No. 23-870

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 United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC., THE BUCKEYE INSTITUTE, CATO INSTITUTE, AND THE INSTITUTE FOR HAZARDOUS MATERIALS PACKAGING AND CERTIFICATION TESTING, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

DAVID C. TRYON
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

JERRY W. COX, ESQ.
INSTITUTE FOR HAZARDOUS MATERIALS PACKAGING AND CERTIFICATION TESTING, INC.
14561 Sterling Oaks Dr.
Naples, FL 34110
(703) 757-5866
jcox@potomacstrategy associates.com

ELIZABETH GAUDIO MILITO
Counsel of Record
ROB SMITH
NFIB SMALL BUSINESS LEGAL CENTER, INC.
555 12th Street, NW
Ste. 1001
Washington, DC 20004
(202) 406-4443
elizabeth.milito@nfib.org
rob.smith@nfib.org

ANASTASIA P. BODEN
THOMAS A. BERRY
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1414
aboden@cato.org

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICI CURIAE*	1
INTRODUCTION AND SUMMARY OF ARGUMENT	3
ARGUMENT	6
I. Multiple Courts of Appeals Have Now Used Rule 26(b) to Circumvent this Court's Precedents	6
II. The Text of Rule 26(b) Permits Equitable Tolling in this Case	9
III. The Eleventh Circuit's Reading of Rule 26(b) Creates a Conflict with the Rules Enabling Act	10
IV. Reading Rule 26(b) to Preclude Equitable Tolling for Review of Agency Decisions Elevates Agencies over Article III Courts	13
V. Without this Court's Review, Agencies Can Use Rule 26(b) to Benefit from Their Own Wrongdoing	14
CONCLUSION	17

TABLE OF AUTHORITIES

CASES Page(s)

Boechler, P.C. v. Comm'r of Internal Revenue,
596 U.S. 199 (2022)..... 4, 6, 8-10, 13

Burlington N. R.R. Co. v. Woods,
480 U.S. 1 (1987)..... 10-11

Egelhoff v. Breiner,
532 U.S. 141 (2001)..... 16

Fort Bend Cty. v. Davis,
139 S. Ct. 1843 (2019)..... 6

Harrow v. Dep't of Def.,
No. 2022-2254, 2023 WL 1987934
(Fed. Cir. Feb. 14, 2023), *cert granted*,
No. 23-21, (Dec. 8, 2023)..... 6

Irwin v. Dep't of Veterans Affairs,
498 U.S. 89 (1990)..... 13

Liu v. SEC,
140 S. Ct. 1936 (2020)..... 16

Lozano v. Montoya Alvarez,
572 U.S. 1 (2014)..... 6, 13

Lucia v. SEC,
585 U.S. 237 (2018)..... 14, 15

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980)..... 11

Mutual Life Ins. Co. v. Armstrong,
117 U.S. 591 (1886)..... 16

Nutraceutical Corp. v. Lambert,
139 S. Ct. 710 (2019)..... 4, 7-9

TABLE OF AUTHORITIES—Continued

Page(s)

Polyweave Packaging, Inc. v. Dep't of Transp., No. 21-4202 (6th Cir. 2022) 15

Root v. Lake Shore & M.S. Ry. Co., 105 U.S. 189 (1881)..... 16

Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010)..... 10-12

Sibbach v. Wilson & Co., 312 U.S. 1 (1941)..... 10

United States v. Wong, 575 U.S. 402 (2015)..... 14

Wilkins v. United States, 598 U.S. 152 (2023)..... 6

Young v. United States, 535 U.S. 43 (2002)..... 13

CONSTITUTION

U.S. Const. art. II, § 2, cl. 2..... 5, 14, 15

U.S. Const. art. III..... 5, 11, 13, 14

U.S. Const. amend. V 4, 11

STATUTES

5 U.S.C. § 7703(b)(1)(A)..... 7

26 U.S.C. § 501(c)(3)..... 2

26 U.S.C. § 6330(d)(1) 8

28 U.S.C. § 2072(a)..... 10

28 U.S.C. § 2072(b)..... 10

TABLE OF AUTHORITIES—Continued

Page(s)

49 U.S.C. § 5127 ..... 9, 10, 12

49 U.S.C. § 5127(a)..... 7, 9

RULES

Fed. R. App. P. 26(b)..... 2-16

Fed. R. App. P. 26(b)(2) 6, 10

Fed. R. Civ. P. 4(m) 12

Fed. R. Civ. P. 23(f) 4, 7, 8

COURT FILINGS

Motion to Vacate and Remand, *Polyweave Packaging, Inc. v. Dep't of Transp.*, No. 21-4202, Doc. 29 (6th Cir. July 22, 2022). 15

Resp't Br., *Harrow v. Dep't of Def.*, No. 23-21 (February 2024) 7

INTEREST OF *AMICI CURIAE*[1]

The National Federation of Independent Business Small Business Legal Center, Inc. (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. It is an affiliate of the National Federation of Independent Business, Inc. (NFIB), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—to formulate and promote free-market policy in the states. The Buckeye Institute accomplishes the organization's mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policies, and marketing those public policy solutions for implementation in Ohio and replication across the country. The Buckeye Institute assists executive and legislative branch policymakers by providing ideas, research, and data to enable lawmakers' effectiveness in advocating free-market public policy solutions. The

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. Under Supreme Court Rule 37.2(a), *amici curiae* notified counsel for both parties of their intent to file this brief at least 10 days prior to the due date for the brief.

Buckeye Institute is a nonpartisan, nonprofit, tax-exempt organization, as defined by I.R.C. § 501(c)(3). Through its Legal Center, The Buckeye Institute works to restrain governmental overreach at all levels of government. In fulfillment of that purpose, The Buckeye Institute files lawsuits and submits amicus briefs.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. To that end, Cato's Robert A. Levy Center for Constitutional Studies publishes books and studies, conducts conferences, produces the annual *Cato Supreme Court Review*, and files amicus briefs.

The Institute for Hazardous Materials Packaging and Certification Testing, Inc. (IHMPACT) was incorporated in 2021 as a not-for-profit, tax-exempt charitable and educational association whose founding members include family-owned small businesses that manufacture, test and certify packaging products to meet federal standards for safely transporting hazardous materials and other persons interested in serving IHMPACT's purposes. IHMPACT exists in part to educate regulators, lawmakers, and judicial or quasi-judicial officials concerning hazardous materials transportation safety. IHMPACT also promotes industry compliance with U.S. Department of Transportation regulations and the Department's compliance with constitutional requirements governing proceedings to enforce those regulations.

Amici take interest in this case because the question of whether Federal Rule of Appellate Procedure 26(b) bars equitable tolling for judicial review of administra-

tive agency action will have a widespread impact on regulated entities, including small businesses.

INTRODUCTION AND SUMMARY OF ARGUMENT

Just two terms ago, this Court unanimously held that a 30-day statutory filing deadline to seek review of an administrative agency's determination could be equitably tolled. This case asks whether a court-created rule can categorically bar equitable tolling of a statutory filing deadline for judicial review of agency action, regardless of Congress's directives? The answer should be that it cannot.

But the Eleventh Circuit, Federal Circuit, and the Government see things differently. They have used Federal Rule of Appellate Procedure 26(b) (Rule 26(b))[2] as a loophole to avoid this Court's recent holding. Under their theory, Rule 26(b) bars equitable tolling in all instances where a party seeks to petition for review of an agency determination.

That cannot be right, and this Court's review is necessary to stop this trend before Rule 26(b) becomes abused to the detriment of regulated entities.

---

[2] Federal Rule of Appellate Procedure 26(b):

(b) EXTENDING TIME. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file: . . .

(2) 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.

First, the Eleventh Circuit's reading of Rule 26(b) ignores this Court's opinion in *Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199 (2022), and misreads the Court's decision in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019). *Boechler* applies to statutory filing deadlines, while *Nutraceutical* was limited to a court-created filing deadline in Civil Rule of Procedure 23(f). Properly read and considered, there is no conflict between these two decisions. But the Eleventh Circuit's decision applying *Nutraceutical* to a statutory filing deadline, also advanced by the Federal Circuit and Government, creates one.

Second, the text of Rule 26(b) permits equitable tolling in this case. Nothing in the Hazardous Materials Transportation Act suggests Congress meant to prohibit equitable tolling for review of Department of Transportation (DOT or Department) actions. Equitable tolling is a longstanding principle of our law and a backdrop upon which Congress enacts limitations periods. The lack of any evidence that Congress meant to alter that backdrop in the statute suggests that it permits equitable tolling and is therefore "specifically authorized by law" under Rule 26(b).

Additionally, the Eleventh Circuit's reading of Rule 26(b) violates the Rules Enabling Act. While courts can create rules of procedure, these rules cannot abridge substantive rights. The right restricted here is that under the Due Process Clause to have an impartial and disinterested arbiter determine whether the government can take one's financial property. The Eleventh Circuit's reading of Rule 26(b) to block judicial review of agency action directly impacts this right and the available remedies for its infringement.

Also, this erroneous interpretation of Rule 26(b) makes little constitutional sense. Our Constitution expressly provides for the adjudication of rights in Article III courts. Equitable tolling is routinely available to plaintiffs in Article III courts, including in claims against the government. Categorically barring equitable tolling for review of nonconstitutional in-house agency adjudication removes rights routinely enjoyed in Article III courts. The effect is that the non-neutral and nonconstitutional forum provides fewer protections for litigants compared to the neutral and constitutionally-provided forum.

Finally, reading Rule 26(b) to bar equitable tolling for judicial review of any agency action will reward wrongful conduct. The Department admitted, in a separate case, that the officer reviewing Petitioner's administrative case was not properly appointed under Article II. And it did so before the officer rendered a decision in Petitioner's case. Yet it hid this constitutional defect from Petitioner. When Petitioner discovered the impropriety, the Department conveniently claimed it was too late. Wrongdoers should not benefit from their improper conduct, and this Court's review is necessary to affirm that agencies are not exempt from this principle.

Amici urge this Court to grant the Petition.

ARGUMENT

I. Multiple Courts of Appeals Have Now Used Rule 26(b) to Circumvent this Court's Precedents.

This Court's review is necessary to stop a new and disturbing trend in the courts of appeals since *Boechler*, which held that a statutory filing deadline to review agency action was subject to equitable tolling. *Boechler* confirmed that "[e]quitable tolling is a traditional feature of American jurisprudence . . . ." *Boechler*, 596 U.S. at 208–09 (2022) (quoting *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10 (2014)).

Post-*Boechler*, two courts of appeal—the Eleventh Circuit below and the Federal Circuit in *Harrow v. Dep't of Def.*, No. 2022-2254, 2023 WL 1987934 (Fed. Cir. Feb. 14, 2023) (per curiam), *cert granted*, No. 23-21, (Dec. 8, 2023)—have used Rule 26(b) to entirely bar equitable tolling for reviewing the decision of an administrative agency, regardless of statutory text. Doing so contradicts the letter of this Court's decision in *Boechler*, and the spirit of this Court's precedents on statutory filing deadlines.[3]

In *Harrow*, the Federal Circuit concluded that the 60-day filing deadline to appeal a decision of the Merit Systems Protection Board was a jurisdictional requirement not subject to equitable tolling. *Harrow*, 2023 WL 1987934, at *1. That court cited Rule 26(b)(2) for the proposition that it could not extend the time to file a petition for review through equitable tolling. *Id.*

---

[3] *See, e.g., Wilkins v. United States*, 598 U.S. 152 (2023); *Fort Bend Cty. v. Davis*, 139 S. Ct. 1843, 1849–50 (2019) (discussing this Court's precedents on interpreting statutory time requirements).

The Eleventh Circuit below sidestepped the statutory jurisdictional question altogether, citing *Nutraceutical* and Rule 26(b) to justify its decision that the 60-day deadline in 49 U.S.C. § 5127(a) is not subject to equitable tolling. App. 4a–5a.

As Petitioner discusses, *Nutraceutical* involved a filing deadline within the court-adopted Federal Rules of Civil Procedure themselves, not a statutory filing deadline. Pet. at 10, 21; *see also Nutraceutical Corp.*, 139 S. Ct. at 714–15. *Nutraceutical* held that Civil Rule 23(f)'s 14-day deadline to seek permission for appealing a class certification decision is not subject to equitable tolling. *Id.* at 714. This is so because "the Federal Rules of Appellate Procedure single out Civil Rule 23(f) for inflexible treatment." *Id.* at 715. To support this conclusion, this Court cited Rule 26(b) for the notion that "[t]he *Rules* thus express a *clear intent to compel rigorous enforcement of Rule 23(f)'s deadline*[.]" *Id.* at 715 (emphasis added). Not once in *Nutraceutical* did this Court apply Rule 26(b) to a statutory filing deadline, or otherwise suggest that it would prevent equitable tolling for a deadline other than that found in Civil Rule 23(f). *Id.* at 710–18 (not one mention of a filing deadline in the U.S. Code). Thus, the Eleventh Circuit's application of Rule 26(b) to a statutory filing deadline rests on a misreading of *Nutraceutical* that cannot stand.[4]

[4] Further warranting this Court's review is that the Government also misreads *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019). *See* Resp't Br., *Harrow v. Dep't of Def.*, No. 23-21, at 42–44 (citing *Nutraceutical* and Rule 26(b) to argue that a filing deadline in 5 U.S.C. 7703(b)(1)(A) is not subject to equitable tolling). If the Court fails to correct this misunderstanding of its decision, it will only spread.

Both the Eleventh and Federal Circuits' decisions conflict with this Court's decision in *Boechler*. *Boechler* held that the 30-day deadline in 26 U.S.C. § 6330(d)(1) to petition the Tax Court for review of an IRS tax levy is a nonjurisdictional claim processing rule, subject to equitable tolling. *Boechler*, 596 U.S. at 211. A "procedural requirement [is] jurisdictional only if *Congress* 'clearly states' that it is." *Id.* at 203 (emphasis added) (quoted source omitted). On equitable tolling, the Court made clear that it is a "traditional feature of American jurisprudence" and "nonjurisdictional limitations periods are presumptively subject to equitable tolling." *Id.* at 208–09.

Nowhere in *Boechler* did this Court reference Rule 26(b). For the Eleventh Circuit, Federal Circuit, and Government to be correct that Rule 26(b) bars equitable tolling of statutory deadlines to review agency action, the *Boechler* Court would have needed to cite Rule 26(b), given that *Boechler* involved both a statutory deadline and an appeal of an agency determination. Nor did the *Boechler* decision cite *Nutraceutical*. This omission makes sense only if one reads *Nutraceutical* to be limited to court-created filing deadlines such as Civil Rule 23(f), rather than the significantly broader holding that Respondents contend. Also, both *Boechler* and *Nutraceutical* were unanimous decisions, meaning seven of this Court's current members were in the majority of both opinions. If the Court's logic and rationale regarding the application of Rule 26(b) to the filing deadline of Civil Rule 23(f) also applied to statutory filing deadlines, surely one of the seven would have raised Rule 26(b)'s application to the facts in *Boechler*.

Boechler controls. If Rule 26(b) bars equitable tolling of statutory filing deadlines in all instances where a party appeals the action of an administrative agency, *Boechler*'s entire discussion on the availability of equitable tolling in that case would have been nugatory. Instead, the Eleventh and Federal Circuits have ignored *Boechler*, and read both Rule 26(b) and *Nutraceutical* in a way that conflicts with *Boechler*. This Court's review is necessary to reinforce *Boechler* while placing Rule 26(b) and *Nutraceutical* in their proper context.

II. The Text of Rule 26(b) Permits Equitable Tolling in this Case.

Rule 26(b) itself permits equitable tolling. Fed. R. App. P. 26(b) ("For good cause, the court may extend the time prescribed . . . ."). Because court-adopted rules cannot alter the statutory scheme, Rule 26(b) rightfully limits its scope to "these rules" or orders of a court. *Id.* A court "may not extend the time to file: . . . a notice of appeal from or a petition to enjoin, set aside, . . . or otherwise review an order of an administrative agency . . . , *unless specifically authorized by law*." *Id.* (emphasis added).

Nothing in 49 U.S.C. § 5127 demonstrates that Congress wanted to bar equitable tolling. Section 5127 "does not expressly prohibit equitable tolling," *Boechler*, 596 U.S. at 209, and its short 60-day time limit is "directed at the taxpayer," *id.*, because it focuses on when a person must file the petition for judicial review of agency action. *See* 49 U.S.C. § 5127(a) ("The petition must be filed . . . .").

Since equitable tolling is a "background principle against which Congress drafts limitations periods" and "Congress [does not] alter that backdrop lightly,"

§ 5127 must be read as being enacted pursuant to that backdrop. *Boechler*, 596 U.S. at 209. It contains no prohibition on equitable tolling nor is there statutory evidence to rebut the presumption that equitable tolling is generally available. Thus, 49 U.S.C. § 5127 should be read as a law that authorizes equitable tolling, falling into Rule 26(b)(2)'s exception.

III. The Eleventh Circuit's Reading of Rule 26(b) Creates a Conflict with the Rules Enabling Act.

The Eleventh Circuit's reading of Rule 26(b), and that of the Federal Circuit and advanced by the Government, runs afoul of the Rules Enabling Act (Act). It does so by abridging the substantive right of individuals to seek judicial review of a constitutionally tainted agency proceeding that deprives them of their property.

The Act allows the Supreme Court to prescribe general rules of practice and procedure for cases in federal courts. 28 U.S.C. § 2072(a). The power granted is limited, in that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b). Under this limitation, the rules must "really regulate[] procedure[.]" *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941). In other words, the question under the Act is whether the challenged rule regulates the "process for enforcing [] rights," or impacts the "rights themselves, the available remedies, or the rules of decision by which the court adjudicated either." *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407–08 (2010) (Scalia, J., joined by Roberts, C.J., Thomas and Sotomayor, JJ.).

Granted, the Federal Rules operate under a strong presumption of validity. *Burlington N. R.R. Co. v.*

Woods, 480 U.S. 1, 6 (1987).[5] But the presumption is overcome here if Rule 26(b) means, as the Eleventh Circuit read it to, that regulated entities cannot seek judicial review of a constitutionally tainted agency proceeding within 60 days of learning about the constitutional error.

The Eleventh Circuit's interpretation of Rule 26(b) undermines the right of individuals to seek review of agency decisions from a neutral arbiter where case-specific factual circumstances warrant equitable tolling. This right to review agency actions comes from the Due Process Clause, which "entitles a person to an *impartial* and *disinterested tribunal*" in civil cases. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (emphasis added).

Consider the federal litigation process as a ladder: the first step is initial review in either a federal court or agency proceeding, the second is appellate review by the courts of appeals, and the third is ultimate review by this Court. In the ordinary civil case, the availability of redress in the first rung of the litigation ladder—federal district court—satisfies the Due Process Clause requirement. This is so because the Article III judge is the "impartial and disinterested" arbiter that the Clause mandates. But where the deprivation of liberty or property by administrative agency is involved, a regulated party's first availability for an "impartial and disinterested tribunal" is not the first rung of the litigation ladder (i.e., the agency proceeding), but instead, the second—federal appellate courts.

---

[5] The Court has upheld numerous Federal Rules of Civil and Appellate Procedure from Rules Enabling Act claims. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407–08 (2010) (Scalia, J., joined by Roberts, C.J., Thomas and Sotomayor, JJ.) (listing the rules upheld).

See, e.g., 49 U.S.C. § 5127 (noting proper venue for review of final agency action is the U.S. courts of appeals).

Preventing impartial review of agency action is a denial of a substantive right. The Eleventh Circuit's reading of Rule 26(b) "alter[s] the right[]" to not be deprived of property without due process and it cuts off "available remedies." *See Shady Grove Orthopedic Associates, P.A.*, 559 U.S. at 407–08 (Scalia, J., joined by Roberts, C.J., Thomas and Sotomayor, JJ.). Worse than altering the "rules of decision" by which a court will adjudicate claims, the Eleventh Circuit's interpretation of Rule 26(b) eliminates court review entirely after 60 days, even where the agency proceeding was constitutionally tainted. Doing so goes far beyond regulating procedure, like service of process, submission to examinations, sanctions for wrongful filings, or the joinder of claims.

Our Constitution provides a right to be free from the deprivation of property, which includes fines imposed by administrative agencies. But there is no substantive right to serve process how one wishes, to file frivolous appeals or certifications, or to have one's claim heard exclusive of all others. Nor did any of these previous challenges cut off the remedies available. Defective service of process can be cured. Fed. R. Civ. P. 4(m). Sanctions for frivolous or wrongful filings have no impact on a court's judgment for either party. In contrast, the lower court's view of Rule 26(b) directly impacts the remedies for litigants—it forever prevents the ability to have an agency fine overturned even if the facts of a case may warrant equitable tolling.

The Eleventh Circuit's reading of Rule 26(b) creates a conflict with the Rules Enabling Act. That decision

"abridge[s]" the right to have an "impartial and disinterested tribunal" review agency action that deprives individuals of their property. The correct understanding of Rule 26(b), allowing for equitable tolling, presents no such conflict.

IV. Reading Rule 26(b) to Preclude Equitable Tolling for Review of Agency Decisions Elevates Agencies over Article III Courts.

Federal Rule of Appellate Procedure 26(b) cannot *per se* bar equitable tolling of statutory deadlines for judicial review of agency actions. Permitting it to do so would produce an egregious result whereby equitable tolling may be available for filing deadlines in front of a neutral arbiter (Article III courts), but would never be available to seek a neutral arbiter's review of a non-neutral party's (administrative agency) decision. Put simply, administrative agencies would be further insulated from judicial review.

Equitable tolling is readily available in Article III courts. It is "a long-established feature of American jurisprudence[.]" *Lozano*, 572 U.S. at 10. This Court has described the notion that "limitations periods are customarily subject to equitable tolling" as "hornbook law." *Young v. United States*, 535 U.S. 43, 49 (2002) (internal quotations omitted) (quoting *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990)). "[M]ost [deadlines] can be equitably tolled[.]" *Boechler*, 596 U.S. at 211. Equitable tolling is available in both lawsuits between private parties and against the Government. *Irwin*, 498 U.S. at 95–96 ("Time requirements in lawsuits between private litigants are customarily subject to 'equitable tolling'" and "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should

also apply to suits against the United States." (quoted source omitted)).

Other than a clear statutory directive from Congress, which is lacking here, no reason exists for equitable tolling to be available in some suits against the Government (such as those brought under the Federal Tort Claims Act in Article III courts, *see United States v. Wong*, 575 U.S. 402, 420 (2015)), but not others (like those seeking judicial review of agency action).

By using Rule 26(b) to categorically bar equitable tolling when seeking review of agency action, the decisions of the Eleventh and Federal Circuits place administrative agencies in a superior position to Article III courts. Neither Congress nor our Constitution countenances such an outcome.

V. Without this Court's Review, Agencies Can Use Rule 26(b) to Benefit from Their Own Wrongdoing.

This case perfectly demonstrates why equitable tolling of deadlines to review agency decisions is vital to protect regulated entities.

The Constitution requires that inferior officers be appointed in one of three ways: 1) by the President; 2) by the Courts of Law; or 3) by the Heads of Departments. U.S. Const. Art. II. § 2, cl. 2; *Lucia v. SEC*, 585 U.S. 237, 244 (2018). The DOT Chief Safety Officer who heard Petitioner's appeal of the initial agency determination was not appointed by the President, a Court of Law, or a Head of Department. DOT conceded this constitutional infirmity to the Sixth Circuit, *three days before* the improperly appointed official rendered the final agency decision in

Petitioner's appeal. *See* Motion to Vacate and Remand, *Polyweave Packaging, Inc. v. Dep't of Transp.*, No. 21-4202, Doc. 29 (6th Cir. July 22, 2022).[6]

Prior to the final decision in Petitioner's appeal, the Department knew that the presiding official was an Officer of the United States. *Id.* ("The Chief Safety Officer . . . at issue is an officer."). It knew that his appointment was invalid under the Appointments Clause. *Id.* ("[T]he government has determined that PHMSA's Chief Safety Officer, the official who issued the agency decision under review, was not properly appointed at the time that he issued that decision."). And it knew that the proper remedy was to "have the matter reviewed by a new and properly appointed official." *Id.*; *see also Lucia*, 585 U.S. at 251–52 (holding that the proper remedy for an invalid appointment is a new hearing before a different and properly appointed official). Yet the agency hid the constitutional defect from Petitioner and permitted the invalidly appointed official to issue a final agency decision.

The Department, and all administrative agencies, should not be rewarded for concealing a constitutional defect while running out the clock. Yet the decisions of the Eleventh and Federal Circuits do exactly that.

Reading Rule 26(b) to bar equitable tolling for review of any agency action may incentivize agency gamesmanship. It will also disproportionately hurt low-income individuals and small businesses, who lack the financial and legal resources to monitor

[6] The Chief Safety Officer involved in this case is the same one who issued the agency's decision in *Polyweave Packaging* and whose appointment the Department conceded was invalid.

agency actions for constitutional error, let alone even recognize those errors when they occur.

In other contexts, it is a longstanding principle that wrongdoers should not benefit from their wrongdoing. Regarding patents, this Court has said that "it would be inequitable [for a wrongdoer to] make a profit out of his own wrong." *Root v. Lake Shore & M.S. Ry. Co.*, 105 U.S. 189, 207 (1881). In the inheritance context, "slayer" statutes "have been adopted by nearly every State" and the "principle underlying the[se] statutes . . . is well established in the law[.]" *Egelhoff v. Breiner*, 532 U.S. 141, 151 (2001); *see also Mutual Life Ins. Co. v. Armstrong*, 117 U.S. 591, 600 (1886) (describing the idea that one who takes the life of another should recover the life insurance proceeds from that party's death as a "reproach to the jurisprudence of the country"). And the principle equally applies in the administrative law context, with this Court recently permitting the SEC to seek disgorgement under its power to seek equitable relief so that wrongdoers may not benefit from illegal activity. *See Liu v. SEC*, 140 S. Ct. 1936, 1940 (2020). Our system is not one with rules for thee, but not for me.

Allowing Rule 26(b) to bar equitable tolling of judicial review for all agency action rewards, and can incentivize, improper behavior. Wrongdoers should not profit from their unlawful activity, and that principle equally applies to administrative agencies.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

DAVID C. TRYON
THE BUCKEYE INSTITUTE
88 East Broad Street
Suite 1300
Columbus, OH 43215
(614) 224-4422
D.Tryon@BuckeyeInstitute.org

JERRY W. COX, ESQ.
INSTITUTE FOR HAZARDOUS MATERIALS PACKAGING AND CERTIFICATION TESTING, INC.
14561 Sterling Oaks Dr.
Naples, FL 34110
(703) 757-5866
jcox@potomacstrategy associates.com

ELIZABETH GAUDIO MILITO
Counsel of Record
ROB SMITH
NFIB SMALL BUSINESS LEGAL CENTER, INC.
555 12th Street, NW
Ste. 1001
Washington, DC 20004
(202) 406-4443
elizabeth.milito@nfib.org
rob.smith@nfib.org

ANASTASIA P. BODEN
THOMAS A. BERRY
CATO INSTITUTE
1000 Mass. Ave., N.W.
Washington, DC 20001
(202) 216-1414
aboden@cato.org

Counsel for Amici Curiae

March 14, 2024