Supreme Court has applied some or all of these factors in assessing the timeliness of appeals

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not, *Henderson*, 562 U.S. at 436, *Irwin* cannot be distinguished in that fashion.

from federal administrative tribunals to Article III courts, *see Henderson*, 562 U.S. at 435-36, the timeliness of appeals from federal district courts to federal courts of appeals, *see Bowles*, 551 U.S. at 209 n.2 (basing its finding on a "century's worth of precedent" related to similar appeals), and cases involving "other types of threshold requirements," *Reed Elsevier,* 559 U.S. at 166 (footnote omitted) (finding statutory registration requirement non-jurisdictional); *see, e.g.*, *Kwai Fun Wong*, 135 S. Ct. at 1632-38 (discussing statute's text, context, and relevant Supreme Court treatment to find time limits to initially file tort claims non-jurisdictional); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 137-39 (2008) (holding that well-settled Supreme Court precedent rebutted the presumption of tolling for deadline to file initial claims at the U.S. Court of Federal Claims); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 511-15 (2006) (discussing statute's text, context, and relevant Supreme Court treatment of similar requirements to find numerosity requirement to sue non-jurisdictional). We should review the nature of the filing deadline in § 7703(b)(1)(A) using this analysis. Because *Fedora* and the line of cases stemming from *Monzo* incompletely analyzed the issue at bar, we should take this opportunity to reconsider this line of cases.[4]

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[4] The Supreme Court continues to pay close attention to whether various rules contain jurisdictional conditions. *See Hamer v. Neighborhood Hous. Servs. of Chi.*, 855 F.3d 761 (7th Cir. 2016), *cert. granted*, 85 U.S.L.W. 3409 (U.S. Feb. 27, 2017) (No. 2016-658) (granting certiorari as to whether a federal rule of appellate procedure is jurisdictional). The petition for certiorari in *Hamer* identifies a post-*Bowles* circuit-split on whether a district court

III. Conclusion

It is rare for the issue before us, which more often affects pro se litigants than others, to come to the court fully briefed with the aid of counsel and with the views of the interested governmental agencies. *Cf. Jones v. Dep't of Health & Human Servs.*, 834 F.3d 1361, 1364-66 (Fed. Cir. 2016) (addressing appeal from pro se petitioner who filed the appeal before the filing window in 5 U.S.C. § 7703(b)(1)(A) began to run). Because we are the only circuit with subject matter jurisdiction over appeals from final orders of the MSPB, we must revisit our precedent when the circumstances require, both to ensure the viability of our holdings and to guarantee litigants a full opportunity to lawful relief. For these reasons and the reasons stated in Judge Plager's dissent at the panel stage, I respectfully dissent.

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can extend time to file a notice of appeal beyond the thirty days provided in the Federal Rules of Appellate Procedure. *See* Pet. for Writ of Cert., *Hamer v. Neighborhood Hous. Servs. of Chi.*, No. 2016-658, 2016 WL 6833892, at *4-5, *8-11 (U.S. Nov. 15, 2016). It appears that our sibling circuits have not taken as narrow a road in interpreting *Bowles*, even for appeals from federal district courts to federal appeals courts, as *Fedora* counsels.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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2015-3039

Petition for review of the Merit Systems Protection Board in No. SF-0752-13-0433-I-1.

PLAGER, *Circuit Judge*, dissenting from the denial of the petition for panel rehearing.

I dissent from the denial of the petition for panel rehearing for the reasons expressed in my dissent to the panel majority opinion, and for the reasons expressed in Judge Wallach's dissent from the denial of the petition for rehearing en banc.