NO. 22-_____

In the Supreme Court of the United States

AC INTERESTS, L.P.,

Petitioner,

v.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,

Respondent.

On Petition for a Writ of Certiorari to the Texas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner AC Interests, L.P. applied for emission reduction credits established by the 1990 Federal Clean Air Act to the Texas Commission on Environmental Quality (TCEQ). While 97.3% of federally approved air pollution control programs have a 10-year to unlimited lifetime, TCEQ limits them to a 5-year life. In the course of litigation, which traveled once up to the Texas Supreme Court before remand, TCEQ argued that the 60-month time limit had expired. The Texas courts' denied Petitioner's argument that the 60-month deadline should have been equitably tolled while the rights to these credits were being litigated. The Questions Presented are:

1. Should Common Law allow the 60-month deadline for using emission reduction credits to be equitably tolled while a party seeks to establish the right to those credits in the trial and appellate courts?

2. Whether the Due Process Clause of the Fifth and Fourteenth Amendments allows the 60-month deadline for using emission reduction credits to be tolled while a party seeks to establish the right to those credits in trial and appellate courts?

3. Whether the TCEQ's 60-month Emission Credit "lifetime" is in violation of the Federal Clean Air Act?

4. Whether the "mootness" determination by the Texas Supreme Court and First Court of Appeals violates AC Interests' Due Process rights under the Fifth and Fourteenth Amendments?

5. Whether the $2,715,600 Emission Credit value that the TCEQ cost AC Interests is a "Taking" under the Takings Clause of the Fifth Amendment?

LIST OF PROCEEDINGS

Supreme Court of Texas

Case No. 21-0078

AC Interests, L.P. v. Tex. Comm'n on Envtal. Quality

Date of Final Order: February 18, 2022

Date of Rehearing Denial: April 22, 2022

Court of Appeals for the First District of Texas

No. 01-19-00387-CV

AC Interests, L.P., Formerly American Coatings, L.P., *Appellant,* v. Texas Commission on Environmental Quality, *Appellee.*

Date of Final Opinion: December 17, 2020

District Court of Travis County, Texas, 345th Judicial District

No. D-1-GN-14-005160

AC Interests, L.P., Formerly American Coatings, L.P., *Plaintiff,* v. Texas Commission on Environmental Quality, *Defendant.*

Date of Final Order: April 26, 2019

Supreme Court of Texas

No. 16-0260

AC Interests, L.P. v. Tex. Comm'n on Envtal. Quality

Date of Final Opinion: March 23, 2018

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The Order of the Texas Supreme Court dated February 18, 2022, denying a Petition for Review is included in the Appendix at App.1a. The Memorandum Opinion of the United States Court of Appeals for the First District of Texas dated December 17, 2020 is included in the appendix to this petition at App.2a. The Order of the 345th District Court, Travis County, Texas granting the Texas Commission on Environmental Quality Plea to Jurisdiction, dated April 26, 2019 is included at App.20a.

JURISDICTION

The Texas Supreme Court entered its judgment on April 22, 2022. Jurisdiction in this Court is proper under 28 U.S.C. § 1257(a).[1]

[1] *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 485 (1975); *Shaffer v. Heitner*, 433 U.S. 186, 195 n.12 (1977).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. XIV, § 1, cl. 2

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. V

The Fifth Amendment to the United States Constitution provides:

> No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

INTRODUCTION

The dispute in this case arises from the air-emission-credits program established by the Texas Commission on Environmental Quality (the "TCEQ").[2] The Texas program is based on USEPA guidance pursuant to the 1990 Federal Clean Air Act. The purpose of the voluntary program "is to allow the owner or operator of a facility . . . to generate emission credits by reducing emissions beyond the level required by any applicable local, state, or federal requirement," which the facility owner or operator then may use in accordance with the program rules.[3]

Appellant AC Interests, L.P., formerly American Coatings, L.P. ("AC Interests"), applied to the TCEQ for emission credits. After the TCEQ denied the application, AC Interests sought judicial review but its appeal of the decision to the district court was dismissed under Texas Rule of Civil Procedure 91a for lack of proper statutory service. The Texas Supreme Court reversed and remanded in March 2018.[4]

On remand, in November 2018—after the latest date (October 2018) the purported TCEQ 60-month time limit had expired—the TCEQ filed a plea to the jurisdiction, arguing the case became moot when any emission credits AC Interests might have generated

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[2] 30 Tex. Admin. Code §§ 101.300–.311.

[3] *Id.* § 101.301.

[4] *AC Interests, L.P. v. Tex. Comm'n on Envtl. Quality*, 543 S.W.3d 703 (Tex. 2018). (App.22a).

at its facility expired and, thus, any judgment rendered by a court will be without any practical legal effect. The district court granted the plea to the jurisdiction, and AC Interests appealed the dismissal order. (App. 20a).

In this petition, AC Interests contends (1) the mootness doctrine does not apply; (2) the TCEQ's denial of emission credits is an unconstitutional taking; and (3) it is entitled to a hearing on merits or a jury trial.

This Court should therefore grant the petition in this case.

STATEMENT OF THE CASE

The TCEQ administers the Texas Clean Air Act, which establishes a regulatory framework to "safeguard the state's air resources from pollution." Using provisions of the Federal Clean Air Act (1970, et. seq.) as a basis and to incentivize the voluntary reduction of emissions, the TCEQ has adopted rules authorizing it to grant emission credits, including emission reduction credits ("ERCs").[5] An ERC is a "certified emission reduction . . . that is created by eliminating future emissions and quantified during or before the period in which emission reductions are made from a facility."[6]

One way a company may generate emission credits is by permanently shutting down a facility that lawfully

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[5] 30 Tex. Admin. Code §§ 101.300–.304.

[6] *Id.* § 101.300(10).

emits certain pollutants.[7] The emission reduction must be certified, meaning the reduction must be "enforceable, permanent, quantifiable, real, and surplus."[8] If the TCEQ certifies the reduction, the facility owner or operator may use, trade, sell, or bank the emission credit for later use.[9] AC Interests asked the TCEQ to certify ERCs generated at an AC Interests facility that had ceased emissions. The TCEQ denied the application, prompting AC Interests to timely file a petition for judicial review in December 2014.[10]

That petition stated that the AC Interests facility was destroyed by fire in July 2010. Although it obtained a permit to reconstruct the facility from the TCEQ in May 2013, AC Interests decided against rebuilding. Instead, AC Interests applied for certification of ERCs in October 2013—and then revised its application three times between November 2013 and July 2014—based on a permanent-shutdown emissions reduction strategy.[11] In November 2014, the TCEQ denied the certification of ERCs.

AC Interests' filing stated that the TCEQ's refusal to certify ERCs violated "statutory provisions, exceeded [TCEQ's] statutory authority, and was arbitrary and

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[7] *Id.* §§ 101.302(a)(1), .303(a)(1)(A).

[8] *Id.* § 101.302(d)(1)(A).

[9] *Id.* §§ 101.306(a), .309(d).

[10] A person "affected by" a TCEQ decision may appeal by filing a petition in a Travis County district court. Tex. Health & Safety Code § 382.032(a).

[11] The regulatory framework for emission credit applications provides that an application may be revised upon written notice from TCEQ of its denial. *Id.* § 101.302(f)(3).

capricious." AC Interests requested in its petition that, among other things, the district court: (1) set aside the TCEQ's decision; (2) remand to the TCEQ for further administrative proceedings on AC Interests' application for ERC certification; and (3) order that the "TCEQ issue an Emission Banking Credit and Allowance Certificate to AC Interests," along with costs, attorney's fees, and all other relief to which AC Interests was entitled.

The district court initially dismissed AC Interests' appeal in March 2015 because AC Interests did not timely serve the TCEQ with the petition for judicial review. But in March 2018, the Texas Supreme Court reversed and remanded, concluding that the late service did not require dismissal.[12] Said fact was conveniently overlooked by the First Court of Appeals in their December 2020 decision.

On remand, in November 2018, the TCEQ again sought dismissal through a plea to the jurisdiction. The TCEQ asserted for the first time that the appeal was moot because any ERCs that could have been certified expired 60 months after the date of the emissions reduction at AC Interests' facility. By either parties' calculation, any ERC that AC Interest might have generated expired 60 months after the facility shut down, which was either the date of the facility fire, in July 2010, or the date AC Interests decided not to reconstruct the facility, in October 2013.[13] Since

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[12] *AC Interests, L.P.*, 543 S.W.3d 714-15. (App.22a).

[13] The TCEQ asserted its mootness contention for the first time in its jurisdictional plea filed with the district court in November 2018. *See id.*; *AC Interests, L.P. v. Tex. Comm'n on Envtl. Quality*,

the TCEQ's Plea to the Jurisdiction was after either date, said plea was filed late. Said late filing was also conveniently overlooked by the First Court of Appeals in their December 2020 decision. (App.2a).

The TCEQ alleges that a live controversy ceased to exist between the parties on July 31, 2015, during the prior appeal, or, at the latest, by October 2018, and thus any decision by the district court would be without "a practical legal effect on the alleged controversy related to [the] TCEQ's denial of AC Interests' ERC application." The district court granted the TCEQ's plea to the jurisdiction. (App.20a).

An appeal to the Texas First Court of Appeals followed. In December 2020, the First Court of Appeals affirmed the district court's ruling. (App.2a). Following that, an appeal was made to the Texas Supreme Court, which after receiving brief from AC Interests and TCEQ affirmed the lower court's ruling on February 18, 2022. (App.1a). Later the Texas Supreme Court denied AC Interests' Motion for Rehearing on April 22, 2022. (App.65a).

On this basis, AC Interests is filing Petition for a Writ of Certiorari.

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521 S.W.3d 58 (Tex. App.—Houston [1st Dist.] 2016), rev'd by 543 S.W.3d at 707–15.

REASONS FOR GRANTING THE PETITION

I. THE COMMON LAW TOLLING DOCTRINE APPLIES WHEN THERE IS A LEGAL IMPEDIMENT TO EXERCISING A LEGAL RIGHT WITHIN THE LIMITATIONS PERIOD AND AC INTERESTS' DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEEN AMENDMENT WERE VIOLATED.

A. The Common Law Tolling Doctrine Applies When There Is a Legal Impediment to Exercising a Legal Right Within the Limitations Period.

The common law tolling doctrine provides that, when "a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right."[14]

AC Interests contends that filing suit to establish the right to ERCs falls squarely within the equitable tolling doctrine described above. When a party must resort to legal proceedings to establish the right to ERCs, that party is prevented from using the ERCs

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[14] *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991), quoting *Walker v. Hanes*, 570 S.W.2d 534, 540 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.). *CTS Corporation v. Peter Waldburger et al.,* 134 S.Ct. 2175, (2014) (Statutes of limitations, but not statutes of repose, are subject to "equitable tolling," a doctrine that pauses the running of, or tolls, a statute of limitations when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.)

during the pendency of the case—it is that very case that answers the question of whether the party has a right to the credits in the first place. The time during which the legal proceedings are pending should therefore not be counted against a person when determining whether the 60-month period for using ERCs has expired.

The Court of Appeals, however, held that tolling did not apply. It reasoned that equitable tolling only applies when the outcome of one case determines the viability of a second cause of action.[15] Because this lawsuit does not seek to define the rights at stake in another lawsuit—but the right to use ERCs—the Court held that the doctrine does not apply.[16]

The equitable tolling doctrine is not so limited. Courts have long applied equitable tolling to other kinds of limitations periods such as, for example, deadlines for non-judicial foreclosures. Those cases do not have to do with exercising the right to sue but exercising a contractual right that is subject to a legally imposed limitations period.[17] Thus, equitable tolling extends beyond the existence of the ability to file suit and covers

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[15] *AC Interests*, 2020 Tex. App. LEXIS 9988 at *11 n.18.

[16] *Id.*

[17] *Pioneer Bldg. & Loan Ass'n v. Johnston*, 117 S.W.2d 556, 559 (Tex. Civ. App.—Waco 1938) (applying equitable tolling where injunction prevented non-judicial foreclosure); *Cloward v. United States Bank Tr., N.A.*, No. 05-18-01397-CV, 2020 Tex. App. LEXIS 6107, at *15 (Tex. App.—Dallas Aug. 3, 2020, pet. filed) (applying equitable tolling where individuals were "legally impeded from exercising their contractual right to sell the property at a non-judicial foreclosure sale").

the exercise of other legal rights on which a limitations period is attached.

The Court of Appeals' error stemmed from focusing on the equitable tolling doctrine as applied to legal malpractices cases, as set out in *Hughes v. Mahaney & Higgins*.[18] The *Hughes* rule does entail two lawsuits —one in which a party must defend an attorney's actions and one in which the party is suing the attorney for those same actions.[19] However, the tolling doctrine from which *Hughes* derived its malpractice-based rule is much broader.[20] The broader doctrine does not require the existence of two lawsuits, but instead asks a much simpler question: does a legal proceeding function as an impediment to the exercise of a legal right?[21]

The scenario in this case lies at the intersection of two seminal tolling cases. In the first, *Cavitt v. Amsler*, the appellate court tolled the statute of limitations for recovering stock dividends during the period a suit to establish the right to those dividends was pending.[22] Central to its reasoning was the fact that *Cavitt* could

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[18] *AC Interests*, 821 S.W.2d 154 (Tex. 1991); 2020 Tex. App. LEXIS 9988 at *12 n.18.

[19] *Hughes v. Mahaney & Higgins*, 821 S.W.2d at 157 (Tex. 1991).

[20] *Id.* (collecting equitable tolling cases and concluding that the "rationale applied in these cases" should also apply to legal malpractice scenario).

[21] *Cloward*, 2020 Tex. App. LEXIS 6107, at *15 (Tex. App.—Dallas Aug. 3, 2020, pet. filed) (applying tolling because there was a legal impediment to exercising contractual right).

[22] *Cavitt v. Amsler*, 242 S.W. 246, 248-49 (Tex. Civ. App. 1922) cited by *Hughe*s, 821 S.W.2d at 157, (Tex. 1991).

not bring a suit to enforce a right which had not yet been established.[23]

In the second, *Pioneer,* the Court tolled the statute of limitations on exercising the contractual right to initiate a non-judicial foreclosure because an injunction prevented Pioneer from doing so.[24]

Here, as in *Cavitt*, an individual cannot exercise its right to emission reduction credits until the right to those credits has been established. The Court of Appeals decision puts individuals in an impossible position, requiring them to exercise a right that does not yet exist. In *Cavitt*, the court refused to require a person to exercise a right that did not yet exist.[25] The Court should do the same here.

And, as in *Pioneer*, the right at stake here is not the right to sue, but the right to take non-judicial action—action on which the law places a limitations period. The Court of Appeals erred in holding that the limitations period that is the subject of equitable tolling must pertain to bringing a lawsuit.

The TCEQ devotes much of its response to arguing that equitable tolling should not apply because tolling is not written into the text of the Administrative Code.[26] However, equitable tolling is a common law doctrine. By its very nature it is not written into statutes,

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[23] *Id.*

[24] *Pioneer*, 117 S.W.2d at 559

[25] *Cavitt v. Amsler*, 242 S.W. 246, 248-49 (Tex. Civ. App. 1922).

[26] Petition Response at 7, 8-9, 13.

but instead applies when certain equitable circumstances are present.[27] Therefore, it is not significant that the statute creating the limitations period at issue here does not include a tolling provision.[28]

Instead, the question should be whether the common law doctrine of equitable tolling applies in these circumstances. That doctrine says that, when "a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have barred his right." As set out in AC Interest's Petition for Review, that doctrine squarely applies here: the 60-month limitations period for using Emission Reduction Credits (ERCs) should be tolled while litigation to establish the right to those credits is pending.

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[27] *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 156-57 (Tex. 1991).

[28] As noted in AC Interest's Petition for Review, the Administrative Code has two possible limitations periods, but does not have built-in exceptions to those periods. 30 Texas Admin. Code § 101.309(b)(2) (60 months); 30 Texas Admin. Code § 101.304(e)(1)(C) (72 months). Therefore, it does not express a policy determination intending to exclude the application of common law doctrines. *Cf. Underkofler v. Vanasek*, 53 S.W.3d 343, 346 (Tex. 2001) ("We defer to the Legislature's explicit policy determination that only two exceptions apply to the statute of limitations for these statutory claims . . . ").

B. AC Interests' Due Process Rights Under the Fifth and Fourteen Amendment Were Violated.

To prevail on its due process claim, AC Interests must show both that it had a recognized liberty or property interest and was deprived of that interest without adequate notice or a meaningful opportunity to be heard.[29]

The applicable texts of the Fifth and Fourteenth Amendments are as follows:

> AMENDMENT V. No person shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> AMENDMENT XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement
>
> > SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

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[29] *Mathews v. Eldridge*, 424 U.S. 319, 332–35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

jurisdiction the equal protection of the laws.

1. AC Interests' Property Interest

AC Interests has demonstrated 7.3 tons per year of Volatile Organic Compound ("VOC") Emission Credit reductions. In 2014, VOC Emission Credits were valued at approximately $300,000 per ton in the Houston Galveston Ozone Non-Attainment Area Emission Credit Market ("HGA NAA"); this yields a total value of about $2,190,000. Adding approximately 24% interest total over eight years brings the total value to $2,715,600.

That is, the TCEQ has cost AC Interests a net of $2,715,600 in property interests. AC Interests believes this is a "Taking" under the Takings Clause of the Fifth Amendment.

2. AC Interests Has Been Deprived of Due Process of Law and the Equal Protection of the Laws.

AC Interests' original pleading on December 10, 2014 contained a demand for a "Hearing on the Merits" of AC Interests' Emission Credit application pursuant to Travis County Texas District Court's Local Rule 10 —Administrative Hearings. This was delay by TCEQ's Rule 91a filing until the Texas Supreme Court reversed and remanded the TCEQ 91a filing in March 2018. This consumed 39 months. Next the TCEQ filed a late "Plea to the Jurisdiction" in November 2018. This filing has consumed an additional (from March 2018) 52 months. The total—91 months-dwarfs the purported TCEQ Emission Credit time limit of 60 months.

Said filings by the TCEQ have deprived AC Interests of Due Process of Law and the Equal Protection of the Laws, by purposefully delaying the resolution of the case and any hearing on the merits of the case beyond the "TCEQ 60 month Emission Credit" time limit. AC Interests was deprived of above property interest without adequate notice or a meaningful opportunity to be heard. [30]

C. Several State Supreme Courts Have Issued Rulings on Either the Due Process Clause or Equitable Tolling.

Texas and Alabama have allowed equitable tolling; whereas Virginia has not allowed it. California and Alabama have issued rulings that Due Process has been denied; whereas Virginia has issued rulings that Due Process has not been denied.

VIRGINIA. In *City of Richmond, Et Al. v. Mary J. Dervishian, Et Als.,* 190 Va. 398, Supreme Court of Appeals of Virginia (Va. 1950).[31] Mary J. Dervishian filed a bill in equity against the City of Richmond for an injunction to restrain defendants from instituting any condemnation proceedings under city charter for condemnation of realty for a parking area, and other landowners were permitted to intervene as complainants. The Supreme Court of Appeals held that proposed condemnation was for an authorized public use, that city ordinance authorizing condemnation was not a denial of due process, that it was not necessary for city

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[30] *Mathews v. Eldridge*, 424 U.S. 319, 332-35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

[31] *City of Richmond, Et Als. v. Mary J. Dervishian*, Et Als., 190 Va. 398, Supreme Court of Appeals of Virginia (Va. 1950)

to make an attempt first to purchase the realty before instituting condemnation proceedings, that city charter, and not general statute was controlling with respect to condemnation proceedings, and that ordinance authorizing condemnation was defective as to description of realty sought to be condemned.[32]

TEXAS. In *Commercial Life Insurance Company v. Texas State Board of Insurance,* 774 S.W.2d 650, 652, (Tex. 1989),[33] the Supreme Court of Texas determined that the fifteen-day period for filing a motion for rehearing does not begin to run until a party receives notice of the complained of agency order. To reach this conclusion, the court found that section 16(b) of the Administrative Procedure and Texas Register Act (APTRA)[34] imposed a statutory duty on the agency to notify "parties" of its orders and decisions: "[W]e interpret the notice provision of section 16(b) to ensure that a party's ability to seek judicial review of agency orders and decisions will not be compromised solely because of the agency's failure to give notice of the order."[35]

ALABAMA. In *Ex parte STV One Nineteen Senior Living, LLC, d/b/a Somerby at St. Vincent's One Nineteen v. STV One Nineteen Senior Living, LLC, d/b/a Somerby at St. Vincent's One Nineteen; State Health*

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[32] *Id.*

[33] *Commercial Life Insurance Company v. Texas State Board of Insurance*, 774 S.W.2d 650, 652, (Tex. 1989).

[34] Section 16(b) of the Texas Administrative Procedure and Texas Register Act (APTRA).

[35] *Id.*; *see also Meador-Brady Management Corp. v. Texas Motor Vehicle Comm'n*, 866 S.W.2d 593, 595-96 (Tex. 1993).

Planning and Development Agency; and Certificate of Need Review Board, 161 So.3d 196, Supreme Court of Alabama (Ala. 2014),[36] first assisted-living facility sought review of decision by the Certificate of Need Review Board (CONRB) granting second facility's request for an emergency certificate of need (CON) for 24 specialty-care assisted-living-facility beds. The Circuit Court, Montgomery County, No. CV-10-901242, Eugene W. Reese, J., affirmed. First facility appealed. The Court of Civil Appeals, 161 So.3d 187, reversed and remanded with instructions. Second facility sought certiorari review, which was granted. The Supreme Court of Alabama held that: [1] first facility did not waive on appeal right to challenge issuance of emergency CON; [2] second facility's CON had not vested before it was challenged; and [3] application did not demonstrate an emergency under statute that allowed emergency applications.[37]

Note: Endnote 11-*See* Ala. Admin. Code (SHPDA) Rule 410-1-11-.01, explaining that a CON is "valid for a period" that runs "from the date of issuance," and also that that period is tolled during the pendency of any judicial review of the decision to issue the CON.[38]

Note: Endnote 12-In addition to, and corroborative of, the foregoing, an interpretation of § 22-21-270(d) of the nature urged by Somerby would raise due-process

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[36] *Ex parte STV One Nineteen Senior Living, LLC, d/b/a Somerby at St. Vincent's One Nineteen v. STV One Nineteen Senior Living, LLC, d/b/a Somerby at St. Vincent's One Nineteen; State Health Planning and Development Agency; and Certificate of Need Review Board*, 161 So.3d 196, Supreme Court of Alabama (Ala. 2014).

[37] *Id.*

[38] *Id.* At 211.

concerns. Somerby insists that, despite Danberry's timely filings, somehow the law prevented Danberry from challenging Somerby's CON. Such a possibility, especially the foreclosure of any judicial review, raises a fundamental due process problem. Danberry should not be put in the position of having followed the review processes prescribed to it by law and yet for reasons beyond its control be foreclosed from receiving that review.[39]

CALIFORNIA. In *Voices of the Wetlands v. State Water Resources Control Board, et al*, 52 Cal.4th 499 (Cal. 2011),[40] the Supreme Court held that:[1] superior court had subject matter jurisdiction over the mandamus petition; [2] retaining jurisdiction pending interlocutory remand for new evidence was proper and [3] premising best technology available (BTA) finding on comparison of costs and benefits was proper. *Id.* The holding went on to state: "We agree with plaintiff, and with the courts in *Sierra Club v. Contra Costa County and Resource Defense Fund*, that any agency reconsideration must fully comport with due process and may not simply allow the agency to rubber-stamp its prior unsupported decision."[41]

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[39] *Alabama Republican Party v. McGinley*, 893 So.2d 337, 344 (Ala. 2004) (observing that "[t]he hallmarks of procedural due process are notice and 'the opportunity to be heard "at a meaningful time and in a meaningful manner"). *Id.* At 212.

[40] *Voices of the Wetlands v. State Water Resources Control Board, et al*, 52 Cal.4th 499 (Cal. 2011).

[41] *Id.* At 528.

D. Each Federal Circuit Court Has Issued Rulings on Either the Due Process Clause or Equitable Tolling.

The Second, Fourth, Seventh and Ninth Circuits have allowed equitable tolling; whereas the First, Fifth, Sixth, Eleventh, D.C. and Federal Circuits have has not allowed it. The Tenth Circuit has both allowed and disallowed equitable tolling. The Third Circuit have issued rulings that Due Process has been denied; whereas the First Circuit has issued rulings that Due Process has not been denied.

FIRST CIRCUIT. In *Jordan Hospital, Inc. v. Donna E. Shalala, etc., et al.,* 276 F.3d 72 (1st Cir. 2002),[42] the First Circuit held that: (1) "no review" provision of Medicare Act precluded judicial review of decision of Health Care Financing Administration (HCFA); (2) any property interest in receiving reimbursement was sufficiently protected by regulatory scheme; and (3) statutory deadline for filing reclassification applications was not subject to equitable tolling.[43]

The holding went on to state: "To prevail on its procedural due process claim, Jordan must show both that it had a recognized liberty or property interest and was deprived of that interest without adequate notice or a meaningful opportunity to be heard.[44] Assuming, without deciding, that Jordan has a legitimate property interest in receiving reimbursement

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42 *Jordan Hospital, Inc. v. Donna E. Shalala, etc., et al.*, 276 F.3d 72 (1st Cir. 2002).

43 *Id.*

44 *Mathews v. Eldridge*, 424 U.S. 319, 332-35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

payments, we must then determine whether Jordan raises a colorable constitutional claim. We find that it has not."[45]

SECOND CIRCUIT. *City of New York, New York City Health and Hospitals Corp., State of New York, Cesar Perales, Commissioner, N.Y.S. Dept. of Social Services, William F. Morris, Acting Commissioner, N.Y.S. Office of Mental Health, Jane Does I and II, Richard Does I, II, III & IV, v. Margaret M. Heckler, Secretary of Health and Human Services, John A. Svahn, Commissioner of U.S. Social Security Administration*, 742 F.2d 729 (2d Cir. 1984).[46] On challenge to procedure utilized by the Social Security Administration in determination of original and continuing eligibility of claimants for disability benefits, the United States District Court for the Eastern District of New York, Chief Judge invalidated the procedure used. On appeal by the Secretary of Health and Human Services, the Court of Appeals held that: (1) submission of questionnaire by plaintiff class members before administration decision satisfied presentment requirement for jurisdiction of the District Court; (2) the 60–day limitation period for judicial review is not jurisdictional and was effectively tolled during time that challenged administrative policy remained operative but undisclosed, and was tolled until such time as plaintiffs had reasonable

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[45] *Id.* At 78.

[46] *City of New York, New York City Health and Hospitals Corp., State of New York, Cesar Perales, Commissioner, N.Y.S. Dept. of Social Services, William F. Morris, Acting Commissioner, N.Y.S. Office of Mental Health, Jane Does I and II, Richard Does I, II, III & IV, v. Margaret M. Heckler, Secretary of Health and Human Services, John A. Svahn, Commissioner of U.S. Social Security Administration*, 742 F.2d 729 (2d Cir. 1984).

opportunity to learn facts concerning cause of action; (3) case was one in which writ of mandamus properly would issue; and (4) where it was determined in federal court that plaintiff class members previously determined to be disabled for purposes of Social Security Act disability benefits had been terminated without proper procedures, reinstatement was properly ordered.[47] Endnote 3: Federal question jurisdiction,[48] was also invoked for causes of action based on the rulemaking provision of . . . and the Due Process Clause of the Constitution. In view of our disposition of the appeal, we do not reach the question of whether jurisdiction is available on these alternative bases.[49]

THIRD CIRCUIT. In *Irvin Bailey, on Behalf of Himself and All Others Similarly Situated v. Louis W. Sullivan, M.D., Secretary of Health and Human Services of the United States of America*, 885 F.2d 52 (3d Cir. 1981),[50] the Third Circuit held that Secretary's "combination policy," limiting consideration of combined effects of unrelated impairments in determining eligibility for disability benefits, violated the Social Security Act and was invalid.[51]

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47 *Id.*

48 28 U.S.C. § 1331 (1982).

49 *Id.* At 738.

50 *Irvin Bailey, on Behalf of Himself and All Others Similarly Situated v. Louis W. Sullivan, M.D., Secretary of Health and Human Services of the United States of America*, 885 F.2d 52 (3d Cir. 1981).

51 *Id.*

FOURTH CIRCUIT. In *Cochran v. Holder*, 564 F. 3d 318 (4th Cir. 2009),[52] Fourth Circuit construed 29 C.F.R. § 1613.405(b) as providing for the tolling of the 90-day statute of limitations when an employee files a timely motion for reconsideration. [53]

FIFTH CIRCUIT. *In The Matter of Contractor Technology, Ltd., St. Paul Travelers Insurance Company v. Century Asphalt Materials, LLC.*, 529 F.3d 313 (5th Cir. 2008),[54] the Fifth Circuit held that: [1] materials supplier had not "substantially complied" with requirement it provide timely written notice under McGregor Act by sending notice of claim within three days after date of repayment established by bankruptcy court, approximately seventeen months after its delivery of material, and [2] McGregor Act's notice requirement was not a statute of limitations, and equitable tolling did not apply to bond claim.[55]

SIXTH CIRCUIT. In *Jerry Engleson, v. Unum Life Insurance Company of America; Seibert Keck Long Term Disability Income Plan*, 723 F.3d 611 (6th Cir. 2013), the Sixth Circuit held that: [1] district court's decision in upholding administrator's denial of benefits to participant on limitations grounds was functional equivalent of summary judgment ruling; [2] administrator was not under regulatory obligation in 2001 to disclose in its claim denial letter either participant's

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[52] *Cochran v. Holder*, 564 F. 3d 318 (4th Cir. 2009).

[53] *Id.*

[54] *The Matter of Contractor Technology, Ltd., St. Paul Travelers Insurance Company v. Century Asphalt Materials, LLC.*, 529 F.3d 313 (5th Cir. 2008).

[55] *Id.*

right to pursue litigation in federal court or limited window for obtaining such review; [3] phrase, "appropriate information," requires only the disclosure of information pertaining to internal processes, not judicial review; [4] neither subsequent grant-of-benefits letter nor even later letter refusing another internal appeal constituted adverse benefit determination as to prior claim; [5] administrator's summary plan description (SPD) complied with regulation; [6] administrator did not affirmatively waive contractual limitations provision; and [7] participant was not diligent in pursuing his benefits, and thus he was not entitled to equitable tolling of contractual limitations period.[56]

SEVENTH CIRCUIT. In *Donald Fessenden v. Reliance Standard Life Ins. Co. and Oracle USA, Inc., Group Long Term Disability Plan,* 927 F.3d 998 (7th Cir. 2019),[57] the Seventh Circuit held that administrator forfeited deferential standard of review by failing to comply with deadline for issuing final decision.[58]

When a claimant seeks review of an administrator's denial of benefits, the administrator must review the claim "not later than" a specified period of time—45 days for disability claims and 60 days for others.[59] The administrator can extend that time, but only when "special circumstances" apply. During the

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[56] *Id.*

[57] *Donald Fessenden v. Reliance Standard Life Ins. Co. and Oracle USA, Inc., Group Long Term Disability Plan*, 927 F.3d 998 (7th Cir. 2019)

[58] *Id.*

[59] *Id.*

extension period, a tolling mechanism protects the administrator from delay on the part of the claimant.[60]

EIGHTH CIRCUIT. In *Charles and Marion Hefti v. Commissioner of Internal Revenue.,* 899 F.2d 709 (8th Cir. 1990), [61] the Eighth Circuit held that: (1) denial of taxpayers' motion for summary judgment merged into order of dismissal, so as to permit Court of Appeals to review limitations issue, and (2) action had to be remanded for determination as to whether tax regulation regarding tolling of limitations period exceeded statutory authorization.[62]

NINTH CIRCUIT. In *Public Citizen Inc.; Center for Auto Safety; The Trauma Foundation; Andrew McGuire; Jane Kelly; Ralf Hotchkiss, Petitioners, Automotive Occupant Restraints Council, Intervenors v. Norman Y. Mineta, Alliance of Automobile Manufacturers, Inc.*, 343 F.3d 1159 (9th Cir. 2011), [63] the court held that: (1) NHTSA's interpretation as to when final rule was "issued" for purposes of statutory 59-day period for filing petition for judicial review was unreasonable and not entitled to deference; (2) for purposes of 59-day period for filing petition for judicial

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60 *Id.*

61 *Charles and Marion Hefti v. Commissioner of Internal Revenue.*, 899 F.2d 709 (8th Cir. 1990).

62 *Id.*

63 *Public Citizen Inc.; Center for Auto Safety; The Trauma Foundation; Andrew McGuire; Jane Kelly; Ralf Hotchkiss, Petitioners, Automotive Occupant Restraints Council, Intervenors v. Norman Y. Mineta, Alliance of Automobile Manufacturers, Inc.*, 343 F.3d 1159 (9th Cir. 2011).

review, NHTSA regulation is "issued" on the date that regulation is made available for public inspection; (3) order was "issued" as of published filing date in Federal Register; (4) NHTSA regulation limiting tolling of statutory period for seeking judicial review did not limit judicial review to parties who filed formal petition for reconsideration; (5) petitioners who did not file petition for reconsideration were precluded from seeking review of provision that was the same in both interim and final rule; and (6) transfer of timely filed petition for review was warranted.[64]

TENTH CIRCUIT. In *Mono-Therm Industries, Incorporated and Con-Serv, a Division of Bay State Gas Company v. Federal Trade Commission*, 653 F.2d 1373 (10th Cir. 1981),[65] the Tenth Circuit held that: (1) corporation's request for emergency relief from Commission's enforcement of rule during pendency of appeal was moot in light of commission's tentative decision to grant certain cellulose producers, including corporation, partial exemption from requirements of essential portion of rule, and (2) 60-day appeal period was not tolled or reset by any action of Commission from date of rules promulgation to date of alleged final promulgation which would save corporation's otherwise untimely petition.[66]

Later In *Jeremy E. Riley v. Immigration & Naturalization Service, The District Director, District 19*, 310

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64 *Id.*

65 *Mono-Therm Industries, Incorporated and Con-Serv, a Division of Bay State Gas Company v. Federal Trade Commission*, 653 F.2d 1373 (10th Cir. 1981).

66 *Id.*

F.3d 1253 (10th Cir. 2002), [67] the Tenth Circuit held that: (1) district court had habeas jurisdiction to consider a challenge by non-criminal alien to legality of his extended detention; (2) alien's supervised release from detention to which he was subject following entry of a final order of deportation mooted his habeas challenge to legality of that detention; and (3) regulatory timeline for filing motion to re-open deportation proceedings was subject to equitable tolling. However, the court held that the INS's refusal to join a motion to re-open did not violate due process because there is no right or entitlement to such relief.[68]

ELEVENTH CIRCUIT. In *Harriet Wilson v. The Standard Insurance Company*, 613 Fed. Appx. 841 (11th Cir. 2015),[69] the Eleventh Circuit held that: [1] contractual limitations period was enforceable against claimant's untimely claim, and [2] claimant was not entitled to equitable tolling of her untimely claim due to lack of diligence.[70]

D.C. CIRCUIT. In *Laminators Safety Glass Association v. Consumer Product Safety Commission*, 578 F.2d 406 (DC Cir. 1978), [71] the D.C. Circuit held that held that association failed to file petition for review within 60-day period after promulgation of consumer

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[67] *Jeremy E. Riley v. Immigration & Naturalization Service, The District Director, District 19*, 310 F.3d 1253 (10th Cir. 2002).

[68] *Id.*

[69] *Harriet Wilson v. The Standard Insurance Company*, 613 Fed. Appx. 841 (11th Cir. 2015).

[70] *Id.*

[71] *Laminators Safety Glass Association v. Consumer Product Safety Commission*, 578 F.2d 406 (DC Cir. 1978).

product safety standard as required. *Id.* Since Consumer Product Safety Act and regulations promulgated thereunder did not provide for rehearing or reconsideration after promulgation of consumer product safety standard, statutory period for seeking judicial review of consumer standard covering various architectural glazing materials, including laminated glass, was not tolled by association's filing of petition for reconsideration.[72], [73] Endnote 8: The Association presents an alternative argument that if the consumer product safety standard was promulgated in January 1977, LSGA has a due process right to file post-promulgation exceptions since the Association came into existence only after the standard became final. Individual members of the association, however, had notice of the proceedings and a full opportunity to participate. Under these circumstances, we find the petitioner's due process claims without merit.[74]

FEDERAL CIRCUIT. In *Winthrop J. Block, Patrick M. Burns, Brenda Iwasyk, David M. Jacobs and Verborie W. Shaw, v. Secretary of Veterans Affairs*, 641 F.3d 1313 (Fed. Cir. 2011),[75] the Federal Circuit held that: [1] filing of district court action could not serve to toll running of statute of limitations with regard to instant cause of action and [2] Veterans' Judicial Review Act (VJRA) did not retroactively create cause of action

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[72] Consumer Product Safety Act, §§ 9(a)(1, 2), (e), 10, 11, 15 U.S.C.A. §§ 2058(a)(1, 2), (e), 2059, 2060.

[73] *Id.*

[74] *Id.* At 468.

[75] *Winthrop J. Block, Patrick M. Burns, Brenda Iwasyk, David M. Jacobs and Verborie W. Shaw, v. Secretary of Veterans Affairs*, 641 F.3d 1313 (Fed. Cir. 2011).

for procedural challenge to Veterans' Administration regulations.[76] Petitioners did not press the due process claim that was alleged in the original district court complaint.[77]

II. WITHOUT TOLLING THE PURPOSE OF THE CLEAN AIR ACTS WOULD BE FRUSTRATED.

The Texas Clean Air Acts created a mechanism by which individuals can challenge erroneous decisions by the TCEQ. It did this by creating the right to appeal TCEQ decisions to the district court of Travis County.[78]

Under the Court of Appeals' decision, that right to appeal is undermined. If litigation takes too long—a factor over which individuals often have little control—the right to appeal is lost because the issue becomes moot. In the case at bar, for example, AC Interests has spent years defending against the TCEQ's efforts to dismiss its case on procedural grounds. Through no fault of its own, it has lost its ability to meaningfully appeal the TCEQ's decision, despite the Clean Air Act's provision to the contrary.

In its opinion, the Court of Appeals noted that the Clean Air Act states that it should be "vigorously enforced."[79] However, that provision of the Act if anything, militates in favor of tolling. In order to "vigorously enforce" the right to appeal TCEQ decisions,

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[76] *Id.*

[77] *Id.* At 1317.

[78] Tex. Health & Safety Code § 382.032(a).

[79] *AC Interests*, 2020 Tex. App. LEXIS 9988 at *13 quoting Tex. Health & Safety Code § 382.002.

applying the tolling doctrine is necessary. Otherwise, individuals will lose the right to appeal through no fault of their own, whenever litigation is protracted.

This is not a case where a statute has built-in exceptions to a limitations period, which indicate the Legislature's intent to exclude common law tolling.[80] Here, the Administrative Code sets out either a 60 or a 72-month period in which to use emission credits.[81] It does not purport to express a policy determination on the application of common law doctrines.

The last time AC Interests was before the Texas Supreme Court, the Court stated of TCAA Section 382.032,[82] "The statute's purpose here is to provide a process for the judicial review of TCEQ decisions." The Court should grant this petition for review in order to determine whether meaningful judicial review can indeed take place without tolling of the 60-month period. AC Interests contends that it cannot.

III. THE CASE IS NOT MOOT.

A. Emission Credit Life

AC Interests' Briefs to the Texas Supreme Court include argument as to the usefulness of ERCs beyond their 60-month lifespan that might preserve the

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80 *Underkofler v. Vanasek*, 53 S.W.3d 343, 346 (Tex. 2001) ("We defer to the Legislature's explicit policy determination that only two exceptions apply to the statute of limitations for these statutory claims . . . ").

81 30 Texas Admin. Code § 101.309(b)(2) (60 months); 30 Tex. Admin. Code § 101.304(e)(1)(C) (72 months).

82 Tex. Health & Safety Code § 382.032.

controversy over TCEQ's denial of ERCs.[83] There is no rationale for Texas' five year Emission Credit lifetime. Emission Credits are simply numerical representations of emission reductions above those reductions required to attain the NAAQS. Emission Credits do not "spoil;" therefore, there is no need to limit Emission Credit lifetimes.

To illustrate-nationwide, excluding Texas, 33 of 38 (86.5%) of Federally approved state and local jurisdictions have an unlimited emission credit lifetime[84] Four states (10.8% of jurisdictions)—Louisiana, Maryland, New Jersey, and Pennsylvania—have ten year Emission Credit lifetimes. Indiana has an emission credit lifetime of five years, plus time for construction. Texas has the shortest Emission Credit lifetime—five years—of any jurisdiction. *See* Appendix E.

Federal emission reduction credit guidelines support unlimited lifetime for emission reductions whenever practical. TCEQ's own rule for Discrete Emission Reduction Credits ("DERCs") allow an unlimited Emission Credit lifetime.[85]

Pursuant to U.S.E.P.A. guidance,[86] the federal guidance on economic incentive programs provides:

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[83] *Kallinen*, 516 S.W.3d 617, 622 (case is not moot if some issue remains in controversy). (Tex. 2017).

[84] *AC Interests v. TCEQ*, Texas Supreme Court Case Number 21-0078, Petitioner's Reply to Respondent's Brief (1/18/2022), 36.

[85] 30 TAC 101.378.

[86] U.S. Envtl. Prot. Agency, *Improving Air Quality with Economic Incentive Programs*, page 260 (Jan. 2001), available at https://www.epa.gov/nsr/improving-air-quality-economic-incentive-programs.

The EPA supports unlimited lifetime for emission reductions whenever practical because they:

- provide more certainty and flexibility to sources participating in trading.
- avoid the emission spikes that could potentially occur at the time that the valid life of the emission reductions would expire.
- do not, in general, pose a threat to the overall goals of EIPs.

Furthermore, Federal Aviation Administration ("FAA") guidance on airport emission reduction credits for early measures through voluntary airport low emission programs allows up to a 40 year lifetime on Emission Credits.[87]

B. Exceptions to Mootness Doctrine

Texas courts recognize two exceptions to the mootness doctrine: (1) the capability of repetition yet evading review exception; and (2) the collateral consequences exception.[88] "The 'capable of repetition yet evading review' exception is applied where the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot." The 'collateral consequences' exception has been applied when Texas courts have recognized that prejudicial events have occurred "whose effects continued to stigmatize helpless or hated individuals long after the unconstitutional judgment had ceased to operate. Such

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87 *Guidance on Airport Emission Reduction Credits for Early Measures Through Voluntary Airport Low Emission Programs*, Prepared by the OAQPS.

88 *State v. Lodge*, 608 S.W.2d 910, 912 (Tex. 1980).

effects were not absolved by mere dismissal of the cause as moot."[89]

AC Interests contends that both exceptions apply in this case. It argues that the "capable of repetition yet evading review" exception applies because the 60 month Emission Credit life was too short in its duration to be fully litigated. Also, the AC Interests argues that there is reason to expect that it will be subjected to the same action in the future because TCEQ did not concede that the statutes in question were unconstitutional.

The "capable of repetition yet evading review" exception has been used to challenge unconstitutional acts performed by the government. AC Interests' contention is that the 60-month Credit life was of such short duration that it evaded review because of judicial challenges. AC Interests asserts that the "collateral consequences" exception is applicable because of both the public interest in resolving this important question of administrative law, and the ruling's potential effect upon effect upon the numerous future Emission Credit applications.[90]

From a policy perspective, the Court of Appeals' decision creates perverse incentives. The TCEQ now has the incentive to drag litigation out as long as possible in the hopes that it will render an individual's claim moot.[91] This undermines judicial economy by

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89 *Id.* at 19.

90 *AC Interests, L.P. v. Tex. Comm'n on Envtl. Quality*, 543 S.W.3d 703, 713 (Tex. 2018).

91 *Cf.*, *Pioneer*, 117 S.W.2d at 559 ("Such a rule would permit a party, by his own wrongful conduct, to destroy the lawful contractual rights of his adversary, and is therefore unsound.").

creating a benefit to protracted litigation that disincentivizes settlement. It also places a large burden on individuals seeking to earn ERCs, who must now anticipate high legal fees, while knowing that the success of their claim depends not on its merits, but on how long the process takes.

In addition, failing to apply tolling defeats the reasonable expectations of individuals who, in reliance on the TCEQ's rules, undergo an emission reduction event in order to generate ERCs.[92] The facts in the case at bar are illustrative. Thirteen months elapsed between the time AC Interests submitted its first application to the TCEQ and the date AC Interests' final application was denied. AC Interests promptly appealed to the Travis County district court. AC Interests was then forced to defend against the TCEQ's procedural motions for most of the next six years,[93] culminating in dismissal due to the passage of time. This is an absurd consequence that places individuals in an untenable position.[94]

The policy concerns implicated by the Court of Appeals decision affect not just AC Interests, but all individuals seeking ERCs under the TCEQ's rules. The ability to render the right to ERCs moot by virtue of the process designed to establish that right creates

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92 30 Texas Admin. Code § 101.303(a)(1).

93 *AC Interests, L.P. v. Tex. Comm'n on Envtl. Quality*, D-1-GN-14-05160, TCEQ TRCP 91a Motion, January 27, 2015 through 2018; *AC Interests, L.P. v. Tex. Comm'n on Envtl. Quality*, No. 01-19-00387-CV, 2020 Tex. App. LEXIS 9988, at *2 (Tex. App.—Houston [1st Dist.] Dec. 17, 2020) (mem. op.).

94 *Hughes*, 821 S.W.2d at 156-57 (applying tolling doctrine where strict application of limitations period created untenable position).

a damaging catch-22 that threatens to undermine the purpose of both the Federal and Texas Clean Air Acts. Individuals will be hesitant to undergo expensive emission reductions when the ability to generate ERCs in return can be so easily destroyed on a procedural technicality. The Court should grant this Petition in order to decide this important question of state law.[95]

IV. TCEQ HAS ASSERTED THAT AC INTERESTS' EMISSION CREDIT APPLICATION WAS DEFICIENT, WHICH CLAIM BY TCEQ IS INCORRECT.

During oral arguments before the Trial Court and First COA, the TCEQ has asserted that AC Interests' Emission Credit Application was deficient. This claim by TCEQ is incorrect. AC Interests, between October 14, 2013 and September 22, 2014, submitted over 500 pages of documentation in support of the said Emission Credit application. This documentation equals or exceeds, in both quality and quantity, similar applications submitted by "Fortune 500" companies for comparable applications. This is notwithstanding that said, Fortune 500 companies have unlimited resources as compared to AC Interests.

V. TCEQ WAIVED PLEA TO JURISDICTION RIGHTS BY FILING A LATE PLEA TO JURISDICTION.

AC Interests' emission credits were generated on July 10, 2010—the day the plant burned down. Therefore, pursuant to 30 Texas Admin. Code § 101.309(b)(2), TCEQ should have filed its Plea to Jurisdiction by July 10, 2015, the date the 60-month limit expired. They did not. They waited until November 1, 2018. Therefore, the TCEQ waived Plea to Jurisdiction

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[95] Tex. Gov't Code § 22.001(a).

Rights by filing a Late Plea to Jurisdiction. Said plea should have been filed by July 11, 2015 at the latest.

VI. THE FACT THAT TOLLING IS NOT WRITTEN INTO THE STATUTE IS NOT SIGNIFICANT BECAUSE EQUITABLE TOLLING IS A COMMON LAW DOCTRINE.

Equitable tolling is a common law doctrine. By its very nature it is not written into statutes, but instead applies when certain equitable circumstances are present.[96] Therefore, it is not significant that the statute creating the limitations period at issue here does not include a tolling provision.[97]

Instead, the question should be whether the common law doctrine of equitable tolling applies in these circumstances. That doctrine says that, when "'a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time during which he is thus prevented should not be counted against him in determining whether limitations have

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[96] *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 156-57 (Tex. 1991).

[97] And, as noted in AC Interest's Petition for Review, the Administrative Code has two possible limitations periods, but does not have built-in exceptions to those periods. 30 Texas Admin. Code § 101.309(b)(2) (60 months); 30 Texas Admin. Code § 101.304(e)(1)(C) (72 months). Therefore, it does not express a policy determination intending to exclude the application of common law doctrines. *Cf. Underkofler v. Vanasek*, 53 S.W.3d 343, 346 (Tex. 2001) ("We defer to the Legislature's explicit policy determination that only two exceptions apply to the statute of limitations for these statutory claims . . . ").

barred his right.'"[98] As set out in AC Interest's Petition for Review, that doctrine squarely applies here: the 60-month limitations period for using Emission Reduction Credits (ERCs) should be tolled while litigation to establish the right to those credits is pending.

VII. A LIMITATIONS PERIOD DOES NOT HAVE TO PERTAIN TO THE RIGHT TO SUE.

The limitations periods with which the equitable tolling doctrine is concerned are not confined to the right to sue. Statutes can restrict the period in which other legal rights can be exercised as well, and tolling has been applied in those cases just as forcefully. For example, as noted in AC Interest's Petition for Review, courts have applied tolling to the period in which the right to initiate a non-judicial foreclosure can be exercised.[99]

In applying the equitable tolling doctrine, courts are focused, not on the nature of the limitations period in question, but rather, on whether a party could not meet a limitations period because of a legal impediment to doing so.[100] When a person is being asked to exercise

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98 *Hughes*, 821 S.W.2d at 157 quoting *Walker v. Hanes*, 570 S.W.2d 534, 540 (Tex. Civ. App.-Corpus Christi 1978, writ ref'd n.r.e.).

99 *Pioneer Bldg. & Loan Ass'n v. Johnston*, 117 S.W.2d 556, 559 (Tex. Civ. App.— Waco 1938) (applying equitable tolling where injunction prevented non-judicial foreclosure); *Cloward v. United States Bank Tr., N.A.*, No. 05-18-01397-CV, 2020 Tex. App. LEXIS 6107, at *15 (Tex. App.—Dallas Aug. 3, 2020, pet. denied) (applying equitable tolling where individuals were "legally impeded from exercising their contractual right to sell the property at a non-judicial foreclosure sale").

100 *Cavitt v. Amsler*, 242 S.W. 246, 248-49 (Tex. Civ. App. 1922, op. on reh'g) cited by *Hughes*, 821 S.W.2d at 157.

a right that does not yet exist, tolling should apply.[101] That is exactly what occurred here: AC Interests could not use ERCs while litigation to establish the right to those ERCs was pending.

VIII. FAR FROM GIVING ERCS AN "INFINITE LIFE," APPLYING TOLLING WOULD LIKELY SHORTEN THE LENGTH OF LITIGATION AND SUPPORT THE PURPOSE OF THE CLEAN AIR ACT.

The TCEQ's litigation tactics are what extended the life of the litigation in this case. AC Interests spent over seven years (91 months) defending against the TCEQ's procedural motions, all of which distracted from the real issue of whether AC Interests had a right to the ERCs in the first place. It is those very litigation tactics that the TCEQ now has the power to continue to use to prevent parties from ever using ERCs by running the clock down on the limitations period.

The Texas Clean Air Act created the right to appeal erroneous TCEQ decisions.[102] Applying tolling supports the purpose of the Clean Air Act by allowing for meaningful judicial review. Without it, individuals lose their right to appeal whenever litigation is protracted. As is illustrated in this case, that is often a factor over which individuals have no control. Applying tolling would shorten the length of litigation by removing the TCEQ's incentive to use dilatory litigation tactics, encouraging speedy resolution of disputes over the award of ERCs and upholding the purpose of the Clean Air Act.

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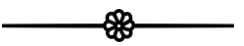
101 *Id.*

102 Tex. Health & Safety Code § 382.032(a).



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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