

# SUPREME COURT OF THE UNITED STATES

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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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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

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 PLC 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

1 provision, why isn't -- 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  
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 addition, it is  
23 the sort of loose jurisdictional language that  
24 the clear statement rule is designed to clean  
25 up.

1 CHIEF JUSTICE ROBERTS: Well, we know  
2 that one area where jurisdiction is enforced  
3 rigorously is from one level of court to  
4 another, right, from the district court to court  
5 of appeals. Why does it make sense to have a  
6 totally different rule when it's from an agency  
7 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 don't agree with that  
10 argument. And if I may say first -- first,  
11 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 address it, is if  
20 the lower court feels that the -- that having a  
21 filing deadline subject to equitable tolling is  
22 not appropriate, it could say that the -- that  
23 the filing deadline is not jurisdictional but  
24 also is mandatory and not subject to equitable  
25 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 court of appeals is -- is fully capable of  
19       making.

20           JUSTICE SOTOMAYOR: We look at facts  
21       and mootness and standing, the statutes that  
22       give us directly equitable tolling permission.  
23       The one thing about mandatory claim processing  
24       is that it can't be sua sponte decided by a  
25       court below. It has to be raised by the

1 opposing 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 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 that  
16 perspective sua sponte that the Federal Circuit  
17 raised it on its own.

18 JUSTICE JACKSON: What is the --

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 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 wouldn't -- we are not resting our case on the  
7 proposition that if the -- that if this filing  
8 deadline is not jurisdictional, then the Court  
9 is necessarily unable to raise it sua sponte.

10 The indication here, though, is what  
11 we would ask is at least that the Federal  
12 Circuit be given the opportunity on remand to  
13 decide whether it would raise it sua sponte.  
14 What was clear in the reasoning below is the  
15 court felt that it had to because the issue was  
16 jurisdictional. And so we would like to brief  
17 the issue at the least on remand, that -- that  
18 in this circumstance either the Court can't or  
19 it just might not.

20 JUSTICE ALITO: Why would the  
21 government be precluded from raising the  
22 question if we were to send the case back?  
23 They -- before they even had -- my understanding  
24 is that before they even had an opportunity to  
25 respond, the court sua sponte issued an order to

1 show cause, right?

2 MR. DAVIS: That is correct, yes. So  
3 I would say two things. One, we would request  
4 that that issue be reserved for remand as well.  
5 For all we know, the government may or may not  
6 raise this issue at all.

7 It may, 11 years into this pro --  
8 mostly pro se litigation, the government just  
9 might allow Mr. Harrow to proceed on the merits  
10 with his appeal. But the basis for forfeiture  
11 would be not so much the issuance -- issuance of  
12 the order to show cause but the fact that after  
13 the Federal Circuit issued its order to show  
14 cause, the government chose not to submit a  
15 brief. And that has not been an issue that's  
16 been briefed, the forfeiture issue, but we would  
17 suggest that in the first instance the Federal  
18 Circuit should address that.

19 JUSTICE JACKSON: Am I wrong that the  
20 Federal Circuit has precedent that looks at this  
21 very deadline and holds that it's not subject to  
22 equitable forfeiture?

23 MR. DAVIS: Yes, you're right. I  
24 apologize. You're right.

25 JUSTICE JACKSON: I'm right.

1 MR. DAVIS: Yeah. You're right.

2 JUSTICE JACKSON: I'm sorry, I asked  
3 the question in a weird way.

4 MR. DAVIS: No, no, no, entire --  
5 entirely my fault. But -- so, yes, so -- so  
6 there's precedent that goes back almost exactly,  
7 I believe, 40 years in the Federal Circuit that  
8 treats this filing deadline as jurisdictional  
9 and, therefore, not subject to forfeiture and  
10 not subject to equitable tolling.

11 Having said that, this Court has  
12 repeatedly held, as early as 2006 in Arbaugh and  
13 as recently as 2023, I believe, in  
14 Santos-Zacaria, that lower court precedent are  
15 not enough by themselves to establish -- to  
16 satisfy --

17 JUSTICE JACKSON: Yes. I'm just -- I  
18 guess I'm just wondering whether the equitable  
19 tolling finding is bound up with their  
20 jurisdictional finding such that if we said  
21 you're right, it's not jurisdictional and sent  
22 it back, would the Federal Circuit be bound to  
23 say: Well, it's mandatory anyway, and your  
24 client doesn't get any relief?

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

1       So two -- so three -- three pieces, I would say.

2               One, I believe it is -- those two are  
3       bound up. I don't think the Federal Circuit had  
4       occasion to decide what would happen with  
5       equitable tolling if the -- if the filing  
6       deadline were non-jurisdictional because the --

7               JUSTICE JACKSON: I see.

8               MR. DAVIS: -- equitable tolling issue  
9       is subsumed within the determination that the  
10      filing deadline is jurisdictional.

11              JUSTICE JACKSON: I see.

12              MR. DAVIS: Having said that, there is  
13      the issue of forfeiture, so our client still  
14      might get relief. And then there's also the  
15      issue of whether the government on remand might  
16      or might not choose to pursue this issue and  
17      might allow Mr. Harrow, who has proceeded for 11  
18      years seeking \$3,000 of compensation and  
19      interest, to just get his day in court in the  
20      Federal Circuit on the merits.

21              JUSTICE GORSUCH: It is extraordinary,  
22      the lengths to which this case has gone, seven  
23      years waiting and then the email and all that,  
24      but I just have a question background.

25              Both sides agree that we have a clear

1 statement rule with respect to whether a  
2 statute's jurisdictional or a mandatory claims  
3 processing rule.

4 I'm just curious what -- what you  
5 think the justification for that clear statement  
6 rule is, what you're understanding of its  
7 background?

8 MR. DAVIS: Sure. I think there's a  
9 couple of justifications as I understand it.  
10 One is that in the first instance, courts have  
11 at times used the word "jurisdiction" loosely  
12 when -- with implications that Congress probably  
13 never intended, and so it's a -- it's a rule of  
14 fidelity to congressional intent in that sense.

15 I think there is a second  
16 justification that has now arisen which explains  
17 in part why lower court decisions are not  
18 enough, which is having this Court at least  
19 since 2006 having articulated the clear  
20 statement rule, Congress should be presumed to  
21 -- to legislate with that background in mind.  
22 And so it's sort of double fidelity to  
23 congressional intent.

24 JUSTICE GORSUCH: Yeah, it's a little  
25 awkward, though, isn't it, because, I mean, you



1     could say: Well, there have been a lot of  
2     drive-by jurisdictional rulings, don't -- don't  
3     do that anymore, stop and -- and just faithfully  
4     interpret statutes. But this Court's gone  
5     further and -- and said clear statement rule.

6             MR. DAVIS: Yes, Your Honor. I -- I  
7     actually -- I think either suffices in this  
8     instance because I do think the "pursuant to"  
9     language isn't strong enough, the explicit  
10    language of 7703(b)(1)(A) isn't strong enough to  
11    infer congressional intent and the like.

12            And -- and -- and so -- and Lindahl  
13    really was a drive-by jurisdictional statement.  
14    I do agree that the articulation has been  
15    stronger than that or the rule has been stronger  
16    than that. And I think I would hope that that  
17    makes this a relatively easy case, but -- so  
18    there is a fork in the road, but I would say  
19    either path leads --

20            JUSTICE GORSUCH: What is your  
21    understanding as to why the government has  
22    resisted your client's case so -- so strongly?  
23    I mean, it is -- he spent seven years waiting,  
24    five of which were because the government  
25    couldn't manage to get a quorum together to

1 resolve it, sent an email to an old email  
2 address, and -- and he acted as quickly as he --  
3 as he could when he got it, and yet here we are  
4 in the Supreme Court of the United States over a  
5 \$3,000 claim.

6 MR. DAVIS: Yes. Yes.

7 JUSTICE GORSUCH: We're hearing it.  
8 You know, we've done every other claims  
9 processing rule statute on the books. I'm just  
10 kind of surprised we're having to do -- the  
11 government's making us do this one.

12 MR. DAVIS: Right.

13 JUSTICE GORSUCH: Do you have any  
14 insight?

15 MR. DAVIS: I don't have insight. I  
16 mean, I would say it's a little bit off point,  
17 but my client has great reverence for the law.  
18 In some way, this whole process has been a  
19 tremendous honor for him.

20 JUSTICE GORSUCH: Oh, I don't fault --  
21 I don't fault your client.

22 MR. DAVIS: No, no. Yes.

23 JUSTICE GORSUCH: I'm -- I'm just  
24 wondering why the government's making us do  
25 this.

1 MR. DAVIS: I don't know.

2 (Laughter.)

3 MR. DAVIS: I mean, but it is a sort  
4 of form of compensation, that to be here today  
5 is an honor for me and an honor for him, and so  
6 -- but -- but having said -- having said that --

7 JUSTICE GORSUCH: It's an honor for  
8 all of us.

9 (Laughter.)

10 JUSTICE ALITO: And I -- I  
11 seriously -- I seriously doubt that we have seen  
12 every single statute where there is potential  
13 jurisdictional versus claims processing rule  
14 argument. I'm willing to bet that there are  
15 more.

16 MR. DAVIS: Yeah. Hopefully, a clear  
17 ruling today in our favor would help to  
18 alleviate that issue, but --

19 JUSTICE SOTOMAYOR: I think the  
20 government wants the Court to do the work for  
21 it, meaning it -- the Court has to sua sponte  
22 assert -- determine jurisdiction. And if the  
23 Court doesn't, then they have to do a little  
24 work and look at the record and see if, in fact,  
25 whether they have an exhaustion claim or not.

1                   MR. DAVIS: I hesitate to hazard a  
2     yes, Your Honor, with a couple of -- a couple of  
3     thoughts, I would, is, one, the government  
4     didn't raise this below, so it's at least  
5     conceivable again that on remand they would let  
6     it go.

7                   JUSTICE SOTOMAYOR: No, because the  
8     Court was doing it for them. Thank you,  
9     counselor.

10                  MR. DAVIS: Absolutely. And I do  
11     think along similar lines, and I -- I, again,  
12     hesitate to be presumptuous, but I think, in  
13     some ways, at least some members of the Federal  
14     Circuit would welcome this Court's intervention.  
15     They seem stuck in a precedent that at least  
16     some of them believe is no longer consistent  
17     with Supreme Court doctrine, but they are  
18     abiding by it unless and until they're told  
19     otherwise.

20                  CHIEF JUSTICE ROBERTS: Thank you,  
21     counsel.

22                  Justice Thomas?

23                  Justice Alito? No?

24                  Thank you.

25                  MR. DAVIS: Thank you, Your Honor.

1 CHIEF JUSTICE ROBERTS: Ms. Brown.

2 ORAL ARGUMENT OF AIMEE W. BROWN

3 ON BEHALF OF THE RESPONDENT

4 MS. BROWN: Thank you, Mr. Chief  
5 Justice, and may it please the Court:

6 In Section 1295(a)(9), Congress  
7 granted the Federal Circuit jurisdiction over  
8 appeals from final MSPB decisions pursuant to  
9 Section 7703(b)(1), which includes a deadline  
10 for filing an appeal.

11 As this Court has recognized in cases  
12 like BP and SAS Institute, the plain meaning of  
13 "pursuant to" is "in accordance with" or "in  
14 compliance with."

15 By conditioning the Court's  
16 jurisdiction on compliance with 7703(b)(1), the  
17 statutory text provides the clear tie between  
18 the appeal deadline and the jurisdictional grant  
19 which satisfies this Court's clear statement  
20 rule.

21 That view of the text is confirmed by  
22 precedent and history. In Lindahl, this Court  
23 squarely addressed whether the Federal Circuit  
24 had jurisdiction over an appeal from the MSPB  
25 and held that such jurisdiction is governed by

1 Section 1295(a)(9) and 7703(b)(1) together, with  
2 Section 7703(b)(1) setting the jurisdictional  
3 perimeters for the Federal Circuit's review.

4 For the past 40 years, the Federal  
5 Circuit has recognized the same thing and has  
6 repeatedly held that the time limit here is  
7 jurisdictional. Against the backdrop of that  
8 settled precedent, Congress has repeatedly  
9 reenacted or amended the statute, including  
10 specifically the time limit.

11 Petitioner's contrary arguments fail  
12 to offer any plausible alternative reading of  
13 the statutory text. His argument that none of  
14 Section 7703(b)(1) is jurisdictional is directly  
15 contrary to *Lindahl* and would make Section  
16 1295(a)(9)'s grant of jurisdiction incomplete.  
17 And his alternative argument that the first  
18 sentence of 7703(b)(1) is jurisdictional but the  
19 second is not creates a distinction that  
20 Congress didn't draw.

21 Adopting Petitioner's view would  
22 require the Court to read "pursuant to" to mean  
23 different things for the different sentences of  
24 Section 7703(b)(1). And demanding Congress to  
25 speak more -- with more specificity would turn

1 the clear statement rule into the kind of magic  
2 words requirement that this Court has repeatedly  
3 rejected.

4 Finally, even if the Court were to  
5 hold that the filing deadline is not  
6 jurisdictional, at a minimum, it's not subject  
7 to equitable tolling. Federal Rule of Appellate  
8 Procedure 26(b) prohibits extending the  
9 deadlines for filing appeals from agency  
10 decisions unless authorized by law. Because  
11 Congress did not authorize any such extension  
12 under either the statute or the federal rules,  
13 Petitioner's untimely appeal cannot go forward.

14 I welcome the Court's questions.

15 JUSTICE THOMAS: Do you think it's at  
16 least plausible that "pursuant to" modifies  
17 "final order"?

18 MS. BROWN: I don't, and I think the  
19 reason for that is that if you were to -- to  
20 read the statute that way, it would say that the  
21 order or decision needed to be pursuant to or in  
22 accordance with, in compliance with, Section  
23 7703(b)(1). But Section 7703(b)(1) doesn't  
24 impose any requirements or limitations on the  
25 order or decision.

1           I think that's particularly clear if  
2   you look at (b)(1)(A) and (b)(1)(B) together,  
3   and those two provisions talk -- they -- they  
4   sort the cases between either the Federal  
5   Circuit exclusively or the Federal Circuit and  
6   the regional courts of appeals. And the basis  
7   for that sorting is not the scope of the order  
8   or decision. It's based on what challenges to  
9   the order or decision are brought within the  
10  appeal.

11           And so I don't think it's actually  
12  possible to read the statute that way.

13           JUSTICE KAGAN: Do you lose if  
14  "pursuant to" just means "under"?

15           MS. BROWN: I don't think so. As we  
16  said in our brief, if "under" were used in this  
17  -- in this context specifically, it would have  
18  the exact same meaning that it -- that "pursuant  
19  to" has here. That's the same meaning that the  
20  Court gave to "under" in cases like *Pereira*. I  
21  think that the easiest way to -- to understand  
22  that is to -- to think about how this -- how  
23  this scheme would work or how this statute would  
24  --

25           JUSTICE KAGAN: I guess I meant



1 "under" as in "go bring an appeal under" that  
2 section. "Go file an order under" that section.

3 MS. BROWN: So do you -- "under" as  
4 kind of like an invoking, it means to invoke?  
5 Okay. So I -- the reason I don't think that  
6 that --

7 JUSTICE KAGAN: I mean, it just  
8 doesn't have anything to do with whether you've  
9 satisfied every jot and tittle of whatever  
10 requirements might apply --

11 MS. BROWN: The --

12 JUSTICE KAGAN: -- to that section.

13 MS. BROWN: The reason that I think  
14 that that interpretation is unavailable here is  
15 because of what the first sentence of Section  
16 7703(b)(1) does require. And I think that it  
17 has to be the case that that part is  
18 jurisdictional and -- and is required by the --  
19 the -- the reading here because, if you imagine,  
20 for example, that the Petitioner here had  
21 brought discrimination claims, and so the case  
22 was a mixed case, and he brought that case in  
23 the -- in the court of appeals, in this -- in  
24 the Federal Circuit in the first instance, and  
25 asserted that he was invoking 7703(b)(1), I

1 don't think that anyone here is suggesting that  
2 that case would then be able to proceed in the  
3 Federal Circuit because the Petitioner had  
4 asserted or invoked or relied on 7703(b)(1). It  
5 belongs in the district court under (b)(2).

6 And so I think, because that  
7 interpretation of the statute and interpretation  
8 of "pursuant to" is mandated for that sentence,  
9 the same thing has to be true for the second  
10 sentence and for the time limit.

11 JUSTICE BARRETT: Ms. Brown, I want to  
12 give you a chance to respond to Justice Gorsuch  
13 and Justice Sotomayor's points about, you know,  
14 why is the government here, why as a practical  
15 matter -- I mean, this is apart from the merits  
16 of your reading of the statute, right, but as a  
17 practical matter, why does the government care  
18 so much whether this is jurisdictional or claims  
19 processing?

20 MS. BROWN: So I -- I think that the  
21 reason that we are here, we -- we take very  
22 seriously this Court's rulings in this area and  
23 its efforts to bring discipline to the use of  
24 jurisdiction, and we're not trying to fight  
25 against the application of the clear statement

1 rule.

2           We do think that this case is quite  
3 different from many of the cases that the Court  
4 has looked at before. In almost every other  
5 case, the suit fell within a clear  
6 jurisdictional grant, and the question was just  
7 whether the -- there was another provision and  
8 another requirement that displaced that  
9 jurisdictional grant with respect to certain --  
10 certain cases or in certain instances.

11           So I think it's really only this case  
12 and Boechler that have dealt with the  
13 interpretation of a provision that clearly has  
14 something to do with jurisdiction, and then the  
15 question there is just what is the scope of that  
16 jurisdictional grant.

17           And so I think we are still kind of  
18 working through and fleshing out and figuring  
19 out how this Court's clear statement rules do  
20 apply to that particular circumstance. And I  
21 think, in this case, that we think we have a  
22 very strong argument as to why reading this --  
23 this jurisdictional provision should lead to the  
24 result that the clear statement rule -- that  
25 even with the clear statement rule, the time

1 limit here is jurisdictional, because we do have  
2 that clear tie with the "pursuant to" language  
3 that was lacking in -- in Boechler itself.

4 JUSTICE BARRETT: Do you have -- does  
5 the government have a position on the question  
6 Justice Alito asked you about whether a court  
7 can raise the mandatory claims processing rule  
8 sua sponte?

9 MS. BROWN: Yes. We do think that  
10 that is permissible under the Court's decision  
11 in Day versus McDonough, and we think it's very  
12 clear that that's what the court of appeals, the  
13 Federal Circuit, was doing here. Both in its  
14 order to show cause and in its order dismissing  
15 the case for lack of jurisdiction, the court  
16 relied on Rule 26.

17 We also think that a remand here would  
18 be somewhat unnecessary, in part because the  
19 Federal Circuit does have binding precedent  
20 holding that -- that equitable tolling does not  
21 apply specifically to rules -- to Section  
22 7703(b)(1). And that -- that case, which is Oja  
23 versus Department of Army, specifically says,  
24 even if we were wrong and Section 7703(b)(1) is  
25 not jurisdictional, we still think that

1 equitable tolling does not apply.

2 And so I don't think it's the case  
3 that it's bound up in its decision, its  
4 determination about the jurisdictionality of the  
5 provision.

6 JUSTICE GORSUCH: At the very least,  
7 though, the government could waive, right?

8 MS. BROWN: Yes, the government could  
9 choose to waive it.

10 JUSTICE GORSUCH: Yeah. So a remand  
11 wouldn't be wholly pointless.

12 MS. BROWN: I suppose that's correct.  
13 I mean, I do think that we have already raised  
14 --

15 JUSTICE GORSUCH: I mean -- and -- and  
16 -- and, gosh, I mean, waiting seven years to  
17 rule on this fellow's claim and then sending  
18 it -- him an email and to an old email address  
19 and he acted as fast as he could, I mean, it's  
20 not wholly inconceivable the government might,  
21 in its magnanimity, choose to waive this defect?

22 MS. BROWN: Sure. So, I -- I mean, I  
23 do want to address the delay here, which I don't  
24 think is really attributable to the -- the  
25 executive branch because the -- the board

1 members' terms expired and there were lags in  
2 time with the nomination and confirmation of --

3 JUSTICE GORSUCH: Well, it was two  
4 years --

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

6 JUSTICE GORSUCH: -- two years on the  
7 executive and five on Congress if you want to be  
8 specific, right?

9 MS. BROWN: Sure. Yes.

10 JUSTICE GORSUCH: Okay.

11 MS. BROWN: Yes. And then the board  
12 acted as quickly --

13 JUSTICE GORSUCH: But it wasn't --

14 MS. BROWN: -- as possible after that,  
15 and there was an obligation --

16 JUSTICE GORSUCH: -- it wasn't Mr.  
17 Harrow's fault by any stretch.

18 MS. BROWN: He did have an obligation  
19 to keep his email address updated, but,  
20 certainly, the delay --

21 (Laughter.)

22 MS. BROWN: -- I'm not trying to  
23 suggest that the delay here was -- was -- was  
24 his fault.

25 JUSTICE GORSUCH: All right. And you

1 -- I'd ask you the same question I asked your  
2 friend on the other side about, what do you  
3 understand the justification for this clear  
4 statement rule to be?

5 MS. BROWN: So the way that this Court  
6 has always framed it is that it's intended to  
7 get at what Congress -- what we think Congress  
8 is actually doing in these cases. And we think  
9 that normally Congress doesn't make a lot of  
10 separate requirements jurisdictional, and so,  
11 when Congress does want to do so, we've asked or  
12 Congress or the Court has -- has suggested that  
13 Congress will speak clearly.

14 JUSTICE GORSUCH: And do you think  
15 this is a sound clear statement rule? Does the  
16 government believe it's a sound clear statement  
17 rule?

18 MS. BROWN: That the clear statement  
19 rule itself, in general, is a sound principle?

20 JUSTICE GORSUCH: Mm-hmm.

21 MS. BROWN: I think -- I think, yes,  
22 we haven't disputed that the clear statement  
23 rule should apply here or -- or is an  
24 appropriate use of this Court's authority.

25 I do think that expanding the clear

1 statement rule in the way that I think you might  
2 have to in order to rule for the Petitioner here  
3 would be a problem, and I think there are kind  
4 of two reasons for that. I think that in order  
5 to rule for the Petitioner here, you would have  
6 to say either that there is something like a  
7 magic words requirement in -- in the context of  
8 a jurisdictional grant in order to give a time  
9 limit jurisdictional consequences, and also that  
10 -- or in the alternative, I guess, that the  
11 Court would be saying that there are some kinds  
12 of extratextual considerations like the kinds of  
13 things that the judiciary thinks should or  
14 should not be jurisdictional that can be  
15 privileged over the clear meaning of the text.

16 JUSTICE KAVANAUGH: I --

17 MS. BROWN: I think that if either of  
18 those principles are adopted, then that really  
19 extends the clear statement rule beyond what the  
20 justification for --

21 JUSTICE KAVANAUGH: What -- if -- if  
22 you were to lose here, what would provide the  
23 most clarity, do you think, for the government  
24 and for the courts of appeals and district  
25 courts, the affected courts, on these kinds of



1 matters? Maybe it is a magic words requirement  
2 would be better, because it seems silly to keep  
3 having this debate.

4 MS. BROWN: I -- I suppose that for  
5 purposes of clarity, a magic words requirement  
6 would -- would be clear, but I don't think that  
7 it would be appropriate because, at that point,  
8 then you are mandating that Congress speak in a  
9 particular way in -- in -- particularly in this  
10 context.

11 JUSTICE KAVANAUGH: Well, maybe "magic  
12 words" is loading the dice. Maybe just speaks  
13 directly to jurisdiction.

14 MS. BROWN: Sure, but I guess we think  
15 that this provision would comply with that  
16 because it -- this is a jurisdictional grant.  
17 We -- we know that this is a jurisdictional  
18 grant, and no one is disputing that.

19 And in that context, generally, when  
20 this Court is interpreting a jurisdictional  
21 grant, it hews very closely to the text in an  
22 effort to avoid either expanding or contracting  
23 the courts' jurisdiction because of the  
24 separation-of-powers concerns that come with  
25 that as -- as an Article III court.

1                   And so I think, at least in the  
2     context of interpreting what is a clear  
3     jurisdictional grant, a magic words requirement  
4     could raise some -- some concerns there in -- in  
5     putting too much of a burden on Congress --

6                   JUSTICE JACKSON: Well, can I ask you  
7     about the clear jurisdictional grant here and  
8     the implications of your view?

9                   MS. BROWN: Yes.

10                  JUSTICE JACKSON: So I'm looking at  
11     1295(a)(9), and it not only cross-references  
12     7703(b)(1), which is at issue here, but also  
13     7703(d). So is it the government's position  
14     that all of the parts and expectations that come  
15     out of 7703(d) are also jurisdictional?

16                  MS. BROWN: So it -- it is our  
17     position that, of course, because the same  
18     language attaches 7703(d) to 1295(a) and to the  
19     jurisdictional grant, that the requirements for  
20     bringing an appeal that are encompassed within  
21     (d) are also jurisdictional. And that is how  
22     OPM has treated them. That's how the Board has  
23     treated them as well.

24                  And I recognize that there's some kind  
25     of raised eyebrows from some at the idea that

1 the director's determination that this  
2 particular issue was one that should be appealed  
3 would be jurisdictional, but I actually don't  
4 think that that issue or that requirement being  
5 jurisdictional is that far afield from some of  
6 the other kinds of gatekeeping requirements for  
7 appeals that this Court has already held to be  
8 jurisdictional and there are --

9 JUSTICE JACKSON: But what about the  
10 procedural oddity of the Federal Circuit having  
11 an affirmative obligation to sua sponte make  
12 this determination in these kinds of cases, if  
13 it was a jurisdictional provision?

14 MS. BROWN: So I -- I think that  
15 that's also not particularly odd or particularly  
16 difficult for the -- for the Federal Circuit to  
17 do. It's going to be apparent on the face of  
18 the petition itself, the Federal Circuit has  
19 discretionary jurisdiction over OPM petitions  
20 for -- for review.

21 And so OPM files something that  
22 basically looks like a cert petition and  
23 includes within that a statement of jurisdiction  
24 that will say the director has made the  
25 determination that this is a case that

1     qualifies. And then I think because that's a  
2     discretionary determination on the part of the  
3     director, the Federal Circuit is just looking  
4     for whether that determination was made and  
5     isn't actually analyzing the substance of that.

6             JUSTICE JACKSON: Well, I guess also  
7     kind of stepping back a bit, buried in your  
8     argument is the notion that both sentences in  
9     7703(b) or 77 -- both sentences have to be  
10    jurisdictional -- sorry, in 1295 -- no --

11            MS. BROWN: In 7703.

12            JUSTICE JACKSON: In 7703.

13            MS. BROWN: Yeah.

14            JUSTICE JACKSON: And I'm just  
15    wondering how you square that with the sort of  
16    holding and reasoning in Santos-Zacaria where  
17    the -- the Court suggested that you didn't have  
18    to read a provision like that in totality.

19            MS. BROWN: So I think that the reason  
20    this is different from Santos-Zacaria is because  
21    we have the "pursuant to" that connects the  
22    jurisdictional grant to 7703(b)(1) as a whole.  
23    I think we would have a much harder argument and  
24    maybe an impossible argument if we were just  
25    looking at 7703(b)(1) out of context of --

1 JUSTICE JACKSON: But why is that --

2 MS. BROWN: -- that grant --

3 JUSTICE JACKSON: -- different?

4 Santos-Zacaria had "in accordance with the  
5 section" and the government made the argument  
6 that is very similar to this one.

7 MS. BROWN: So I think that the  
8 difference there is that that provision in  
9 Santos-Zacaria, which says notwithstanding any  
10 other provision of law, a petition for review  
11 filed with an appropriate court of appeals, in  
12 accordance with this section, shall be the sole  
13 and exclusive means for judicial review.

14 That provision is not the  
15 jurisdictional grant, and so it's not  
16 conditioning the Court's jurisdiction on appeals  
17 filed or orders filed in accordance with this  
18 section. There's another section of 1252 that  
19 granted jurisdiction.

20 So I think we would have a much harder  
21 argument and, again, maybe an impossible one, if  
22 the Court had rejected our reading of a  
23 provision that said something like the court of  
24 appeals shall have jurisdiction to review  
25 removal orders in accordance with this section.

1 But that's not how the Court read that provision  
2 and that's not how the provision is written.

3 JUSTICE JACKSON: Well, that seems  
4 exactly backwards to me but, anyway. We'll --

5 MS. BROWN: I -- I just -- I think it  
6 is the difference between conditioning  
7 jurisdiction and granting jurisdiction with a  
8 condition that it -- that it has to be in  
9 compliance with this section and saying, as in  
10 Santos-Zacaria, that this is the only way you  
11 get jurisdiction. There are no grants of  
12 jurisdiction outside of this section, but that  
13 that provision doesn't say which provisions or  
14 which parts of Section 1252 are themselves  
15 jurisdictional.

16 JUSTICE ALITO: The only thing, in all  
17 of these cases, in this rich line of precedent  
18 that we have about the clear statement rule, the  
19 only legitimate question is what is the meaning  
20 of the particular statutory provision that's  
21 involved?

22 And what is the meaning of the  
23 provision that's involved with respect to  
24 certain other questions that are subsumed under  
25 the jurisdictional/non-jurisdictional inquiry,

1     such as can the court -- must the court raise it  
2     itself? Can the -- can the argument be  
3     forfeited?

4             Our cases have gone off on really  
5     niggling interpretations of statutory language  
6     that doesn't speak at all directly and only very  
7     -- in a very loose way indirectly to this  
8     question, but part of your argument gets at,  
9     perhaps something we could read into this, which  
10    would be more productive, which is to ask what  
11    is it likely that Congress intended with respect  
12    to a particular type of review, and you're  
13    talking about review from an administrative  
14    agency to a -- to a court of appeals.

15            And that seems like it might be a more  
16    -- an inquiry that gets to what Congress likely  
17    thought, had it given any thought to this  
18    question. So could you elaborate on that?

19            MS. BROWN: Sure. So I do think that  
20    that argument is persuasive and very helpful to  
21    us here, if you look at the category of appeals  
22    to Article III courts.

23            And I -- I think within that category,  
24    of course, we have appeals from district courts,  
25    which the Court has already addressed in Bowles,

1     and then we have appeals from agency decisions.  
2     And those have in -- in a variety of contexts  
3     also been treated, the timelines there have also  
4     been treated as jurisdictional.

5             I do think it makes sense to look at,  
6     you know, the court that is actually -- whose  
7     jurisdiction is at issue, and focus more on that  
8     inquiry than where the actual decision is -- is  
9     coming from.

10            JUSTICE ALITO:  So what are the  
11     features of the question as it arises in that  
12     context that would make it more likely that  
13     Congress would say this is a hard-and-fast rule,  
14     and it has to be raised even by the court.

15            MS. BROWN:  So I think --

16            JUSTICE ALITO:  What are the features  
17     of it?  It's the fact that it would put a  
18     fact-finding obligation on the -- on the  
19     appellate court?

20            MS. BROWN:  I do think that that is  
21     part of it.  Usually we don't think of appellate  
22     courts as the courts that are going to be  
23     engaging in fact finding in the first instance.  
24     Of course, I recognize, as Justice Sotomayor was  
25     pointing out, that there are -- there are



1 instances in which that happens, but I think the  
2 general rule is that we don't normally see that.

3 I would also think that, you know, the  
4 fact that some amount of process has already  
5 been undertaken and that the claims have been --  
6 that have started to be reviewed and there has  
7 been a certain amount of -- of that process that  
8 has already gone into effect would indicate that  
9 Congress perhaps wants or -- or would be less  
10 concerned with imposing kind of harsh  
11 consequences because you're already within kind  
12 of the review scheme; whereas it might then also  
13 choose to privilege the idea or the -- the fact  
14 that it wants to ensure efficient administration  
15 and resolution of the claims that have been  
16 brought and to privilege kind of the -- the  
17 finality requirements that -- or the finality  
18 interests that -- that arise in that context as  
19 well.

20 I also think that this Court on its  
21 own has -- has recognized that the same  
22 considerations apply to appeals from district  
23 courts and to appeals from agency decisions in  
24 its adoption of Rule 26. And I know that that  
25 is a separate argument that we have made here as

1 well, but even setting the separate argument  
2 aside, I think Rule 26 in -- in stating that the  
3 presumption is going to be that those deadlines  
4 for appeals either from Article III district  
5 courts or from agency decisions are not subject  
6 to equitable tolling are not able to be  
7 extended, unless Congress specifically states  
8 that they are, indicates that this Court  
9 recognized in adopting that rule that the same  
10 kinds of considerations apply and would -- would  
11 warrant that kind of rule in both instances.

12           If I could speak directly to the  
13 history of this particular provision, I think  
14 that that provides even a further basis to -- to  
15 think that what Congress was doing here was  
16 requiring that this rule to be -- is  
17 jurisdictional.

18           Prior to the creation of the Federal  
19 Circuit, review of MSPB decisions came through  
20 the Court of Claims where the time limits for  
21 filing as jurisdictional, as this Court  
22 recognized in John R. Sand or it came through  
23 regional courts of appeals through the Hobbs Act  
24 where the time limits are jurisdictional under  
25 every circuit's precedent.

1                   So I think that it makes perfect sense  
2     that Congress would maintain the  
3     jurisdictionality of the time limit when it was  
4     just shifting review of those matters over to  
5     the Federal Circuit.

6                   And the Federal Circuit, of course,  
7     then held that the deadline was jurisdictional  
8     very soon after it was created. Lindahl, I  
9     think, likewise, recognized the jurisdictional  
10    status of Section 7703(b)(1).

11                  And then with that backdrop, Congress  
12    has reenacted and amended 7703(b)(1) numerous  
13    times and including with specific reference to  
14    the deadline. It changed the deadline from 30  
15    days to 60 days. It changed when the time  
16    begins to run.

17                  So I think Congress really has been  
18    quite attentive to the way the deadlines operate  
19    in this area and has never indicated that it  
20    disagrees with the jurisdictional status that it  
21    -- that it's had.

22                  I think, you know, this Court has  
23    recognized that in *Helsinn* a few terms ago that  
24    when this Court adopts an interpretation of a  
25    statute, at least implicitly, and that Federal

1 Circuit has exclusive jurisdiction over that  
2 statute and then makes explicit what was  
3 implicit in the Court's decision, that Congress  
4 is then presumed to operate with that in the  
5 background and to -- to know that and to, I  
6 guess, ratify that, when it reenacts and  
7 readopts the same statutory language.

8 CHIEF JUSTICE ROBERTS: What -- and at  
9 what point along that history did we adopt the  
10 clear statement rule with respect to  
11 jurisdictional determinations?

12 MS. BROWN: So that was in Arbaugh,  
13 which I think is a 2006 decision, I want to say.  
14 And the statute has been amended before that,  
15 but even prior to that, it was also amended. I  
16 think there is amendments in 1998, I want to say  
17 but, again, in 2012.

18 And even with all of that in place,  
19 and I think and with Lindahl in place,  
20 importantly, I don't think that there is a  
21 reason to question that what the Federal Circuit  
22 assumed or what Congress assumed was -- was  
23 happening here was that the -- the timeline  
24 maintains its jurisdictional status.

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

1     just for a moment as well, we do think that the  
2     Rule 26 question is -- is presented, is here  
3     before the Court, and we think that the Court  
4     should actually go ahead and decide that  
5     question for, I would say, I guess three  
6     reasons.

7             The first reason is that we think it's  
8     a particularly easy question. The plain text of  
9     the rule says that Rule 26(b) applies and  
10    doesn't permit the extension of deadlines for --  
11    for appeals from agency decisions. I know the  
12    Petitioners have argued that it applies only to  
13    time limits that are contained in the rules  
14    themselves. But that language is not in the  
15    particular -- the sentence that prohibits  
16    this --

17            JUSTICE JACKSON: I'm sorry, why do  
18    you think this is encompassed in the question  
19    presented in this case?

20            MS. BROWN: So we -- we think that  
21    this -- this Court has long held that the  
22    Respondent can bring up any alternative basis  
23    for affirmance that's apparent in the record  
24    here. And so that's what we are -- we're  
25    relying on. I recognize that the Petitioner

1 here hasn't framed the question to include  
2 equitable tolling, but we do think it's an  
3 appropriate exercise of this Court's discretion  
4 to -- to address that because it's apparent from  
5 the record. And this Court has done so in cases  
6 like -- or has recognized that principle in  
7 cases like Union Pacific Railroad and others.

8 So I guess with -- with respect to --

9 JUSTICE JACKSON: Would we have to --  
10 would we have to address the forfeiture argument  
11 that Petitioner raises in order to exercise that  
12 discretion in this case?

13 MS. BROWN: I think you -- you would  
14 have to raise forfeiture. I'm happy to -- to  
15 address that. I don't think that we did forfeit  
16 this argument. The order to show cause before  
17 the district court -- or before the Federal  
18 Circuit came right after the administrative  
19 record was filed but before any briefing had  
20 occurred. Briefing was then stayed.

21 I think that that order can itself  
22 reasonably be -- be viewed as mainly directed  
23 toward the Petitioner because it said that the  
24 order to show cause was -- was to show cause why  
25 this case should not be dismissed. And it cited

1 Rule 26, and it cited the Federal Circuit's  
2 binding precedent. And so, you know, the  
3 government didn't really have an interest in  
4 explaining the same things that the -- that the  
5 Federal Circuit had already recognized there.

6 We did raise Rule 26 in our brief in  
7 opposition. And we noted that the Petitioner  
8 had never said anything about waiver or  
9 forfeiture. In the Petitioner's cert reply, he  
10 also didn't say anything about waiver or  
11 forfeiture at that point and instead stated that  
12 the Court could address Rule 26 on the merits if  
13 it wanted to do so.

14 JUSTICE JACKSON: But the Federal  
15 Circuit's order dismissing the case didn't  
16 discuss it, did it?

17 MS. BROWN: It did include a citation  
18 to Rule 26. I agree that there wasn't any kind  
19 of extended discussion of that. But, again, I  
20 would -- I would say that Federal Circuit  
21 precedent already does make very clear that  
22 there is binding precedent on this issue and  
23 that Rule 26 applies to 7703(b)(1) and -- and  
24 would prohibit extending the deadline there.

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

1 we cited in our brief.

2 JUSTICE KAGAN: I -- I wasn't quite  
3 sure what argument about Rule 26 your brief was  
4 making. I mean, so distinguish between two  
5 arguments. One is that Rule 26 independently  
6 requires what you think it requires, but  
7 another, which is what I took to be the argument  
8 in your brief, is that Rule 26 should inform our  
9 interpretation of 7703(b)(1).

10 And I thought that that was the  
11 argument you were making in your brief, not the  
12 straight argument about Rule 26.

13 MS. BROWN: Yes, I'm sorry if I was --  
14 if I confused the issue there. It is the latter  
15 argument. We do think that Rule 26 informs the  
16 reading of 7703(b)(1). It shifts the  
17 presumption of equitable tolling and says that  
18 it does not apply in the context of appeals from  
19 agency decisions. And that was a rule that was  
20 in place at the time.

21 JUSTICE KAGAN: So if that's the  
22 argument you're making in your brief, and  
23 suppose, just suppose, that the Court rejects  
24 that argument and says 7703(b)(1) is not  
25 jurisdictional, as I read your brief, you don't



1 have a separate Rule 26 argument; is that right?

2 MS. BROWN: No, I don't think that's  
3 the case. I think that even if there is no  
4 jurisdictional status for this rule, the --

5 JUSTICE KAGAN: Well, I know you're  
6 making that argument here, but you didn't make  
7 it in your brief. And read against the backdrop  
8 of a question presented that doesn't have  
9 anything to do with Rule 26, and then in your  
10 brief you only brought up Rule 26 as something  
11 that would inform our understanding of the  
12 statute, what I'm suggesting is that you don't  
13 really have a Rule 26 argument here.

14 MS. BROWN: Okay. I'm sorry. I  
15 misunderstood the question. I think our  
16 argument in our brief and today is that Rule 26  
17 informs the reading of the statute if it's not  
18 jurisdictional on its own. So even if the  
19 statute is not jurisdictional under this -- this  
20 Court's holding and it reads 1295(a) -- (a)(9)  
21 and 7703(b)(1) and says that -- that there is  
22 not a jurisdictional rule here, that then leaves  
23 open the question whether equitable tolling can  
24 apply or whether there can be extensions.

25 And at that point, when there is no

1 language in the statute that speaks to that,  
2 then you either have the Irwin presumption, on  
3 the one hand, that would say yes, we assume  
4 equitable tolling applies, or you have Rule 26,  
5 which displaces that presumption and says no, if  
6 Congress hasn't expressly stated otherwise, then  
7 equitable tolling does not apply.

8 And that's where we think Rule 26  
9 comes into play here.

10 JUSTICE KAVANAUGH: You think that  
11 question's simple enough for us to resolve here  
12 in addition to the main question?

13 MS. BROWN: We do. We do think that  
14 the -- the text of Rule 26 is -- is fairly clear  
15 here and says that it applies as the background  
16 rule and a background principle in -- in the  
17 interpretation of statutes.

18 I -- as I was saying earlier, I think  
19 the Petitioner has argued that it only applies  
20 to deadlines that appear in the rules  
21 themselves. But that is -- that's incorrect.  
22 The language of -- of the rule doesn't say that  
23 in the provision that actually talks about the  
24 prohibition on extending deadlines.

25 That's even clearer if you look at the

1 earlier versions of the rule that were in effect  
2 when Section 7703(b)(1) was enacted. We've  
3 included those in our appendix on pages 10a and  
4 11a. And there it says, "nor may the Court  
5 enlarge the time prescribed by law" for appeals  
6 or for petitions of review of agency decisions.  
7 So we think that's very clear in stating that --  
8 that the rule applies even to -- to statutory  
9 deadlines as well.

10 And when the language was shifted to  
11 its current form in 1998, the submission that  
12 the Chief Justice gave to Congress said that  
13 this was just a stylistic change. It wasn't  
14 meant to alter the substance of the rule. And  
15 so I -- we do think that that's an easy  
16 question.

17 I guess to go back again to the second  
18 reason that we think that the Court should  
19 address Rule 26 here, again I'll refer to the  
20 binding precedent of the Federal Circuit. I  
21 think if this is remanded, it's very clear what  
22 the Federal Circuit would do based on that  
23 precedent.

24 And then the third reason just kind of  
25 goes to the consequences of the determination

1     that the time limit is not jurisdictional, which  
2     is an issue that the parties have joined issue  
3     on and have -- have discussed. And so we do  
4     think it would be appropriate for the Court  
5     to -- to make that determination now and it  
6     would be efficient to do so.

7                 JUSTICE BARRETT: Ms. Brown, if  
8     Petitioner's reading is plausible, do you lose?

9                 MS. BROWN: So when this Court has  
10    explained the clear statement rule, I don't  
11    think right now -- up until this point or as of  
12    yet, the Court has said that if there is one  
13    other plausible definition or interpretation,  
14    then it's not clear. The Court in *Boechler* said  
15    that if there are multiple plausible  
16    interpretations and only one of them is  
17    jurisdictional, it's going to be very hard for  
18    the government to prove that the statement is  
19    clear. But thus far, I think the -- the most  
20    common formulation of the clear statement rule  
21    is just that.

22                If Congress wants to make a certain --  
23    a certain provision jurisdictional, it has to  
24    clearly state that it is. And so I -- I don't  
25    think the Court has gone that far yet, but it

1       could do so, I'm sure.

2                   JUSTICE JACKSON:   Going back to the  
3       Rule 26 issue, Mr. Davis suggests, I guess, in  
4       conjunction with -- with Justice Gorsuch's  
5       questions that this could be a situation in  
6       which the government might look the other way  
7       regarding its pressing of equitable tolling or  
8       objecting to it on remand.

9                   Do you have a comment?

10                  MS. BROWN:   I -- I haven't spoken with  
11       the -- the agency about what it intends to press  
12       on remand, if the Court does bring it to -- to  
13       that point.   I -- I do think that the agency,  
14       and the government in general, has a fairly  
15       strong interest in ensuring that Rule 26 is  
16       accurately applied and that this doesn't open  
17       the door to the potential for equitable tolling  
18       in all sorts of other -- other cases and --

19                  JUSTICE JACKSON:   But if it isn't  
20       jurisdictional --

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

22                  JUSTICE JACKSON:   -- it could go back  
23       and it could possibly go forward, correct?

24                  MS. BROWN:   Yes, although I think that  
25       the Federal Circuit would still have the option

1 of bringing it up sua sponte on its own as well,  
2 which it kind of already has done within the  
3 order to show cause and the order for -- and the  
4 order dismissing the case.

5 But as I was saying, I do think we  
6 have an interest in the correct application of  
7 Rule 26. I recognize that Mr. Harrow here has  
8 some sympathetic circumstances on his side, and  
9 so I think that would be a conversation, but I  
10 -- but I -- I -- I can't represent to you today  
11 that -- that we would try to waive the issue.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 counsel.

14 Justice Thomas, anything?

15 Justice Barrett?

16 JUSTICE SOTOMAYOR: If it's not  
17 mandatory, meaning you can waive it --

18 MS. BROWN: So I think --

19 JUSTICE SOTOMAYOR: -- if you chose?

20 MS. BROWN: I think we think it is  
21 mandatory, just not jurisdictional.

22 JUSTICE SOTOMAYOR: Well, but  
23 mandatory is still a waiveable defense.

24 MS. BROWN: Correct, yes.

25 JUSTICE SOTOMAYOR: All right.

1 CHIEF JUSTICE ROBERTS: Justice

2 Barrett? Nothing?

3 Thank you, counsel.

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

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

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

7 It's Mr. Brown now.

8 (Laughter.)

9 REBUTTAL ARGUMENT OF JOSHUA P. DAVIS

10 ON BEHALF OF THE PETITIONER

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

12 number of points on rebuttal.

13 The first one is the analogy -- excuse

14 me -- to Section 7703(b)(2) where the government

15 argues the first sentence must be

16 jurisdictional. The difficulty for the

17 government by invoking that particular provision

18 is that in Kloeckner this Court held that even

19 if the first sentence there is jurisdictional,

20 the very close -- the filing deadline in the

21 second sentence is not. And so if one is going

22 to rely on that very close parallel textual

23 interpretation, that would actually place the

24 government in a position where it is possible

25 that one of those sentences could have some

1 jurisdictional implications with the other one  
2 not.

3 What this Court said in the second  
4 sentence, which is, again, very closely  
5 parallel, 7703(b)(2) and (b)(1), is that the  
6 filing deadline is just a filing deadline. So I  
7 don't think that analogy helps the government.

8 Second, the government took the  
9 position that if there were a mixed case, and so  
10 it would go -- it would necessarily fit  
11 appropriately under 7703(b)(1), no one would  
12 contest -- I'm sorry, under (b)(2), no one would  
13 contest that there would be a lack of  
14 jurisdiction if the Petitioner invoked  
15 7703(b)(1).

16 That's not the only possible  
17 interpretation, but, in fact, the government's  
18 position is directly opposite to the holding of  
19 this case in BP PLC as I understand it, where  
20 the "pursuant to" language was used and this  
21 Court said that "pursuant to" can be consistent,  
22 and it was there consistent with invoking.

23 And the answer to the question of,  
24 well, how then can you go forward with a mixed  
25 case under (b)(1) is, well, if it's frivolous,



1     then there are other ways to police that,  
2     including sanctions, and attorneys fees and  
3     costs. And nobody here is arguing that Mr.  
4     Harrow isn't appropriately proceeding under  
5     (b)(1).

6                 So I think the kind of raductio ad  
7     absurdum that the government invoked is contrary  
8     to at least one Supreme Court precedent. Two --  
9     well, one final point. I'm sorry, two final  
10    points quickly.

11                In terms of the timing of the amending  
12    of (b)(1)(A), the most recent amendment was  
13    2012. And in 2012, the clear statement rule was  
14    already established, including the statement in  
15    Arbaugh in 2006 that lower court precedents by  
16    themselves are not enough to satisfy the clear  
17    statement rule so if we are inferring Congress's  
18    intent from the amendments to (b)(1)(A), the  
19    natural inference would be that Congress was  
20    listening to this Court and not to the Federal  
21    Circuit precedents that this Court said it -- it  
22    should not listen to.

23                And then the last point I would say is  
24    the question presented is, in fact, limited to  
25    the jurisdictional nature or not of the filing

1 deadline. I do think that between forfeiture  
2 and the complexities at equitable tolling,  
3 government discretion on remand, not to raise  
4 this issue, and the complexities under 26(b),  
5 which include not only that the rule -- it cites  
6 to the rules and not statutes, we did not make  
7 the complete set of arguments about Federal Rule  
8 of Procedure 26(b). We would like the  
9 opportunity if this Court decides the deadline  
10 is not jurisdictional to do so on remand.

11 We think if that issue were to get  
12 back up to this Court, the Court would be in a  
13 much better position to rule effectively with  
14 that sort of background. Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel. The case is submitted.

17 (Whereupon, at 12:23 p.m., the case  
18 was submitted.)  
19  
20  
21  
22  
23  
24  
25

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