No. 23-870

In the
Supreme Court of the United States

METAL CONVERSION TECHNOLOGIES, LLC,
Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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Question Presented

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.

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Interest of Amicus Curiae[1]

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for limited constitutional government, private property rights, and individual freedom. PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law.

This case concerns the ability of plaintiffs to bring claims challenging unlawful agency action. PLF has represented multiple parties in such a position and has consistently argued against courts unnecessarily dismissing meritorious claims. *See, e.g.*, *Sackett v. E.P.A.*, 566 U.S. 120 (2012); *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590 (2016). Under the Eleventh Circuit's inflexible approach to limitations periods for challenging agency action, individuals who are unfairly prevented from filing on time will have no opportunity for their claims to be heard. Finally, PLF has recently litigated a case at this Court concerning whether a time limit was jurisdictional, an issue that is presented here. *Wilkins v. United States*, 598 U.S. 152 (2023).

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[1] Counsel of record for all parties received notice of Amicus Curiae's intention to file this brief at least 10 days prior to its due date. Sup. Ct. R. 37.2. No person or entity, other than Amicus Curiae and its counsel, authored the brief in whole or in part or made any monetary contribution intended to fund the preparation or submission of the brief. Sup. Ct. R. 37.6.

Introduction and Summary of Argument

Federal Rule of Appellate Procedure 26(b)(2) states that a "court may not extend the time to file … a notice of appeal from or a 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." Relying on this judicially adopted rule, the Eleventh Circuit held that Petitioner MCT's petition for review was untimely and not subject to judicial review. App. 5a (citing *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710, 714–15 (2019)).

In reaching its decision, however, the Eleventh Circuit failed to analyze whether equitable extensions are "specifically authorized" by the underlying statute. As this Court has repeatedly held, Congress does not need to use "magic words" to authorize equitable extensions to a statutory time limit. *See Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199, 203 (2022). Instead, this Court recognizes that Congress legislates against the background of common-law adjudicatory principles, *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014), and thus assumes that Congress allows for equitable extensions unless the statutory language indicates otherwise, *Boechler*, 596 U.S. at 209.

By failing to analyze the underlying statute here, the Eleventh Circuit failed to follow this Court's precedents and failed to follow the language of Rule 26(b)(2). The petition for writ of certiorari should be granted.

Argument

I. Equitable tolling is authorized by the underlying statute at issue here.

The Eleventh Circuit's reliance on *Nutraceutical Corp.* was misplaced because the rule this Court analyzed there is fundamentally different than the rule at issue here. In *Nutraceutical Corp.*, this Court analyzed Rule 23(f), which does not allow for any exceptions to the time for filing a notice of appeal for an order granting or denying class action certification. 139 S. Ct at 715. Indeed, this Court noted that "the Federal Rules of Appellate Procedure *single out* Civil Rule 23(f) for inflexible treatment." *Id.* (emphasis added). But unlike the inflexible and singled out Rule 23(f), Rule 26(b)(2) is flexible and allows for extensions if they are "specifically authorized by law." Fed. R. App. P. 26(b)(2). The Eleventh Circuit, however, failed to analyze whether the underlying statute allowed equitable tolling, instead issuing a conclusory statement that equitable tolling was not authorized by law. *See* App. 5a.

To determine whether a statute allows for equitable tolling, courts apply the traditional tools of statutory construction. *See Boechler*, 596 U.S. at 203. The nature of a time limit does not require Congress to use "magic words." *Id.* (citation omitted). And this Court has emphasized that "common-law adjudicatory principles" supply the relevant "background" against which Congress enacts a "statute[] of limitations." *Lozano*, 572 U.S. at 10 (citation omitted).

When analyzing whether a statutory time limit allows for equitable tolling, courts must first determine whether the limitation is jurisdictional

because a jurisdictional requirement does not allow for any exceptions. *Boechler*, 596 U.S. at 203. But Courts do not assume that in creating a mundane time limit, Congress made it a jurisdictional requirement. *Wilkins*, 598 U.S. at 158. Instead, absent a clear statement to the contrary, courts assume that most time bars are nonjurisdictional. *Id.*

Here, the time limit at issue does not contain a clear statement that it is jurisdictional. 49 U.S.C. § 5127. Indeed, the jurisdictional grant is separate from the time limit, which indicates that the time limit is nonjurisdictional. *See* 49 U.S.C. §§ 5127(a), 5127(c); *see also Wilkins*, 598 U.S. at 158. And the statutory language is similar to the statutes of limitations in *Boechler* and *Wilkins*, both of which are nonjurisdictional. *Compare* 49 U.S.C. § 5127*, with* 26 U.S.C. § 6330(d)(1) *and* 28 U.S.C. § 2409a(g). Thus, 49 U.S.C. § 5127 has no jurisdictional impediments to equitable tolling.

Furthermore, there is no indication that the statute forbids courts from tolling the time limit to challenge the order. As this Court has recognized, equitable tolling is a traditional feature of American jurisprudence and courts "do not understand Congress to alter that backdrop lightly[.]" *Boechler*, 596 U.S. at 209. Thus, just as Congress must indicate that a statute of limitations is jurisdictional, it must also indicate if a court cannot toll the time limit in appropriate circumstances.

Here, the time limit in 49 U.S.C. § 5127(a) has similar features to the time limit at issue in *Boechler*, which this Court held was subject to equitable tolling. *See Boechler*, 596 U.S. at 209–10. Importantly, the time limit in 49 U.S.C. § 5127(a) is not written in

emphatic form with detailed or technical language. *Compare* 49 U.S.C. § 5127(a), *with Boechler*, 596 U.S. at 210 (citing 26 U.S.C. § 6330(d)(1)). Nor does the time limit list any exceptions, which usually indicates that Congress intended only the express limits to apply. *Id.*

Thus, the Eleventh Circuit's decision contradicts 49 U.S.C. § 5127(a). To understand whether equitable tolling is "specifically authorized by law," a court must first analyze the underlying statute. The Eleventh Circuit, however, failed to engage in such an analysis. This Court should grant the Petition to reverse the lower court decision.

II. Federal Rule of Appellate Procedure 26(b)(2) does not replace the equitable tolling allowed by the underlying statute.

Recently, in *Harrow v. Department of Defense*, S. Ct. No. 23-21 (Oct. 6, 2023), the federal government argued that because Fed. R. App. P. 26(b)(2) was adopted in 1968, all applicable statutes adopted after that date necessarily incorporate the restriction on tolling into the statute. Brief for the Respondent at 43, *Harrow*, S. Ct. No. 23-21. But that argument misunderstands the clear statement rule and the presumption in favor of equitable tolling.

Although this Court first applied the presumption in favor of equitable tolling in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95–96 (1990), and first articulated the clear statement rule in *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515 (2006), that does not mean that it was only after those cases that Congress began to incorporate those presumptions into its

legislation. As Justice Barrett said during oral argument in *Wilkins*, the clear statement rule (and similarly the presumption in favor of equitable tolling) was not an announcement by this Court to Congress. Transcript of Oral Argument at 25, *Wilkins*, S. Ct. No. 21-1164 (Nov. 30, 2022). Rather, those rules are "approximating what Congress had been doing all along[.]" *Id.* In other words, this Court's cases were not saying "Congress, you have to … line up behind what we say now" but rather those cases reflect an understanding that "we weren't quite getting what [Congress was] doing and [whether Congress was] intending to establish jurisdictional rules." *Id.*

The clear statement rule and the presumption in favor of equitable tolling are an understanding of Congress's intent about statutes of limitations. This Court recognizes that only rarely does Congress intend to adopt a time limit that does not incorporate the ordinary principles of American jurisprudence. Unless Congress states otherwise, this Court assumes that Congress intended to incorporate equitable tolling into a statutory time limit.

Indeed, *Boechler* contradicts the federal government and the Eleventh Circuit's argument about Rule 26(b)(2). *See Boechler*, 596 U.S. at 204 (citing 26 U.S.C. § 6330(d)(1)). The time limit at issue in *Boechler* states: "The person may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter)." 26 U.S.C. § 6330(d)(1). That is certainly "a notice of appeal from … an administrative agency, board, commission, or officer of the United States." Fed. R. App. P. 26(b). And Congress first adopted the

time limit in 1998, Pub. L. No. 105–206, Title III, § 3401(b), 112 Stat. 685, 747 (July 22, 1998), and readopted the provision during several different amendments to the Internal Revenue Code. Yet this Court still held that the time limit allows for equitable tolling. *Boechler*, 596 U.S. at 211.

Thus, it does not matter whether Congress adopted a statute after this Court adopted Fed. R. App. P. 26(b). Congress's default is to allow equitable tolling and if it does not want to allow equitable tolling then it will explicitly say so. Contrary to the federal government's argument in *Harrow*—and the Eleventh Circuit's decision below—Rule 26(b) cannot replace the underlying statute and prevent equitable tolling when Congress allowed it.

III. The Eleventh Circuit's reasoning would prevent courts from extending the time limits for challenging nearly every agency action, even when unfair or unusual circumstances cause plaintiffs to file out of time.

The Eleventh Circuit's rationale has far-reaching consequences. Although the federal government in *Harrow* has suggested that Rule 26(b)(2)'s reach may be limited to those statutes passed after the rule was adopted, Brief for the Respondent at 43, *Harrow*, S. Ct. No. 23-21, the decision below places no such limits, *See* App. 5a. Indeed, courts around the country have applied Rule 26(b)(2) to various agency actions.

If the Eleventh Circuit is correct, then courts are prevented from tolling a time limit for nearly any challenge to agency action. Courts have speculated that Rule 26(b)(2) applies to challenges to decisions by

the Forest Service. *Bensman v. U.S. Forest Serv.*, 408 F.3d 945, 964 (7th Cir. 2005) ("The district court expressed doubt that the doctrines of equitable tolling and equitable estoppel could be applied to decisions of the Forest Service[.]"). Others have held that the Rule applies to appeals from decisions of the Department of Agriculture. *Reinhart v. U.S. Dep't of Agric.*, 39 F. App'x 954, 956 (6th Cir. 2002) ("Despite the equities that might otherwise allow Reinhart to pursue his appeal, a statutory provision that sets the time limit for seeking review of an administrative order" is not subject to equitable tolling[.] (citing Fed. R. App. P. 26(b)(2))). And the D.C. Circuit has held that the Rule applies to petitions for review of the Federal Election Commission. *O'Hara v. Fed. Election Comm'n*, No. 04-1106, 2004 WL 1465681, at *1 (D.C. Cir. June 29, 2004).

Even if courts narrowly interpret Rule 26(b)(2) to apply only to literal "notices of appeal" or "petitions,"—rather than other types of agency actions—there are still several agency actions that FRAP 26(b) would cover. Under the Hobbs Act, 28 U.S.C. §§ 2341–2342, any challenge to the Federal Communications Commission, the Federal Maritime Commission, the Atomic Energy Commission, the Surface Transportation Board, the Maritime Administration, the Secretary of Agriculture, the Secretary of Transportation, and the Secretary of Housing and Urban Development are petitions of review filed with the Court of Appeals.

And in the Tenth Circuit there is no distinction between notices of appeal, petitions, or any other type of review of agency actions. All actions under the APA are treated as appeals from the agency and styled as

petitions for review. *See Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560 (10th Cir. 1994); Sam Kalen, *Federal Administrative Procedure Act Claims: The Tenth Circuit and the Wyoming District Court Should Fix the Confusion Attendant with Local Rule 83.7.2*, 11 Wyo. L. Rev. 513 (2011). Under *Olenhouse*, district courts within the Tenth Circuit apply the Federal Rule of Appellate Procedure. 42 F.3d at 1580. Thus, under the Eleventh Circuit's reading of Rule 26(b)(2), courts in the Tenth Circuit are prevented from extending the time limit in any challenge to agency action for any reason.

A stringent application of Rule 26(b)(2) is likely to negatively affect pro se litigants in vulnerable positions. *Fedora v. Merit Sys. Prot. Bd.*, 868 F.3d 1336, 1340 (Fed. Cir. 2017) (Wallach, J., dissenting from denial of rehearing en banc) (noting that the issue of whether courts can equitably extend deadlines "more often affects pro se litigants than others"). Several courts have applied the Rule to prevent review of a decision by the Board of Immigration Appeals, even when the noncitizen timely filed a petition for review, but filed it in the district court rather than the court of appeals. *Ogunbode v. Barr*, 780 F. App'x 628, 632 (10th Cir. 2019); *see also Guedes v. Mukasey*, 317 F. App'x 16, 17 (1st Cir. 2008).[2]

The judges on the Federal Circuit have debated whether the court can toll the time limit for filing a

[2] The Second Circuit recognized the inequities of a similar situation but instead of holding that the time period could be tolled, it treated the filing of the petition of the district court as if it had been filed in the court of appeals. *Paul v. I.N.S.*, 348 F.3d 43, 45 (2d Cir. 2003).

petition for review from a decision by the Merit Systems Protection Board, *Fedora*, 868 F.3d at 1340 (Wallach, J., dissenting from denial of rehearing en banc), an issue that this Court will review this term, *Harrow v. Department of Defense*, S. Ct. No. 23-21. Under the Federal Circuit's current precedent, the time limit for filing a petition for review cannot be extended for any reason. This has resulted in courts dismissing petitions for review even when "disastrous typhoons" caused the petitioner to delay filing. *Pinat v. Office of Pers. Mgmt*., 931 F.2d 1544, 1546 (Fed. Cir. 1991). Under the 11th Circuit's reasoning here, plaintiffs and petitioners in similar extreme circumstances would be prevented from having their case heard on the merits, even if they missed out on the filing deadline by one day.

Moreover, in addition to preventing equitable tolling, the Eleventh Circuit's reasoning would prevent equitable estoppel in the cases where Federal Rule of Appellate Procedure 26(b) applies. That means that even if the government intentionally mislead someone into delaying the filing of a challenge, the person would have no recourse for filing out of time. Even in cases where this Court has held that equitable tolling is not available, it has been reluctant to prevent equitable estoppel to ensure that deliberate misconduct is not rewarded. *See United States v. Beggerly*, 524 U.S. 38, 49 (1998).

Congress has not indicated that it wants an inflexible approach to the dozens of time limits for challenging agency action. Instead, as this Court has always recognized, Congress has passed statutes against the background of common-law adjudicatory principles, and has allowed for time limits to be

extended when the plaintiff or petitioner is prevented from filing on time due to unusual or unfair circumstances. This Court should grant the petition to ensure that challenges to agency action are not inappropriately dismissed.

IV. At a minimum, this Court should hold the petition pending the decision in *Harrow v. Department of Defense.*

Because this Court has granted the petition in *Harrow*, it should—at a minimum—hold the *Metal Conversion Technologies* petition until *Harrow* is decided. As the Petitioners in *Harrow* have argued, this Court need not reach the Fed. R. App. P. 26(b)(2) issue to decide that case. Still, it would be appropriate for the Court to wait until a decision in *Harrow* to decide whether to grant the petition here.

Conclusion

The petition for writ of certiorari should be granted or held until this Court decides *Harrow v. Department of Defense*.

DATED: March 2024.

Respectfully submitted,

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