No. 23-___

IN THE

Supreme Court of the United States

METAL CONVERSION TECHNOLOGIES, LLC,
Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When an aggrieved party petitions for judicial review of the Department of Transportation's final action under the Hazardous Materials Transportation Act: "[t]he petition must be filed not more than 60 days after the Secretary's action becomes final." 49 U.S.C. § 5127(a). This Court has held that absent clear congressional intent to preclude tolling, nonjurisdictional statutory filing deadlines are subject to equitable tolling. *Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199, 208–09 (2022). As such, "an ordinary, nonjurisdictional deadline [is] subject to equitable tolling." *Id.* at 211.

In the *per curiam* decision below, the Eleventh Circuit assumed § 5127(a)'s 60-day deadline is not jurisdictional. It nonetheless held that Federal Rule of Appellate Procedure 26(b) precludes tolling of this statutory deadline. Rule 26(b), which has not changed since this Court's adoption in 1967, states: "For good cause, the court may extend the time prescribed by these rules … . But the court may not extend the time to file … a petition to … review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law."

The question presented is:

1. Whether Federal Rule of Appellate Procedure 26(b) precludes equitable tolling of 49 U.S.C. § 5127(a)'s ordinary and nonjurisdictional deadline to petition for review of an agency's final action.

PARTIES TO THE PROCEEDING

Petitioner is Metal Conversion Technologies, LLC

Respondent is the U.S. Department of Transportation

RELATED PROCEEDINGS

Metal Conversion Technologies, LLC v. U.S. Department of Transportation, No 22-14140 (11th Cir.). Petition for review dismissed July 27, 2023.

In the Matter of: Metal Conversion Technologies, LLC, PHMSA Case No. 18-0086-HMI-SW (Dep't of Transportation). Decision on Appeal issued July 25, 2022.

In the Matter of: Metal Conversion Technologies, LLC, PHMSA Case No. 18-0086-HMI-SW (Dep't of Transportation). Order of the Chief Counsel issued October 7, 2021.

CORPORATE DISCLOSURE STATEMENT

Petitioner Metal Conversion Technologies LLC is a limited liability company with no parent corporation, and no publicly held corporation holds 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND ORDERS BELOW

The *per curiam* panel opinion of the Eleventh Circuit (App.1a) is not reported in the Federal Reporter but is available at 2023 WL 4789084. The *per curiam* decision of the Eleventh Circuit denying rehearing (App.3a) is not reported in the Federal Reporter. The final order (App.8a) of the U.S. Department of Transportation (DOT) dated July 25, 2022, is available at: https://www.regulations.gov/document/PHMSA-2021-0088-0002. The decision (App.32a) of the agency's Chief Counsel dated October 7, 2021, is available at: https://www.regulations.gov/document/PHMSA-2021-0088-0001.

JURISDICTION

The Eleventh Circuit entered judgment on July 27, 2023, and denied rehearing on October 12, 2023. On December 27, 2023, Justice Thomas extended the time to file a petition for writ of certiorari until February 9, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reproduced in Appendix F to this petition. App.71a-73a.

INTRODUCTION

This Court has spent recent terms attempting to bring discipline to the question of which statutory filing deadlines are subject to equitable tolling. It has repeatedly held that statutory time limits are claim-processing rules that are subject to equitable tolling unless Congress has clearly indicated otherwise by stating that the time limit is jurisdictional or by expressing a clear intent to preclude tolling. This Court has repeatedly granted certiorari to reaffirm this principle when lower courts go astray, most recently in *Wilkins v. United States*, 598 U.S. 152 (2023) (Quiet Title Act's statute of limitation is nonjurisdictional) and *Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199 (2022) (deadline governing petition for judicial review of IRS decision is subject to tolling). This term, the Court granted review in *Harrow v. Dep't of Def.*, No. 23-21, to determine whether the deadline to petition for judicial review of Merit Systems Protection Board (MSPB) decisions is subject to equitable tolling.

In a *per curiam* decision, the Eleventh Circuit held that the ordinary 60-day deadline under 49 U.S.C. § 5127(a) to file a petition for judicial review of the Department of Transportation (DOT)'s final action is not subject to equitable tolling. It reached this conclusion without finding any indication that *Congress* intended to preclude equitable tolling when enacting § 5127(a). Instead, the panel held that Federal Rule of Appellate Procedure 26(b)—which was not enacted by Congress and thus cannot indicate congressional intent—precludes equitable tolling.

That erroneous reasoning presents an important federal question because Rule 26(b)'s preclusive effect

would apply to every federal statutory scheme that provides for judicial review of "an order of an administrative agency, board, commission, or officer of the United States[.]" Fed. R. App. P. 26(b).

The Eleventh Circuit's decision cannot be reconciled with this Court's precedent that clear *congressional* intent to preclude tolling is needed to rebut the presumption in favor of a statutory deadline being subject to equitable tolling. It also conflicts with other circuits' holdings that ordinary deadlines found in statutory review schemes are subject to equitable tolling. The panel below incorrectly resolved an important and recurring issue impacting every agency statutory review scheme. This Court's review is warranted.

The Federal Circuit in *Harrow* reinforced its core jurisdictional decision by stating in passing that Rule 26(b) prohibits tolling the statutory deadline in that case. *Harrow v. Dep't of Def.*, No. 2022-2254, 2023 WL 1987934, at *1 (Fed. Cir. Feb. 14, 2023) (per curiam), cert. granted, No. 23-21, (Dec. 8, 2023) (citing Fed. R. App. P. 26(b)). While Rule 26(b) was not part of the jurisdictional question presented on which this Court granted review in *Harrow*, the Solicitor General's brief opposing certiorari argued that Rule 26(b) independently precludes equitable tolling of a deadline to seek judicial review of final agency action. Resp. Br. at 18-19, *Harrow v. Dep't of Defense*, No. 23-21 (Oct. 6, 2023). Should the Court elect to resolve the Rule 26(b) issue in *Harrow*, Petitioner requests in the alternative that the Court hold this petition pending the decision in *Harrow*, and then dispose of this petition as appropriate in light of that decision.

STATEMENT OF THE CASE

I. LEGAL BACKGROUND

Congress authorized the Secretary of Transportation to promulgate regulations for "the safe transportation … of hazardous material in … commerce." 49 U.S.C. § 5103(b)(1). The Secretary may seek from any "person that knowingly violates [such regulations] … a civil penalty of not more than $75,000 for each violation." *Id.* § 5123(a)(1). Multiple DOT agencies promulgate and enforce regulations issued under § 5123(a)(1). These include the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), and the U.S. Pipeline and Hazardous Materials Safety Administration (PHMSA).

Congress further created a statutory review scheme which provides for judicial review of the Secretary's final decisions to promulgate hazardous materials regulations or to impose a civil penalty for violation of such regulations. *See* 49 U.S.C. § 5127. The congressionally enacted statutory review scheme states:

> [A] person adversely affected or aggrieved by a final action of the Secretary under this chapter may petition for review of the final action in the United States Court of Appeals for the District of Columbia or in the court of appeals for the United States for the circuit in which the person resides or has its principal place of business. The petition must be filed not more than 60

> days after the Secretary's action becomes final.

Id. § 5127(a).

Section 5127(a) is not materially different from countless statutory review schemes that require persons aggrieved by final agency action to seek judicial review within a specific time limit.

None of these statutory review schemes specifically authorize equitable tolling of deadlines. This Court has nonetheless found their deadlines to be subject to tolling. *See*, *e.g.*, *Boechler*, 596 U.S. at 201 (holding 30-day period under 26 U.S.C. § 6330(d)(1) to petition the Tax Court for review of agency decision subject to equitable tolling); *Bowen v. City of New York*, 476 U.S. 467, 481 (1986) (holding 42 U.S.C. § 405(g)'s 60-day period for seeking judicial review of final decision by Secretary of Health and Human Services subject to equitable tolling).

That is because "[e]quitable tolling is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods. … Because [the Court does] not understand Congress to alter that backdrop lightly, nonjurisdictional limitations periods are presumptively subject to equitable tolling." *Boechler*, 596 U.S at 208–09 (citations omitted). This presumption is rebutted only if the structure and context of the statutory review scheme clearly indicate Congress intended to preclude equitable tolling. *Id.* at 209.

II. FACTUAL BACKGROUND AND PROCEEDINGS BELOW

Petitioner is a battery recycling company that operated in Cartersville, Georgia. In February 2020, DOT charged Petitioner with violating regulations promulgated under 49 U.S.C. § 5103(b)(1). App.33–35a. After an informal hearing, DOT assessed a civil penalty against Petitioner for the alleged violations. App.31a. On December 14, 2021, Petitioner filed an administrative appeal to PHMSA's Chief Safety Officer. App.9a.

On July 22, 2022, DOT revealed in a separate case that the Chief Safety Officer was not properly appointed to adjudicate administrative proceedings by the President or Secretary, as required by *Lucia v. SEC*, 138 S. Ct. 2044 (2018). *See* Motion to Vacate and Remand, *Polyweave Packaging, Inc. v. DOT*, No. 21-4202, Doc. 29 at 2 (6th Cir. July 22, 2022); *see also Polyweave Packaging, Inc. v. DOT*, No. 21-4202, 2023 WL 1112247, at *1 (6th Cir. Jan. 27, 2023) ("The Department now concedes that the Chief Safety Officer was not properly appointed at the time of the decision."). DOT discovered the Appointments Clause defect in July 2022, and moved to vacate and remand the civil-penalty order being challenged in *Polyweave*, so it could be decided by a new decision-maker. *See id.* At the time, Petitioner's administrative appeal was pending before the same improperly appointed official, who said nothing.

There was no practical way for Petitioner to have learned on its own about the PHMSA adjudicator's Appointments Clause violation—the agency itself did

not know until July 2022.[1] At that time, Petitioner's case had been pending before the improperly appointed adjudicator for seven months. DOT did not notify Petitioner that the adjudicator was improperly appointed even though he was then reviewing Petitioner's administrative appeal. Nor did DOT provide Petitioner "what *Lucia* requires: an adjudication untainted by an Appointments Clause violation." *Cody v. Kijakazi*, 48 F.4th 956, 962 (9th Cir. 2022). Instead, DOT allowed the tainted adjudicator to keep issuing final civil-penalty orders in cases he had heard while improperly appointed, including against Petitioner on July 25, 2022—just three days after DOT asked the Sixth Circuit to vacate a civil-penalty order because of his improper appointment. In other words, DOT allowed an official whom it knew to be an unconstitutional adjudicator to decide Petitioner's case. Petitioner did not learn of the adjudicator's defective appointment until October 18, 2022. *See* Decl. of J. Patterson, *Metal Conversion Techs., LLC v. Dep't of Transp.*, No 22-14140, Doc 12-2 ¶¶ 14–15 (11th Cir. Feb. 14, 2023).

Petitioner thereafter engaged new counsel and filed a petition to review DOT's civil-penalty order on December 15, 2022—58 days after discovering the appointment defect. Petitioner sought equitable tolling of § 5127's 60-day deadline on the ground that

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[1] The Secretary did not ratify the official's appointment until July 15, 2022. *See* Doc 21-4, Exhibit C to Motion to Dismiss, *gh Package Product Testing and Consulting, Inc. v. Buttigieg*, No. 23-cv-00403, Doc. 21-4 (S.D. Ohio, September 18, 2023).

DOT concealed what it knew to be a blatant constitutional defect in its agency proceeding. *See Bowen*, 476 U.S. at 481 (equitable tolling of filing deadline to challenge agency decision is proper where "the Government's secretive conduct prevents plaintiffs from knowing of a violation of rights[.]"). Due to that concealment, Petitioner did not learn of its Appointments Clause claim until October 18, 2022. Tolling § 5127(a)'s 60-day deadline to commence at that discovery date would render Petitioner's December 15, 2022 filing timely.

The panel asked the parties to address the timeliness of the petition as a "Jurisdictional Question." App.7a. It did not hold § 5127 to be a *jurisdictional* bar. Nonetheless, the panel cited *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714–15 (2019), to hold (without full briefing on non-jurisdictional issues) that § 5127's statutory deadline is "not subject to equitable tolling" because Federal Rule of Appellate Procedure 26(b) "precludes flexibility." App.4a–5a. Rule 26(b) is a rule of procedure adopted by this Court in 1967 and states: "For good cause, the court may extend the time prescribed by these rules," but that "the court may not extend the time to file," among other things, "a petition to … review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law[.]"

REASONS FOR GRANTING THE WRIT

The Court should grant the petition for three reasons.

First, the petition presents an important question of federal law that impacts every statutory scheme

reviewing final agency actions. Section 5127(a)'s deadline is an ordinary deadline, no different from deadlines in countless statutory review schemes. The Eleventh Circuit's decision that Rule 26(b) precludes equitable tolling of § 5127(a)'s deadline would likewise bar the tolling of any other statutory deadline seeking review of agency action. Indeed, the Solicitor General's brief opposing review in *Harrow* relied on the same reasoning to argue that Rule 26(b) would preclude tolling 5 U.S.C. § 7703(b)(1)(A)'s 60-day deadline to seek judicial review of MSPB's decisions, regardless of whether that deadline is jurisdictional. Resp. Br. at 18-19, *Harrow v. Dep't of Def.*, No. 23-21 (Oct. 6, 2023). The government thus agrees with Petitioner that, under the panel's reasoning, no statutory deadline for judicial review of agency action could ever be equitably tolled.

Equitable tolling enables judicial review of agency action where an agency conceals "a systematic procedural irregularity that renders" its decisions "subject to court challenge." *Bowen*, 476 U.S. at 481 (quoting *City of New York v. Heckler*, 742 F.2d 729, 738 (2d. Cir. 1984)). Without it, an agency could evade judicial review by hiding a known constitutional defect—here, an Appointments Clause violation—until the statutory deadline has expired.

Second, the decision below ignores this Court's precedent that ordinary, nonjurisdictional statutory filing deadlines are subject to equitable tolling. This Court has explained that a statutory deadline is presumptively subject to equitable tolling absent clear indication of contrary congressional intent. *Boechler*, 596 U.S. at 208-09. Rule 26(b) cannot supply congressional intent to rebut that presumption

because Congress did not enact it. Additionally, by its own terms, Rule 26(b) governs only the extension of deadlines "prescribed by these rules[,]" meaning rules of juridical procedure adopted by this Court—not statutory deadlines enacted by Congress like § 5127(a).

The Eleventh Circuit's departure from this Court's precedent is based off a misreading of this Court's interpretation of Rule 26(b) in *Nutraceutical Corp.*, 139 S. Ct. 710. *See* App.4a–5a. That case held Rule 26(b) precludes the extension of Federal Rule of Appellate Procedure 23(f)'s *court-adopted* 14-day deadline to appeal a denial of class certification.[2] *Id.* at 714–15. It does not allow Rule 26(b) to override the standard background presumption regarding *Congress's* intent to incorporate equitable tolling when it enacted § 5127(a).

Third, the decision below also conflicts with decisions of at least five other circuits. It breaks with decisions in the Second, Eighth, Ninth, Tenth, and D.C. Circuits that apply this Court's precedent to recognize ordinary statutory deadlines for seeking review of agency action in a variety of contexts are subject to equitable tolling. The starkest of these splits is with the Second Circuit's decision in *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 106–07 (2d Cir. 2018), which held that 49 U.S.C.

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[2] This Court adopted the 14-day deadline in 2009. *See* Supreme Court, *Amendments to Federal Rules of Civil Procedure* (Mar. 26, 2009), *available at* https://www.supremecourt.gov/orders/courtorders/frcv09.pdf (last visited Feb. 6, 2024).

§ 32909(b)'s 59-day filing deadline to review DOT's fuel-economy regulations—which is worded virtually the same as § 5127(a)'s 60-day deadline governing review of DOT's hazardous materials regulations—is subject to equitable tolling. By comparison, the only federal appellate court on the Eleventh Circuit's side of the split is the Federal Circuit in *Harrow*, 2023 WL 1987934, at *1 (citing Fed. R. App. P. 26(b)).

Review is warranted to resolve this split and to ensure this Court's precedent is followed on an important question of federal law.

I. THE AVAILABILITY OF EQUITABLE TOLLING FOR STATUTES TO REVIEW AGENCY ACTION IS AN IMPORTANT FEDERAL QUESTION

The Eleventh Circuit's conclusion that Rule 26(b) precludes equitable tolling of § 5127(a)'s statutory deadline is an important issue warranting this Court's review because that preclusion applies with equal force to *all* statutory deadlines for petitions to review final agency action. The decision categorically bars equitable tolling for all statutory schemes reviewing federal agency action.

Congress has enacted countless statutes that provide for judicial review of agency orders, provided that a petitioner files within the congressionally enacted deadline. *See, e.g.*, 5 U.S.C. § 7703(b)(1)(A) (60-day deadline for petition to review MSPB orders); 15 U.S.C. §§ 45(c) (60-day deadline for petition to review FTC orders); § 78y(a)(1) (60-day deadline for petition to review SEC orders); 29 U.S.C. § 660(a) (60-day deadline for petition to review Occupational Safety and Health Review Commission orders); 30 U.S.C. § 816 (30-day deadline for petition to review

Mine Safety and Health Review Commission orders); 42 U.S.C. § 4915(a) (90-day deadline for petition to review certain EPA and FAA actions); 47 U.S.C. § 402(c) (30-day deadline for petition to review FCC orders).

In recent years, this Court has repeatedly granted certiorari to review whether a generic statutory deadline to seek judicial review of agency orders is subject to tolling. It held in *Boechler* that the statutory deadline to petition for judicial review of IRS taxation decisions is "ordinary" and thus subject to tolling. 596 U.S. at 211. And this term, it has granted review of whether the 60-day deadline under 5 U.S.C. § 7703(b)(1)(A) to seek judicial review of a decision of the MSPB is subject to tolling. *See Harrow v. Dep't of Def.*, No. 23-21, 2023 WL 8509836 (Dec. 8, 2023).

The question presented in *Harrow* is whether § 7703(b)(1)(A)'s 60-day deadline is jurisdictional and thus not subject to tolling. *See* Pet. Br. at i, *Harrow v. Dep't of Defense*, No. 23-21 (July 3, 2023). The Solicitor General's brief opposing certiorari explicitly argued that that deadline is *not* subject to tolling, even if it is nonjurisdictional, because Federal Rule of Appellate Procedure 26(b) categorically precludes tolling of any "petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law." Resp. Br. at 18-19, *Harrow v. Dep't of Defense*, No. 23-21 (Oct. 6, 2023) (quoting Fed. R. App. P. 26(b)(2)).

The Solicitor General's argument in *Harrow* regarding § 7703(b)(1)(A) is indistinguishable from the Eleventh Circuit's *per curiam* decision regarding § 5127(a). She therefore must agree with Petitioner

that the Eleventh Circuit's ruling is not limited to § 5127(a) and instead Rule 26(b)'s preclusive effect would apply to all other generic statutory deadlines to petition for judicial review of agency decisions.

The affected statutory review schemes are too numerous to list in full, but would include:

- 15 U.S.C. § 45(c)'s 60-day deadline for petitions to review Federal Trade Commission orders;
- 15 U.S.C. § 78y(a)(1)'s 60-day deadline for petitions to review Securities and Exchange Commission orders;
- 29 U.S.C. § 660(a)'s 60-day deadline for petitions to review Occupational Safety and Health Review Commission orders;
- 30 U.S.C. § 226-2's 90-day deadline to seek judicial review of the Secretary of the Interior's decisions regarding oil and gas leases;
- 30 U.S.C. § 816's 30-day deadline for petitions to review Mine Safety and Health Review Commission orders;
- 42 U.S.C. § 4915(a)'s 90-day deadline for petitions to review certain Environmental Protection Agency and Federal Aviation Administration orders;
- 47 U.S.C. § 402(c)'s 30-day deadline for petitions to review Federal Communications Commission orders;
- 49 U.S.C. § 521(b)(9)'s 30-day deadline for petitions to review Federal Motor Carrier Safety Administration orders;
- 49 U.S.C. § 1153's 60-day deadline for petitions to review National Transportation Safety Board orders; and

- 49 U.S.C. § 32902(b)'s 59-day deadline for petitions to review Department of Transportation fuel-economy regulations.

And, of course, Rule 26(b)'s preclusive effect would extend to the Administrative Procedure Act's default six-year time limit for seeking judicial review of agency orders that are not covered by a specific statutory scheme. *See* 28 U.S.C. § 2401(a).

These and countless other review schemes are essential for regulated parties seeking judicial recourse against the administrative state, "which now wields vast power and touches almost every aspect of daily life[.]" *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 499 (2010). Like § 5127(a), none of these other statutory review schemes specifically authorizes equitable tolling because "[e]quitable tolling is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods." *Boechler*, 596 U.S. at 208–09 (2022) (citation omitted).

As such, the Eleventh Circuit's interpretation of Rule 26(b) would effectively preclude equitable tolling for *all* statutory schemes to review final agency action.

Whether the Eleventh Circuit correctly interpreted the effect of Rule 26(b) on statutory deadlines is therefore important to the operation of every congressionally enacted scheme providing for judicial review of agency actions. Equitable tolling provides for judicial review where the government misleads individuals to believe for the statutory period's duration that adverse decisions reflect "the considered judgment of an agency faithfully executing the law of the United States[,]" *Bowen*, 476 U.S. at 480, when in fact those decisions were "made on the

basis of a systematic procedural irregularity that rendered them subject to court challenge." *Id.* at 481 (quoting *Heckler*, 742 F.2d at 738); *see also Impact Energy Res., LLC v. Salazar*, 693 F.3d 1239, 1253 (10th Cir. 2012) (Lucero, J. concurring) ("[T]he parade of horribles regarding secret agency decision-making is largely mitigated by the availability of equitable tolling.").

A categorical bar against tolling thus "heightens" this Court's concern that the ever-growing administrative state would further "slip from" judicial review, *Free Enter. Fund*, 561 U.S. at 499. It would encourage the very type of agency misconduct that occurred in this case. An agency could evade judicial review by concealing from the target of an enforcement action a known constitutional defect in its administrative proceedings—here, an undisputed violation of the Appointments Clause under *Lucia*—until the statutory deadline has run.

Consider another example in the rulemaking rather than adjudication context. Suppose DOT secretly "relied on factors which Congress has not intended it to consider[]" in developing hazardous materials regulations. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). It then conceals its arbitrary and capricious process until § 5127(a)'s 60-day judicial-review window closes. Under the Eleventh Circuit's misguided approach, no one could seek judicial review of the agency's unlawful rulemaking.

Rule 26(b)'s preclusive effect also would disproportionately harm lower-income individuals and small businesses that often appear *pro se* in agency proceedings. Such parties lack resources

needed to timely discover agencies' efforts to conceal violations of their rights. It also negates this Court's rulings that filing deadlines to challenge agency's proceedings are nonjurisdictional, and thus subject to tolling.

The question of whether Rule 26(b) precludes equitable tolling of a statutory deadline is thus ripe for review, and this case presents a clean vehicle to conduct such a review. The Eleventh Circuit's *per curiam* decision was dispositive of Petitioner's attempt to seek judicial review. If Petitioner had received equitable tolling until the date of discovery, its petition for review would have been timely. But the court below dismissed the petition as untimely based on its determination that Rule 26(b) categorically precludes equitable tolling of a deadline for petitions to review the order of an agency. *See* App.4a–5a. The question is thus squarely presented for this Court's consideration.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT

The decision below conflicts with this Court's precedent that a nonjurisdictional statutory filing deadline is subject to equitable tolling absent clear congressional intent to the contrary, *Boechler*, 596 U.S. at 209. Rule 26(b) cannot supply congressional intent to preclude tolling for the simple reason that it was not enacted by Congress. By relying on that court-created rule to preclude tolling, the decision below contradicts this Court's precedent.

Irwin v. Department of Veterans Affairs, 498 U.S. 89, 95–96 (1990), "sets out the framework for deciding the applicability of equitable tolling in suits against

the Government." *United States v. Wong*, 575 U.S. 402, 407 (2015). That framework recognizes that "[e]quitable tolling is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods." *Boechler*, 596 U.S. at 208–09 (citation omitted). "Because [courts] do not understand Congress to alter that backdrop lightly, nonjurisdictional limitations periods are presumptively subject to equitable tolling." *Id.* at 209 (citing *Irwin*, 498 U.S. at 95–96). This presumption is "reinforced" when Congress enacted a deadline after *Irwin*, because it "was likely aware that courts[]" would interpret the relevant "timing provision[]" to "apply the presumption." *Holland v. Florida*, 560 U.S. 631, 645–46 (2010). A reinforced presumption applies here because 49 U.S.C. § 5127(a) was enacted after *Irwin* as part of the Safe, Accountable, Flexible Efficient Transportation Equity Act of 2005, Pub. L 109-59, title VII, § 7123(b), 119 Stat. 1907, Aug. 10, 2005.

"Congress, of course, may provide otherwise if it wishes to do so." *Irwin*, 498 U.S. at 96. For example, it can make a statute of limitations jurisdictional, but that "requires its own plain statement[.]" *Wong*, 575 U.S. at 420. This Court has "repeatedly held that filing deadlines ordinarily are not jurisdictional[,]" and that a particular time bar may be treated as jurisdictional only if Congress "clearly stated" so. *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153–154 (2013) (cleaned up). The panel below did not suggest that 49 U.S.C. § 5127(a)'s deadline is jurisdictional.

Nonjurisdictional statutory deadlines like that in § 5127(a) are presumed to be subject to equitable

tolling. *Boechler*, 596 U.S. at 208–09. This presumption may be rebutted only if the statutory text or structure reveals that "Congress did not intend the 'equitable tolling' doctrine to apply[.]" *United States v. Brockamp*, 519 U.S. 347, 354 (1997). Hence, "limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute." *Young v. United States*, 535 U.S. 43, 49 (2002) (cleaned up). This Court has consistently held that ordinary statutory deadlines for petitions to review an agency's decision are subject to equitable tolling.

In *Bowen*, 476 U.S. 467, this Court considered whether 42 U.S.C. § 405(g)'s 60-day deadline for seeking judicial review of a final decision of the Social Security Administration was subject to equitable tolling. That statutory deadline reads:

> Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, … may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

42 U.S.C. § 405(g).

Even though Rule 26(b) was in effect, this Court still permitted equitable tolling of the deadline, "conclud[ing] that application of a 'traditional equitable tolling principle' to the 60-day requirement of § 405(g) is fully 'consistent with the overall congressional purpose' and is 'nowhere eschewed by

Congress.'" *Id.* at 480 (quoting *Honda v. Clark*, 386 U.S. 484, 501 (1967)).

The decision below cannot be reconciled with *Bowen*. A reviewable decision by the SSA is no less an "order of an administrative agency, board, commission, or officer of the United States" under Rule 26(b) than a DOT decision reviewable under § 5127(a). The Eleventh Circuit's categorical rule—that deadlines to petition for judicial review of such decisions are not subject to tolling—squarely contradicts *Bowen*.

The decision below also breaks with this Court's more recent decision in *Boechler*, 596 U.S. 199. There, a law firm sought equitable tolling after missing the 30-day deadline under 26 U.S.C. § 6330(d)(1) to petition the Tax Court to review IRS's assessment of a levy. The Eighth Circuit held tolling was unavailable. But this Court reversed because nothing in the statutory text or structure indicated that Congress intended to foreclose tolling, it held, "Section 6330(d)(1)'s 30-day time limit to file a petition for review of [the agency's] determination is an ordinary, nonjurisdictional deadline subject to equitable tolling." *Id.* at 211.

The same conclusion obtains with respect to 49 U.S.C. § 5127(a)'s deadline for petitions to review DOT final actions because nothing in that statute's text or structure suggests that Congress intended to preclude equitable tolling. Section 5127(a)'s 60-day deadline is not written in "emphatic form." *Kontrick v. Ryan*, 540 U.S. 443, 458 (2004) (citation omitted). Nor does it set forth "limitations in a highly detailed technical manner," that "cannot easily be read as containing implicit exceptions." *See Brockamp*, 519

U.S. at 350. Nor does "the nature of the underlying subject" here result in equitable tolling that creates "serious administrative problems" for the agency. *Id.* at 352 (declining to toll tax-collection deadline under 26 U.S.C. § 6511).

Section 5127(a) simply states that a person "may petition for review of the final action" in the courts of appeal "not more than 60 days after [an agency's] action becomes final." It is remarkably similar to § 6330(d)(1) at issue in *Boechler*, which states that a person "may, within 30 days of [an agency's] determination under this section, petition the Tax Court for review[.]" 26 U.S.C. § 6330(d)(1). It is also not materially different from § 405(g) at issue in *Bowen*, which states that a person "may obtain a review of [the agency's] decision by a civil action commenced within sixty days[.]" 42 U.S.C. § 405(g). Section 5127(a) contains an ordinary, nonjurisdictional deadline that is subject to equitable tolling under this Court's precedent.

The Eleventh Circuit's reliance on Rule 26(b) to "preclude flexibility" contradicts this Court's precedent that only *congressional* intent can preclude tolling of a nonjurisdictional statutory deadline. *See Boechler*, 142 S. Ct. at 208–09; *Brockamp*, 519 U.S. at 354; *Irwin*, 498 U.S. at 95–96. Rule 26(b) is a self-governing rule of procedure adopted by this Court in 1967 under the Rules Enabling Act. *See* 28 U.S.C. § 2071–77.[3] And it has not been amended since.

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[3] The Rule Enabling Act delegates to this Court authority to "prescribe general rules of practice and procedure and rules of evidence for cases in the United

Because it was not enacted by Congress through bicameralism and presentment, Rule 26(b) cannot be the basis of *congressional* intent in enacting a statutory deadline.

The Eleventh Circuit's departure from this Court's precedent regarding *statutory* deadlines was based on an erroneous reading of *Nutraceutical Corp.*, 139 S. Ct. 710, which merely held that Rule 26(b) precluded the tolling of a *court-adopted* deadline, *id.* at 714–15.

Nutraceutical concerned Federal Rule of Civil Procedure 23(f)'s 14-day deadline to appeal a denial of class certification. *Id.* at 713. That 14-day deadline was adopted by this Court in 2009, *see supra* note 2, and thus "is found in a procedural rule, *not a statute*." *Id.* at 714 (emphasis added). It was therefore appropriate for this Court to rely on Federal Rule of Appellate Procedure 26(b), another court-adopted rule that "single[s] out Civil Rule 23(f) for inflexible treatment[,]" to conclude the 14-day deadline is not subject to tolling. *Id.* at 715. By contrast, Rule 26(b) does not and cannot "single out" § 5127(a) for inflexible treatment because a rule adopted by this

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States district courts … and courts of appeals." 28 U.S.C. § 2072. The Act requires this Court to transmit any rule it prescribes to Congress no later than May 1 of the year in which such rule would take effect. *Id.* § 2074. A rule take effect automatically unless Congress enacts legislation to reject, modify, or delay it. *Id.* Federal Rule of Appellate Procedure 26(b) was adopted by this Court on Dec. 4, 1967, transmitted to Congress by the Chief Justice on Jan. 15, 1968, and became effective on July 1, 1968.

Court in 1967 cannot rebut *Irwin*'s background presumption that *Congress* intended to incorporate traditional principles of equitable tolling when it enacted § 5127(a) in 2005.

Nor does Rule 26(b)'s text purport to rebut such presumption of congressional intent. It first states: "For good cause, the court may extend the time prescribed *by these rules*[,]" Fed. R. App. P. 26(b) (emphasis added), thus limiting its reach to deadlines established in procedural rules adopted by this Court. It then provides an express caveat to this power: "But the court may not extend the time to file[,]" among other things, "a petition to … review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law." *Id*. Because the power to extend reaches only deadlines "prescribed by these rules[,]" the caveat to that power is likewise limited to those same deadlines. *Id*. The 60-day deadline of § 5127(a) is not "prescribed by these rules[,]" *id.*, but rather was enacted by Congress. The procedural rules do not authorize the extension of any deadline enacted by Congress. By the same token, neither can they bar the tolling of such deadlines—certainly not when Congress intended (as courts must presume) tolling to be available.

The relevant question is whether Congress meant for § 5127(a) to be subject to equitable tolling. As with any other question of statutory interpretation, this Court's precedent makes clear that the answer lies in the text and structure of the *statute*. The decision below contradicts that precedent by relying on a court-created rule to override the presumption of congressional intent permitting equitable tolling.

III. THE DECISION BELOW CONFLICTS WITH OTHER CIRCUITS

The Eleventh Circuit's break with this Court's precedent unsurprisingly also conflicts with multiple courts of appeals that have dutifully followed that precedent to find ordinary statutory deadlines seeking judicial review of agency orders in a variety of contexts to be subject to equitable tolling.

The Second, Eighth, and Tenth Circuits have held that the APA's default six-year statute of limitations under 28 U.S.C. § 2401(a) to seek judicial review of final agency action is subject to equitable tolling. *N.D. Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 55 F.4th 634, 641–42 (8th Cir. 2022), *cert. granted on other grounds sub nom. Corner Post, Inc. v. Bd. of Governors, FRS*, 216 L. Ed. 2d 1312 (Sept. 29, 2023); *DeSuze v. Ammon*, 990 F.3d 264, 267 (2d Cir. 2021); *Chance v. Zinke*, 898 F.3d 1025, 1034 (10th Cir. 2018). The Eleventh Circuit's decision that Rule 26(b) precludes tolling for deadlines to petition for judicial review of any order of an agency, board or commission squarely conflicts with these circuits.

The D.C. Circuit recently overruled its own precedent to join the First, Seventh, Ninth, and Tenth Circuits to hold that 5 U.S.C. § 7703(b)(2)'s 30-day deadline to seek review of MSPB's decision on a discrimination claim is subject to equitable tolling. *Robinson v. Dep't of Homeland Sec. Off. of Inspector Gen.*, 71 F.4th 51, 55–58 (D.C. Cir. 2023); *Montoya v. Chao*, 296 F.3d 952, 957 (10th Cir. 2002); *Blaney v. United States*, 34 F.3d 509, 513 (7th Cir. 1994); *Nunnally v. MacCausland*, 996 F.2d 1, 4 (1st Cir. 1993) (per curiam); *Washington v. Garrett*, 10 F.3d 1421, 1437 (9th Cir. 1993). The Solicitor General's

Harrow brief makes clear that the Eleventh Circuit's interpretation of Rule 26(b) would preclude such tolling, thus creating an irreconcilable split.

The Tenth Circuit recognizes that the Mineral Leasing Act's 90-day statutory deadline to seek review of the Secretary of Interior's decision regarding oil and gas leases is subject to equitable tolling. *Impact Energy Res.*, 693 F.3d at 1247. Judge Lucero emphasized that the negative impacts of "secret agency decision-making is largely mitigated by the availability of equitable tolling." *Id.* at 1253 (Lucero, J. concurring). Such tolling and mitigation of the effect of "secret agency decision-making" would not be possible under the Eleventh Circuit's erroneous application of Rule 26(b).

Perhaps the starkest conflict is with the Second Circuit's holding that 49 U.S.C. § 32909(b)'s 59-day deadline to seek review of DOT's fuel-economy regulations is subject to tolling. *NRDC*, 894 F.3d at 107. The deadlines in § 5127(a) and § 32909(b) both govern filing deadlines for review of DOT regulations by a court of appeals. Both use similar language. *Compare* 49 U.S.C. § 5127(a) ("The petition must be filed not more than 60 days after the Secretary's action becomes final.") *with id.* § 32909(b) ("The petition must be filed not later than 59 days after the regulation is prescribed[.]"). The Second Circuit's decision that "Section 32909 is subject to equitable tolling[,]" *NRDC*, 894 F.3d at 107, thus squarely conflicts with the Eleventh Circuit's decision holding that § 5127(a) is "not subject to equitable tolling." App.4a–5a.

The only federal appellate court on the Eleventh Circuit's side of the split is the Federal Circuit in

Harrow, 2023 WL 1987934, at *1, which this Court is currently reviewing. While the core holding in that case was based on the Federal Circuit's belief that the statutory deadline at issue in that case was jurisdictional, and thus not susceptible to tolling, it also said in passing that Rule 26(b) "prohibit[s] the court from extending or reopening the time to petition for review 'unless specifically authorized by law.'" *Id.* (quoting Fed. R. App. P. 26(b)).

A majority of circuits follow this Court's precedent to hold that ordinary, nonjurisdictional deadlines to seek judicial review of agency action are subject to equitable tolling. *Boechler*, 596 U.S. at 209. The decision below belongs to an emerging minority that contradicts this Court's precedent and should be snuffed out now. Review is warranted to resolve this split and to ensure this Court's precedent is followed.

CONCLUSION

For the foregoing reasons, we respectfully urge the Court to grant this petition. In the alternative, should the Court elect to resolve the Rule 26(b) issue in *Harrow*, it should hold this petition pending the decision in *Harrow*, and then dispose of this petition as appropriate in light of that decision.

Respectfully Submitted,

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