SUPREME COURT
OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

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STUART R. HARROW,   )

        Petitioner,   )

           v.   ) No. 23-21

DEPARTMENT OF DEFENSE,   )

        Respondent.   )

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Pages: 1 through 58

Place: Washington, D.C.

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 9

10                   Washington, D.C.

11                 Monday, March 25, 2024

12

13          The above-entitled matter came on for oral

14     argument before the Supreme Court of the United

15     States at 11:31 a.m.

16

17     APPEARANCES:

18     JOSHUA P. DAVIS, ESQUIRE, San Francisco, California;

19          on behalf of the Petitioner.

20     AIMEE W. BROWN, Assistant to the Solicitor General,

21          Department of Justice, Washington, D.C.; on behalf

22          of the Respondent.

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1   C O N T E N T S

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 1                P R O C E E D I N G S

 2                              (11:31 a.m.)

 3            CHIEF JUSTICE ROBERTS:  We'll hear

 4    argument next in Case 23-21, Harrow versus the

 5    Department of Defense.

 6            Mr. Davis.

 7            ORAL ARGUMENT OF JOSHUA P. DAVIS

 8              ON BEHALF OF THE PETITIONER

 9            MR. DAVIS:  Mr. Chief Justice, and may

10    it please the Court:

11            Over the past 20 years or so, this

12    Court has clarified the law to prevent ordinary

13    procedural rules like filing deadlines from

14    being misinterpreted as jurisdictional, contrary

15    to congressional intent.  The clear statement

16    rule governs that analysis.  That rule demands a

17    clear statement from Congress on par with

18    explicit language to establish a jurisdictional

19    requirement.

20            At issue here is whether 5 U.S.C.

21    Section 7703(b)(1)(A)'s filing deadline is

22    jurisdictional.  Nothing in the text of

23    (b)(1)(A) suggests that it is.  That can end the

24    inquiry.  That conclusion is confirmed by the

25    text of the relevant jurisdictional statute, 28
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 1    U.S.C. Section 1295(a).  As relevant here,

 2    Section 1295(a)(9) creates jurisdiction in the

 3    Federal Circuit over appeals "pursuant to"

 4    Section 7703(b)(1).

 5              "Pursuant to" is a notoriously

 6    ambiguous phrase.  Nevertheless, the government

 7    claims that the only plausible interpretation of

 8    "pursuant to" is as necessitating that all the

 9    requirements of (b)(1)(A) are satisfied.

10              But "pursuant to" can mean invoking

11    (b)(1), not satisfying its filing deadline.

12    That is how this Court interpreted interlocutory

13    appellate jurisdiction in -- in removal cases in

14    BP P.L.C. in 2021.  It held that "pursuant to"

15    means invoking a particular statutory provision,

16    not satisfying its requirements.

17              Using this compelling interpretation

18    or a similar one, (b)(1)(A)'s filing deadline is

19    not jurisdictional.  That interpretation is at

20    least plausible.  So, under the clear statement

21    rule, (b)(1)(A)'s filing deadline is a mere

22    claims processing rule.

23              I would welcome any questions from the

24    Court.

25              JUSTICE THOMAS:  Going back to that
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 1   provision, why isn't it -- 7703, why isn't this

 2   controlled by Lindahl?

 3   MR. DAVIS: It's not controlled by

 4   Lindahl for a few reasons. One, Lindahl did not

 5   specifically address at all the filing deadline

 6   provision. It spoke only in loose

 7   jurisdictional terms. And so -- and this Court,

 8   in Wilkins and Santos-Zacaria, has asked for a

 9   much more specific ruling in order for the -- an

10   inference that the clear statement rule is -- is

11   satisfied.

12   In addition, Lindahl didn't impose a

13   jurisdictional requirement at all. It actually

14   read the jurisdiction of the Federal Circuit

15   broadly. It interpreted the relevant statute to

16   say that not only the employees and applicants

17   for employment are able to bring claims under

18   7703(b)(1)(A), but so are retirees, even though

19   they're not mentioned explicitly.

20   So, 1985, Lindahl is not -- it doesn't

21   specifically address this provision or a filing

22   deadline whatsoever. And, in -- in addition, it

23   is the sort of loose jurisdictional language

24   that the clear statement rule is designed to

25   clean up.

1   CHIEF JUSTICE ROBERTS: Well, we know

2 that one area where jurisdiction is enforced

3 rigorously is from one level of a court to

4 another, right, from the district court to a

5 court of appeals. Why does it -- it make sense

6 to have a totally different rule when it's from

7 an agency to the court of appeals?

8   MR. DAVIS: A couple -- a couple of

9 reasons. First of all, in Bowles, the reason

10 that the Court adopted this approach was a long

11 history of this type of notice of appeal from an

12 Article III court to an Article III court. Now

13 this Court has repeatedly said that Bowles and

14 that general rule should not be read beyond the

15 Article III to Article III context, including in

16 Hamer and in Fort Bend -- Fort Bend County.

17   And then, more generally, it's --

18 there's not only a different statute at play

19 here, one of much more recent vintage, but also

20 there's a very different jurisdictional posture.

21 One of the things this Court has said repeatedly

22 in interpreting filing deadlines and other

23 potentially jurisdictional provisions is to look

24 at the nature of the litigation process that

25 it's coming from.

1   And the MSPB process, much like this

2 Court -- like the veterans approach in Henderson

3 or like the adversarial approach in -- for the

4 IRS in Boechler, is a much more lenient

5 approach. It is adversarial, but it is not in

6 the same way that an Article III litigation is.

7 And so context is important here.

8   And given that context and also the

9 precedential reading of the clear statement

10 rule, I would submit that the clear statement

11 rule should apply kind of ab initio here, and

12 then the burden is on the government to show

13 that the only plausible reading --

14   JUSTICE SOTOMAYOR: There's no history

15 that you can point to where Congress has always

16 spoken in jurisdictional terms of an agency

17 appealing to an Article III court, correct?

18   MR. DAVIS: That's -- that's -- that's

19 precisely right.

20   JUSTICE SOTOMAYOR: And, in fact,

21 there are some statutes that clearly on their

22 face provide for equitable tolling in that

23 situation?

24   MR. DAVIS: That's right, and --

25   JUSTICE SOTOMAYOR: So that defeats

1   any history?

2   MR. DAVIS: I think that's right.

3   JUSTICE SOTOMAYOR: All right. Could

4   -- one other argument the government raised was

5   that courts of appeals are ill suited to handle

6   the factual basis of this kind of finding.

7   Do you agree with that argument and,

8   if you don't, why not?

9   MR. DAVIS: I -- I don't agree with

10   that argument. And if I may say first of --

11   first, before that, that argument conflates two

12   separate issues. One is whether this

13   requirement is jurisdictional, and the other is

14   whether it's mandatory.

15   And so it is at least possible -- the

16   only issue before this Court today is, is the

17   filing deadline jurisdictional. But this Court

18   could or the lower court would be in the first

19   instance the right place to -- to address it, is

20   if the lower court feels that it -- the -- that

21   having a filing deadline subject to equitable

22   tolling is not appropriate, it could say that

23   the -- that the filing deadline is not

24   jurisdictional but also is mandatory and not

25   subject to -- equitable tolling.

     1   Having said that, to answer Your

     2   Honor's question more directly, we don't agree

     3   for a series of reasons. I mean, one of them is

     4   that appellate courts often engage in similar

     5   kinds of limited factual inquiries. Standing is

     6   an example. So is Federal Rule of Civil

     7   Procedure 23, where an appellate court is asked

     8   whether class certification would ring the death

     9   knell for litigation.

    10   These are kinds of narrowly

    11   constrained procedural questions that a court is

    12   fully able to handle and an appellate court is

    13   fully able to handle. And so it would be the

    14   same thing here. The facts are not actually all

    15   that disputed. They're relatively narrow.

    16   Here, the real question is a legal

    17   judgment, and that is the kind of legal judgment

    18   a -- a court of appeals is -- is fully capable

    19   of making.

    20   JUSTICE SOTOMAYOR: We look at facts

    21   in mootness, in standing, the statutes that give

    22   us directly equitable tolling permission. The

    23   one thing about a mandatory claim processing is

    24   that it can't be sua sponte decided by a court

    25   below. It has to be raised by the opposing

1   party, correct?

2   MR. DAVIS: I believe that's generally

3   correct. That's right, that --

4   JUSTICE SOTOMAYOR: And was that the

5   case here?

6   MR. DAVIS: It was the case here.

7   Here, in fact, the government below never raised

8   the deadline issue at all. The Federal Circuit

9   raised it sua sponte.

10   And then, when the Federal Circuit --

11   it issued an order to show cause asking for

12   briefing, my client, Mr. Harrow, addressed the

13   issue in briefing and the government did not

14   file a brief addressing that issue. So it was

15   entirely from the government -- from -- from

16   that perspective sua sponte that the Federal

17   Circuit raised it on its own.

18   JUSTICE JACKSON: Well, isn't -- is --

19   JUSTICE ALITO: What's the -- what is

20   the authority for the proposition that a

21   mandatory claims processing rule cannot be

22   raised sua sponte by a court?

23   MR. DAVIS: I -- I would say that -- a

24   couple of issues. I would say, one, it is --

25   generally speaking, that has been the approach,

1   but it is -- that's not an issue here today.

2   And it is also possible, there's at least one

3   case, Day versus McDonough, which indicates that

4   that kind of mandatory claims processing rule

5   could at least potentially. That is not -- so I

6   -- I wouldn't -- we are not resting our case on

7   the proposition that if the -- that if this

8   filing deadline is not jurisdictional, then the

9   Court is necessarily unable to raise it sua

10   sponte.

11   The indication here, though, is what

12   we would ask is at least that the Federal

13   Circuit be given the opportunity on remand to

14   decide whether it would raise it sua sponte.

15   What was clear in the reasoning below is the

16   court felt that it had to because the issue was

17   jurisdictional. And so we would like to brief

18   the issue at the least on remand, that -- that

19   in this circumstance either the Court can't or

20   it just might not.

21   JUSTICE ALITO: Why would the

22   government be precluded from raising the

23   question if we were to send the case back?

24   They -- before they even had a -- my

25   understanding is that before they even had an

 1   opportunity to respond, the court sua sponte

 2   issued an order to show cause, right?

 3   MR. DAVIS: That is correct, yes. So

 4   I -- I would say two things. One, we would

 5   request that that issue be reserved for remand

 6   as well. For all we know, the government may or

 7   may not raise this issue at all.

 8   It may, 11 years into this pro --

 9   mostly pro se litigation, the government just

10   allow -- might allow Mr. Harrow to proceed on

11   the merits with his appeal. But the -- the

12   basis for forfeiture would be not so much the

13   issuance -- issuance of the order to show cause

14   but the fact that after the Federal Circuit

15   issued its order to show cause, the government

16   chose not to submit a brief. And that has not

17   been an issue that's been briefed, the

18   forfeiture issue, but we would suggest that in

19   the first instance the Federal Circuit should

20   address that.

21   JUSTICE JACKSON: Am I wrong that the

22   Federal Circuit has precedent that looks at this

23   very deadline and holds that it's not subject to

24   equitable forfeiture?

25   MR. DAVIS: Yes, you're right. I

 1   apologize. You're right.

 2   JUSTICE JACKSON: I'm right.

 3   MR. DAVIS: Yeah. You -- you're

 4   right.

 5   JUSTICE JACKSON: I'm sorry, I asked

 6   the -- the question in a weird way.

 7   MR. DAVIS: No, no, no, entire --

 8   entirely my fault. But -- so, yes, so -- so

 9   there's precedent that goes back almost exactly,

10   I believe, 40 years in the Federal Circuit that

11   treats this filing deadline as jurisdictional

12   and, therefore, not subject to forfeiture and

13   not subject to equitable tolling.

14   Having said that, this Court has

15   repeatedly held, as early as 2006 in Arbaugh and

16   as recently -- excuse me, as 2023, I believe, in

17   Santos-Zacaria, that lower court precedent are

18   not enough by themselves to establish -- to

19   satisfy the clear statement rule.

20   JUSTICE JACKSON: Yes. I'm just -- I

21   guess I'm just wondering whether the equitable

22   tolling finding is bound up with their

23   jurisdictional finding such that if we said

24   you're right, it's not jurisdictional and sent

25   it back, would the Federal Circuit be bound to

1   say: Well, it's mandatory anyway, and your

2   client doesn't get any relief?

3   MR. DAVIS: Oh, thank you, Your Honor.

4   So two -- two -- two -- so three -- three

5   pieces, I would say.

6   One, I -- I believe it is -- those two

7   are bound up. I don't think the Federal Circuit

8   had occasion to decide what would happen with

9   equitable tolling if the -- if the filing

10   deadline were non-jurisdictional because the --

11   JUSTICE JACKSON: I see.

12   MR. DAVIS: -- equitable tolling issue

13   is subsumed within the determination that the

14   filing deadline is jurisdictional.

15   JUSTICE JACKSON: I see.

16   MR. DAVIS: Having said that, there is

17   the issue of forfeiture, so our client still

18   might get relief. And then there's also the

19   issue of whether the government on remand might

20   or might not choose to pursue this issue and

21   might allow Mr. Harrow, who has proceeded for 11

22   years seeking $3,000 of compensation and

23   interest, to just get his day in court in the

24   Federal Circuit on the merits.

25   JUSTICE GORSUCH: It -- it is

 1   extraordinary, the lengths to which this case

 2   has gone, seven years waiting and then the email

 3   and all that, but I -- I just have a question on

 4   background.

 5   Both sides agree that we have a clear

 6   statement rule with respect to whether a

 7   statute's jurisdictional or a mandatory claims

 8   processing rule.

 9   I'm just curious what -- what you

10   think the justification for that clear statement

11   rule is, what you're understanding of its

12   background?

13   MR. DAVIS: Sure. I think there's a

14   -- a couple of justifications as I understand

15   it. One is that in the first instance, courts

16   have at times used the word "jurisdiction"

17   loosely when -- with implications that Congress

18   probably never intended, and so it's a -- it's a

19   rule of fidelity to congressional intent in that

20   sense.

21   I think there is a second

22   justification that has now arisen which explains

23   in part why lower court decisions are not

24   enough, which is having this Court at least

25   since 2006 having articulated the clear

1   statement rule, Congress should be presumed to

2   -- to legislate with that background in mind.

3   And so it's sort of double fidelity to

4   congressional intent.

5   JUSTICE GORSUCH: Yeah, it's a little

6   awkward, though, isn't it, because, I mean, you

7   could say: Well, they -- there have been a lot

8   of drive-by jurisdictional rulings, don't --

9   don't do that anymore, stop and -- and just

10 faithfully interpret statutes. But this Court's

11 gone further and -- and said clear statement

12 rule.

13   MR. DAVIS: Yes, Your Honor. I -- I

14 actually -- I think either suffices in this

15 instance because I do think the "pursuant to"

16 language isn't strong enough, the explicit

17 language of 7703(b)(1)(A) isn't -- isn't strong

18 enough to infer congressional intent and the

19 like.

20   And -- and -- and so -- and Lindahl

21 really is -- was a drive-by jurisdictional

22 statement. I do agree that the articulation has

23 been stronger than that or the rule has been

24 stronger than that. And I think I would hope

25 that that makes this a relatively easy case, but

 1   -- so there is a fork in the road, but I would

 2   say either path leads --

 3   JUSTICE GORSUCH: Well, what is your

 4   understanding as to why the government has

 5   resisted your client's case so -- so strongly?

 6   I mean, it -- it is -- he -- he spent seven

 7   years waiting, five of which were because the

 8   government couldn't manage to get a quorum

 9   together to resolve it, sent him an email to an

10   old email address, and -- and he acted as

11   quickly as he -- as he could and when he got it,

12   and yet here we are in the Supreme Court of the

13   United States over a $3,000 claim.

14   MR. DAVIS: Yes. Yes.

15   JUSTICE GORSUCH: We're hearing it.

16   You know, we've -- we've -- we've done every

17   other claims processing rule statute on the

18   books. I'm just kind of surprised we're having

19   to do -- the government's making us do this one.

20   MR. DAVIS: Right.

21   JUSTICE GORSUCH: Do you have any

22   insight?

23   MR. DAVIS: I don't have insight. I

24   mean, I would say it's a little bit off point,

25   but my client has great reverence for the law.

1   In some way, this whole process has been a

2   tremendous honor for him.

3   JUSTICE GORSUCH: Oh, I don't fault --

4   I don't fault your client.

5   MR. DAVIS: No, no. Yes.

6   JUSTICE GORSUCH: I'm -- I'm -- I --

7   I'm just wondering why the government's making

8   us do this.

9   MR. DAVIS: I don't know.

10   (Laughter.)

11   MR. DAVIS: I mean, so, but it is a

12   sort of form of compensation, that to be here

13   today is an honor for me and an honor for him,

14   and so -- but -- but having said -- having said

15   that --

16   JUSTICE GORSUCH: It's an honor for

17   all of us.

18   (Laughter.)

19   MR. DAVIS: And I -- I --

20   JUSTICE ALITO: I seriously -- I

21   seriously doubt that we have seen every single

22   statute where there is potential jurisdictional

23   versus claims processing rule argument. I'm

24   willing to bet that there are more.

25   MR. DAVIS: I -- yeah. Hopefully, a

 1   clear ruling today in our favor would help to

 2   alleviate that issue, but --

 3   JUSTICE SOTOMAYOR: I -- I think the

 4   government wants the Court to do the work for

 5   it, meaning if -- the Court has to sua sponte

 6   assert -- determine jurisdiction, and if the

 7   Court doesn't, then they have to do a little

 8   work and look at the record and see if, in fact,

 9   whether they have an exhaustion claim or not.

10   MR. DAVIS: I -- I hesitate to -- to

11   hazard a yes, Your Honor, with a -- a couple of

12   -- a couple of thoughts, I would, is, one, the

13   government didn't raise this below, so it's at

14   least conceivable again that on remand they

15   would let it go.

16   JUSTICE SOTOMAYOR: No, because the

17   Court was doing it for them. Thank you,

18   counsel.

19   MR. DAVIS: Absolutely. And -- and I

20   do think along those similar lines, and I -- I,

21   again, hesitate to be presumptuous, but I think,

22   in some ways, at least some members of the

23   Federal Circuit would welcome this Court's

24   intervention. They seem stuck in a precedent

25   that at least some of them believe is no longer

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 1    consistent with Supreme Court doctrine, but they

 2    are abiding by it unless and until they're told

 3    otherwise.

 4              CHIEF JUSTICE ROBERTS:  Thank you,

 5    counsel.

 6              Justice Thomas?

 7              Justice Alito?  No?

 8              Thank you.

 9              MR. DAVIS:  Thank you, Your Honor.

10              CHIEF JUSTICE ROBERTS:  Ms. Brown.

11              ORAL ARGUMENT OF AIMEE W. BROWN

12               ON BEHALF OF THE RESPONDENT

13              MS. BROWN:  Thank you, Mr. Chief

14    Justice, and may it please the Court:

15              In Section 1295(a)(9), Congress

16    granted the Federal Circuit jurisdiction over

17    appeals from final MSPB decisions pursuant to

18    Section 7703(b)(1), which includes a deadline

19    for filing an appeal.

20              As this Court has recognized in cases

21    like BP and SAS Institute, the plain meaning of

22    "pursuant to" is "in accordance with" or "in

23    compliance with."

24              By conditioning the Court's

25    jurisdiction on compliance with 7703(b)(1), the
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 1   statutory text provides the clear tie between

 2   the appeal deadline and the jurisdictional grant

 3   which satisfies this Court's clear statement

 4   rule.

 5   That view of the text is confirmed by

 6   precedent and history. In Lindahl, this Court

 7   squarely addressed whether the Federal Circuit

 8   had jurisdiction over an appeal from the MSPB

 9   and held that such jurisdiction is governed by

10   Section 1295(a)(9) and 7703(b)(1) together, with

11   Section 7703(b)(1) setting the jurisdictional

12   perimeters for the Federal Circuit's review.

13   For the past 40 years, the Federal

14   Circuit has recognized the same thing and has

15   repeatedly held that the time limit here is

16   jurisdictional. Against the backdrop of that

17   settled precedent, Congress has repeatedly

18   reenacted or amended the statute, including

19   specifically the time limit.

20   Petitioner's contrary arguments fail

21   to offer any plausible alternative reading of

22   the statutory text. His argument that none of

23   Section 7703(b)(1) is jurisdictional is directly

24   contrary to Lindahl and would make Section

25   1295(a)(9)'s grant of jurisdiction incomplete.

1   And his alternative argument that the first

2   sentence of 7703(b)(1) is jurisdictional but the

3   second is not creates a distinction that

4   Congress didn't draw.

5   Adopting Petitioner's view would

6   require the Court to read "pursuant to" to mean

7   different things for the different sentences of

8   Section 7703(b)(1). And demanding Congress to

9   speak more -- with more specificity would turn

10   the clear statement rule into the kind of magic

11   words requirement that this Court has repeatedly

12   rejected.

13   Finally, even if the Court were to

14   hold that the filing deadline is not

15   jurisdictional, at a minimum, it's not subject

16   to equitable tolling. Federal Rule of Appellate

17   Procedure 26(b) prohibits extending the

18   deadlines for filing appeals from agency

19   decisions unless authorized by law. Because

20   Congress did not authorize any such extension

21   under either the statute or the Federal Rules,

22   Petitioner's untimely appeal cannot go forward.

23   I welcome the Court's questions.

24   JUSTICE THOMAS: Do you think it's at

25   least plausible that "pursuant to" modifies

1   "final order"?

2   MS. BROWN: I don't, and I think the

3   reason for that is that if you were to -- to

4   read the statute that way, it would say that the

5   order or decision needed to be pursuant to or in

6   accordance with, in compliance with, Section

7   7703(b)(1). But Section 7703(b)(1) doesn't

8   impose any requirements or limitations on the

9   order or decision.

10   I think that's particularly clear if

11   you look at (b)(1)(A) and (b)(1)(B) together,

12   and those two provisions talk -- they -- they

13   sort the cases between either the Federal

14   Circuit exclusively or the Federal Circuit and

15   the regional courts of appeals. And the basis

16   for that sorting is not the scope of the order

17   or decision. It's based on what challenges to

18   the order or decision are brought within the

19   appeal.

20   And so I -- I don't think it's

21   actually possible to read the statute that way.

22   JUSTICE KAGAN: Do you lose if

23   "pursuant to" just means "under"?

24   MS. BROWN: I don't think so. As we

25   said in our brief, if "under" were used in this

1   -- in this context specifically, it would have

2   the exact same meaning that it -- that "pursuant

3   to" has here. That's the same meaning that the

4   Court gave to "under" in cases like Pereira.

5   I think that the easiest way to -- to

6   understand that is to -- to -- to think about

7   how this -- how this scheme would work or how

8   this statute would --

9   JUSTICE KAGAN: I guess I meant

10   "under" as in "go bring an appeal under" that

11   section. "Go file an order under" that section.

12   MS. BROWN: So do you -- "under" as

13   kind of like an invoking, it means to invoke?

14   Okay. So I -- the reason I don't think that

15   that --

16   JUSTICE KAGAN: I mean, it just

17   doesn't have anything to do with whether you've

18   satisfied every jot and tittle of whatever

19   requirements might apply --

20   MS. BROWN: The --

21   JUSTICE KAGAN: -- to that section.

22   MS. BROWN: I -- the reason that I

23   think that that interpretation is unavailable

24   here is because of what the first sentence of

25   Section 7703(b)(1) does require. And I think

1   that it has to be the case that that part is

2   jurisdictional and -- and is required by the --

3   the -- the reading here because, if you imagine,

4   for example, that the Petitioner here had

5   brought discrimination claims, and so the case

6   is a mixed case, and he brought that case in the

7   -- in the court of appeals, in this -- in the

8   Federal Circuit in the first instance, and

9   asserted that he was invoking 7703(b)(1), I

10   don't think that anyone here is suggesting that

11   that case would then be able to proceed in the

12   Federal Circuit because the Petitioner had

13   asserted or invoked or relied on 7703(b)(1). It

14   belongs in the district court under (b)(2).

15   And so I think, because that

16   interpretation of the statute and interpretation

17   of "pursuant to" is mandated for that sentence,

18   the same thing has to be true for the second

19   sentence and for the time limit.

20   JUSTICE BARRETT: Ms. Brown, I want to

21   give you a chance to respond to Justice Gorsuch

22   and Justice Sotomayor's points about, you know,

23   why is the government here, why as a practical

24   matter -- I mean, this is apart from the merits

25   of your reading of the statute, right, but as a

 1   practical matter, why does the government care

 2   so much whether this is jurisdictional or claims

 3   processing?

 4   MS. BROWN: So I -- I think that the

 5   reason that we are here, we -- we take very

 6   seriously this Court's rulings in this area and

 7   its efforts to bring discipline to the use of

 8   jurisdiction, and we're not trying to fight

 9   against the application of the clear statement

10   rule.

11   We do think that this case is quite

12   different from many of the cases that the Court

13   has looked at before. In almost every other

14   case, the suit fell within a clear

15   jurisdictional grant, and the question was just

16   whether the -- there was another provision in

17   another requirement that displaced that

18   jurisdictional grant with respect to certain --

19   certain cases or in certain instances.

20   So I think it's really only this case

21   and Boechler that have dealt with the

22   interpretation of a provision that's clearly --

23   has something to do with jurisdiction, and then

24   the question there is just what is the scope of

25   that jurisdictional grant.

1   And so I think we are still kind of

2   working through and fleshing out and figuring

3   out how this Court's clear statement rules do

4   apply to that particular circumstance. And I

5   think, in this case, that we think we have a

6   very strong argument as to why reading this --

7   this jurisdictional provision should lead to the

8   result that the clear statement rule -- that

9   even with the clear statement rule, the time

10   limit here is jurisdictional, because we do have

11   that clear tie with the "pursuant to" language

12   that was lacking in -- in Boechler itself.

13   JUSTICE BARRETT: Do you have -- does

14   the government have a position on the question

15   Justice Alito asked you about whether a court

16   can raise the mandatory claims processing rule

17   sua sponte?

18   MS. BROWN: Yes. We -- we do think

19   that that is permissible under the Court's

20   decision in Day versus McDonough, and we think

21   it's very clear that that's what the court of

22   appeals, the Federal Circuit, was doing here.

23   Both in its order to show cause and in its order

24   dismissing the case for lack of jurisdiction,

25   the court relied on Rule 26.

1   We also think that a remand here would

2 be somewhat unnecessary, in -- in part because

3 the Federal Circuit does have binding precedent

4 holding that -- the equitable tolling does not

5 apply specifically to Rule -- to Section

6 7703(b)(1). And that -- that case, which is Oja

7 versus Department of Army, specifically says,

8 even if we were wrong and Section 7703(b)(1) is

9 not jurisdictional, we still think that

10 equitable tolling does not apply.

11   And so I don't think it's the case

12 that it's bound up in its decision, its

13 determination about the jurisdictionality of the

14 provision.

15   JUSTICE GORSUCH: At the very least,

16 though, the government could waive, right?

17   MS. BROWN: Yes, the government could

18 choose to waive if it -- if it were to choose

19 that.

20   JUSTICE GORSUCH: Yeah. So a remand

21 wouldn't be wholly pointless.

22   MS. BROWN: I suppose that's correct.

23 I mean, I do think that we have already raised

24 --

25   JUSTICE GORSUCH: I mean -- and -- and

1   -- and -- and, gosh, I mean, waiting seven years

2   to rule on this fellow's claim and then sending

3   it -- him an email and to an old email address

4   and he acted as fast as he could, I mean, it's

5   not wholly inconceivable the government might,

6   in its magnanimity, choose to waive this defect?

7   MS. BROWN: Sure. So, I -- I mean, I

8   do want to address the delay here, which I don't

9   think is really attributable to the -- the

10   executive branch because the -- the board

11   members' terms expired and there were lags in

12   time with the nomination and confirmation of --

13   JUSTICE GORSUCH: Well, it was two

14   years --

15   MS. BROWN: -- the new board members.

16   JUSTICE GORSUCH: -- two years on the

17   executive and five on Congress if you want to be

18   specific, right?

19   MS. BROWN: Sure. Yes.

20   JUSTICE GORSUCH: Okay.

21   MS. BROWN: Yes. And then the board

22   acted as quickly --

23   JUSTICE GORSUCH: But it wasn't --

24   MS. BROWN: -- as possible after that,

25   and there was an obligation --

1   JUSTICE GORSUCH: -- it wasn't Mr.

2   Harrow's fault by any stretch.

3   MS. BROWN: He did have an obligation

4   to keep his email address updated, but,

5   certainly, the delay --

6   (Laughter.)

7   MS. BROWN: -- I'm not trying to

8   suggest that the -- the delay here was -- was --

9   was his fault.

10   JUSTICE GORSUCH: All right. And you

11   -- I -- I -- I'd ask you the same question I

12   asked your friend on the other side about, what

13   do you understand the justification for this

14   clear statement rule to be?

15   MS. BROWN: So the way that this Court

16   has always framed it is that it's intended to

17   get at what Congress -- what we think Congress

18   is actually doing in these cases. And we think

19   that normally Congress doesn't make a lot of

20   separate requirements jurisdictional, and so,

21   when Congress does want to do so, we've asked

22   for Congress or the Court has -- has suggested

23   that Congress will speak clearly.

24   JUSTICE GORSUCH: And do you think

25   this is a sound clear statement rule? Does the

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1    government believe it's a sound clear statement
2    rule?
3             MS. BROWN:  That the clear statement
4    rule itself, in general, is a sound principle?
5             JUSTICE GORSUCH:  Mm-hmm.
6             MS. BROWN:  I think -- I think, yes,
7    we haven't disputed that the clear statement
8    rule should apply here or -- or is an
9    appropriate use of this Court's authority.
10            I do think that expanding the clear
11   statement rule in the way that I think you might
12   have to in order to rule for the Petitioner here
13   would be a problem, and I think there are kind
14   of two reasons for that.
15            I think that in order to rule for the
16   Petitioner here, you would have to say either
17   that there is something like a magic words
18   requirement in the -- in the context of a
19   jurisdictional grant in order to give a time
20   limit jurisdictional consequences and also that
21   -- or, in the alternative, I guess, that the
22   Court would be saying that there are some kinds
23   of extra-textual considerations like the kinds
24   of things that the judiciary thinks should or
25   should not be jurisdictional that can be
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1   privileged over the clear meaning of the text.

2   JUSTICE KAVANAUGH: I --

3   MS. BROWN: I think that if either of

4   those principles are adopted, then that really

5   extends the clear statement rule beyond what the

6   justification for --

7   JUSTICE KAVANAUGH: What -- if -- if

8   you were to lose here, what would provide the

9   most clarity, do you think, for the government

10   and for the courts of appeals and district

11   courts, the affected courts, on these kinds of

12   matters? Maybe it is a magic words requirement

13   would be better, because it seems silly to keep

14   having this debate.

15   MS. BROWN: I -- I suppose that for

16   purposes of clarity, a magic words requirement

17   would -- would be clear, but I don't think that

18   it would be appropriate because, at that point,

19   then you are mandating that Congress speak in a

20   particular way in -- in -- particularly in this

21   context.

22   JUSTICE KAVANAUGH: Well, maybe "magic

23   words" is loading the dice. Maybe just speaks

24   directly to jurisdiction.

25   MS. BROWN: Sure, but I guess we think

 1   that this provision would comply with that

 2   because it -- this is a jurisdictional grant.

 3   We -- we know that this is a jurisdictional

 4   grant, and no one is disputing that.

 5   And in that context, generally, when

 6   this Court is interpreting a jurisdictional

 7   grant, it hews very closely to the text in an

 8   effort to avoid either expanding or contracting

 9   the courts' jurisdiction because of the

10   separation-of-powers concerns that come with

11   that as -- as an Article III court.

12   And so I think, at least in the

13   context of interpreting what is a clear

14   jurisdictional grant, a magic words requirement

15   could raise some -- some concerns there in -- in

16   putting too much of a burden on Congress --

17   JUSTICE JACKSON: Can I ask you about

18   the clear jurisdictional grant here and the

19   implications of your view?

20   MS. BROWN: Yes.

21   JUSTICE JACKSON: So I'm looking at

22   1295(a)(9), and it not only cross-references

23   7703(b)(1), which is at issue here, but also

24   7703(d). So is it the government's position

25   that all of the parts and expectations that come

 1   out of 7703(d) are also jurisdictional?

 2   MS. BROWN: So it -- it is our

 3   position that, of course, because the same

 4   language attaches 7703(d) to 1295(a) and to the

 5   jurisdictional grant, that the requirements for

 6   bringing an appeal that are encompassed within

 7   (d) are also jurisdictional. And -- and that is

 8   how OPM has treated them. That's how the -- the

 9   Board has treated them as well.

10   And I recognize that there's some kind

11   of raised eyebrows from some at the idea that

12   the director's determination that this

13   particular issue was one that should be appealed

14   would be jurisdictional, but I actually don't

15   think that that issue or that requirement being

16   jurisdictional is that far afield from some of

17   the other kinds of gatekeeping requirements for

18   appeals that this Court has already held to be

19   jurisdictional and there are --

20   JUSTICE JACKSON: But what about the

21   procedural oddity of the Federal Circuit having

22   an affirmative obligation to sua sponte make

23   this determination in these kinds of cases if it

24   was a jurisdictional provision?

25   MS. BROWN: So I -- I think that

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 1    that's also not particularly odd or -- or

 2    particularly difficult for the -- for the

 3    Federal Circuit to do.  It's going to be

 4    apparent on the face of the petition itself, the

 5    Federal Circuit has discretionary jurisdiction

 6    over OPM petitions for -- for review.

 7              And so OPM files something that

 8    basically looks like a cert petition and

 9    includes within that a statement of jurisdiction

10    that will say the director has made the

11    determination that this is a case that

12    qualifies.  And then I think, because that's a

13    discretionary determination on the part of the

14    director, the Federal Circuit is just looking

15    for whether that determination was made and

16    isn't actually analyzing the substance of that.

17              JUSTICE JACKSON:  Well, I guess also

18    kind of stepping back a bit, buried in your

19    argument is the notion that both sentences in

20    7703(b) or 77 -- both sentences have to be

21    jurisdictional -- sorry, in 1295 -- no.

22              MS. BROWN:  In 7703.

23              JUSTICE JACKSON:  In 7703.

24              MS. BROWN:  Yeah.

25              JUSTICE JACKSON:  And I'm just
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1   wondering how you square that with the sort of

2   holding and reasoning in Santos-Zacaria, where

3   the -- the Court suggested that you didn't have

4   to read a provision like that in -- in totality.

5   MS. BROWN: So I think that the reason

6   this is different from Santos-Zacaria is because

7   we have the "pursuant to" that connects the

8   jurisdictional grant to 7703(b)(1) as a whole.

9   I think we would have a much harder argument and

10   maybe an impossible argument if we were just

11   looking at 7703(b)(1) out of the context of --

12   JUSTICE JACKSON: But why is that --

13   MS. BROWN: -- that grant.

14   JUSTICE JACKSON: -- different?

15   Santos-Zacaria had "in accordance with this

16   section" and the government made the argument

17   that is very similar to this one.

18   MS. BROWN: So I think that the

19   difference there is that that provision in

20   Santos-Zacaria, which I -- it says

21   notwithstanding any other provision of law, a

22   petition for review filed with an appropriate

23   court of appeals, in accordance with this

24   section, shall be the sole and exclusive means

25   for judicial review, that provision is not the

1   jurisdictional grant, and so it's not

2   conditioning the Court's jurisdiction on appeals

3   filed or orders filed in accordance with this

4   section. There's another section of 1252 that

5   granted jurisdiction.

6   So I think we would have a much harder

7   argument and, again, maybe an impossible one if

8   the Court had rejected our reading of a

9   provision that said something like the court of

10   appeals shall have jurisdiction to review

11   removal orders in accordance with this section.

12   But that's not how the Court read that provision

13   and that's not how the provision is written.

14   JUSTICE JACKSON: Well, that seems

15   exactly backwards to me, but anyway. We'll --

16   MS. BROWN: I -- I just -- I think it

17   is the difference between conditioning

18   jurisdiction and granting jurisdiction -- as --

19   with a condition that it -- that it has to be in

20   compliance with this section and saying in -- as

21   in Santos-Zacaria, that this is the only way you

22   get jurisdiction, there are no grants of

23   jurisdiction outside of this section, but that

24   that provision doesn't say which provisions or

25   which parts of Section 1252 are themselves

1   jurisdictional.

2   JUSTICE ALITO: The only thing in --

3   in all of these cases, in this rich line of

4   precedent that we have about the clear statement

5   rule, the only legitimate question is what is

6   the meaning of the particular statutory

7   provision that's involved, and what is the

8   meaning of the provision that's involved with

9   respect to certain other questions that are

10   subsumed under the

11   jurisdictional/non-jurisdictional inquiry, such

12   as can the court -- must the court raise it

13   itself? Can the -- can the argument be

14   forfeited?

15   Our cases have gone on -- off on

16   really niggling interpretations of statutory

17   language that doesn't speak at all directly and

18   only very -- in a very loose way indirectly to

19   this question, but part of your argument gets at

20   perhaps something we could read into this which

21   would be more productive, which is to ask what

22   is it likely that Congress intended with respect

23   to a particular type of review, and you're

24   talking about review from an administrative

25   agency to a -- to a court of appeals.

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1           And that seems like it might be a more
2    -- an inquiry that gets to what Congress likely
3    thought had it given any thought to this
4    question.  So could you elaborate on that?
5           MS. BROWN:  Sure.  So I -- I mean, I
6    do think that that argument is persuasive and
7    very helpful to us here if you look at the
8    category of appeals to Article III courts.
9           And I -- I think, within that
10   category, of course, we have appeals from
11   district courts, which the Court has already
12   addressed in Bowles, and then we have appeals
13   from agency decisions.  And those have in -- in
14   a variety of contexts also been treated, the
15   timelines there have also been treated as
16   jurisdictional.
17          And I do think that it makes sense to
18   look at, you know, the court that's actually --
19   the -- whose jurisdiction is at issue and focus
20   more on that inquiry than where the actual
21   decision is -- is coming from.
22          JUSTICE ALITO:  So what are the
23   features of the -- the question as it arises in
24   that context that would make it more likely that
25   Congress would say this is a hard-and-fast rule
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1   and it -- it has to be raised even by the court?

2   MS. BROWN: So I -- I think --

3   JUSTICE ALITO: What are the features

4   of it? It's the fact that it would put a -- a

5   fact-finding obligation on the -- on the

6   appellate court?

7   MS. BROWN: I do think that that is

8   part of it. Usually we don't think of appellate

9   courts as the courts that are going to be

10   engaging in fact finding in the first instance.

11   Of course, I recognize, as Justice Sotomayor was

12   pointing out, that there are -- there are

13   instances in which that happens, but I think the

14   general rule is that we don't normally see that.

15   I would also think that, you know, the

16   fact that some amount of process has already

17   been undertaken and that the -- the claims have

18   been -- that have -- that have started to be

19   reviewed and there has been a certain amount of

20   -- of -- of that process that has already gone

21   into effect would make -- would indicate that

22   Congress perhaps wants or -- or would be less

23   concerned with imposing kind of harsh

24   consequences because you're already within kind

25   of the review scheme, whereas it might then also

        1   choose to privilege the idea or the -- the --

        2   the fact that it might -- it wants to ensure

        3   efficient administration and resolution of the

        4   claims that have been brought and to privilege

        5   kind of the -- the finality requirements that --

        6   or the finality interests that -- that arise in

        7   that context as well.

        8   I also think that this Court in -- on

        9   its own has -- has recognized that the same

       10   considerations apply to appeals from district

       11   courts and to appeals from agency decisions in

       12   its adoption of Rule 26. And I know that that

       13   is a separate argument that we've made here as

       14   well, but -- but even setting the separate

       15   argument aside, I think Rule 26, in -- in

       16   stating that the presumption is going to be that

       17   those deadlines for appeals either from Article

       18   III district courts or from agency decisions are

       19   not subject to equitable tolling or are not able

       20   to be extended unless Congress specifically

       21   states that they are, indicates that this Court

       22   recognized in adopting that rule that the same

       23   kinds of considerations apply and would -- would

       24   -- would warrant that kind of rule in both

       25   instances.

1   If I could speak directly to the

2   history of this particular provision, I think

3   that that provides even a further basis to -- to

4   think that what Congress was doing here was

5   requiring that this rule to be -- is

6   jurisdictional.

7   Prior to the creation of the Federal

8   Circuit, review of MSPB decisions came through

9   the Court of Claims, where the time limit for

10 filing is jurisdictional, as this Court

11 recognized in John R. Sand, or it came through

12 regional courts of appeals through the Hobbs

13 Act, where the time limits are jurisdictional

14 under every circuit's precedent.

15   So I think that it makes perfect sense

16 that Congress would maintain the

17 jurisdictionality of the time limit when it was

18 just shifting review of those matters over to

19 the Federal Circuit.

20   And the Federal Circuit, of course,

21 then held that the deadline was jurisdictional

22 very soon after it was created. Lindahl, I

23 think, likewise, recognized the jurisdictional

24 status of Section 7703(b)(1).

25   And then, with that backdrop, Congress

 1   has reenacted and amended 7703(b)(1) numerous

 2   times, and including with specific reference to

 3   the deadline. It changed the deadline from 30

 4   days to 60 days. It changed when the -- time

 5   begins to run.

 6   So I think Congress really has been

 7   quite attentive to the way that the deadlines

 8   operate in this area and has never indicated

 9   that it disagrees with the jurisdictional status

10   that it's -- that's -- that it's had.

11   And I -- I think, you know, this Court

12   has recognized that in Helsinn a few terms ago

13   that when this Court adopts an interpretation of

14   a statute at least implicitly and the Federal

15   Circuit has exclusive jurisdiction over that

16   statute and then makes explicit what was

17   implicit in the Court's decision, that Congress

18   is then presumed to operate with that in the

19   background and to -- to know that and to, I

20   guess, ratify that when it reenacts and readopts

21   the same statutory language.

22   CHIEF JUSTICE ROBERTS: What -- and at

23   what point along that history did we adopt, you

24   said, they -- the clear statement rule with

25   respect to jurisdictional determinations?

 1   MS. BROWN: So that was in Arbaugh,

 2   which I think is a 2006 decision I want to say.

 3   And the statute has been amended before that,

 4   but even prior to that, it was also amended. I

 5   think there was amendments in 1998 I want to say

 6   but -- but again in 2012.

 7   And even with all of that in place,

 8   and I think and with Lindahl in place

 9   importantly, I -- I -- I don't think that there

10   is a reason to question that what the Federal

11   Circuit assumed or what Congress assumed was --

12   was -- was happening here was that the -- the

13   timeline maintains its jurisdictional status.

14   If I -- if I could talk about Rule 26

15   just for a moment as well, we do think that the

16   Rule 26 question is -- is presented, it is -- is

17   here before the Court, and we think that the

18   Court should actually go ahead and decide that

19   question for, I would say, I guess three

20   reasons.

21   The first reason is that we think it's

22   a particularly easy question. The plain text of

23   the rule says that Rule 26(b) applies and

24   doesn't permit the extension of deadlines for --

25   for appeals from agency decisions. I know that

1   the Petitioners have argued that it applies only

2   to time limits that are contained in the rules

3   themselves, but that language is not in the

4   particular -- the sentence that prohibits this

5   expansion.

6   JUSTICE JACKSON: I'm sorry, why do

7   you think this is encompassed in the question

8   presented in this case?

9   MS. BROWN: So we -- we think that

10   this -- this Court has long held that the

11   Respondent can bring up any alternative basis

12   for affirmance that's apparent in the record

13   here. And so that's what we are -- we're

14   relying on. I -- I recognize that the

15   Petitioner here hasn't framed the question to

16   include equitable tolling, but we do think it's

17   an appropriate exercise of this Court's

18   discretion to -- to address that because it's

19   apparent from the record. And this Court has

20   done so in cases like -- or has recognized that

21   principle in cases like Union Pacific Railroad

22   and others.

23   So I guess, with -- with respect --

24   JUSTICE JACKSON: Would -- would we

25   have to -- would we have to address the

1   forfeiture argument that Petitioner raises in

2   order to exercise that discretion in this case?

3   MS. BROWN: I think you -- you would

4   have to raise forfeiture. I'm happy to -- to

5   address that. I don't think that we did forfeit

6   this argument. The order to show cause before

7   the district court -- or before the Federal

8   Circuit came right after the administrative

9   record was filed but before any briefing had

10   occurred. Briefing was then stayed.

11   I think that that order can itself

12   reasonably be -- be viewed as mainly directed

13   toward the Petitioner because it said that the

14   order to show cause was the -- was to show cause

15   why this case should not be dismissed, and it

16   cited Rule 26, and it cited the Federal

17   Circuit's binding precedent. And so, you know,

18   the government didn't really have an interest in

19   explaining the same things that the -- the --

20   that the Federal Circuit had already recognized

21   there.

22   We did raise Rule 26 in our brief in

23   opposition and we noted that the Petitioner had

24   never said anything about waiver or forfeiture.

25   In the Petitioner's cert reply, he also didn't

 1   say anything about waiver or forfeiture at that

 2   point and instead stated that the Court could

 3   address Rule 26 on the merits if it wanted to do

 4   so.

 5   JUSTICE JACKSON: But the Federal

 6   Circuit's order dismissing the case didn't

 7   discuss it, did it?

 8   MS. BROWN: It did include a citation

 9   to Rule 26. I agree that there wasn't any kind

10   of extended discussion of that. But, again, I

11   would -- I would say that Federal Circuit

12   precedent already does make very clear that

13   there -- there is binding precedent on this

14   issue and that Rule 26 applies to 7703(b)(1) and

15   -- and would prohibit extending the deadline

16   there.

17   And, again, that's the Oja case that

18   we've cited in our brief.

19   JUSTICE KAGAN: I -- I -- I wasn't

20   quite sure what argument about Rule 26 your

21   brief was making. I mean, so distinguish

22   between two arguments. One is that Rule 26

23   independently requires what you think it

24   requires, but another, which is what I took to

25   be the argument in your brief, is that Rule 26

 1   should inform our interpretation of 7703(b)(1).

 2   And I thought that that was the

 3   argument you were making in your brief, not the

 4   straight argument about Rule 26.

 5   MS. BROWN: Yes. I'm sorry if I was

 6   -- if I confused the issue there. It is the

 7   latter argument. We do think that Rule 26

 8   informs the reading of 7703(b)(1). It shifts

 9   the presumption of equitable tolling and says

10   that it does not -- it does not apply in the

11   context of appeals from agency decisions. And

12   that was a rule that was in place at the time.

13   JUSTICE KAGAN: So, if that's the

14   argument you're making in your brief, and

15   suppose, just suppose, that the Court rejects

16   that argument and says 7703(b)(1) is not

17   jurisdictional, as I read your brief, you don't

18   have a separate Rule 26 argument, is that right?

19   MS. BROWN: No, I -- I don't think

20   that's the case. I think that even if there is

21   no jurisdictional status for this rule, the --

22   JUSTICE KAGAN: Well, I know you're

23   making that argument here, but you didn't make

24   it in your brief. And read against the backdrop

25   of a question presented that doesn't have

           1   anything to do with Rule 26, and then, in your

           2   brief, you only brought up Rule 26 as something

           3   that would inform our understanding of the

           4   statute, what I'm suggesting is that you don't

           5   really have a Rule 26 argument here.

           6   MS. BROWN: Okay. I'm sorry. I -- I

           7   misunderstood the question. I think our

           8   argument in our brief and today is that Rule 26

           9   informs the reading of the statute if it's not

          10   jurisdictional on its own. So even if the

          11   statute is not jurisdictional under this -- this

          12   Court's holding and it reads 1295(a) -- (a)(9)

          13   and 7703(b)(1) and says that -- that there is

          14   not a jurisdictional rule here, that then leaves

          15   open the question whether equitable tolling can

          16   apply or whether there can be extensions.

          17   And at that point, when there is no

          18   language in the statute that speaks to that,

          19   then you either have the Irwin presumption on

          20   the one hand that would say yes, we assume

          21   equitable tolling applies, or you have Rule 26,

          22   which displaces that presumption and says no, if

          23   Congress hasn't express -- expressly stated

          24   otherwise, then equitable tolling does -- does

          25   not apply, and that's where we think Rule 26

 1   comes into play here.

 2   JUSTICE KAVANAUGH: You think that

 3   question's simple enough for us to resolve here

 4   in addition to the main question?

 5   MS. BROWN: We do. We do think that

 6   the -- the text of Rule 26 is -- is fairly clear

 7   here and -- and says that it applies as a

 8   background rule and a background principle in --

 9   in the interpretation of statutes.

10   I -- I -- as I was saying earlier, I

11   think the Petitioner has argued that it only

12   applies to deadlines that appear in the rules

13   themselves. But that is -- that's incorrect.

14   The language of the statute -- of the rules does

15   -- doesn't say that in the provision that

16   actually talks about the prohibition on

17   extending deadlines.

18   That's even clearer if you look at the

19   earlier versions of the rule that were in effect

20   when Section 7703(b)(1) was enacted. We've

21   included those in our appendix on pages 10a and

22   11a. And, there, it says, "nor may the Court

23   enlarge the time prescribed by law" for appeals

24   or for petitions of review of agency decisions.

25   So we think that's very clear in stating that --

 1   that the rule applies even to -- to statutory

 2   deadlines as well.

 3   And when the language was shifted to

 4   its current form in 1998, the submission that

 5   the Chief Justice gave to Congress said that

 6   this was just a stylistic change. It wasn't

 7   meant to alter the substance of the rule. And

 8   so I -- we do think that that's an easy

 9   question.

10   I guess, to go back again to the

11   second reason that we think that the Court

12   should address Rule 26 here, again, I'll refer

13   to the binding precedent of the Federal Circuit.

14   I think, if this is remanded, it's very clear

15   what the Federal Circuit would do based on that

16   precedent.

17   And then the third reason just kind of

18   goes to the consequences of the determination

19   that the time limit is not jurisdictional, which

20   is an issue that the parties have joined issue

21   on and have -- have discussed. And so we do

22   think it would be appropriate for the Court

23   to -- to make that determination now and it

24   would be efficient to do so.

25   JUSTICE BARRETT: Ms. Brown, if

         1   Petitioner's reading is plausible, do you lose?
         2   MS. BROWN: So, when this Court has
         3   explained the clear statement rule, I don't
         4   think right -- up until this point or as of yet,
         5   the Court has said that if there is one other
         6   plausible definition or interpretation, then
         7   it's not clear. The Court in Boechler said that
         8   if there are multiple plausible interpretations
         9   and only one of them is jurisdictional, it's
        10   going to be very hard for the government to
        11   prove that the statement is clear. But, thus
        12   far, I think the -- the -- the most common
        13   formulation of the clear statement rule is just
        14   that.
        15   If -- if Congress wants to make a
        16   certain -- a certain provision jurisdictional,
        17   it has to clearly state that it is. And so I --
        18   I don't think the -- the Court has gone that far
        19   yet, but if it could do so, I'm sure.
        20   JUSTICE JACKSON: Going back to the
        21   Rule 26 issue, Mr. Davis suggests, I guess, in
        22   conjunction with -- with Justice Gorsuch's
        23   questions that this could be a situation in
        24   which the government might look the other way
        25   regarding its pressing of equitable tolling or

1   objecting to it on remand.

2   Do you have a comment?

3   MS. BROWN: I -- I haven't spoken with

4   the -- the agency about what it intends to press

5   on remand if the Court does bring it to -- to

6   that point. I -- I do think that the agency and

7   the government in general has a fairly strong

8   interest in ensuring that Rule 26 is accurately

9   applied and that this doesn't open the door to

10   the potential for equitable tolling in all sorts

11   of other state -- other cases in which --

12   JUSTICE JACKSON: But if it isn't

13   jurisdictional --

14   MS. BROWN: Right. That's correct.

15   JUSTICE JACKSON: -- we could go back

16   and it could possibly go forward, correct?

17   MS. BROWN: Yes, although I think that

18   the Federal Circuit would still have the option

19   of bringing it up sua sponte on its own as well,

20   which it kind of already has done within the

21   order to show cause and the order for -- and the

22   order dismissing the case.

23   But -- but, as I was saying, I -- I do

24   think we have an interest in the correct

25   application of Rule 26. I recognize that Mr.

1   Harrow here has some sympathetic circumstances

2   on his side, and so I -- I think that would be a

3   conversation, but I'm -- but I -- I -- I can't

4   represent to you today that -- that we would try

5   to waive the issue.

6   CHIEF JUSTICE ROBERTS: Thank you,

7   counsel.

8   Justice Thomas, anything?

9   Justice Barrett?

10   JUSTICE SOTOMAYOR: If it's not

11   mandatory, meaning you can waive it --

12   MS. BROWN: So I think --

13   JUSTICE SOTOMAYOR: -- if you chose?

14   MS. BROWN: I think we think it is

15   mandatory, just not jurisdictional.

16   JUSTICE SOTOMAYOR: But -- well, but

17   mandatory is still the waivable defense.

18   MS. BROWN: Correct, yes.

19   JUSTICE SOTOMAYOR: All right.

20   CHIEF JUSTICE ROBERTS: Justice

21   Barrett? Nothing?

22   Thank you, counsel.

23   Rebuttal, Mr. Davis -- or Mr. Brown?

24   No, Mr. Davis. Sorry, excuse me.

25   MR. DAVIS: You're the Chief Justice.

         1   It's Mr. Brown now.

         2   CHIEF JUSTICE ROBERTS: -- okay to

         3   change your mind.

         4   MR. DAVIS: Yes, Your Honor.

         5   (Laughter.)

         6   REBUTTAL ARGUMENT OF JOSHUA P. DAVIS

         7   ON BEHALF OF THE PETITIONER

         8   MR. DAVIS: So just a -- a -- a small

         9   number of points on rebuttal.

        10   The first one is the analogy, excuse

        11   me, to Section 7703(b)(2) where the government

        12   argues the first sentence must be

        13   jurisdictional. The difficulty for the

        14   government by invoking that particular provision

        15   is that in Kloeckner, this Court held that even

        16   if the first sentence there is juris --

        17   jurisdictional, the very close -- the filing

        18   deadline in the second sentence is not. And so,

        19   if one is going to rely on that very close

        20   parallel textual interpretation, that would

        21   actually place the government in a position

        22   where it is possible that one of those sentences

        23   could have some jurisdictional implications with

        24   the other one not.

        25   What this Court said in the second

 1   sentence, which is, again, very closely

 2   parallel, 7703(b)(2) and (b)(1), is that the

 3   filing deadline is just a filing deadline. So I

 4   don't think that analogy helps the government.

 5   Second, the government took the

 6   position that if there were a mixed case, and so

 7   it would go -- would -- would necessarily fit

 8   appropriately under 7703(b)(1), no one would

 9   contest -- I'm sorry, under (b)(2), no one would

10   contest that there would be a lack of

11   jurisdiction if the Petitioner invoked

12   7703(b)(1).

13   That's not the only possible

14   interpretation, but, in fact, the government's

15   position is directly opposite to the holding of

16   this case in BP P.L.C. as I understand it, where

17   the "pursuant to" language was used and this

18   Court said that "pursuant to" can be consistent,

19   and it was there consistent with invoking.

20   And the answer to the question of,

21   well, how then can you go forward with a -- a --

22   a mixed case under (b)(1) is, well, if it's

23   frivolous, then there are other ways to police

24   that, including sanctions and attorney's fees

25   and costs. And nobody here is arguing that Mr.

 1   Harrow isn't appropriately proceeding under

 2   (b)(1). So I think the kind of -- reductio ad

 3   absurdum that the government invoked is contrary

 4   to at least one Supreme Court precedent.

 5   Two -- well, one final point. Oh, I'm

 6   sorry, two final points quickly.

 7   In terms of the timing of the amending

 8   of (b)(1)(A), the most recent amendment was

 9   2012. And in 2012, the clear statement rule was

10   already established, including the statement in

11   Arbaugh in 2006 that lower court precedents by

12   themselves are not enough to satisfy the clear

13   statement rule, so if we are inferring

14   Congress's intent from the amendments to

15   (b)(1)(A), the natural inference would be that

16   Congress was listening to this Court and not to

17   the Federal Circuit precedents that this Court

18   said it should -- it should not listen to.

19   And then the -- the last point I would

20   say is the question presented is, in fact,

21   limited to the jurisdictional nature or not of

22   the filing deadline. I do think that between

23   forfeiture and the complexities at equitable

24   tolling, government discretion on remand not to

25   raise this issue, and the complexities under

1   26(b), which include not only that the -- the

2   rule -- it cites to the rules and not statutes,

3   we did not make the complete set of arguments

4   about Federal Rule of Appellate Procedure 26(b).

5   We would like the opportunity if this Court

6   decides the deadline is not jurisdictional to do

7   so on remand.

8   We think, if that issue were to get

9   back up to this Court, the Court would be in a

10   much better position to rule effectively with

11   that sort of background. Thank you.

12   CHIEF JUSTICE ROBERTS: Thank you,

13   counsel.

14   The case is submitted.

15   (Whereupon, at 12:23 p.m., the case

16   was submitted.)

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