NO. _____

In the Supreme Court of the United States

GREGORY HANNA,

Petitioner,

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

R. Scott Oswald
Counsel of Record
Anita Mazumdar Chamber
THE EMPLOYMENT LAW GROUP, PC
1717 K Street, NW, Suite 1110
Washington, DC 20006
(202) 331-3911
soswald@employmentlawgroup.com

March 2, 2026 *Counsel for Petitioner*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Whether the regulation provision in question under the Energy Reorganization Act is genuinely ambiguous in determining federal courts' case law and interpretation or the Department of Labor's case law and interpretation by and through the Administrative Review Board's adjudication of claims under the Act.

2. Although the Fourth Circuit purported to apply a separation of powers doctrinal standard to Petitioner's appeal, relying on *Hyatt v. Heckler*, 807 F.2d 376, 379 (4th Cir. 1986). However, the Fourth Circuit is discharged to address and review whether the ARB erroneously applied its own law and standards for equitable tolling as to Appellant's claims, dissimilar in its entirety from *Hyatt*.

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Gregory Hanna

Respondents/Defendant-Appellee below

- United States Department of Labor
- Administrative Review Board
- Global Nuclear Fuel Americas LLC

LIST OF PROCEEDINGS

United States Court of Appeals for the Fourth Circuit

No. 24-1435

Gregory Hanna, *Petitioner*, v. United States Department of Labor, Administrative Review Board; Global Nuclear Fuel Americas LLC, *Respondents*.

Opinion: October 1, 2025

U.S. Dept. of Labor, Administrative Review Board

Arb Case No. 2023-0015, ALJ No. 2020-ERA-00002

In the Matter of Gregory Hanna, *Complainant*, v. Global Nuclear Fuel Americas, LLC, *Respondent*

Decision and Order: March 19, 2024

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

LIST OF PROCEEDINGS iii

TABLE OF AUTHORITIES vii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Overview 3

B. Factual History 6

C. Proceedings Below 12

REASONS FOR GRANTING THE WRIT 13

I. The Fourth Circuit's Application of the Separation of Powers Doctrine Is Not Consistent with This Court's Guidance 13

A. On *De Novo* Review, the Fourth Circuit Should Have Reviewed and Applied the ARB's Standards of Equitable Tolling 13

B. This Case Is Distinguishable from *Hyatt* 14

C. The ARB's Interpretation of the Energy Reorganization Act Is Entitled to *Auer* Deference 15

TABLE OF CONTENTS (Cont.)

Page

II. The Courts Are in Disarray Over Whether Agency Deference Applies on an Error of Law and the Court Should Resolve This Issue 18

A. The Circuits Should Follow Federal Courts in Giving Deference to Agency Interpretations of Its Own Regulations ... 18

B. Without a Precedent from This Court, Disputed Interpretations Will Continue to Be Split on Adherence to Circuit Law 21

CONCLUSION 22

APPENDIX TABLE OF CONTENTS

OPINIONS AND ORDERS

Opinion, U.S. Court of Appeals for the Fourth Circuit (October 1, 2025) 1a

Judgment, U.S. Court of Appeals for the Fourth Circuit (October 1, 2025) 5a

Decision and Order, U.S. Department of Labor Administrative Review Board (March 19, 2024) 6a

Decision and Order, U.S. Department of Labor Office of Administrative Law Judges (December 21, 2022) 23a

REHEARING ORDER

Order Denying Petition for Rehearing, U.S. Court of Appeals for the Fourth Circuit (December 2, 2025) 46a

TABLE OF CONTENTS (Cont.)

Page

OTHER DOCUMENTS

Complainant-Appellant's Memorandum of Points and Authorities in Support of Appeal (March 13, 2023)..... 47a

Response Brief of Global Nuclear Fuel-Americas, LLC (May 9, 2023)..... 75a

Complainant-Appellant's Reply to Defendant Global Nuclear Fuel-Americas, LLC's Response Brief (June 1, 2023)..... 125a

Brief of the Acting Secretary of Labor (September 5, 2024)..... 140a

Letter from Occupational Safety and Health Administration (October 19, 2023) 160a

Reply Brief of Petitioner to the Response Brief of the U.S. Department of Labor (October 25, 2024) 164a

TABLE OF AUTHORITIES

Page

CASES

Auer v. Robbins,
519 U.S. 452 (1997) 16, 17, 19, 20

Bowles v. Seminole Rock & Sand Co.,
325 U.S. 410 (1945) 16, 19

Brofford v. PNC Investments, LLC,
ARB No. 2018-03, ALJ No. 2017-CFP-00002 (ARB Feb. 14, 2019)..... 4

Campbell ex rel. Campbell v. Apfel,
177 F.3d 890 (9th Cir. 1999) 19

Cathedral Candle Co. v. U.S. Int'l Trade Comm'n, 400 F.3d 1352 (Fed. Cir. 2005)..... 19

Com. of Mass., Dep't of Pub. Welfare v. Sec'y of Agric., 984 F.2d 514 (1st Cir. 1993)..... 18

English v. Whitfield,
858 F.2d 957 (4th Cir. 1988) 6, 13, 14

Hyatt v. Heckler,
807 F.2d 376 (4th Cir. 1986) .... i, 5, 13, 14, 15, 22

In re Hyman v. KD Res., LLC,
ARB No. 09-076, ALJ No. 2009-SOX-020,
2010 WL 1260209
(ARB Mar. 31, 2010)..... 5, 13, 14, 15, 17

Jianli Chen v. Holder,
703 F.3d 17 (1st Cir. 2012)..... 19

Kisor v. Wilkie,
588 U.S. 558 (2019) 16, 17, 20

Loper Bright Enterprises v. Raimondo,
603 U.S. 369 (2024) 6, 19, 21

TABLE OF AUTHORITIES (Cont.)

Page

Lopez-Cortaza v. Sessions,
739 F.App'x 855 (8th Cir. 2018) 18

Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005) 21

Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell, 100 F.Supp.3d 1122
(D.N.M. 2015) 19

Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan,
512 F.Supp.2d 32 (D.D.C. 2007) 18

Shipbuilders Council of Am. v. U.S. Coast Guard, 578 F.3d 234 (4th Cir. 2009) 16

Sparre v. U.S. Department of Labor,
924 F.3d 398 (7th Cir. 2019) 20

Stone & Webster Constr., Inc. v. United States DOL, 684 F.3d 1127 (2012) 20

Texas Clinical Labs, Inc. v. Sebelius,
612 F.3d 771 (5th Cir. 2010) 19

United States v. Boler,
115 F.4th 316 (4th Cir. 2024)..... 16, 17

STATUTES

5 U.S.C. § 706..... 21

28 U.S.C. § 1254(1) 1

42 U.S.C. § 5851,
Energy Reorganization Act of 1974 ..... i, 2, 3,
..... 16-18, 20

Pub.L. 95-601, § 10, 92 Stat. 2951
(Nov. 6, 1978)..... 2

TABLE OF AUTHORITIES (Cont.)

Page

Pub.L. 102-486, Title XXIX, § 2902(a)–(g), (h)(2), (3), 106 Stat. 3123 (Oct. 24, 1992) 2

Pub.L. 109-58, Title VI, § 629, 119 Stat. 785 (Aug. 8, 2005)..... 2

REGULATIONS

29 C.F.R. § 24.103(c) 3

29 C.F.R. § 24.103(d)(1) 2

29 C.F.R. § 24.103(d)(2) 3, 13, 14, 16, 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner Gregory Hanna respectfully requests this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit, entered in this case on October 1, 2025.

OPINIONS BELOW

The December 21, 2022, unreported order of the United States Department of Labor Office of Administrative Law Judges is reproduced at App.23a of the Appendix. The March 19, 2024 unreported order of the United States Department of Labor Office of Administrative Law Judges is reproduced at App.6a. The October 1, 2025, majority opinion of the Fourth Circuit is reproduced at App.1a.

JURISDICTION

The Fourth Circuit entered its final judgment on October 1, 2025. App.1a. On December 2, 2025, the Fourth Circuit denied the petition for rehearing *en banc*. App.46a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves claims of unlawful retaliation under the Energy Reorganization Act of 1974 ("ERA"), specifically 42 U.S.C. § 5851, Employee protection ((Pub.L. 93-438, Title II, § 211, formerly § 210, as added Pub.L. 95-601, § 10, Nov. 6, 1978, 92 Stat. 2951; renumbered § 211 and amended Pub.L. 102-486, Title XXIX, § 2902(a) to (g), (h)(2), (3), Oct. 24, 1992, 106 Stat. 3123, 3124; Pub.L. 109-58, Title VI, § 629, Aug. 8, 2005, 119 Stat. 785.)

42 U.S.C. § 5851. Employee protection

(b) Complaint, filing and notification

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, within 180 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (in this section referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint, the Commission, and the Department of Energy.

29 C.F.R. § 24.103(d)(1)

(d) Time for Filing.

(1) Except as provided in paragraph (d)(2) of this section, within 30 days after an alleged violation of any of the statutes listed in § 24.100(a) occurs

(i.e., when the retaliatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been retaliated against in violation of any of the statutes listed in § 24.100(a) may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, e-mail communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.

STATEMENT OF THE CASE

A. Overview

In 1974, Congress enacted the Energy Reorganization Act of 1974, 42 U.S.C. § 5851, providing employees with a cause of action when discharged in retaliation for reporting nuclear safety concerns. However, Congress conditioned that right on timeliness: a retaliation complaint must be filed with the Occupational Safety and Health Administration ("OSHA") within 180 days of the alleged violation. See *id.* § 5851(b)(1); 29 C.F.R. § 24.103(c). However, "[t]he time for filing [such] a complaint may be tolled for reasons warranted by applicable case law." 29 C.F.R. § 24.103(d)(2).

This case arises from allegations of retaliation by Respondent, Global Nuclear Fuel-Americas, LLC ("GNF"). Petitioner, Gregory Hanna ("Hanna") alleged retaliation for raising significant safety concerns, and

GNF's termination of his employment shortly after he complained of the retaliation he suffered. However, Hanna missed the statutory 180-day deadline to file his complaint by ten (10) days after a series of events Hanna had reasonably relied on prior to the filing of his OSHA complaint.

Following the Secretary's findings that Hanna complaint was untimely filed, Hanna filed a *pro se* appeal of the determination and requested a hearing before the Office of Administrative Law Judges ("OALJ"). The OALJ applied The Department of Labor's Administrative Review Board's ("ARB") standard for finding equitable tolling appropriate in at least four circumstances: (i) where the "respondent has actively misled the complainant regarding the cause of action"; (ii) when "the plaintiff has in some extraordinary way been prevented from filing his or her action," such as a debilitating illness, injury, or natural disaster; (iii) when "complainant has raised the precise statutory claim in issue but has done so in the wrong forum"; and (iv) where the "respondent's own acts or omissions have lulled the complainant into foregoing prompt attempts to vindicate his or her rights." *Brofford v. PNC Investments, LLC*, ARB No. 2018-03, ALJ No. 2017-CFP-00002, slip op. at 2 (ARB Feb. 14, 2019). The OALJ did not find Hanna had established a basis to equitable tolling and dismissed his complaint as untimely and an appeal to the ARB followed.

Hanna's appeal to the ARB raised the issue of lulling where the OALJ failed to consider that Respondent-Appellee misled Hanna and lulled Hanna, either intentionally or unintentionally, through its inconsistent actions and statements, into believing he would eventually be reinstated. However, The ARB

made error in law by failing to assess equitable estoppel or whether GNF lulled Hanna into foregoing prompt attempts to vindicate his rights. Tolling is appropriate when the complainant was lulled into a false sense of security. *Hyman v. KD Res., LLC*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 5, 2010 WL 1260209 (ARB Mar. 31, 2010). Should the Board have properly assessed all basis for equitable estoppel, the Board would have found that GNF lulled Hanna after he was terminated on June 1, 2017, due to GNF's later actions—through its internal appeals process, ombudsman process, external investigation, company administrative actions, and overall inconsistencies in the company's actions—which gave Hanna false assurance that his termination and concerns would be resolved internally. Despite Hanna's repeated attempts to raise this issue of equitable estoppel and lulling, the ALJ failed to consider the issue of lulling when the ALJ dismissed Hanna's complaint. JA329 at 11:11-17; JA335-336 at 17:20-18:18; JA343-344 at 25:18-26:7; JA343-344. at 26:20-27:8; JA401 at 83:3-18; 83:22-25; JA409 at 91:10-19.

The ARB's decision was upheld in the Fourth Circuit applying the law of the circuit maintaining, "The separation of powers doctrine requires administrative agencies to follow the law of the circuit whose courts have jurisdiction over the cause of action. In the absence of a controlling decision by the Supreme Court, the respective courts of appeals express the law of the circuit." *Hyatt v. Heckler*, 807 F.2d 376, 379 (4th Cir. 1986). And, in the precise context of an Energy Reorganization Act retaliation complaint, we have held that an employee may not invoke equitable estoppel "[a]bsent evidence that the employer acted to

deceive the employee as to the existence of its claim or otherwise to mislead or coerce the employee into not filing a claim in a timely fashion." *English v. Whitfield*, 858 F.2d 957, 963 (4th Cir. 1988).

The Court should grant certiorari to correct this error and remand. Further, because the circuit courts are in disarray over the proper application of *Loper*, the Court should grant certiorari and resolve this issue.

B. Factual History

In 2012, Hanna was hired as a Flexible Fuel Operator at Global Nuclear Fuel-Americas (GNF), owned and operated by General Electric Company. JA149-150. In 2015, GNF promoted Hanna to an Incinerator Operator, assisting in the burning of nuclear materials using an incinerator located at the GE Hitachi Site in Wilmington, North Carolina. JA131; JA235.

On January 25, 2017, a high-level radiation alarm sounded on a GNF Area Engineer's laptop. JA233. The Area Engineer, with the approval of his supervisor, requested that Hanna and other incinerator operators return to the GNF site to diagnose and repair the issue. JA233. The operators determined it was necessary to replace and reconnect fallen "sock filters" of the incinerator, which are designed to keep radioactive ash and particulates from entering the atmosphere and surrounding areas. JA233-234.

However, the sock filter repair lacked basic safety precautions. There was no RAD team (a radiological protection team) in the room to approve the maintenance, monitor exposure levels, oversee nuclear safety, prevent accidental exposure, and distribute proper

personal protective equipment. JA234. Hanna later discovered that the work order for this repair had expired more than a year earlier. JA131. Due to these failures, Hanna and the other incinerators were likely exposed to excessively high levels of radiation. JA234. Hanna left the incinerator building covered in radioactive ash. JA167.

Despite several employees developing severe rashes resulting in blisters and scars, none of Hanna's coworkers were willing to report this egregious violation of safety protocols because being in a confined space without supervision or proper personal protective equipment ("PPE") was an "immediately fire-able offense," termed a "Category I" offense. JA234-235; JA189; JA267-293; JA301. Hanna took the initiative to report the safety violation to his supervisor, John Mathews. JA131. Hanna reported that employees working in the incinerator building were at risk due to malfunctioning equipment, exposure to uranium powder and ash, lack of a valid work order, likely excessive radiation exposure, and the absence of a RAD team during repairs. JA131; JA234. Mathews assured Hanna that he would address the issues and keep him informed of corrective actions.JA131; JA186-187.

Around the same time, GE Hitachi was preparing for a Nuclear Regulatory Commission (NRC) audit scheduled for April 3, 2017. JA131. Hanna had assisted in the pre-audit report and was slated to conduct a portion of the tour for the NRC. JA131. However, on March 31, 2017, four days before the NRC audit and two months after Hanna reported safety concerns, Mathews and John Berger informed Hanna that he was suspended with pay, effective immediately, pending an investigation. JA131. The suspension was based on

Hanna's alleged commitment of "Category I" offense of leaving the plant site during his shift. JA131-132. This Category I offense would later be cited in Hanna's termination letter dated June 1, 2017, despite the purported offense having taken place nearly six months earlier in January and February 2017, respectively, and despite there being no video evidence of Hanna having left the work site. JA123; JA110-117. The delayed investigation into this Category I offense only four days before the NRC audit and two months after Hanna reported safety concerns, was gravely concerning. JA131.

On April 5, 2017, Hanna reported to the GE Corporate Ombudsman a total of twelve issues he was experiencing at GNF, including retaliation for reporting the January 25, 2017, incinerator issue. Appx51. On May 2, 2017, Ombudsperson Karen Williams issued an investigatory report concluding that all of Hanna's allegations were unsubstantiated. JA542-544.

On May 31, 2017, Hanna was called to a meeting at GNF with Berger and Human Resources representative Ana Garriga. JA235. Berger gave Hanna a letter informing him of his immediate termination due to his "failure to comply with Company policies," specifically alleging he had left the work site while "on the clock" two times in January and February 2017. JA123. The letter outlined the appeal process and stated that Hanna would be contacted regarding benefits and COBRA Insurance conversion information. JA123.

During the termination meeting, GNF presented Hanna with two choices: he could either file an internal appeal to challenge the termination decision or accept a severance agreement, which required him to forgo his right to appeal. JA641 at 21:00-22; JA258.

Hanna immediately notified Garriga of his intent to appeal. JA641 at 25:00-25:25. The internal appeal consisted of three-level: 1) appeal with a supervisor; 2) appeal with a manager; and 3) peer panel or print manager direct appeal. JA641 at 20:00-21:00. GNF informed Hanna that he would be kept as an "active employee on unpaid suspension" to access his benefits, and the employee assistance program would still be available to him during this appeal process JA641 at 24:00-25:00.

Hanna filed his first-level appeal to Mathews on June 9, 2017. JA124; JA240. Mathews denied the appeal, stating that Berger directed him to rule against Hanna. JA240. Hanna then filed his second appeal to Berger, who had originally terminated him. JA126; JA240. Berger declined to review Hanna's evidentiary proof that he had not left the plant site and issued a letter on July 17, 2017, stating that the Positive Management policy and corresponding practice were followed properly and consistently. JA544. On the same day Hanna received the letter, Hanna emailed Garriga, notifying her of his intent to pursue a third appeal and requesting evidence that he had left the work site. JA812.

On July 19, 2017, Hanna submitted a letter raising his safety concerns to Jeff Immelt (CEO), Susan Peters (SVP of Human Resources), Jeanne Mathews (Executive Counsel Labor and Employment), and corporate ombudsperson Marianna Monteiro. JA155. The July 19, 2017, letter contained, among other things, an allegation of retaliation based on his safety concerns and evidentiary gaps in GNF's allegations. JA131. GNF responded to Hanna's letter by thanking Hanna for raising his concern and informed

him that a new investigation would begin. JA546-547. Subsequently, GNF paused the internal appeal process and initiated an entirely new investigation of Hanna's concern through Tim Matthews. JA317.

On July 28, 2017, Monteiro informed Hanna that his status remained unchanged during the new investigation. JA318. At this time, GNF reported to the United States government that Hanna was still a full-time employee for several years after they terminated him. As of February 2021, Hanna was listed as being a current full-time employee working the 1st shift – on leave – in GNF's internal system with nine years and ten months of service at GNF. JA728; JA757-760. His "estimated last day of leave" in GNF's internal system was January 1, 2058. JA728. Public reports also confirm Hanna was reported to be employed at GE at least as late as February 2021. JA727. When Hanna requested pay reinstatement due to financial difficulties, Monteiro directed him to his local human resources department, i.e., Garriga. JA656. Despite Monteiro's instructions, Garriga stated that a fresh investigation was underway and Hanna's status remained at termination pending the results. JA751.

Following the first failed investigation in April 2017, Hanna requested that an independent, neutral third party, specifically "someone not associated with the GEH business," investigate his nuclear safety report and GNF's subsequent retaliation. JA133. Monteiro hired Tim Matthews as an "independent ombudsperson." JA242. Hanna later discovered that Matthews worked for the firm representing GNF in the current matter, Morgan Lewis. JA242. The investigation was initiated in August 2017, but Hanna had not heard from an investigator one month later. JA656.

Hanna followed up with Monteiro on August 29, 2017, expressing concern about the lack of communication and the ombudsperson revealing his identity, as he believed the process would be anonymous. JA657. Monteiro responded that the case was being investigated and that she would request an update. JA657. On September 18, 2017, Hanna followed up again, stating that he needed status on the investigation because he found out his job was posted, leading him to believe that GE never intended to bring him back to work. JA656. Monteiro said she was unaware of the developments and redirected him to his local HR. JA656.

Concurrently with the GNF internal appeals and ombudsman process, Hanna searched for other avenues to report his concerns and the retaliation he experienced. In June 2017, before filing his first internal appeal, Hanna and his friend, Katherine MacDonald, placed at least 13 calls to various agencies, including the EEOC and the DOL. JA764. However, Hanna was not made aware that the proper venue for filing a complaint of this type was with OSHA until November 2017, when he contacted attorneys. JA159. Hanna attempted to have a call placed to OSHA on November 21, 2017, but MacDonald's voicemail on his behalf went unanswered. JA159.

The second corporate ombudsperson investigation was ongoing from August 2017 through December 2017, ending just after the 180-day statutory deadline to file with OSHA. Matthews's investigation involved multiple interviews from September 2017 through the end of November 2017. JA242. The debrief occurred on December 22, 2017, 23 days after the deadline for

filing with OSHA, and Matthews's investigation found Hanna's allegations to be "unsubstantiated." JA242.

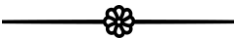
Throughout Hanna's entire appeal process, Hanna continued to receive benefits from GNF. Notably, Hanna was still employed by GNF according to his W-2s at least through 2020. JA757. He received at least one payroll deposit of $1,000 from GNF on July 18, 2019, over two years after his purported termination. JA477 at 6-13. Contrary to Berger's indication on May 31, 2017, Hanna did not receive a call or any information regarding COBRA. Instead, GNF paid all of Hanna's health insurance premiums through January 2018, when they placed him on a "leave of absence." JA397 at 8-14. After January 2018, Hanna maintained all insurance benefits provided to GNF employees but paid the premiums himself. JA183; JA300. His GNF retirement savings plan remained open, with statements mailed every three months. JA655; JA761.

C. Proceedings Below

Hanna filed his formal complaint with OSHA on December 8, 2017, 10 days after the 180-day statutory deadline. JA71. On October 24, 2019, OSHA deemed his complaint untimely and dismissed it. JA218. On November 18, 2019, Hanna requested a hearing at the OALJ. On December 12, 2022, the ALJ issued a Decision and Order Dismissing the Complaint as Untimely filed. JA842. On January 5, 2023, Hanna petitioned the Board for review of the OALJ. On March 19, 2024, the Board affirmed the ALJ's decision and order.

Hanna appealed to the Fourth Circuit, on the Board's decision to deny equitable tolling for abuse of discretion. Hanna relied on Board case law permitting tolling where "the [employer]'s conduct, *innocent or not*,

reasonably induced the plaintiff not to file suit within the limitations period." *In re Hyman v. KD Res.*, ARB No. 09-076, ALJ No. 2009-SOX-020, 2010 WL 1260209, at *4 (A.R.B. Mar. 31, 2010) (emphasis added). Despite the Board's reliance on their own prior case law, this Court held that Fourth Circuit precedent governs the administrative agency's decisions, citing the separation of power doctrine decision derived in *Hyatt*. *See Hanna v. U.S. Dept. of Labor*, No. 24-1345, (4th Cir. Aug. 19, 2025) reh'g denied (Oct. 1, 2025). Instead, applying *English v. Whitfield*, 858 F.2d 957, 963 (4th Cir. 1988), and refusing to acknowledge the issue of discretion from the Board's decision.



REASONS FOR GRANTING THE WRIT

I. The Fourth Circuit's Application of the Separation of Powers Doctrine Is Not Consistent with This Court's Guidance.

A. On *De Novo* Review, the Fourth Circuit Should Have Reviewed and Applied the ARB's Standards of Equitable Tolling.

The Energy Reorganization Act provides that "the time for filing a complaint may be tolled for reasons warranted by applicable case law." 29 C.F.R. § 24.103(d)(2). The ARB, an agency within the U.S. Department of Labor, is empowered with the authority to "issue agency decisions after review or on appeal." Here, the issue on appeal resolved around the ARB failing to address and consider one of the basis specified for equitable tolling, elucidated by ARB's past decision. In interpreting 29 C.F.R. § 24.103(d)(2),

the ARB allowed for equitable tolling "where the respondent's own acts or omissions have lulled the complainant into foregoing prompt attempts to vindicate his rights." *Hyman v. KD Res., LLC*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 3, 2010 WL 1260209 (ARB Mar. 31, 2010). In this circumstance, tolling is appropriate when the complaint was lulled into a false sense of security, leading him to believe that his concerns were being resolved by the respondent. *Id*. But Fourth Circuit case law interpreting 29 C.F.R. § 24.103(d)(2) limit equitable tolling to employee's "[a]bsent evidence that the employer acted to deceive the employee as to the existence of its claim or otherwise to mislead or coerce the employee into not filing a claim in a timely fashion." *English v. Whitfield*, 858 F.2d 957, 963 (4th Cir. 1988). This Court, in reviewing the ARB's decision, must review whether the ARB applied the ARB's standards of equitable tolling correctly, and not whether the ARB correctly applied the Fourth Circuit's standard of equitable tolling.

B. This Case Is Distinguishable from *Hyatt*.

The Fourth Circuit explained that "[t]he separation of powers doctrine requires administrative agencies to follow the law of the circuit whose courts have jurisdiction over the cause of action. In the absence of a controlling decision by the Supreme Court, the respective courts of appeals express the law of the circuit." *Hyatt v. Heckler*, 807 F.2d 376, 379 (4th Cir. 1986). But in *Hyatt*, the Court was concerned a class action alleging that the Secretary of Health and Human Services "did not follow the decisional law of the Fourth Circuit in adjudicating cases within the Fourth Circuit." *Id*. at 331. The issue presented in *Hyatt* concerned whether the Secretary had to comply with the district court's

order "to issue a specific regulation with regard to the decision of pain cases in North Carolina under Fourth Circuit law," and whether the Secretary's standards superseded Fourth Circuit pain law. *Id* at 331 -333. The Court held that the Secretary's regulation "was and continued to be rejected by this court, "as the regulation was not codified by Congress when it enacted the Disability Benefits Reform Act of 1984 ("DIBRA") and therefore does not supersede Fourth Circuit pain law. *Id*. at 332-333. DIBRA is consistent with established Fourth Circuit case law, and the Secretary's regulation proscribes standards that go farther than DIBRA and Fourth Circuit case law. *Id*.

Unlike in *Hyatt*, this case centers on an appeal from the ARB, wherein Appellant is concerned with the ARB failing to address one of the four established circumstances under which a statutory deadline may be tolled through equitable estoppel. The ARB failed to address whether "the respondent's own acts or omissions have lulled the complainant into foregoing prompt attempts to vindicate his rights." *See Hyman v. KD Res., LLC*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 3, 2010 WL 1260209 (ARB Mar. 31, 2010). The Fourth Circuit is discharged to address and review whether the ARB erroneously applied its own law and standards for equitable tolling as to Appellant's claims, dissimilar in its entirety from *Hyatt*.

C. The ARB's Interpretation of the Energy Reorganization Act Is Entitled to *Auer* Deference.

Under *Auer* deference, an agency's interpretation of its own regulation is "'controlling unless plainly erroneous or inconsistent with the regulation.'"

Shipbuilders Council of Am. v. U.S. Coast Guard, 578 F.3d 234, 242 (4th Cir. 2009); (citing *Auer v. Robbins*, 519 U.S. 452, 461 (1997)); *accord Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14 (1945) ("[T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.").

In *Kisor v. Wilkie*, this Court clarified the *Auer* deference doctrine. 588 U.S. 558 (2019). In *Kisor*, the Court proscribed factors courts should consider to determine whether courts should apply the *Auer* deference. First, a court affords *Auer* deference where a regulation is genuinely ambiguous. *Id.* at 574. Where, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id.* at 575.

Here, the regulation provision in question under the Energy Reorganization Act is genuinely ambiguous. Under the regulation, "the time for filing a complaint may be tolled for reasons warranted by applicable case law." 29 C.F.R. § 24.103(d)(2). The phrase "warranted by applicable case law," is vague, ambiguous, and open to several interpretations. At issue here, is whether the regulation refers to federal courts' case law and interpretation or the Department of Labor's case law and interpretation by and through the Administrative Review Board's adjudication of claims under the Act.

Once a regulation is determined to be genuinely ambiguous, "the agency's interpretation of its regulation 'must come within the zone of ambiguity' created by the ambiguous text of the regulation." *United States v. Boler*, 115 F.4th 316, 323 (4th Cir. 2024) (citing *Kisor v. Wilkie*, 588 U.S. 558, 576 (2019). Here, the

Administrative Review Board's interpretation of 29 C.F.R. § 24.103(d)(2) comes within the zone of ambiguity, as the ARB interpreted this statute to provide four circumstances in which a statutory deadline may be tolled through equitable estoppel. Those of: (i) where the respondent has actively misled the complainant regarding the cause of action; (ii) when the plaintiff has in some extraordinary way been prevented from filing his or her action, such as a debilitating illness, injury, or natural disaster; (iii) when the complainant has raised the precise statutory claim at issue but has done so in the wrong forum; and (iv) where the respondent's own acts or omissions have lulled the complainant into foregoing prompt attempts to vindicate his rights. *Hyman v. KD Res., LLC*, ARB No. 09-076, ALJ No. 2009-SOX-020, slip op. at 3, 2010 WL 1260209 (ARB Mar. 31, 2010). The ARB's interpretation of the Energy Reorganization Act and when tolling is warranted, falls squarely within the zone of ambiguity created by the statute, and addresses and interprets the statute to provide four specific situations where equitable tolling applies.

Finally, this Court provided additional factors to determine whether the character of an agency's interpretation is entitled to *Auer* deference. *Boler*, 115 F.4th at 323. Those of (1) the interpretation must be the "official position" of the agency, (2) the agency's interpretation must in some way implicate its substantive expertise, and (3) an agency's reading of a rule must reflect its fair and considered judgment. *Id*. (citing *Kisor*, 588 U.S. at 577-579).

Applying these factors, the ARB's interpretation of the Energy Reorganization Act definitively implicates its substantive expertise, as the ARB is tasked with

issuing "agency decisions under a variety of statutes, most of which involved whistleblower," statutes. Furthermore, the ARB's reading and interpretation of the Energy Reorganization Act represents a fair and impartial judgment.

II. The Courts Are in Disarray Over Whether Agency Deference Applies on an Error of Law and the Court Should Resolve This Issue.

A. The Circuits Should Follow Federal Courts in Giving Deference to Agency Interpretations of Its Own Regulations.

Federal courts across the country, in reviewing administrative decisions *de novo*, give deference to the agency's reasonable interpretation of statutes and regulations it administers. Several federal circuit courts have reinforced this principle, that where the "issues before the court are legal in nature, *de novo* review of an administrative matter does not mean that the district court must devise an entirely new regulatory scheme," but rather "the court must ensure that the agency has followed its own regulations and that those regulations do not exceed the scope of the agency's mandate." *Com. of Mass., Dep't of Pub. Welfare v. Sec'y of Agric.*, 984 F.2d 514, 521 (1st Cir. 1993); *see Lopez-Cortaza v. Sessions*, 739 F.App'x 855, 859 (8th Cir. 2018) (reviewing "an agency's legal determinations *de novo*, according to substantial deference to the agency's interpretation of the statutes and regulations it administers"); *Sara Lee Corp. v. Am. Bakers Ass'n Ret. Plan*, 512 F.Supp.2d 32, 37 (D.D.C. 2007) (reviewing agency's legal determinations *de novo*, "according substantial deference to the agency's interpretation of the statutes and regulations it

administers"); *Texas Clinical Labs, Inc. v. Sebelius*, 612 F.3d 771, 775 (5th Cir. 2010) ("the [agency's] purely legal questions are reviewed *de novo*, giving deference to the agency's interpretation of the statute and regulations as appropriate")(internal citations omitted); *Jianli Chen v. Holder*, 703 F.3d 17, 21 (1st Cir. 2012) ("[r]ulings of law . . . engender *de novo* review, but with some deference to the agency's reasonable interpretation of statutes and regulations that fall within its sphere of authority"); *Cathedral Candle Co. v. U.S. Int'l Trade Comm'n*, 400 F.3d 1352, 1364 (Fed. Cir. 2005) ("[I]t is well settled that an agency's interpretation of its own regulations is entitled to broad deference"); *Campbell ex rel. Campbell v. Apfel*, 177 F.3d 890, 893 (9th Cir. 1999) ("It is well established that [Federal Courts] defer to an agency's reasonable interpretation of its statutes and regulations"); *Navajo Health Found.-Sage Mem'l Hosp., Inc. v. Burwell*, 100 F.Supp.3d 1122, 1175 (D.N.M. 2015) (Explaining "[w]hen agencies interpret their own regulations—to, for example, adjudicate whether a regulated party was in compliance with them—courts accord agencies what is known as *Auer* or *Seminole Rock deference*").

Further, the Court has described *Auer* deference as the courts' practice of "deferr[ing] to agencies' reasonable readings of genuinely ambiguous regulations." Circuits that follow agency interpretation of regulations often reference *Auer* as part of their rationale. Notably, these circuit decisions all precede *Loper Bright Enters. v. Raimondo*, in which the Court eliminated court deference to reasonable agency interpretation of statutory provisions, which, at best, muddies the waters

on what deference courts should give to agency interpretations of their own regulations.

Generally, the Sixth, Seventh, Eighth, Ninth, and D.C. Circuits defer to the agency (using *Auer* deference) regarding ambiguous regulations (now on the condition that the *Kisor* conditions are met), but only the Seventh Circuit explicitly applied agency law in a tolling decision. In *Sparre v. United States*, 924 F.3d 398 (7th Cir. 2019), the Seventh Circuit applied agency law and confirmed that the Administrative Review Board (ARB) had not abused its discretion.

The First, Second, Third, Fifth, and Eleventh Circuits have all consistently applied circuit law over agency law. The Eleventh Circuit case, *Stone & Webster Constr., Inc. v. United States DOL*, 684 F.3d 1127 (2012), where the employee in *Stone* filed a whistleblower complaint with OSHA under the ERA. The Eleventh Circuit ultimately applied both OSHA's regulations and Eleventh Circuit precedent. The *Stone* court concluded that the ARB applied the wrong standard of review when reviewing the Administrative Law Judge's decision. The court determined that even if the ARB had applied the right standard of review, the Eleventh Circuit would still have granted the petition for review and remanded the case because the ARB failed to correctly identify and apply Eleventh Circuit precedent. Because the ARB construed or interpreted Eleventh Circuit case law and not the ERA, the Eleventh Circuit found that it was obligated to review and correct the ARB's application of Eleventh Circuit precedent.

B. Without a Precedent from This Court, Disputed Interpretations Will Continue to Be Split on Adherence to Circuit Law.

The Supreme Court has not issued a controlling decision that explicitly requires administrative agencies to follow the law of the circuit whose courts have jurisdiction over the cause of action. This court emphasized that lower courts, including Courts of Appeals, are required to adhere to directly controlling Supreme Court precedents, even if those precedents rest on reasoning that has been rejected in other decisions. *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005). This principle underscores the hierarchical nature of judicial authority but does not directly impose a requirement on administrative agencies to follow circuit law.

Under the APA, courts are tasked with reviewing agency actions to ensure they are not arbitrary, capricious, or contrary to law. 5 U.S.C. § 706. While this provision governs judicial review of agency actions, it does not explicitly mandate that agencies must follow the law of the circuit in which a case arises. Notwithstanding this Court's decision in *Loper Bright Enters. v. Raimondo*, the issue here does not entail an ambiguous interpretation of a statue, but rather the Agency's misapplication of the applicable case law. "Applicable case law" only became ambiguous when the ARB erred in applying the standards set forth in the OALJ and when appealed to the Fourth Circuit the question on review was not the Agency's interpretation of the statue, but rather the Agency's misapplication of the applicable case law on review.

CONCLUSION

For the foregoing reasons, Hanna respectfully requests that this Court issue a writ of certiorari to review the judgment of the Fourth Circuit's application of the separation of powers doctrine as set out in *Hyatt*, reverse the decision of the lower courts, and remand.

Respectfully submitted,

R. Scott Oswald
Counsel of Record
Anita Mazumdar Chamber
THE EMPLOYMENT LAW GROUP, PC
1717 K Street, NW, Suite 1110
Washington, DC 20006
(202) 331-3911
soswald@employmentlawgroup.com

Counsel for Petitioner

March 2, 2026