No. _____

In the Supreme Court of the United States

JEFFERY S. MUSSELMAN,
Petitioner,
v.
DEPARTMENT OF THE ARMY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GREGORY G. GARRE
MELISSA ARBUS SHERRY
Counsel of Record
ROMAN MARTINEZ
GABRIEL K. BELL
ROBERT J. GAJARSA
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
melissa.sherry@lw.com
Counsel for Petitioner

QUESTION PRESENTED

Section 7703(b)(1)(A) of Title 5 establishes a 60-day time limit for an employee or applicant for employment to seek judicial review of a final decision by the Merit Systems Protection Board. 5 U.S.C. § 7703(b)(1)(A). The question presented is:

Whether the time limit in Section 7703(b)(1)(A) is a jurisdictional requirement or a claim-processing rule subject to equitable tolling.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Jeffrey S. Musselman respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-3a) is unreported. The precedential decision of the court of appeals denying initial hearing en banc (App. 22a-23a) is published at 868 F.3d 1341. The final order of the Merit Systems Protection Board (App. 4a-17a) is unpublished but available at 2016 WL 3365977.

JURISDICTION

The court of appeals entered judgment on October 13, 2017. App. 1a-3a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 5, United States Code Section 7703, provides in pertinent part:

> **(b)(1)(A)** Except as provided in subparagraph (B) and paragraph (2) of this subsection, a petition to review a final order or final decision of the [Merit Systems Protection] 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)](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.

INTRODUCTION

This Court has spent more than a decade trying to bring discipline to what legal rules are properly characterized as "jurisdictional." The Court has made clear that statutory time limits are quintessential claim-processing rules unless Congress has clearly indicated to the contrary. And it has articulated a "readily administrable bright line" rule to identify those rare circumstances where a time limit will be treated as jurisdictional: there must be a "clear statement." In recent years, the Court has granted certiorari nearly every Term to reaffirm those principles when lower courts have gone astray and, with only few exceptions, has declared a variety of mandatory legal rules nonjurisdictional.[1]

---

[1] *See Wong v. United States*, 135 S. Ct. 1625, 1632 (2015) (Federal Tort Claims Act time limits nonjurisdictional); *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 148 (2013) (Medicare time limit for appeal to Provider Reimbursement Review Board nonjurisdictional); *Gonzalez v. Thaler*, 565 U.S. 134, 137 (2012) (requirement that a certificate of appealability indicate the specific

Over 30 years ago, the Federal Circuit—in what can best be described as a "drive-by jurisdictional ruling"—declared the time limit to file a petition for review of a final order of the Merit Systems Protection Board "jurisdictional" and, for that reason, not subject to equitable tolling. Despite this Court's intervening case law reiterating that time limits are rarely jurisdictional, and despite the absence of any "clear statement" to the contrary in § 7703(b)(1)(A), the

---

issue to be challenged nonjurisdictional); *Stern v. Marshall (In re Estate of Marshall)*, 564 U.S. 462, 479 (2011) (carve-out for "personal injury" claims in bankruptcy statute nonjurisdictional); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 438 (2011) (time limit to file appeal to Veterans Court nonjurisdictional); *Holland v. Florida*, 560 U.S. 631, 645 (2010) (Antiterrorism and Effective Death Penalty Act statute of limitations nonjurisdictional); *Dolan v. United States*, 560 U.S. 605, 611 (2010) (statutory deadline for ordering restitution nonjurisdictional); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 157 (2010) (requirement that copyright be registered before filing suit nonjurisdictional); *Union Pacific R.R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 71 (2009) (proof of conferencing requirement before National Railroad Adjustment Board arbitration nonjurisdictional); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 504, 516 (2006) (Title VII provision exempting employers with fewer than 15 employees nonjurisdictional); *Eberhart v. United States*, 546 U.S. 12, 15 (2005) (per curiam) (federal criminal rules setting forth time limits for new trial nonjurisdictional); *Scarborough v. Principi*, 541 U.S. 401, 411-12 (2004) (filing deadlines for fee applications under Equal Access to Justice Act nonjurisdictional); *Kontrick v. Ryan*, 540 U.S. 443, 452-53 (2004) (filing deadlines for objecting to debtor's discharge in bankruptcy nonjurisdictional); *cf.* Cert. Petition at i, *Hamer v. Neighborhood Hous. Servs.*, 2016 WL 6833892 (Nov. 15, 2016) (No. 16-658), *cert. granted*, 137 S. Ct. 1203 (2017) (certiorari granted to decide whether Federal Rule of Appellate Procedure 4(a)(5)(C) is jurisdictional).

Federal Circuit has repeatedly declined to reconsider that decision and has reaffirmed its prior precedent over vigorous dissents—most recently in this case.

The Federal Circuit's decision below cannot be reconciled with this Court's cases. It conflicts with how other courts of appeals have treated the virtually identical time limit for seeking judicial review of "mixed cases" in neighboring § 7703(b)(2). It is an important issue that impacts federal employment disputes nationwide. And it denies review of a serious claim filed by a Bronze Star recipient, who served for decades with distinction in the armed forces, because the U.S. Post Office inexplicably took *16 days* to deliver a petition that he sent by *priority* mail. Absent this Court's intervention, the Federal Circuit's erroneous decision will control and will perpetuate now-discredited understandings of when a statutory time limit qualifies as jurisdictional. This Court's review is urgently needed.

STATEMENT

1. "The Civil Service Reform Act of 1978 (CSRA), 5 U.S.C. § 1101 *et seq.*, establishes a framework for evaluating personnel actions taken against federal employees." *Kloeckner v. Solis*, 568 U.S. 41, 44 (2012). If the personnel action is sufficiently serious, the employee may appeal an agency's decision to the Merit Systems Protection Board ("MSPB" or "Board"). *Id.* Section 7703 of the CSRA governs judicial review of MSPB decisions. 5 U.S.C. § 7703. For so-called "mixed cases"—*i.e.*, "claims that an agency action appealable to the MSPB violates an antidiscrimination statute listed in § 7702(a)(1)"—employees must seek judicial review in district court. *Kloeckner*, 568 U.S. at 46, 56. For all other cases seeking review of a final Board decision

(including this case), a petition for review must be filed in the Federal Circuit. *See* 5 U.S.C. § 7703(b)(1)(A).

Similar language governs the timing for review of both types of cases. For mixed cases, Section 7703(b)(2) provides that, "[n]otwithstanding any other provision of law, any such case filed under any such section must be filed within 30 days after the date the individual filing the case received notice of the judicially reviewable action under such section 7702." 5 U.S.C. § 7703(b)(2). For all other cases, Section 7703(b)(1)(A) provides that, "[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." *Id.* § 7703(b)(1)(A).

2. For over 20 years, Petitioner served with distinction in the United States Air Force. *See* Pet. C.A. Br. 8. He worked in Operations Intelligence and Explosive Ordnance Disposal and received numerous decorations, including a Bronze Star, a Meritorious Service Medal, and the Air Force Commendation Medal. *See id.*

In 2001, after retiring from the Air Force as a Master Sergeant, Petitioner continued his service as a civilian. *See* Pet. C.A. Br. 8. For almost 15 years, Petitioner worked in the Analytical Remediation Activity Division ("CARA") of the Army's 20th Chemical, Biological, Radiological, Nuclear, and Explosives Command. *See id.* In 2013, Petitioner was named the acting program manager for CARA's western command and was recommended for a promotion. *See id.* at 9-10. But after making several protected whistleblower disclosures to senior management, Petitioner was removed from his role as

acting program manager and his promotion was never finalized. *See id.* at 12-16.

3. Petitioner appealed to the MSPB, alleging that the adverse personnel action was retaliatory. On June 17, 2016, the Board issued its final order denying Petitioner's request for corrective action. App. 15a; Pet. C.A. Br. 18. The Board agreed that the Army's acts were ostensibly linked to protected whistleblowing activity, but it denied relief after finding that the Army's adverse personnel actions could have been justified on independent grounds. App. 9a-12a; Pet. C.A. Br. 17-18.

4. a. Any petition to review the MSPB's final decision was due 60 days later, on August 16, 2016. *See* 5 U.S.C. § 7703(b)(1)(A). On August 3, 2016—nearly two weeks before the filing deadline—Petitioner (who was proceeding pro se) mailed his petition for review to the Federal Circuit—even taking the extra step and expense of using Priority Mail. *See* App. 19a. The United States Postal Service promised that the petition would be delivered by August 5, 2016—11 days before the petition was due. *See* Att. 1 to Pet. C.A. Resp. to Show Cause Order, ECF No. 8. Instead, the petition was not delivered to the court until August 19, 2016—16 days after mailing, and three days past the § 7703(b)(1)(A) filing deadline. *See* App. 19a. It is undisputed that this delay was through no fault of Petitioner.[2]

---

[2] The "product and tracking" information page shows the petition arriving at the USPS Origin Facility in Little Rock, Arkansas on August 4. Att. 2 to Pet. C.A. Resp. to Show Cause Order, ECF No. 8. The next entry shows the petition arriving at

b. The Federal Circuit issued an order to show cause why the petition should not be dismissed as untimely. *See* Order Directing Parties to Show Cause 2, ECF No. 4. It then requested appointment of pro bono counsel and ordered the parties to brief "whether § 7703(b)(1)'s filing deadline is jurisdictional or whether it can be extended or tolled under these circumstances." App. 20a. Specifically, the Federal Circuit explained:

> While this court has stated that the time for filing a petition for review pursuant to 5 U.S.C. § 7703(b)(1) is "statutory, mandatory, [and] jurisdictional," *Oja v. Dep't of the Army*, 405 F.3d 1349, 1357 (Fed. Cir. 2005) (quoting *Monzo v. Dep't of Transp.*, 735 F.2d 1335, 1336 (Fed. Cir. 1984)), it has also raised questions as to whether those cases accord with the more recent precedent from the Supreme Court. *See Jones v. Dept. of Health & Human Servs.*, 2016 WL 4434665 at *1 n.2 (Fed. Cir. Aug. 22, 2016) ("It may be time to ask whether we should reconsider *Oja* and *Monzo* in light of recent Supreme Court precedent finding some statutory time limits nonjurisdictional.").

Id. The court of appeals accordingly directed the parties to "address the Supreme Court's more recent cases dealing with whether statutory-time limits are jurisdictional or merely claims-processing rules and whether those cases have overruled *Oja*, *Monzo*, and

---

the USPS Destination Facility in Linthicum Heights, Maryland on August 18, 2016. *See id.*

Pinat [*v. Office of Pers. Mgmt.*, 931 F.2d 1544 (Fed. Cir. 1991)] or whether those cases should be overruled." *Id.*

c. Because of the binding adverse circuit precedent holding that the time for filing a petition under § 7703(b)(1)(A) is jurisdictional, Petitioner requested initial hearing en banc after filing his opening brief. On July 20, 2017, by a 7-4 vote, the Federal Circuit denied that request for en banc review. *Id.* at 22a-23a. Judges Wallach, Newman, O'Malley, and Stoll dissented. *Id.* at 22a. The same day, the Federal Circuit denied two petitions for rehearing en banc raising the same issue. *See Fedora v. Merit Sys. Prot. Bd.*, 868 F.3d 1336, 1337, 1339-40 (Fed. Cir. 2017) (en banc), *pet. for cert. filed*, No. 17-557 (U.S. Oct. 6, 2017); *Vocke v. Merit Sys. Prot. Bd.*, 868 F.3d 1341, 1341 (Fed. Cir. 2017) (en banc), *pet. for cert. filed*, No. 17-544 (U.S. Oct. 6, 2017). The dissenting judges incorporated their written opinion dissenting from rehearing en banc in *Fedora* (App. 22a), and explained that their *Fedora* opinion "applies with equal force" to Petitioner's case (*Fedora II*, 868 F.3d at 1338 n.2).

d. Because the petition for review was untimely under now-binding circuit precedent, on August 28, 2017, Petitioner filed an unopposed motion for judgment of dismissal. *See* ECF No. 39. On October 6, 2017, Petitioner submitted a letter to the Federal Circuit requesting resolution of the pending motion to allow for this Court's review. *See* ECF No. 40. On October 13, 2017, the Federal Circuit dismissed the petition for review as untimely. App. 1a-3a.

REASONS FOR GRANTING THE WRIT

This case presents the question whether the 60-day deadline to file a petition for review of a final decision

of the MSPB is the rare "jurisdictional" time limit that deprives the Federal Circuit of authority to equitably toll the filing deadline. More than a decade of this Court's precedent plainly answers that question in the negative. Time and again, the Court has reaffirmed that—absent a clear statement to the contrary—statutory time limits are nonjurisdictional claim-processing rules presumptively subject to equitable tolling. Congress did nothing special in § 7703(b)(1)(A) to depart from that rule. The Federal Circuit's decision to nevertheless cloak the 60-day filing deadline with jurisdictional status cannot be reconciled with this Court's cases, and its steadfast refusal to reconsider its precedent warrants this Court's review.

As the dissenting judges recognized, the question presented is also "exceptionally important." *Fedora v. Merit Sys. Prot. Bd.*, 868 F.3d 1336, 1338 (Fed. Cir. 2017) (en banc) (*Fedora II*) (Wallach, J., dissenting), *pet. for cert. filed*, No. 17-557 (U.S. Oct. 6, 2017). The Federal Circuit has exclusive jurisdiction over "non-mixed" cases. Its erroneous (and entrenched) decision will control every such personnel action involving federal employees going forward. And most of those litigants are proceeding pro se. The decision, moreover, conflicts with the decisions of other courts of appeals that have held that the nearly identical 30-day deadline for seeking judicial review of "mixed cases" in neighboring § 7703(b)(2) is *non*jurisdictional and *is* subject to equitable tolling.

The facts of this case are also particularly egregious, making it an ideal vehicle to consider the question. Petitioner is a Bronze Star recipient who has served his country for decades with distinction in various capacities. In 2013, while serving in a civilian

capacity in the Army, he was appointed acting program manager and recommended for a promotion. But he was suddenly demoted and his promotion effectively revoked after making several protected whistleblower disclosures to senior management. Petitioner has a strong claim that these adverse personnel actions were in retaliation for those disclosures—indeed, the Board held that Petitioner had proved as much but still denied corrective action. Yet, under the decision below, an Article III court will never hear that claim on its merits because the United States Postal Service inexplicably took *16* days to deliver a petition for review that he sent by *priority* mail—leading him to miss the filing deadline by three days. The Federal Circuit rule sanctioning that unconscionable result cries out for this Court's review.

I. The Federal Circuit's Decision Conflicts With This Court's Precedents And Is Wrong

A. Section 7703(b)(1)(A) Is Not The Rare Jurisdictional Time Limit

1. It is well-settled that statutory time limits are presumptively subject to equitable tolling. *See Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). That is true whether the defendant is a private party or the Government. *See id.*; *Wong v. United States*, 135 S. Ct. 1625, 1630-31 (2015). The only question, then, is whether that presumption has been rebutted here. One way to rebut the presumption, and the only one at issue in this case, is to establish that the time limit is "jurisdictional." *Wong*, 135 S. Ct. at 1631. Section 7703(b)(1)(A) comes nowhere close to meeting that "high bar." *See id.*

As this Court has explained, the question of whether a time limit is "jurisdictional" is far from

merely "semantic." *Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). "Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system." *Id.* A jurisdictional time limit is not subject to equitable tolling, and it can be raised at any time—including on appeal—to get a case dismissed. *See Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013).

Because of the "untoward consequences" that attach to a jurisdictional label, the Court has "'tried in recent cases to bring some discipline to the use' of the term 'jurisdiction.'" *Id.* (quoting *Henderson*, 562 U.S. at 435). "[E]ven if" a rule is "important and mandatory," it "should not be given the jurisdictional brand" unless "it governs a court's adjudicatory capacity." *Henderson*, 562 U.S. at 435.

"[C]laim-processing rules," for example, "should not be described as jurisdictional." *Id.* "These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain times." *Id.* And, "[t]ime and again," this Court has "described filing deadlines as 'quintessential claim-processing rules,' which 'seek to promote the orderly progress of litigation,' but do not deprive a court of authority to hear a case." *Wong*, 135 S. Ct. at 1632 (quoting *Henderson*, 562 U.S. at 435).

To be sure, Congress can decide to brand a time limit jurisdictional and, in so doing, impose all of the "harsh consequences" that follow. *Id.* But it has to do so in clear terms. Under this Court's "readily administrable bright line" rule, *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006), a "time bar[]" will be treated as jurisdictional "only if Congress has 'clearly state[d]' as much," *Wong*, 135 S. Ct. at 1632 (alteration in

original) (quoting *Arbaugh*, 546 U.S. at 515). "[A]bsent such a clear statement, . . . 'courts should treat the restriction as nonjurisdictional.'" *Id.* (alterations in original) (citations omitted). Although Congress does not have to use "'magic words,'" "traditional tools of statutory construction must plainly show that Congress imbued a procedural bar with jurisdictional consequences." *Id.* (citation omitted). Applying that "clear statement rule," this Court has "made plain that most time bars are nonjurisdictional." *Id.*

2. Section 7703(b)(1)(A) is not the "rare statute of limitations that can deprive a court of jurisdiction." *Wong*, 135 S. Ct. at 1632. To the contrary, "it 'reads like an ordinary, run-of-the-mill statute of limitations.'" *See id.* at 1633 (quoting *Holland v. Florida*, 560 U.S. 631, 647 (2010)); *cf. Kloeckner*, 133 S. Ct. at 605 (describing time limit in § 7703(b)(2) as "nothing more than a filing deadline"). Section 7703(b)(1)(A) provides that, "[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." 5 U.S.C. § 7703(b)(1)(A).

"Most important," that text "speaks only to a claim's timeliness, not to a court's power." *Wong*, 135 S. Ct. at 1632. It "does not speak in jurisdictional terms or refer in any way to the jurisdiction" of the Federal Circuit. *Id.* at 1633 (quoting *Arbaugh*, 546 U.S. at 515); *see Henderson*, 562 U.S. at 438. And it does not "address [the Federal Circuit's] authority to hear untimely suits, or in any way cabin its usual equitable powers." *Wong*, 135 S. Ct. at 1633. "[I]n case after case," this Court has "emphasized . . . that jurisdictional statutes speak about jurisdiction, or more generally phrased, about a court's powers." *Id.* at 1633

n.4. Section 7703(b)(1)(A), in contrast, uses "mundane statute-of-limitations language." *Id.* at 1632.

The fact that § 7703(b)(1)(A) uses the word "shall" and is thus framed in "mandatory" terms is "of no consequence." *Id.* Indeed, "that is true of most such statutes." *Id.* No matter how "'emphatic[ally]' expressed those terms may be," this Court has required Congress to do "something special . . . to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." *Id.* (alteration in original) (citation omitted). And, if anything, the language here is far less emphatic than other prescriptions this Court has deemed nonjurisdictional. *See, e.g.*, *id.* (holding nonjurisdictional a statutory time limit providing that untimely claims "shall be forever barred" (citation omitted)). Accordingly, the language of § 7703(b)(1)(A) "provides no clear indication that Congress wanted that provision to be treated as having jurisdictional attributes." *Henderson*, 562 U.S. at 439.

The statutory context does not provide the necessary clear statement the text lacks. Section 7703 is titled "Judicial review of decisions of the Merit Systems Protection Board" and is located within Title 5 of the United States Code. The Federal Circuit's authority to hear appeals from the MSPB comes from a different title, in a section entitled "Jurisdiction of the United States Court of Appeals for the Federal Circuit." *See* 28 U.S.C. § 1295(a)(9). Nothing in that provision "addresses the time" for seeking review of an MSPB decision. *See Henderson*, 562 U.S. at 440.

Moreover, the administrative regime for reviewing adverse personnel actions is protective of the federal employee claimants. *See, e.g.*, *Civil Service Reform: Hearings on H.R. 11280 Before the H. Comm. on Post*

Office & Civil Service, 95th Cong. 3, 513, 519-20 (1978) (explaining how the CSRA was designed to "protect[] the[] rights" of federal employees by establishing a framework for them to appeal certain adverse personnel actions to the Merit Service Protection Board"); *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearing on S. 2640, S. 2707, & S. 2830 Before the S. Comm. on Governmental Affairs*, 95th Cong. 33, 100-01, 976 (1978) (explaining how the CSRA was designed to ensure civil service employees "fairness," "equity," and "justice" by helping to guarantee "full due process" to oppose adverse agency actions). Indeed, as Judge Wallach noted in dissent below, many of the claimants (like Petitioner initially was) are not represented by counsel. *See Fedora II*, 868 F.3d at 1340. The history and purpose of the CSRA thus further confirm that Congress did not impose an unyielding jurisdictional bar *sub silentio*. *See Bowen v. City of New York*, 476 U.S. 467, 480 (1986) (noting that Social Security benefits review especially protective of claimants); *Henderson*, 562 U.S. at 437 (same for veterans benefits).

Because nothing in the text, context, history, or purpose of § 7703(b)(1)(A) "indicates (much less does so plainly) that Congress meant to enact something other than a standard time bar," *Wong*, 135 S. Ct. at 1632, the Federal Circuit erred in branding the 60-day deadline jurisdictional. Without that erroneous classification, the "general rule" set forth in *Irwin* controls: the 60-day time limit is subject to equitable tolling.

B. The Federal Circuit's Contrary Arguments Do Not Withstand Scrutiny

For more than 30 years, the Federal Circuit has stubbornly adhered to the position that § 7703(b)(1)(A)'s time limit is jurisdictional and, therefore, not subject to equitable tolling. It has done so despite intervening decisions by this Court directly undermining—if not overruling—the reasoning of those cases. And it has done so over vigorous dissents. None of the ever-evolving reasons offered establish the requisite "clear statement" needed to render § 7703(b)(1)(A) one of the "rare" jurisdictional statutes of limitations.

The Federal Circuit first declared that § 7703(b)(1)(A) was jurisdictional (and not subject to equitable tolling) in *Monzo v. Department of Transportation*, 735 F.2d 1335, 1336 (Fed. Cir. 1984). There, the Federal Circuit declared—without further discussion or reasoning—that the "period for appeal is statutory, mandatory, [and] jurisdictional." *Id.* The court cited an earlier decision, *Ramos v. United States*, which had rested on "the notion that statutes of limitations are a condition on the sovereign's consent to suit." 683 F.2d 396, 397 (Ct. Cl. 1982) (citing *Soriano v. United States*, 352 U.S. 270, 276 (1957)). *Irwin*, of course, later rejected that reasoning and held that the rebuttable presumption that equitable tolling is available applies equally to suits against the United States. *Irwin*, 498 U.S. at 94-96 (expressly rejecting presumption against equitable tolling set forth in *Soriano*); *see also Wong*, 135 U.S. at 1634-37 (recognizing the same). Accordingly, *Monzo* was either a "drive-by jurisdictional ruling" (*Arbaugh*, 546 U.S. at

511 (citation omitted)), or a decision resting on a premise that is no longer good law.

When the Federal Circuit confronted the issue again post-*Irwin*, it reaffirmed *Monzo* in a split decision. *See Oja v. Department of the Army*, 405 F.3d 1349 (Fed. Cir. 2005). In *Oja*, the majority held that it was "bound" by *Monzo*, but also noted that it would have reached the same conclusion "for other reasons." *Id.* at 1357. According to the majority, *Irwin* might have been limited to Title VII cases—or at least would have more force in that context. *Id.* But even if *Irwin* applied, the majority reasoned that Federal Rules of Appellate Procedure 15(a)(1) and 26(b)(2) rebutted any presumption of tolling simply because they were "presented to Congress . . . before going into effect," and Congress "did not" change them. *Id.* at 1359.[3]

Six months after *Oja*, however, this Court decided *Eberhart v. United States*, 546 U.S. 12 (2005). There, the Court considered whether Federal Rules of

---

[3] The majority noted that, in *Stone v. INS*, 514 U.S. 386 (1995), this Court had stated "that statutory provisions specifying the timing of review are 'mandatory and jurisdictional' . . . and are not subject to equitable tolling." *Oja*, 405 F.3d at 1359 (alteration in original) (citations omitted). But the majority did not rely on *Stone* because an en banc Federal Circuit decision had interpreted that decision "to mean only 'that statutory provisions specifying the time for review are not subject to equitable tolling, after *Irwin*, *if Congress has so expressed its intent*.'" *Id.* (emphasis in *Oja*) (quoting *Bailey v. West*, 160 F.3d 1360, 1366 (Fed. Cir. 1998) (en banc)); *see also Henderson*, 562 U.S. at 437 (noting that *Stone* described "the deadline for seeking review in the court of appeals of removal orders of the Board of Immigration Appeals" as "'mandatory and jurisdictional'" "without elaboration" (quoting *Stone*, 514 U.S. at 405)).

Criminal Procedure 33 and 45 were jurisdictional in nature. Like Federal Rule of Appellate Procedure 26(b)(2), Rule 45 provided that a court "may not extend the time to take any action under [Rule 33], except as stated" in Rule 33 itself. *Id.* at 15. And, like the Federal Rules of Appellate Procedure, Congress was presented with this Rule and did not change it. Yet, this Court declared them to be nonjurisdictional claim-processing rules. *Id.* at 17-19; *see also Kontrick v. Ryan*, 540 U.S. 443, 453 (2004) ("axiomatic" that court-prescribed rules of procedure "do not create or withdraw federal jurisdiction." (quoting *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978))). Thus, even apart from its other flaws (*see, e.g.*, *Oja*, 405 F.3d at 1367 (Newman, J., dissenting)), the majority's alternative reasoning in *Oja* was unsustainable after *Eberhart*.

The Federal Circuit has now revisited the issue for a third time. *See Fedora v. Merit Sys. Prot. Bd.*, 848 F.3d 1013, 1016 (Fed. Cir. 2017) (*Fedora I*). Once again, the Federal Circuit rejected the argument that its prior decisions were "no longer good law" in light of intervening decisions of this Court. *Id.* at 1015. A divided panel adhered to the court's prior precedent over a dissent calling for en banc review. *Id.* at 1017-26 (Plager, J., dissenting). And the majority (once again) abandoned the grounds articulated in the court's prior cases in favor of a new reason why the time limit in § 7703(b)(1)(A) is jurisdictional and not subject to equitable tolling.

The new reason: *Bowles v. Russell*, 551 U.S. 205 (2007). In the majority's view, all of this Court's other cases stand only for the proposition that "limitations periods . . . are not jurisdictional"; they "d[id] not

concern appeal periods." *Fedora I*, 848 F.3d at 1015. *Bowles*, according to the majority, controlled all "[a]ppeal periods to Article III courts" and declared them jurisdictional. *Id.*

But *Bowles* does not control here. Indeed, this Court already rejected such an expansive reading of *Bowles* in *Henderson*. There, the United States attempted to read "*Bowles* to mean that all statutory deadlines for taking appeals in civil cases are jurisdictional." 562 U.S. at 436. The Court disagreed and explained that *Bowles* "did not hold categorically that every deadline for seeking judicial review in civil litigation is jurisdictional." *Id.* Rather, "it concerned only 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.* (citation omitted). Section 7703(b)(1)(A)'s direct review of an administrative agency decision is also *not* an appeal "of that type." *Id.*

Thus, as the dissent from the denial of en banc review noted, *Bowen v. City of New York*, 476 U.S. 467 (1986), provides the better analogue. Like this case, *Bowen* involved a time period within which to seek judicial review of an agency decision to an Article III court. *See id.* at 472; *Fedora II*, 868 F.3d at 1338-39. Like this case, *Bowen* involved an administrative scheme designed to protect claimants. 476 U.S. at 472. And, like this case, the claimants seeking judicial review often proceed pro se. *See id.* at 480. In *Bowen*, this Court held that a court could equitably toll the filing deadline to obtain review of the agency's Social Security benefits decision. *Id.* at 469-70, 487. In the absence of any clear statement from Congress, the

Federal Circuit should have reached the same result here.

In the end, *Bowles* was the product of *stare decisis*—a "century's worth of precedent and practice in American courts." *Henderson*, 562 U.S. at 436 (quoting *Bowles*, 551 U.S. at 209 n.2); *cf. Wong*, 135 S. Ct. at 1636 ("*John R. Sand* [*& Gravel Co. v. United States*, 552 U.S. 130 (2008)] asked, why not hold that the Tucker Act's time limit . . . is nonjurisdictional? The answer came down to two words: *stare decisis*."). Section 7703(b)(1)(A) lacks any such pedigree.

II. The Federal Circuit's Decision Has Created Intra-Circuit Dissension And An Inter-Circuit Conflict

The Federal Circuit has exclusive jurisdiction to review "a final order or final decision of the Merit Systems Protection Board." 28 U.S.C. § 1295(a)(9); *see also* 5 U.S.C. § 7703(b)(1)(A). There is thus no potential for a direct circuit split on the question presented, and the Federal Circuit has consistently refused to reconsider its prior decisions for decades—and over the dissents of five judges. *See, e.g.*, *Oja*, 405 F.3d at 1364-65 (Newman, J., dissenting); *Fedora I*, 848 F.3d at 1025 (Plager, J., dissenting); *Fedora II*, 868 F.3d at 1337 (Wallach, O'Malley, Newman, and Stoll, JJ., dissenting); *see also* App. 22a. Indeed, the Federal Circuit routinely and summarily dismisses untimely petitions for review of MSPB decisions for lack of jurisdiction.[4] Absent review by this Court, the Federal

---

[4] *See, e.g.*, *Brenndoerfer v. United States Postal Serv.*, 693 F. App'x 904, 906 (Fed. Cir. 2017); *Jarmin v. Office of Pers. Mgmt.*, 678 F. App'x 1023, 1024-25 (Fed. Cir. 2017); *Hearn v. Department*

Circuit's erroneous treatment of § 7703(b)(1)(A) as jurisdictional—and all the harsh and untoward consequences that come with that label—will be the law that governs federal employment disputes nationwide.

But there is more. As this Court is well aware, judicial review of certain personnel disputes are filed first in district court and appealed to the regional circuits. *See Perry v. Merit Sys. Prot. Bd.*, 137 S. Ct. 1975, 1979 (2017). This occurs when an employee asserts a violation of federal antidiscrimination laws. *Id.* The deadline for seeking review of such "mixed cases" is set forth in the substantially similar neighboring provision, § 7703(b)(2). Mixed cases are subject to a shorter time limit (30 days, compared to 60 days). *Compare* 5 U.S.C. § 7703(b)(1)(A), *with id.* § 7703(b)(2). And the time does not begin to run until the individual "receive[s]" notice of the "judicially reviewable action" (as opposed to when the Board "issues" such notice). *Perry*, 137 S. Ct. at 1981-82 & n.2. But otherwise, the language is virtually identical.

---

of the Army, 662 F. App'x 916, 919 (Fed. Cir. 2016); *Cross v. Office of Pers. Mgmt.*, 574 F. App'x 929, 930 (Fed. Cir. 2014); *Willingham v. Department of the Navy*, 526 F. App'x 975, 977 (Fed. Cir. 2013); *Shipp v. Department of Health & Human Servs.*, 498 F. App'x 975, 978 (Fed. Cir. 2012); *Burroughs v. Department of the Army*, 428 F. App'x 998, 999 (Fed. Cir. 2011); *Howard v. Merit Sys. Prot. Bd.*, 392 F. App'x 857, 858 (Fed. Cir. 2010); *West v. Office of Pers. Mgmt.*, 345 F. App'x 554, 555 (Fed. Cir. 2009); *Wilder v. Department of Health & Human Servs.*, 274 F. App'x 888, 889 (Fed. Cir. 2008); *Hebron v. United States Postal Serv.*, 226 F. App'x 994, 994 (Fed. Cir. 2007); *Pike v. Department of the Navy*, 184 F. App'x 952, 952 (Fed. Cir. 2006); *Donnelly v. United States Postal Serv.*, 153 F. App'x 732, 732 (Fed. Cir. 2005).

Under § 7703(b)(1)(A), the petition for review "shall be filed" within 60 days "[n]otwithstanding any other provision of law." 5 U.S.C. § 7703(b)(1)(A). And, under § 7703(b)(2), any case "must be filed" within 30 days "[n]otwithstanding any other provision of law." *Id.* § 7703(b)(2).

Because the Federal Circuit does not have jurisdiction over mixed cases, other courts of appeals have separately considered whether § 7703(b)(2)'s time limit is jurisdictional or, alternatively, subject to equitable tolling. Post-*Irwin*, the courts of appeals have concluded that § 7703(b)(2)'s filing deadline is *not* jurisdictional and *is* subject to equitable tolling. *See, e.g.*, *Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002); *Blaney v. United States*, 34 F.3d 509, 512-13 (7th Cir. 1994); *Nunnally v. MacCausland*, 996 F.2d 1, 3 (1st Cir. 1993); *Williams-Scaife v. Department of Def. Dependent Schs.*, 925 F.2d 346, 348 (9th Cir. 1991).[5]

---

[5] The law in the Sixth Circuit is less clear. Post-*Irwin*, a panel held that the § 7703(b)(2) filing deadline is not subject to equitable tolling, but that decision was vacated on other grounds by this Court and never reinstated. *See Dean v. Veterans Admin. Reg'l Office*, 943 F.2d 667, 669-70 (6th Cir. 1991), *vacated and remanded on other grounds*, 503 U.S. 902 (1992), *remanded to district court without op.*, 972 F.2d 346 (6th Cir. 1992). Later panel decisions have restated the holding from *Dean* in dicta, but there is no actual holding from a published Sixth Circuit decision on this issue. *See Johnson v. United States Postal Serv.*, 64 F.3d 233, 237-38 (6th Cir. 1995) (affirming dismissal of an untimely pre-*Irwin* petition by a district court, restating the *Dean* standard, but reasoning that the facts would not support equitably tolling the deadline by six months anyway); *see also Glarner v. United States Dep't of Veterans Admin.*, 30 F.3d 697, 701 (6th Cir. 1994) (restating language from *Dean* but holding that the Federal Tort Claims Act's filing deadline was not jurisdictional). The Sixth

District courts in the Third, Fifth, Eighth, and D.C. Circuits have reached the same conclusion.[6] The decision below cannot be reconciled with those decisions, and the Federal Circuit made no effort to distinguish those cases.

For good reason. As Judge Newman explained in her dissent in *Oja*, there is no basis on which to conclude that Congress intended one filing deadline in § 7703(b) to be jurisdictional and not the other. "Both § 7703(b)(1) and § 7703(b)(2) state time limits for the filing of claims against the federal employer, and both are directed to judicial 'review' of such claims"—"[t]here is no hint that Congress intended to preclude equitable tolling in actions under § 7703(b)(1) while permitting it in actions under § 7703(b)(2)." *Oja*, 405 F.3d at 1364-65 (Newman, J., dissenting). The entrenched circuit conflict thus provides an additional reason to grant review.

III. This Case Is An Ideal Vehicle To Resolve The Question Presented

This case is an ideal vehicle for this Court's review. The Federal Circuit's answer to the question presented

---

Circuit apparently has not revisited those decisions—and has not had an opportunity to consider this Court's more recent case law.

[6] *See Ware v. Frank*, Civ. A. No. 90-7423, 1992 WL 19861, at *2 (E.D. Pa. Jan. 30, 1992), *aff'd without op.*, 975 F.2d 1552 (3d Cir. 1992); *Doberstein v. St. Paul Dist. of the IRS*, Civ. No. 4-91-663, 1992 WL 42930, at *2 (D. Minn. Feb. 24, 1992), *aff'd*, 978 F.2d 1263 (8th Cir. 1992); *Williams v. Court Servs. & Offender Supervision Agency*, 772 F. Supp. 2d 186, 188 (D.D.C. 2011), *vacated on other grounds*, 840 F. Supp. 2d 192 (D.D.C. 2012); *Hicks v. Peake*, No. 3:07-cv-0819 M ECF, 2008 WL 3884367, at *2-3 (N.D. Tex. Aug. 20, 2008); *Becton v. Pena*, 946 F. Supp. 84, 87 (D.D.C. 1996).

was dispositive. The petition for review was dismissed as untimely based entirely on the Federal Circuit's determination that § 7703(b)(1)(A) is jurisdictional. And the facts of this case are especially egregious, underscoring the importance, and consequences, of the Federal Circuit's rule.

Petitioner was the recipient of numerous decorations during his 20 years of service in the Air Force, including a Bronze Star, and has worked as a civilian in the Army for the past 15 years. *See* Pet. C.A. Br. 8. In 2013, after being named an acting program manager within the Army's 20th Chemical, Biological, Radiological, Nuclear, and Explosives Command, he was recommended for a promotion. *See id.* at 9-10. But after making several protected whistleblower disclosures to senior management after an illustrious 35-plus-year career of serving his country, his promotion was unexpectedly and suddenly revoked. *See id.* at 12-16.

When the MSPB rejected his appeal despite finding the Army's actions to have been retaliatory (*see* App. 12a-15a), he turned to the courts. Proceeding pro se, Petitioner mailed his petition for review nearly *two weeks* before it was due to the Federal Circuit. *See* Att. 1 to Pet. C.A. Resp. to Show Cause Order, ECF No. 8. Despite the added financial burden, he paid for Priority Mail. *See id.* And the federal government (through the United States Postal Service) promised him that the petition would be delivered within two days—*11 days* before the filing deadline. *See id.* Nevertheless, it took the United States Postal Service *16 days* to deliver the petition from Arkansas to Washington, D.C., and he missed the filing deadline by three days. *See* Att. 2 to Pet. C.A. Resp. to Show

Cause Order, ECF No. 8; Order Directing Parties to Show Cause, ECF No. 4; Pet. C.A. Br. 18-19.

As the Federal Circuit itself recognized, this inexplicable delay was through "no fault" of Petitioner. App. 19a. And yet, the court was bound by its existing precedent to dismiss Petitioner's claim as untimely—kicking him out of court altogether based on the federal government's own negligence in failing to deliver the petition as promised. What a way to treat a decorated serviceman pursuing serious federal claims. Indeed, convicted felons are afforded greater latitude when filing court papers from jail. *See, e.g.*, Fed. R. App. P. 25(a)(2)(C) (papers filed by inmates timely when deposited in the mail—a rule that, if applied here, would have made the petition timely filed in the Federal Circuit).

If the deadline at issue is subject to equitable tolling, such tolling clearly is called for here and Petitioner's claim would be saved. That makes this case an especially compelling vehicle for considering the Federal Circuit's harsh rule. The question presented warrants this Court's review, and this is the ideal case in which to grant such review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GREGORY G. GARRE
MELISSA ARBUS SHERRY
Counsel of Record
ROMAN MARTINEZ
GABRIEL K. BELL
ROBERT J. GAJARSA
LATHAM & WATKINS LLP
555 11th Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
melissa.sherry@lw.com

Counsel for Petitioner

October 16, 2017

APPENDIX

APPENDIX TABLE OF CONTENTS

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JEFFERY S. MUSSELMAN,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2016-2522

Petition for review of the Merit Systems Protection Board in No. DA-1221-14-0499-W-3.

ON MOTION

Before TARANTO, CHEN, and HUGHES, *Circuit Judges.*

TARANTO, *Circuit Judge.*

O R D E R

Jeffery S. Musselman moves for an entry of judgment dismissing his petition for review as untimely. Mr. Musselman states that the Department of the Army does not oppose dismissal and will not file a response.

Mr. Musselman filed an individual right of action appeal at the Merit Systems Protection Board. On

June 17, 2016, the Board issued its final order, denying Mr. Musselman's request for corrective action. This court received Mr. Musselman's petition for review on August 19, 2016, 63 days after the Board issued its final order.

The time for filing a petition for review from a Board decision or order is governed by 5 U.S.C. § 7703(b)(1), which provides in relevant part that "any petition for review shall be filed within 60 days after the Board issues notice of the final order or decision of the Board." 5 U.S.C. § 7703(b)(1)(A). This court has held that the deadlines for appealing to this court from the Board are "mandatory" and "jurisdictional." *Fedora v. Merit Sys. Prot. Bd.*, 848 F.3d 1013, 1016 (Fed. Cir. 2017).

In order to be timely, a petition for review must be received by the court within the filing deadline. *Pinat v. Office of Pers. Mgmt.*, 931 F.2d 1544, 1546 (Fed. Cir. 1991) (explaining that a petition is filed when received by this court); *see also* Fed. R. App. P. 25(a)(2)(A). Here, that means the petition had to be received by this court no later than August 16, 2016. The petition was not received, however, until August 19th. Under our precedent, as Mr. Musselman concedes, dismissal is required, as the filing deadline is not subject to equitable tolling.

Accordingly,

IT IS ORDERED THAT:

(1) The stay of proceedings is lifted.

(2) The motion is granted. The petition for review is dismissed.

(3) Each side shall bear its own costs.

FOR THE COURT

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

s25

ISSUED AS A MANDATE: October 13, 2017

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JEFFERY S. MUSSELMAN,
Appellant,

v.

DEPARTMENT OF THE ARMY,
Agency.

DOCKET NUMBER
DA-1221-14-0499-W-3

DATE: June 17, 2016

123 M.S.P.R. 490 (MSPB June 17, 2016);
2016 WL 3365977

THIS FINAL ORDER IS NONPRECEDENTIAL[1]

Jeffery S. Musselman, Vilonia, Arkansas, pro se.

Shonte Fletcher, Esquire, Aberdeen Proving Ground, Maryland, for the agency.

BEFORE

Susan Tsui Grundmann, Chairman
Mark A. Robbins, Member

---

[1] A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. *See* 5 C.F.R. § 1201.117(c).

FINAL ORDER

The appellant has filed a petition for review of the initial decision, which denied his request for corrective action in this individual right of action (IRA) appeal. Generally, we grant petitions such as this one only when: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. *See* title 5 of the Code of Federal Regulations, section 1201.115 (5 C.F.R. § 1201.115). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly MODIFIED by this Final Order to find that the appellant engaged in additional protected activity but nonetheless failed to prove that it was a contributing factor to any personnel action, we AFFIRM the initial decision.

The appellant filed this IRA appeal, alleging that he was subjected to improper retaliation for engaging in protected activity. *Musselman v. Department of the Army*, MSPB Docket No. DA-1221-14-0499-W-1, Initial Appeal File (IAF), Tab 1. He alleged that each of the following disclosures and activities were protected: (a) on June 28, 2013, he arranged a teleconference between

his Director, K.N., and a number of term employees; (b) on June 28, 2013, he informed K.N. that loss of the term employees could result in mission failure and result in a gross waste of funds; (c) on April 5, 2011, he reported an employee's sexual harassment complaint to his Program Manager; (d) on July 18, 2011, he reported that his Program Manager was engaged in time fraud; and (e) on October 24, 2011, he prepared a memorandum in relation to an equal employment opportunity (EEO) complaint filed by another individual.[2] *See id.* at 11-15. The appellant further alleged that, because of these activities, he was relieved of his duties as Acting Program Manager and denied a temporary promotion. IAF, Tab 1 at 4, Tab 11 at 4.

The administrative judge found that the appellant met his jurisdictional burden, but twice dismissed the matter, without prejudice, to postpone adjudication due to the unavailability of witnesses. IAF, Tab 37 at 1-2; *Musselman v. Department of the Army*, MSPB Docket No. DA-1221-14-0499-W-2, Refiled Appeal File (RAF-I), Tab 36 at 2-3; *Musselman v. Department of the Army*, MSPB Docket No. DA-1221-14-0499-W-3, Refiled Appeal File (RAF-II), Tab 6, Initial Decision (ID) at 1 n.l. Ultimately, after holding the requested hearing, the administrative judge denied the appellant's request for corrective action. ID at 2, 30. Concerning the appellant's allegations that he had made protected disclosures or engaged in protected activity, (a)-(e), the administrative judge first found that (a), (c), and (e) were not protected activity or

---

[2] For the sake of simplicity and clarity, this decision follows the initial decision by identifying the appellant's disclosures and activities as (a)-(e).

disclosures. ID at 10-14, 16-18. She also found that, while (d) was a protected disclosure, the appellant failed to prove that it was a contributing factor to any personnel action. ID at 18-19. Finally, the administrative judge found that (b) was a protected disclosure, and the appellant proved that it was a contributing factor to the removal of his "acting" duties and the denial of his temporary promotion, ID at 14-16, 18-19, but the agency proved by clear and convincing evidence that it would have taken the personnel actions notwithstanding the disclosure, ID at 20-30.

The appellant has filed a petition for review. *Musselman v. Department of the Army*, MSPB Docket No. DA-1221-14-0499-W-3, Petition for Review (PFR) File, Tab 1. The agency has filed a response. PFR File, Tab 3.

The Board will not consider the appellant's new argument and evidence concerning activity (a), his arrangement of a teleconference.

The appellant arranged a teleconference on June 28, 2013, between K.N. and a number of term employees that wanted to discuss their impending release. IAF, Tab 5 at 5-7. He alleged that this was protected activity under 5 U.S.C. § 2302(b)(9)(B). IAF, Tab 11 at 4. The administrative judge determined that it was not. ID at 10-14.

Section 2302(b)(9)(B) makes it unlawful for an individual to take, fail to take, or threaten to take or fail to take a personnel action because of the employee "testifying for or otherwise lawfully assisting any individual in the exercise of any right referred to in [5 U.S.C. § 2302(b)(8)(A)](i) or (ii)." 5 U.S.C. § 2302(b)(9)(B); *Alarid v. Department of the Army*, 122 M.S.P.R. 600, ¶ 10 (2015). For example, performing

union-related duties, such as filing grievances and representing other employees in the grievance process, are protected activities under section 2302(b)(9). *Alarid*, 122 M.S.P.R. 600, ¶ 10.

Below, the appellant did not assert that he was representing the term employees in any negotiated grievance procedures. ID at 13; RAF-II, Tab 3 at 7. Instead, he argued that he was facilitating the term employees' request to discuss the end of their terms under the agency's Open Door policy statement. ID at 12; IAF, Tab 11 at 4, Tab 26 at 5; RAF-11, Tab 3 at 7. That policy statement indicates that the doors to the Command Sergeant Major's and Brigadier General's offices are open "to air any issues, grievances, or to offer suggestions that have not been adequately addressed through the Chain of Command." IAF, Tab 26 at 5. The administrative judge found that the Open Door policy was not a "law, rule, or regulation" granting employees any "appeal, complaint, or grievance right" under 5 U.S.C. § 2302(b)(9). ID at 13.

On review, the appellant does not dispute the administrative judge's conclusion about the Open Door policy. Instead, he argues, for the first time, that the term employees were covered by a collective bargaining agreement (CBA). PFR File, Tab 1 at 4. He submitted a copy of that CBA, and asserts that he was complying with the grievance procedures portion of the agreement by scheduling the June 28, 2013 teleconference. *Id.* at 4, 8-53. However, the Board generally will not consider an argument raised for the first time in a petition for review absent a showing that it is based on new and material evidence not previously available despite the party's due diligence. *Banks v. Department of the Air Force*, 4 M.S.P.R. 268, 271

(1980). Because the appellant failed to show that his new argument and evidence were previously unavailable, we will not address them further, and we will not disturb the administrative judge's conclusion that (a) was not protected.

We modify the initial decision to find that the activities (c) and (e) were protected activity, but the appellant failed to prove that either was a contributing factor in a personnel action.

In his initial appeal, the appellant alleged that he reported an employee's sexual harassment complaint to his Program Manager on April 5, 2011, and he prepared a memo in relation to an EEO complaint filed by another individual on October 24, 2011. IAF, Tab 1 at 14-15. The administrative judge found that those activities, (c) and (e), were not protected because they occurred prior to the enactment of the Whistleblower Protection Enhancement Act of 2012 (WPEA), Pub. L. No. 112-19, 126 Stat. 1465. ID at 16-18. On review, the appellant seems to argue otherwise. PFR File, Tab 1 at 5.

Pursuant to the WPEA, which became effective on December 27, 2012, Congress expanded the grounds on which an appellant may file an IRA appeal with the Board. *See Hooker v. Department of Veterans Affairs*, 120 M.S.P.R. 629, ¶ 9 (2014); WPEA § 101(b)(1)(A). Prior to the enactment of the WPEA, an appellant only could file an IRA appeal with the Board based on allegations of whistleblower reprisal under 5 U.S.C. § 2302(b)(8). *See Wooten v. Department of Health & Human Services*, 54 M.S.P.R. 143, 146 (1992), *superseded by statute as stated in Carney v. Department of Veterans Affairs*, 121 M.S.P.R. 446, ¶ 5 (2014). Following the WPEA's enactment, an appellant

also may file an IRA appeal with the Board concerning alleged reprisal based on certain other classes of protected activity as defined in 5 U.S.C. § 2302(b)(9)(A)(i), (B), (C), and (D). 5 U.S.C. § 1221(a); *Hooker*, 120 M.S.P.R. 629, ¶ 9. However, the Board has declined to give retroactive effect to the new IRA appeal rights provided under the WPEA for alleged violations of section 2302(b)(9)(A), (B), or (C). *See Hooker*, 120 M.S.P.R. 629, ¶¶ 11-15.

The administrative judge determined that (c) and (e) were not protected because both occurred prior to the enactment of the WPEA. ID at 17. In doing so, the administrative judge erred. The date of the purported retaliation is dispositive, not the date of the protected activity. *See Hooker*, 120 M.S.P.R. 629, ¶ 15 (explaining that the Board would not apply the WPEA retroactively for violations of section 2302(b)(9)(B) because doing so would increase a party's liability for past conduct). Because the purported retaliation, the removal of "acting" duties and the denial of a temporary promotion, occurred in 2013, after the enactment of the WPEA, both are covered by 5 U.S.C. §§ 1221(a), 2302(b)(9)(B). IAF, Tab 5 at 4. We, therefore, vacate the administrative judge's findings to the contrary. Nevertheless, based on our analysis below, we find that the appellant's claim still fails.

To establish a prima facie case of reprisal, an appellant must prove, by preponderant evidence, that he engaged in protected activity and that the activity was a contributing factor in a personnel action against him. *See* 5 U.S.C. § 1221(e)(1); *Shibuya v. Department of Agriculture*, 119 M.S.P.R. 537, ¶ 25 (2013). Only if the appellant makes out a prima facie case of reprisal for protected activity must the agency be given an

opportunity to prove, by clear and convincing evidence, that it would have taken the same personnel action in the absence of the protected activity. *See* 5 U.S.C. § 1221(e)(2); *Shibuya*, 119 M.S.P.R. 537, ¶ 32.

Although we find that (c) and (e) were protected activities, the appellant failed to prove that either was a contributing factor in the removal of his "acting" duties or the denial of his temporary promotion. An appellant can establish contributing factor by showing that the official responsible for the personnel action knew of the protected activity and took the personnel action within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action. *See Mason v. Department of Homeland Security*, 116 M.S.P.R. 135, ¶ 26 (2011). In this case, the administrative judge determined that even if (c) and (e) were protected, the appellant failed to show that K.N., the individual responsible for removing his "acting" duties, had any knowledge of the same. ID at 19 n. 9. In his petition, the appellant asserts that K.N. was copied on emails "detailing EEOC and sexual assault cases in which the appellant provided sworn testimony." PFR File, Tab 1 at 5. However, he failed to identify any evidence that shows K.N. knew of the appellant's involvement, and we are aware of none. *See id.*; *Tines v. Department of the Air Force*, 56 M.S.P.R. 90, 92 (1992) (finding that a petition for review must contain sufficient specificity to enable the Board to ascertain whether there is a serious evidentiary challenge justifying a complete review of the record); *Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980) (determining that, before the Board will undertake a complete review of the record, the petitioning party must explain why the

challenged factual determination is incorrect, and identify the specific evidence in the record which demonstrates the error), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam); *cf.* IAF, Tab 32 at 18; RAF-I, Tab 27 at 20-21. Similarly, to the extent that individuals other than K.N. were responsible for the denial of the appellant's temporary promotion, which the agency attributes to a hiring freeze stemming from sequestration, *see, e.g.*, IAF, Tab 16 at 7-8, 22-28, the appellant failed to show that such individuals had any knowledge of (c) or (e). Accordingly, we find that the appellant failed to prove, by preponderant evidence, that activities (c) or (e) were a contributing factor to the agency removing his "acting" duties or denying his temporary promotion.

The administrative judge properly found that the agency met its burden of proof.

Although the administrative judge found that the appellant established a prima facie case of whistleblower retaliation concerning disclosure (b), she also found that the agency met its burden of proving that it would have removed the appellant's "acting" duties and denied his temporary promotion notwithstanding that disclosure. ID at 20-30. The appellant appears to dispute that finding on review. PFR File, Tab 1 at 5-7. We find no merit to his arguments.

Clear and convincing evidence "is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established." 5 C.F.R. § 1209.4(e). In determining whether an agency has proven, by clear and convincing evidence, that it would have taken an action notwithstanding an employee's whistleblowing, the

Board will consider all of the relevant factors, including the following: (1) the strength of the agency's evidence in support of its action; (2) the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision; and (3) any evidence that the agency takes similar actions against employees who are not whistleblowers but who are otherwise similarly situated. *Carr v. Social Security Administration*, 185 F.3d 1318, 1323 (Fed. Cir. 1999). The Board must consider all the pertinent record evidence in making this determination, both evidence that supports the agency's case and evidence that detracts from it. *See Whitmore v. Department of Labor*, 680 F.3d 1353, 1368 (Fed. Cir. 2012).

In short, the administrative judge found that the agency presented evidence of legitimate reasons for its personnel actions, including K.N.'s dissatisfaction with the appellant's performance of his duties and an agency-wide hiring freeze. ID at 21-24, 27-29. She also found that the pertinent agency officials had little motive to retaliate against the appellant because his disclosure about the negative impact of losing term employees was a widely held view that had been conveyed previously by others and there had been prior attempts to retain those term employees—attempts that were unsuccessful due to the budget realities of sequestration. ID at 20-21, 26-27. Further, the administrative judge found that the agency took similar actions against employees who were not whistleblowers but were otherwise similarly situated. ID at 28-29.

On review, the appellant argues that, while the agency presented evidence that K.N.'s displeasure with his performance of "acting" duties stemmed from

the appellant permitting an outside contractor to participate in an internal call without K.N.'s knowledge,[3] doing so was required by the agency's CBA and the National Labor Relations Act. PFR File, Tab 1 at 6-7. However, we need not address this argument because the appellant failed to raise it below. ID at 24-25; RAF-II, Tab 3 at 7; *Banks*, 4 M.S.P.R. at 271.

Next, the appellant reasserts that, although the agency presented evidence that his temporary promotion was denied due to a hiring freeze, there were some exceptions to the hiring freeze. PFR File, Tab 1 at 5. The administrative judge addressed this matter below, finding numerous witnesses credible when they testified that only the U.S. Army Forces Command made exceptions to the hiring freeze, those exceptions were limited, and exceptions were not made for temporary promotions. ID at 21-24, 28-29. That testimony included the appellant's supervisor reporting that his own temporary promotion was denied, along with the temporary promotions of the appellant and two other subordinates. ID at 21-22. It also included a Human Resources Specialist reporting that those specific temporary promotions were denied due to the hiring freeze and indicating that he was not aware of any temporary promotions being approved during the relevant period. ID at 23.

---

[3] It appears that the presence of the U.S. Army Corps of Engineers contractor on the teleconference was perceived as problematic because the call included discussions about the agency's ability to continue bidding on and performing reimbursable work for the U.S. Army Corps of Engineers if the term employees were released. *See, e.g.*, IAF, Tab 5 at 22-23.

The Board must give deference to an administrative judge's credibility determinations when they are based, explicitly or implicitly, on the observation of the demeanor of witnesses testifying at a hearing; the Board may overturn such determinations only when it has "sufficiently sound" reasons for doing so. *Haebe v. Department of Justice*, 288 F.3d 1288, 1301 (Fed. Cir. 2002). Although the appellant has reasserted that the agency made some exceptions to its hiring freeze, generally, he has failed to present any basis for disturbing the administrative judge's decision to credit the associated explanations provided by the testifying witnesses. *See Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 105-06 (1997) (finding no reason to disturb the administrative judge's findings when she considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions); *Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987) (same). Accordingly, we agree with the administrative judge's determination that the agency proved, by clear and convincing evidence, that it would have removed the appellant's "acting" duties and denied his temporary promotion, notwithstanding his protected disclosure.

In the absence of any other arguments, we find no other basis for disturbing the initial decision.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

The initial decision, as supplemented by this Final Order, constitutes the Board's final decision in this matter. 5 C.F.R. § 1201.113. You have the right to request review of this final decision by the U.S. Court of Appeals for the Federal Circuit.

The court must receive your request for review no later than 60 calendar days after the date of this order. *See* 5 U.S.C. § 7703(b)(l)(A) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F .2d 1544 (Fed. Cir. 1991).

If you want to request review of the Board's decision concerning your claims of prohibited personnel practices under 5 U.S.C. § 2302(b)(8), (b)(9)(A)(i), (b)(9)(B), (b)(9)(C), or (b)(9)(D), but you do not want to challenge the Board's disposition of any other claims of prohibited personnel practices, you may request review of this final decision by the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction. The court of appeals must receive your petition for review within 60 days after the date of this order. *See* 5 U.S.C. § 7703(b)(l)(B) (as rev. eff. Dec. 27, 2012). If you choose to file, be very careful to file on time. You may choose to request review of the Board's decision in the United States Court of Appeals for the Federal Circuit or any other court of appeals of competent jurisdiction, but not both. Once you choose to seek review in one court of appeals, you may be precluded from seeking review in any other court.

If you need further information about your right to appeal this decision to court, you should refer to the Federal law that gives you this right. It is found in title 5 of the United States Code, section 7703 (5 U.S.C. § 7703) (as rev. eff. Dec. 27, 2012). You may read this law as well as other sections of the United States Code,

at our website, http://www.mspb.gov/appeals/uscode.htm. Additional information about the United States Court of Appeals for the Federal Circuit is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11. Additional information about other courts of appeals can be found at their respective websites, which can be accessed through the link below:

http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at http://www.mspb.gov/probono for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Merit Systems Protection Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

FOR THE BOARD: s/ illegible
William D. Spencer
Clerk of the Board

Washington, D.C.

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JEFFERY S. MUSSELMAN,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2016-2522

Petition for review of the Merit Systems Protection Board in No. DA-1221-14-0499-W-3.

Filed: Nov. 14, 2016

PER CURIAM.

O R D E R

Having received the parties' responses to this court's August 31, 2016 show cause order, the court directs the parties to address this court's jurisdiction in their briefs.

By way of background, Jeffery S. Musselman filed an individual right of action appeal at the Merit Systems Protection Board. When he did so, he elected to receive communications from the Board electronically. On June 17, 2016, the Board issued its final order, denying Mr. Musselman's request for corrective action in his appeal. The Board's decision

included a "Notice to the Appellant Regarding Your Further Review Rights," stating specifically that the Federal Circuit "must receive your request for review no later than 60 calendar days after the date of this order." The court received Mr. Musselman's petition for review on August 19, 2016, sixty-three days after the Board issued its final order.

In responding to this court's show cause order, the Department of the Army argues that this case should be dismissed for lack of jurisdiction. It notes that the time for filing a petition for review from a Board decision or order is governed by 5 U.S.C. § 7703(b)(1), which provides in relevant part that "[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." 5 U.S.C. § 7703(b)(1)(A). And it notes that in order to be timely, a petition for review must ordinarily be received by the court within the filing deadline. *Pinat v. Office of Pers. Mgmt.*, 931 F.2d 1544, 1546 (Fed. Cir. 1991); *see also* Fed. R. App. P. 25(a)(2)(A).

Mr. Musselman responds with evidence suggesting that the United States Postal Service (USPS) erred in delivering his petition. Mr. Musselman mailed his petition on August 3, 2016 in Vilonia, Arkansas. The "product and tracking" information page attached to his response appears to show that, through no fault of Mr. Musselman, there was a substantial delay in forwarding the petition, as the petition arrived at the USPS Origin Facility in Little Rock, Arkansas on August 4, 2016, but was not delivered to the USPS Destination Facility in Linthicum Heights, Maryland until August 18, 2016.

This evidence raises the question of whether this court can and should waive the 60-day deadline because the filing of the petition was delayed by the USPS. While this court has stated that the time for filing a petition for review pursuant to 5 U.S.C. § 7703(b)(1) is "statutory, mandatory, [and] jurisdictional," *Oja v. Dep't of the Army*, 405 F.3d 1349, 1357 (Fed. Cir. 2005) (quoting *Monzo v. Dep't of Transp.*, 735 F.2d 1335, 1336 (Fed. Cir. 1984)), it has also raised questions as to whether those cases accord with the more recent precedent from the Supreme Court. *See Jones v. Dept. of Health & Human Servs.*, 2016 WL 4434665 at *1 n.2 (Fed. Cir. Aug. 22, 2016) ("It may be time to ask whether we should reconsider *Oja* and *Monzo* in light of recent Supreme Court precedent finding some statutory time limits nonjurisdictional.").

Therefore, in addition to other arguments they wish to raise, the parties must address in their briefs whether § 7703(b)(1)'s filing deadline is jurisdictional or whether it can be extended or tolled under these circumstances. The parties should address the Supreme Court's more recent cases dealing with whether statutory-time limits are jurisdictional or merely claims-processing rules and whether those cases have overruled *Oja*, *Monzo*, and *Pinat* or whether those cases should be overruled.

The parties should further address whether the noted delay by the USPS in delivering Mr. Musselman's petition for review to this court warrants tolling or extending the time for filing presuming such tolling or extension is available. Finally, the parties should address whether the Board has authority to grant an extension to file a petition for review if this court were barred from doing so under Federal Rule of

Appellate Procedure 26(b)(1) and if so what would be the proper procedure for a petitioner who has filed a late petition to seek such relief.

Accordingly,

IT IS ORDERED THAT:

(1) The stay of the briefing schedule is lifted. Mr. Musselman's opening brief is due within 90 days from the date of filing of this order.

(2) The parties are directed to address the issues discussed above in their briefs.

(3) The Merit Systems Protection Board is directed to inform the court within 14 days from the date of filing of this order whether it wishes to intervene.

(4) A copy of this order shall be transmitted to the merits panel assigned to this case.

FOR THE COURT

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

s32

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JEFFERY S. MUSSELMAN,
Petitioner

v.

DEPARTMENT OF THE ARMY,
Respondent

2016-2522

Petition for review of the Merit Systems Protection Board in No. DA-1221-14-0499-W-3.

ON PETITION FOR HEARING EN BANC

2017 WL 3081819

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, 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 hearing en banc for the reasons stated in the dissent from denial of the petition for rehearing en banc in *Fedora v. Merit Systems Protection Board*, No. 15-3039.

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

PER CURIAM.

ORDER

Petitioner Jeffery S. Musselman filed a petition for initial hearing en banc. A response to the petition was invited by the court and filed by respondent Department of the Army. The petition and response were referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for initial hearing en banc is denied.

FOR THE COURT

July 20, 2017
Date

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

---

* Circuit Judge Moore did not participate.