No. 23-870

In the Supreme Court of the United States

METAL CONVERSION TECHNOLOGIES, LLC, PETITIONER

v.

DEPARTMENT OF TRANSPORTATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether 49 U.S.C. 5127(a), which requires that petitions for review of certain orders issued by the Secretary of Transportation "must be filed not more than 60 days after the Secretary's action becomes final," is a mandatory claims-processing rule not subject to equitable tolling.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a) is not published in the Federal Reporter but is available at 2023 WL 4789084. The final order of the Pipeline and Hazardous Materials Safety Administration (Pet. App. 8a-31a) is unreported. The decision of the agency's Chief Counsel (Pet. App. 32a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 2023. A petition for rehearing was denied on October 12, 2023 (Pet. App. 1a-2a). On December 27, 2023, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including February 9, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "[T]o protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material," 49 U.S.C. 5101, Congress has empowered the Secretary of Transportation to designate materials as "hazardous" and to prescribe regulations governing their "safe transportation," 49 U.S.C. 5103(b)(1).

Regulations issued pursuant to that authority generally require, among other things, that hazardous materials must be accompanied by appropriate documentation; that the packing, shipping, and transporting of those materials must comply with requirements specific to the type of material at issue; and that shipments must be marked as containing hazardous material. 49 C.F.R. 171.2(b), (e), and (i), 172.200(a), 172.300(a), 172.400, 173.22. Lithium-ion batteries are among the hazardous materials covered by the regulations. See generally 49 C.F.R. 173.185. Such batteries are hazardous "because they can overheat and ignite in certain conditions and, once ignited, can be especially difficult to extinguish." *Hazardous Materials; Transportation of Lithium Batteries*, 72 Fed. Reg. 44,930, 44,930 (Aug. 9, 2007).

The Secretary has the authority to investigate potential violations of the regulations, issue compliance orders, and impose civil penalties. See 49 U.S.C. 5121(a), 5123(a). A regulated party subject to such an order or penalty may petition for judicial review in the appropriate court of appeals "not more than 60 days after the Secretary's action becomes final." 49 U.S.C. 5127(a).

2. In April 2017, a train car caught fire and exploded at a rail yard in Houston, Texas. Pet. App. 33a-34a. An investigation by the Pipeline and Hazardous Materials Safety Administration (PHMSA), a subagency within

the Department of Transportation, determined that the material in the train car originated from petitioner. *Id.* at 34a. The shipment contained, among other things, lithium-ion batteries placed in 55-gallon metal drums. *Id.* at 35a-36a, 54a-56a. The bills of lading failed to indicate that hazardous materials were inside the drums, however, and there was no indication that the drums were marked with hazardous material labels. *Id.* at 36a, 55a. Further investigation revealed that the truck driver who originally picked up the shipment from petitioner's facility was not informed that the shipment contained hazardous materials, did not see any such labelling on the shipment, and was not qualified to transport such material. *Id.* at 36a-37a, 47a-48a, 55a.

PHMSA's investigation also revealed that petitioner had made ten other shipments between November 2015 and April 2017, none of which had bills of lading noting that they contained hazardous materials. Pet. App. 37a-40a, 46a-47a.

PHMSA issued a notice proposing to assess penalties against petitioner for eleven violations of the regulations governing shipment of lithium batteries—one violation for each of the eleven shipments the investigation identified. Pet. App. 33a. After settlement discussions failed, the PHMSA Chief Counsel considered the administrative record, including the PHMSA's notice, the inspection report, and petitioner's reply, and issued an order finding petitioner responsible for four violations. *Id.* at 59a-66a. For those violations, the Chief Counsel assessed a total penalty of $131,456. *Id.* at 69a.

3. In December 2021, petitioner took a written administrative appeal of the Chief Counsel's determination. See 49 C.F.R. 107.1 and 107.325(b). Petitioner did not contest the factual and legal findings in the Chief

Counsel's decision, but asserted that it was not the proper respondent, that its violations were not "knowing," and that the assessed civil penalty should have been reduced. C.A. R.E. 2.

The appeal was ultimately referred to PHMSA's Chief Safety Officer, Howard W. McMillan, for final adjudication. The record in this case does not contain any information concerning the circumstances of McMillan's appointment to his position because petitioner never argued before the agency that any PHMSA officials were improperly appointed. But petitioner appears to accept that McMillan was duly appointed to his office by the Secretary of Transportation not later than July 15, 2022. Pet. 7 & n.1; see U.S. Const. Art. II, § 2, Cl. 2 (authorizing the appointment of "inferior" officers by Heads of Departments when authorized by law).

On July 25, 2022, the Chief Safety Officer issued a final decision affirming the Chief Counsel's decision.[1] Pet. App. 8a. PHMSA sent the Chief Safety Officer's decision to petitioner's counsel by certified mail on August 2, 2022, see C.A. Doc. 11-3, at 25 (Feb. 14, 2023), and that mailing constituted service on petitioner, see 49 C.F.R. 105.35(a)(1).

4. On December 15, 2022—135 days after PHMSA's final order was served—petitioner filed a petition for review. Pet. App. 4a.

Shortly after the petition for review was docketed, the court of appeals issued a *sua sponte* order directing the parties to file simultaneous cross-briefs addressing whether the petition was timely filed. Pet. App. 7a. In response, the government provided documentation

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[1] The Chief Safety Officer reduced the penalty by $2 to "facilitate a 12-month payment plan without a repeating decimal." Pet. App. 31a & n.27.

demonstrating proper service of the Chief Safety Officer's decision, as well as evidence documenting delivery of that decision to petitioner's then-counsel. C.A. Doc. 11-3, at 25, 27-28. As relevant here, petitioner asserted that Section 5127(a)'s 60-day time limit is not jurisdictional and is subject to equitable tolling. C.A. Doc. 12-1, at 10-12 (Feb. 14, 2023). Petitioner further contended that equitable tolling was appropriate because it had learned in October 2022 that the Chief Safety Officer was an inferior officer not properly appointed under the Appointments Clause of the Constitution, and had filed its petition for review 58 days after learning of that defect. *Id.* at 12-20.

The court of appeals dismissed the petition as untimely in an unpublished per curiam order. Pet. App. 3a-5a. The order explained that even assuming that petitioner is correct that Section 5127(a)'s time limit is a nonjurisdictional claims-processing rule, such rules are not subject to equitable tolling where Federal Rule of Appellate Procedure 26(b)(2) applies. Pet. App. 4a-5a. That rule provides that a court of appeals "may not extend the time to file * * * 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." Fed. R. App. P. 26(b). The court further explained that equitable tolling of the deadline under Section 5127(a) "is not 'specifically authorized by law.'" Pet. App. 5a (quoting Fed. R. App. P. 26(b)(2)).

5. Petitioner sought rehearing en banc, which the court of appeals denied with no judge requesting a poll. Pet. App. 2a.

ARGUMENT

The court of appeals held that 49 U.S.C. 5127(a), which provides that a petition for review of certain orders of the Department of Transportation must be filed "not more than 60 days" after the order becomes final, is a mandatory claims-processing rule not subject to equitable tolling. That decision is correct and does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. a. Equitable tolling is a "common-law adjudicatory principle[]," *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 10 (2014) (citation omitted), that "derive[s] from the traditional power of the courts to 'apply the principles of equity jurisprudence,'" *California Pub. Emps.' Ret. Sys.* v. *ANZ Sec., Inc.*, 582 U.S. 497, 507 (2017) (citation and ellipsis omitted). It "permits a court to pause a statutory time limit 'when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.'" *Ibid.* (citation omitted). Nevertheless, this Court has recognized that "some claim-processing rules are 'mandatory'" and not subject to equitable tolling or other judicial modification. *Nutraceutical Corp.* v. *Lambert*, 139 S. Ct. 710, 714 (2019) (citation omitted).

The availability of equitable tolling under any particular statute "is fundamentally a question of statutory intent." *Lozano*, 572 U.S. at 10. In many cases, "common-law adjudicatory principles" supply the relevant "background" against which Congress enacts a time limit. *Ibid.* (citation omitted). When that is so, this Court has presumed that Congress incorporated equitable tolling into the statute. See *id.* at 11; see also *Boechler, P.C.* v. *Commissioner*, 596 U.S. 199, 208-209 (2022); *Irwin* v.

Department of Veterans Affairs, 498 U.S. 89, 95-96 (1990).

Petitioner has not identified any common-law or historical tradition of treating statutory deadlines for filing a petition for review in a court of appeals as subject to equitable tolling. But even assuming such a presumption once existed for those deadlines, it is not the relevant background rule today. In 1968, this Court adopted the Federal Rules of Appellate Procedure, which specifically prohibit courts from extending the time for filing in the court of appeals either "a notice of appeal" of a district court decision, subject to a specified exception, or "a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency," subject to an exception for extensions that are "specifically authorized by law." Fed. R. App. P. 26(b); Fed. R. App. P. 26(b) (1968). Rule 26(b) thus places the time limits for petitions for review of agency action on similar footing with notices of appeal, which are not subject to equitable tolling, as this Court has long recognized. See *Bowles* v. *Russell*, 551 U.S. 205, 209-213 (2007). For either time limit, Rule 26(b) precludes courts of appeals from applying a common-law presumption of equitable-tolling to the time for filing. And with respect to petitions for review of agency action, a court of appeals may extend such a deadline only if "specifically authorized by law." Fed. R. App. P. 26(b); see *Nutraceutical*, 139 S. Ct. at 716.

Rule 26(b) formed part of the relevant backdrop in 2005 when Congress enacted 49 U.S.C. 5127(a). See Pub. L. No. 109-59, Tit. VII, § 7123(b), 119 Stat. 1907; Fed. R. App. P. 26(b)(2) (2002). In that statute, Congress prescribed the time for filing a petition for review of an action of the Secretary of Transportation under

the hazardous material transport statute, requiring that the petition "must be filed not more than 60 days after the Secretary's action becomes final." 49 U.S.C. 5127(a). Because Rule 26(b) had displaced any common-law equitable tolling that might have been thought applicable to that kind of time limit, any presumption that Congress incorporated equitable tolling into the statute does not apply. Instead, the question is whether Congress specifically authorized equitable tolling in Section 5127(a). It did not.

By its terms, Section 5127(a)'s time limit is mandatory: the petition "*must* be filed *not more than 60 days* after the Secretary's action becomes final." 49 U.S.C. 5127(a) (emphasis added). There are no exceptions. That mandatory language is especially notable given that other provisions of Title 49 expressly provide courts with authority to entertain a petition for review filed after the statutory deadline and therefore provide the "authoriz[ation]" that Rule 26(b)(2) requires. Fed. R. App. P. 26(b)(2). For example, 49 U.S.C. 46110(a) permits a court of appeals to entertain a late petition for review of certain orders issued by the Secretary of Transportation and his subordinates "if there are reasonable grounds for not filing by the 60th day." Similarly, 49 U.S.C. 1153(b)(1) allows a court of appeals to consider petitions for review of certain orders of the National Transportation Safety Board after the expiration of the statutory deadline "if there was a reasonable ground for not filing within that 60-day period." Congress's express choice to authorize certain late-filed petitions for review in those circumstances further underscores the absence of any authorization here. See *Gallardo* v. *Marstiller*, 596 U.S. 420, 431 (2022) ("[The Court] must give effect to, not nullify, Congress' choice

to include limiting language in some provisions but not others.").

There is, moreover, good reason for Rule 26(b)'s background rule that treats petition-for-review deadlines as mandatory and not subject to equitable tolling. Equitable tolling is by nature a "fact-intensive" inquiry. *Holland* v. *Florida*, 560 U.S. 631, 654 (2010) (citation omitted). Appellate courts lack the tools that district courts have at their disposal to undertake that sort of factfinding. Indeed, the premise of a direct-review statute is that the appellate court will conduct its review solely on the basis of the administrative record and without engaging in factfinding of its own. See, *e.g.*, *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973) (per curiam); cf. 28 U.S.C. 2107(c) (providing that determinations of "excusable neglect or good cause" for the delayed filing of a notice of appeal will be made by district courts, not the courts of appeals). There is every reason for a clear and easily administrable default rule that can be straightforwardly applied at the outset of cases, rather than requiring courts of appeals to engage in threshold factfinding with respect to every late-filed petition under numerous other petition-for-review statutes. This case illustrates the wisdom of that approach: petitioner has made clear (Pet. 6-8) that in seeking to equitable tolling, it relies on materials that are not part of the record in the administrative proceeding; rather, its position is based entirely on filings in unrelated cases and assumptions about the Chief Safety Officer's involvement with its administrative appeal that could only be addressed through factual development in the court of appeals.

b. Petitioner's contrary arguments lack merit. Petitioner asserts that Rule 26(b) cannot reflect "*congressional* intent in enacting a statutory deadline" because

it is "a self-governing rule of procedure" adopted by this Court. Pet. 20-21. But as noted above, petitioner has not identified any background rule or tradition that statutory deadlines for filing a petition for review directly in a court of appeals were subject to equitable tolling. Moreover, the rules themselves are "'reported to Congress by the Chief Justice'" before going into effect "so that Congress might consider whether it wished to legislate any changes in them," *Houston* v. *Lack*, 487 U.S. 266, 280 (1988) (Scalia J., dissenting) (quoting 28 U.S.C. 2072). Congress declined to do so. In those circumstances, just as applicable common-law presumptions of equitable tolling inform the interpretation of some statutory time limits, see *Irwin*, 498 U.S. at 95-96, Rule 26(b)'s displacement of any such presumption that may have existed does the same with respect to the time limits for court of appeals' review of agency actions. In both cases, Congress legislates against the relevant background rule and may overcome the presumption. See *ibid.* (holding that a "rebuttable presumption of equitable tolling" applies to suits against private defendants and the United States, but that Congress "may provide otherwise if it wishes to do so"); Fed. R. App. P. 26(b)(2) (prohibiting courts from extending the time to file a notice of appeal for review of agency decisions "unless specifically authorized by law"). Here, Rule 26 had long been in effect when Congress enacted 49 U.S.C. 5127(a) in 2005. See p. 7, *supra*.

Petitioner's argument that Rule 26(b) applies only to deadlines prescribed elsewhere in the Federal Rules (Pet. 22) fares no better. As originally adopted, Rule 26(b) provided that a court of appeals could "enlarge the time prescribed by these rules," but could not "enlarge the time *prescribed by law* for filing a petition" for re-

view of "an order of an administrative agency * * * except as specifically authorized by law." Fed. R. App. P. 26(b) (1968) (emphasis added). That language plainly indicates that the rule's limit on extending the time to appeal applies to statutory deadlines. In 1998, the Court removed the "prescribed by law" language as part of a general restyling of the rules, but the Advisory Committee Notes emphasized that the removal was "stylistic only." Fed. R. App. P. 26 advisory committee's note (1998); see *Communication from the Chief Justice, the Supreme Court of the United States, Amendments to Federal Rules of Appellate Procedure*, H.R. Doc. 269, 105th Cong., 2d Sess. 180 (1998) ("These changes are intended to be stylistic only."). Petitioner wholly fails (Pet. 20) to recognize or account for the original text of Rule 26(b).

Nor can petitioner's policy arguments overcome the plain text of the rule. Petitioner asserts (Pet. 14-16) that equitable tolling must be available under every statute involving petitions for review because otherwise agencies would have incentives to "conceal" their true motivations or to engage in gamesmanship. Pet. 16. But courts have treated such deadlines as mandatory and not subject to equitable tolling for decades, and petitioner points to nothing suggesting that any such systemic problem has been revealed in that time. See *e.g.*, *Henderson* v. *Shinseki*, 562 U.S. 428 (2011) (noting that "lower court decisions have uniformly held that the Hobbs Act's 60-day time limit for filing a petition for review of certain final agency actions" is not subject to equitable tolling). Regardless, Congress can address any such concerns by expressly authorizing equitable tolling, as it has done in other statutes.

2. The court of appeals' decision does not conflict with any decision of this Court or another court of appeals. Petitioner's contrary argument largely relies on decisions involving provisions that are not subject to Rule 26(b).

a. Petitioner contends (Pet. 16-22) that the decision below is at odds with this Court's precedents addressing the availability of equitable tolling in other contexts. But none of those cases involved a petition for direct review of agency action in a court of appeals or any other deadline subject to Rule 26(b). See, *e.g.*, *Bowen* v. *City of New York*, 476 U.S. 467 (1986) (statute of limitations for commencing a civil action in district court); *Irwin*, 498 U.S. at 95-96 (same); *Boechler,* 596 U.S. at 204 (appeal to Article I court); *Sebelius* v. *Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 149 (2013) (time for appealing within an Executive-Branch agency). Because Rule 26(b)(2) applies only to appeals from agency decisions to Article III courts of appeals, the decisions petitioner cites involving other review regimes have nothing to say about Rule 26(b).

b. Petitioner makes the same error with respect to various court of appeals' decisions it cites (Pet. 23-25), which likewise involved review of agency decisions in district court, where Rule 26 does not apply. The court of appeals' decisions permitting equitable tolling of the six-year statute of limitations for review of agency decisions under 28 U.S.C. 2401(a), for example, each involved review in district court. See *North Dakota Retail Ass'n* v. *Board of Governors of the Fed. Reserve Sys.*, 55 F.4th 634, 641-642 (8th Cir. 2022), cert. granted, 144 S. Ct. 478 (2023); *DeSuze* v. *Ammon*, 990 F.3d 264, 267 (2d Cir. 2021); *Chance* v. *Zinke*, 898 F.3d 1025, 1034 (10th Cir. 2018). The same is true of decisions involving

5 U.S.C. 7703(b)(2), which sets a 30-day deadline for seeking review in district court of a Merit Systems Protection Board decision involving discrimination. See *Robinson* v. *Department of Homeland Sec. Office 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). Likewise, the deadline petitioner cites under the Mineral Leasing Act, 30 U.S.C. 226-2, applies to commencing suit in district court, not in the court of appeals. See *Impact Energy Res., LLC* v. *Salazar*, 693 F.3d 1239, 1247 (10th Cir. 2012) (per curiam), cert. denied, 571 U.S. 819 (2013).

Petitioner cites only a single case that addresses a statutory deadline for filing a petition for review of an agency decision in a court of appeals. Pet. 24 (citing *NRDC* v. *National Highway Traffic Safety Admin.*, 894 F.3d 95 (2d Cir. 2018)). In that case, the Second Circuit considered 49 U.S.C. 32909(b), which provides that petitions for review of certain regulations of the National Highway Traffic Safety Administration "must be filed not later than 59 days after the regulation is prescribed." *Ibid.* The parties chiefly disputed when the regulation at issue had been "prescribed" for purposes of the running of that period, and the Second Circuit held that the petition was timely filed based on its view that the time begins to run when the rule is published in the Federal Register. *NRDC*, 894 F.3d at 105-106 (citation omitted). After reaching that holding, the court of appeals also stated in dicta that even if that were not so, equitable tolling would apply because Section 32909(b) is a "claim-processing provision" that is

"nonjurisdictional" and thus "subject to equitable tolling." *Id.* at 107.

The Second Circuit did not hold that the statute before it was subject to equitable tolling despite Rule 26(b). Indeed, the Second Circuit's decision did not cite Rule 26(b) or discuss the background presumptions applicable to petition-for-review statutes. And the Second Circuit's decision was rendered before this Court's decision in *Nutraceutical*, which applied Rule 26(b) in making clear that even a claims-processing rule may be "'mandatory'" and therefore "'unalterable' if properly raised by an opposing party." 139 S. Ct. at 714 (citation omitted).

3. Finally, petitioner urges (Pet. 3, 25) that this petition should be held pending the Court's resolution of *Harrow* v. *Department of Defense*, No. 23-21 (argued Mar. 25, 2024). The question presented in *Harrow* is whether the deadline for filing a petition for review in the Federal Circuit of certain decisions of the Merit Systems Protection Board is jurisdictional and thus not subject to equitable tolling. Gov't Br. at I, *Harrow*, *supra* (No. 23-21). As an alternative ground for affirmance, the government has also contended that the statute at issue is a mandatory claims-processing rule that is not subject to equitable tolling, based on Rule 26(b) and its application to statutory deadlines for filing petitions for review of agency actions. *Id.* at 42-44.

While the Court could reasonably decide to hold this petition for *Harrow* out of an abundance of caution, it is unnecessary to do so. Even if this Court reaches the alternative ground for affirmance in *Harrow* and resolves it in a manner favorable to petitioner, petitioner will be unable to clear the high bar for demonstrating entitlement to equitable tolling. Petitioner's sole basis

for seeking equitable tolling is its assertion that the agency concealed facts that prevented petitioner from challenging the final order on Appointments Clause grounds. Specifically, petitioner contends (Pet. 7 & n.1) that the Chief Safety Officer who decided petitioner's administrative appeal lacked a proper appointment until July 15, 2022—ten days before rendering a decision on petitioner's appeal on July 25. Petitioner contends (Pet. 8) that it did not learn of this issue until after the 60-day period for seeking review under Section 5127(a) had run, and that equitable tolling would be appropriate because the government "concealed what it knew to be a blatant constitutional defect in its agency proceeding."

Yet petitioner acknowledges (Pet. 7 & n.1) that the Chief Safety Officer *was* properly appointed when he rendered a decision on petitioner's administrative appeal. That decision was the only action the Chief Safety Officer took in petitioner's case: He did not hold a hearing, take evidence, issue any earlier or interim decision, rule on motions, or conduct any other proceedings in petitioner's appeal prior to his appointment. Petitioner thus received a decision from an adjudicator all agree was properly appointed at the time he took the only action relevant to petitioner's administrative appeal.

No court of appeals has recognized an Appointments Clause defect in similar circumstances. This case is far afield from *Cody* v. *Kijakazi*, 48 F.4th 956 (9th Cir. 2022), where the court of appeals found an Appointments Clause violation where an improperly appointed official rendered a final decision while improperly appointed, which the court concluded had "tainted" the official's subsequent reconsideration after proper appointment. *Id.* at 962; see *id.* at 961-963. Indeed, exist-

ing Eleventh Circuit precedent would foreclose petitioner's argument because the Eleventh Circuit has rejected a claim of an Appointments Clause violation even where an official rendered some rulings in a case before being properly appointed. *Raper* v. *Commissioner of Soc. Sec.*, 89 F.4th 1261, 1269-1273 (2024), petition for reh'g pending, No. 22-11103 (filed Mar. 12, 2024). And the suggestion that the agency acted inappropriately is particularly unwarranted, given that petitioner acknowledges (Pet. 6) that the agency disclosed the Appointments Clause issue in a separate case in which the official had issued a decision while improperly appointed, and sought a remand to correct the issue in that case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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