No.

IN THE

Supreme Court of the United States

ROBERT D. VOCKE, JR,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

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 adhered to its holding in *Fedora v. MSPB* 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, without need for any clear statement by Congress. As a consequence, the court 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

This is a companion to the petition filed on October 6, 2017 in *Fedora v. Merit Systems Protection Board*, No. 17-___, which involves the same question that is presented here. Specifically, as the *Fedora* petition explains (at 23), Laurence Fedora and Robert Vocke suffered the same inequitable fate: The Federal Circuit's erroneous instructions to pro se litigants caused both of them to narrowly miss a filing deadline, which the Federal Circuit then held "jurisdictional" and without exception. The petitions are substantively the same, with some slight variations to account for the decisions below. The Court should grant both petitions and consolidate the cases for argument or, at a minimum, hold this petition pending resolution of *Fedora*.

Both petitions concern a persistent problem that the Court repeatedly has seen fit to address. Namely, this 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 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 juris-

diction. 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 Federal Circuit 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 Mr. Vocke and Mr. Fedora to miss the deadline it then enforced against them in unyielding fashion.

Like Mr. Fedora, Mr. Vocke is a long-time federal employee who alleges that he suffered an illegal personnel action. 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 followed to a T the Federal Circuit's advice about when to petition for review of an MSPB decision. But the Federal Circuit had given erroneous instructions to pro se litigants like Mr. Vocke. 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. Vocke's petition missed the deadline by a few days.

The unpublished order below acknowledged that there are "compelling factual … [and] legal arguments which can be made to support" remedying this minor glitch. Pet. App. 6a. But under "prior [circuit] precedent[,]" the panel was "bound" to treat it as a fatal flaw. *Id.* Namely, the day before, a sharply divided panel had held in Mr. Fedora's case that the time limit set forth in § 7703(b)(1)(A) is "jurisdictional"—and therefore absolute—and so cannot ever be equitably tolled. The panel majority there reasoned in categorical fashion that, after *Bowles v. Russell*, "[a]ppeal periods to Article III courts" are jurisdictional. Fedora App. 4a.[1] Dissenting in *Fedora*, Judge Plager lamented that that analysis "does not do justice to the complexities of the issue …, is inconsistent with current Supreme Court guidance, and … results in a wrong conclusion that is based neither on good law nor fundamental fairness." Fedora 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 in both *Fedora* and *Vocke*. Fedora App. 38a (Wallach, J., dissenting from denial of rehearing en banc, Newman, J. and O'Malley, J., joining); Fedora App. 33a (Stoll, J.); Pet. App. 8a (dissenters from denial of rehearing en banc adopting same positions as in *Fedora*).

[1] "Fedora App." refers to the appendix to the petition for certiorari filed in *Fedora v. MSPB*, No. 17-___. "C.A. App." refers to the supplemental appendix that the Merit Systems Protection Board filed in the Court of Appeals in *Vocke v. MSPB*, No. 16-2390, Dkt. 17.

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.'" Fedora 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." Fedora 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. Even were it not for the multiple circuit splits that demonstrate the need for clarification, the Federal Circuit's holding below 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), its ruling has broad, nationwide effect. Left uncorrected, it will deprive countless federal employees of "a full opportunity to lawful relief" from unlawful adverse action. Fedora App. 43a (Wallach, J.).

For these vital and important reasons, review should be granted.

OPINIONS AND ORDERS BELOW

The initial decision of the MSPB administrative judge dismissing the case is reprinted at C.A. App. SA1-SA8. The final order of the MSPB dismissing the case is available at 2016 WL 1742994 and reprinted at C.A. App. SA9-SA18. The Federal Circuit's decision dismissing Mr. Vocke's petition for review is available at 680 F. App'x 944 and reprinted at Pet. App. 1a-6a. The order denying rehearing en banc is reported at 868 F.3d 1341 and reprinted at Pet. App. 7a-9a.

JURISDICTION

The Federal Circuit entered judgment on February 17, 2017, Pet. App. 1a-6a, and denied a timely petition for rehearing on July 20, 2017, Pet. App. 7a-9a. 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. Vocke Diligently Follows The Erroneous Filing Instructions That The Federal Circuit Provided To Pro Se Litigants

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

Mr. Vocke is a long-time federal employee. He alleges that the Department of Commerce retaliated against him for blowing the whistle on fraud, waste, and abuse in the compensation system at the National Institute of Standards and Technology, where he works as a scientist. Pet. App. 2a-3a. After Mr. Vocke exhausted his administrative remedies before the Office of Special Counsel, he appealed to the MSPB. Pet. App. 3a. An MSPB administrative judge dismissed his claims, and Mr. Vocke appealed to the full MSPB. Pet. App. 4a. On May 2, 2016, it issued a final decision dismissing his claims, which he received on May 11, 2016. C.A. App. SA9; No. 16-2390, Dkt. 2 at 1.

Proceeding pro se, Mr. Vocke 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). 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. SA16; No. 16-2390, Dkt. 2

at 12-13. The *Guide* is part of the Federal Circuit's Rules of Practice and was published on the Court's website. *See* U.S. Court of Appeals for the Federal Circuit, *Guide for Pro Se Petitioners and Appellants (Guide)*, Rules of Practice 165 (March 1, 2016), https://tinyurl.com/cafcprose16. The *Guide* advised Mr. Vocke 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." No. 16-2390, Dkt. 2 at 13. (emphasis added). None of this is in dispute.

It also is undisputed that, in accordance with the court's advice, Mr. Vocke filed his petition within 60 days of receiving the MSPB's decision. Pet. App. 4a; No. 16-2390, Dkt. 2 at 1. 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. Vocke'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. No. 16-2390, Dkt. 2 at 14.

The Federal Circuit clerk initially returned Mr. Vocke's petition as untimely without docketing it or referring it to a panel. *Id.* When Mr. Vocke responded and established that his petition was in fact timely under the *Guide*'s directions, *id.* at 12-15, the clerk docketed it. Pet. App. 4a; No. 16-2390, Dkt. 1-1.[2]

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[2] The *Guide* was finally corrected four months later, in December 2016. *See* U.S. Court of Appeals for the Federal Circuit,

Bound By The Divided Panel Decision In Fedora*, A Panel Dismisses Mr. Vocke's Petition As Jurisdictionally Untimely*

A. The day after a divided panel of the Federal Circuit dismissed Mr. Fedora's case in a published decision, another panel of the Federal Circuit dismissed Mr. Vocke's petition in an unpublished order. It explained that it was "bound … by … prior [circuit] precedent"— including *Fedora*—holding § 7703(b)(1)(A) to be jurisdictional and without equitable exception. Pet. App. 6a. And it cited Judge Plager's *Fedora* dissent for the proposition that there are "compelling factual … [and] legal arguments" supporting equitable tolling in these circumstances. *Id.* But it made clear that "[t]o the extent Vocke wishes to urge equitable tolling, he must … do so to the en banc court." *Id.*

B. The *Fedora* panel was deeply divided. The majority recognized that "this court's 'Guide for Pro Se Petitioners,' … incorrectly instructed that" a petition was due 60 days from *receipt* of the MSPB's order. Fedora App. 8a. It mustered little sympathy, however. It intimated that—notwithstanding the plainly incorrect advice contained in the *Guide*—litigants should have followed language elsewhere in the MSPB's orders. Fedora App. 9a. The *Guide*'s misdirection to pro se litigants apparently was not of concern. And ultimately, the majority concluded, it "d[id] not have the authority to equitably toll the filing requirements of

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Guide for Pro Se Petitioners and Appellants, http://www.cafc.uscourts.gov/rules-of-practice/pro-se (listing "[c]hanges of December 1, 2016").

§ 7703(b)(1)(A)," because the provision "is jurisdictional." Fedora 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.'" Fedora 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. Fedora App. 4a-5a.

C. Judge Plager vigorously dissented in *Fedora*. 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." Fedora 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." Fedora 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. Fedora 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." Fedora App. 18a; *see also* Fedora 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. Fedora 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. Fedora App. 22a-23a

(discussing 559 U.S. 154 (2010)). And *Henderson* subsequently rejected a categorical application of *Bowles* to appeal periods. Fedora 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.'" Fedora 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." Fedora 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. Fedora 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." Fedora App. 30a-31a.

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

After securing pro bono counsel, Mr. Fedora and Mr. Vocke sought rehearing en banc, which the MSPB

"d[id] not oppose." No. 15-3039, Dkt. 70;[3] No. 16-2390, Dkt. 36. The Federal Circuit denied rehearing over the dissents of five judges. Judge Wallach authored an opinion—made applicable to both cases—dissenting from the denial of rehearing en banc, which Judges Newman and O'Malley joined. Fedora App. 36a-43a; Pet. App. 8a. Judge Plager (who has senior status) dissented from the denial of panel rehearing in *Fedora*, reiterated his panel dissent, and stated his agreement with Judge Wallach. Fedora App. 44a. Judge Stoll dissented without opinion in both cases. Fedora App. 33a; Pet. App 8a.

According to the dissenters, the Federal Circuit had erred by failing to review this "debatable and exceptionally important" issue. Fedora 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 *Fedora* panel majority's approach. Fedora 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." Fedora App. 43a. Because Federal Circuit precedents do not reflect the current state of the law, it is time "to reconsider this line of cases." Fedora App. 42a. The

[3] In *Fedora*, the United States Postal Service, the intervenor, opposed rehearing. No. 15-3039, Dkt. 71.

Federal Circuit did not do so, and this Court now should.

REASONS FOR GRANTING THE PETITION

Review 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 in *Fedora*, which controlled 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. Vocke, 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 now. Fedora App. 43a. The Federal Circuit's holding is fundamentally wrong and unfair, and should not be allowed to stand. *Infra* § I.

Second, the Court should grant review because *Fedora* 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 Federal Circuit 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. *Fedora*, Which Controlled 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 do *Fedora* and the decision below defy "fundamental fairness," the Federal Circuit's "precedents have not recognized the current state of Supreme Court law on the subject." Fedora 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 [these] case[s], 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." Fedora App. 29a (Plager, J.); *see also* Fedora App. 41a-42a (Wallach, J.).

The *Fedora* 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." Fedora 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. Fedora 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 *Fedora*, 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 Federal Circuit erroneously disregards this "newer thinking about jurisdiction." Fedora App. 21a (Plager, J.); *see also* Fedora App. 40a-42a (Wallach, J.).

As the dissenters further demonstrated, *Fedora* 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 *Fedora* panel majority accepted here: "that *Bowles* mean[s] that all statutory deadlines for taking appeals in civil cases are jurisdictional." Fedora App. 24a (Plager, J.); *see also* Fedora 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 *Fedora*, *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 *Fedora* 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: These cases present 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 *Fedora* 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. Fedora 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." Fedora 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." Fedora App. 39a (Wallach, J.). *Bowen* of course remains good law; numerous courts have applied *Bowen* after *Bowles*.[4] Yet

[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);

"*Fedora* does not mention *Bowen*," and thus, Judge Wallach explained, "I do not think *Bowles* can control[] the inquiry." Fedora 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).

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 *Fedora* panel majority (and adhered to in the decision below) 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." Fedora 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[.]" Fedora 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." Fedora 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* Fedora 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. Fedora 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

[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 in these cases, as Judge Wallach noted, Fedora App. 43a). The Federal Circuit has already dismissed three federal employees' appeals—all in unpublished orders; all involving employees who appeared pro se before the MSPB—just since *Fedora* was decided. In addition to dismissing Mr. Vocke's case, 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 also dismissed the case of Claus Brenndoerfer, 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* No. 16-2390, Dkt. 2 at 14; 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, *Fedora* will deprive countless federal employees of their only opportunity 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 these cases.

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']," Fedora 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. Fedora 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 partic-

ular, 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 Federal Circuit's decision in *Fedora*, applied 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 *Fedora*, a divided Federal Circuit held that time limits on appealing to an Article III court are always jurisdictional. Fedora 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)." Fedora 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. Fedora App. 5a; *see also* Fedora 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 non-jurisdictional. *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. These Cases Are Ideal Vehicles For Resolving The Question Presented.

Never will there be better vehicles for addressing whether the time limit in § 7703(b)(1)(A) is jurisdictional than *Fedora* and *Vocke*. 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 simultaneous consideration of en banc petitions in three separate cases. (This one, *Fedora,* 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 in *Fedora*, but probably for the last time; the court's treatment of cases like Mr. Vocke's indicates that further dispositions will be summary orders, if not ministerial actions by the clerk's office.

See supra p. 24. And the *Fedora* 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.

These cases also present uniquely suitable vehicles 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 view of the interested governmental agencies." Fedora App. 43a (Wallach, J.).

Finally, it is hard to imagine better factual vehicles to address these important issues, involving more compelling circumstances, than *Fedora* and *Vocke*. If ever there were a need for a court to exercise its equitable powers to prevent injustice, it is here. The Federal Circuit undisputedly gave manifestly erroneous filing instructions specifically addressed to pro se litigants. Then, when Mr. Fedora and Mr. Vocke painstakingly followed those instructions, causing them to miss the real deadline, the Federal Circuit held their cases jurisdictionally barred forever, depriving them of their only opportunity for judicial review of their claims that the government violated the civil service laws. Far from a necessary evil, the Federal Circuit's holding that § 7703(b)(1)(A) is "jurisdictional" contravened this Court's precedents. The Federal Circuit's decisions in *Fedora* and *Vocke* are both incorrect and unjust, and present excellent vehicles for resolving this important issue.

CONCLUSION

For the foregoing reasons, the Court should grant the petitions in this case and in *Fedora*, or alternatively hold this petition pending resolution of *Fedora*.

Respectfully submitted,

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Dated October 6, 2017

APPENDIX A

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT D. VOCKE, JR.,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2016-2390

Petition for review of the Merit Systems Protection Board in No. DC-1221-13-1266-W-1.

Decided: February 17, 2017

ROBERT D. VOCKE, JR., Germantown, MD, pro se.

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

Before NEWMAN, MOORE, and O'MALLEY, *Circuit Judges*.

PER CURIAM.

Robert Vocke seeks review of the May 2, 2016 decision of the Merit Systems Protection Board ("the Board") dismissing his whistleblower appeal for lack of jurisdiction. *Vocke v. Dep't of Commerce*, No. 13-1266, 2016 WL 1742994 (M.S.P.B. May 2, 2016). For the foregoing reasons, we *dismiss* for lack of jurisdiction.

BACKGROUND

Vocke is employed as a Physical Scientist with the National Institute of Standards and Technology ("NIST"), part of the Department of Commerce ("the Agency"). In July and August 2012, Vocke sent emails to his supervisors and up his chain of command regarding alleged improprieties in the Agency's performance pay and bonus compensation. Specifically, Vocke believed that certain managers were receiving significantly higher compensation than performance ratings warranted. Vocke received no response until August 15, 2012, when his second-level supervisor, Gregory Turk, sent him a Letter of Counseling. That letter stated, in relevant part:

> You are receiving this counseling memorandum to address your demonstrated failure to communicate with your supervisors appropriately and to clarify my expectations for your conduct in the future.

> …
>
> In each of the above-described emails, I find your tone to be disrespectful, derisive, and unprofessional ….
>
> I expect that you will communicate appropriately with your supervisors in the future and be more cognizant of your tone in those communications. I expect that, going forward, you will be professional and courteous at all times. It is your responsibility to conduct yourself in a professional manner.
>
> This memorandum is only a counseling and will not be included in your Official Personnel Folder. I must remind you that any future misconduct may result in disciplinary action up to and including removal from the Federal Service.

On February 18, 2013, Vocke filed a complaint with the Office of Special Counsel ("OSC"), alleging that the Agency was acting in retaliation against lawful whistleblowing disclosures. Specifically, Vocke alleged that he had received "a corrective action counseling letter on the threat of removal from Federal Service" in response to his disclosure of information evidencing a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, and an abuse of authority. *Vocke*, 2016 WL 1742994, at ¶ 3; *see generally* 5 U.S.C. § 2302(b)(8). On May 30, 2013, OSC informed Vocke that it had terminated its inquiry into his allegations, and Vocke appealed to the Board.

Finding no factual dispute bearing on the issue of jurisdiction, the Administrative Judge ("AJ") dismissed the appeal for lack of jurisdiction without a hearing, on two grounds. *Vocke*, 2016 WL 1742994, at ¶ 1. First, the AJ determined that the Letter of Counseling did not rise to the level of "personnel action" within the meaning of § 2302(b)(8). Second, the AJ determined that the contents of Vocke's disclosures concerned, at best, debatable expenditures rather than illegal or grossly wasteful spending, making his disclosures not protected under § 2303(b)(8). Vocke filed a petition for review to the Board.

On May 2, 2016, the Board denied Vocke's petition for review, affirming the AJ's finding that the Letter of Counseling did not constitute personnel action, and vacating the AJ's alternative finding as to the protectability of the contents of Vocke's disclosures. *Id.* That decision stated that "[y]ou have the right to request review of this final decision by the U.S. Court of Appeals for the Federal Circuit," and "[t]he court must receive your request for review no later than 60 days after the date of this order." *Id.* at ¶¶ 12-13 (citing 5 C.F.R. § 1201.113).

Vocke filed a petition for review before this court, which we received on July 7, 2016. The Agency, previously the respondent in this case, moved to dismiss Vocke's appeal as untimely. We denied that motion without prejudice, and instructed the parties to address the issue in their briefs.

DISCUSSION

Congress has limited this court's review of final decisions of the Board to those petitions "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). Failure to comply with that statutory deadline prevents jurisdiction in this court. *See Oja v. Dep't of the Army*, 405 F.3d 1349, 1360 (Fed. Cir. 2005) ("Compliance with the filing deadline of 5 U.S.C. § 7703(b)(1) is a prerequisite to our exercise of jurisdiction over this case."); *see also Monzo v. Dep't of Transp.*, 735 F.2d 1335, 1336 (Fed. Cir. 1984) (stating that the filing deadline under 5 U.S.C. § 7703(b)(1) is "statutory, mandatory [and] jurisdictional").

"The Board's filing of its decision … start[s] the 60-day period under § 7703(b)(1)(A)." *Hearn v. Dep't of Army*, No. 2013-3137, 2016 WL 5746341, at *2 (Fed. Cir. Oct. 4, 2016). The Board filed its final decision on May 2, 2016, resulting in a deadline to petition for review of July 1, 2016. We received Vocke's petition on July 7, 2016.

Vocke appears to contend that his petition was timely because it was filed only "57 days after [he] *received* the final order." Pet. Reply Br. at 4 (emphasis added). To the extent Vocke believes that the 60-day period under § 7703(b)(1)(A) runs from date of receipt, he is incorrect. Vocke appears to be relying on now-amended statutory language. Prior to 2012, § 7703(b)(1)(A) stated that petitions "must be filed within 60 days after the date the petitioner *received notice* of the final order or decision." 5 U.S.C. § 7703(b)(1)(A) (2011) (emphasis added). The current language of the statute, which indisputably applies here, states that petitions "shall be filed within 60

days after the Board *issues notice* of the final order or decision." 5 U.S.C. § 7703(b)(1)(A) (2016) (emphasis added). Vocke has not persuaded us that the new statutory language should, counterintuitively, be interpreted identically to the old.

To the extent Vocke is requesting equitable tolling due to his misunderstanding of the 60-day period, that argument is rejected as well. Vocke raises compelling factual arguments on this front—including, for example, that our own "Guide for Pro Se Petitioners and Appellants" may have had out-of-date language. There are also legal arguments which can be made to support application of equitable tolling to this particular filing deadline. *See Fedora v. Merit Sys. Prot. Bd.*, No. 2015-3039 (Fed. Cir. Feb. 16, 2017) (Plager, J., dissenting). This panel is bound, however, by our prior precedent which unequivocally states that "the time period of section 7703(b)(1) is not subject to equitable tolling." *Oja*, 405 F.3d at 1357. To the extent Vocke wishes to urge equitable tolling, he must therefore do so to the en banc court.

CONCLUSION

Because Vocke's petition for review is untimely, we do not have jurisdiction to address its merits. Accordingly, we dismiss.

DISMISSED

Costs

No costs.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT D. VOCKE, JR.,
Petitioner

v.

MERIT SYSTEMS PROTECTION BOARD,
Respondent

2016-2390

Petition for review of the Merit Systems Protection Board in No. DC-1221-13-1266-W-1.

ON PETITION FOR REHEARING EN BANC

ERIC SHUMSKY, Orrick, Herrington & Sutcliffe LLP, Washington, DC, filed a petition for rehearing en banc for petitioner Robert D. Vocke, Jr. 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.

Before PROST, *Chief Judge*, NEWMAN, 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 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 opinion from the denial of the petition for rehearing en banc.

PER CURIAM.

ORDER

Petitioner Robert D. Vocke, Jr. filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by respondent Merit Systems Protection Board. 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 response were referred to the circuit judges who are in regular active service.

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