No. 22-14140

IN THE

United States Court of Appeals for the Eleventh Circuit

METAL CONVERSION TECHNOLOGIES, LLC,
Petitioner,

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION,
Respondent.

PETITIONER'S RESPONSE TO THE COURT'S JURISDICTIONAL QUESTION

February 14, 2023

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CERTIFICATE OF INTERESTED PERSONS

Petitioner Metal Conversion Technologies, LLC, discloses under Federal Rule of Appellate Procedure 26.1 that it has no parent corporation and no publicly held company owns more than 10% of its stock. Petitioner further certifies that the following is a complete list of interested persons as required by Eleventh Circuit Rule 26.1:

1. Metal Conversion Technologies, LLC, *Petitioner.*
2. John Patterson, *President of Metal Conversion Technologies, LLC*
3. Sheng Li, *Counsel for Metal Conversion Technologies, LLC*
4. Kara Rollins, *Counsel for Metal Conversion Technologies, LLC*
5. Deitra Crawly, *Counsel for Metal Conversion Technologies, LLC*, *in the administrative proceeding before Department of Transportation*
6. U.S. Department of Transportation, Pipeline and Hazardous Materials Safety Administration, *Respondent*
7. Peter Buttigieg, *Secretary of the U.S. Department of Transportation*
8. Tristan Brown, *Acting Administrator and Deputy Administrator of the Pipeline and Hazardous Materials Safety Administration*
9. Osasu Dorsey, *Chief Counsel of the Pipeline and Hazardous Materials Safety Administration*
10. Vasiliki Tasagnov, *Deputy Chief Counsel of the Pipeline and Hazardous Materials Safety Administration*

11. Howard McMillan, *Chief Safety Officer of the Pipeline and Hazardous Materials Safety Administration*
12. Joshua M. Salzman, *Counsel for Respondents*
13. Brad Hinselwood, *Counsel for Respondents*

No publicly traded company or corporation has an interest in the outcome of this petition.

Dated: February 14, 2023

/s/ Sheng Li
SHENG LI

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JURISDICTIONAL QUESTION PRESENTED

On January 31, 2023, the Court issued the following jurisdictional question to Petitioner (Doc. 8-2): Please address whether the petition for review, filed on December 15, 2022, is timely to challenge the July 25, 2022, final administrative action by the U.S. Department of Transportation. *See* 49 U.S.C. § 5127 (explaining that a petition for review must be filed "not more than 60 days after the Secretary's action becomes final"); Fed. R. App. P. 15 ("Review of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order.").

INTRODUCTION

The 60-day filing deadline prescribed by 49 U.S.C. § 5127(a) is not jurisdictional because Congress "provided no clear statement indicating that § [5127(a)] is the rare statute of limitations that can deprive a court of jurisdiction." *United States v. Wong*, 575 U.S. 402, 410 (2015). Additionally, the December 15, 2022 petition for review of the U.S. Department of Transportation's ("DOT") July 25, 2022 Final Order is timely. Under both the discovery rule and the doctrine of equitable tolling, Section 5127's 60-day deadline would not have started to run until October 18, 2022. Petitioner Metal Conversion Technologies, LLC, filed its challenge 58 days later, on December 15, 2022.

The discovery rule applies because DOT mailed the Final Order to an incorrect address. As a result, Petitioner did not learn about the Final Order until October 18, 2022, when a third party notified Petitioner. The 60-day filing deadline for challenging

the Final Order under 49 U.S.C. § 5127(a) thus did not start to run until the date of discovery on October 18, 2022. *See Webster v. Dean Guitars*, 955 F.3d 1270, 1276 (11th Cir. 2020) ("[F]ederal claims generally 'accrue when the plaintiff knows or has reason to know of the injury which is the basis of the action.'" (quoting *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990)).

Petitioner is also entitled to equitable tolling on its Appointments Clause challenge to the Final Order. In July 2022, DOT learned that the official who presided over Petitioner's then-pending administrative proceeding was improperly appointed under *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018). DOT concealed this Appointments Clause defect from Petitioner and allowed the improperly appointed official to issue the July 25, 2022 Final Order despite it. Petitioner learned about this Appointments Clause violation only after a third party informed him of DOT's misconduct on October 18, 2022. Because no amount of diligence would have allowed Petitioner to learn about DOT's deliberate constitutional violation and concealment thereof, Petitioner is entitled to toll Section 5127(a)'s 60-day filing deadline to October 18, 2022, making the December 15 filing timely.

FACTUAL BACKGROUND

I. DOT'S ENFORCEMENT ACTION AGAINST PETITIONER

Petitioner is a limited liability corporation incorporated in Georgia in 2003. It provided alloy manufacturing and processing services to the stainless-steel industry until

December 2016, when it ceased operations.[1] Patterson Decl. ¶ 2 (attached as Ex. 1). Petitioner's only business since closing shop is dealing with DOT's investigation and subsequent enforcement action at issue in this case. *Id.* ¶ 5. Petitioner was located at 1 East Porter Street, Cartersville, Georgia 30120, from 2004 until December 2016. *Id.* ¶ 3. After using a P.O. Box in Weirton, West Virginia, from December 2016 to September 2020, Petitioner changed its mailing address in September 2020 to: "211 Mill Street P.O. Box 129, Springport, MI 49284." *Id.* ¶¶ 6, 8.[2]

On February 5, 2020, DOT's Pipeline and Hazardous Materials Safety Administration ("PHMSA") issued a notice of proposed violation against Petitioner for alleged violations of the Hazardous Materials Regulations at 49 C.F.R. parts 171-180. Notice of Probable Violation (Feb. 5, 2020) ("NOPV") (attached as Ex. 2). DOT was aware Petitioner had left its Cartersville, Georgia address because it sent the February 2020 NOPV to Petitioner's then-current P.O. Box in Weirton, West Virginia. *Id.*

PHMSA's adjudicatory scheme permits informal responses to the Chief Counsel's Office as an alternative to a hearing before an administrative law judge

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[1] Petitioner ceased most of its operations in December 2016. Battery Recycling Made Easy ("BRME")—a battery recycling company headed by John Patterson's son, Christian—used the Cartersville, Georgia address as its sales office until it moved in February 2019 to a new address in Calhoun, Georgia. Patterson Decl. ¶ 4.

[2] The Court can take judicial notice of the fact that the U.S. Postal Service ("USPS") provides 12 months of mail-forwarding services in connection with permanent changes of address, like Petitioner's permanent changes of address from Georgia first to West Virginia and then to Michigan. *See* USPS, Mail Forwarding Option, https://faq.usps.com/s/article/Mail-Forwarding-Options (last visited Feb. 14, 2023).

("ALJ"). *See* 49 C.F.R. § 107.317. Petitioner chose this informal option and repeatedly corresponded by phone and email with PHMSA's Office of Chief Counsel. Petitioner informed PHMSA that it is no longer located in Cartersville, Georgia, and that its new mailing address is in Springport, Michigan. The signature line on Petitioner's February 2021 email to PHMSA, for example, clearly lists Petitioner's mailing address as: "211 Mill Street PO Box 129, Springport, MI 49284." Feb 15, 2021 Email Correspondence between J. Patterson and DOT (listing the Springport P.O. box as Metal Conversion's mailing address) (attached as Ex. 3).[3]

On October 7, 2021, PHMSA's Acting Chief Counsel issued an order assessing a civil penalty on Petitioner. *See* In the Matter of: Metal Conversion Technologies, LLC, PHMSA Case No. 18-0086-HMI-SW (Oct. 7, 2021) ("Chief Counsel's Order") (attached as Ex. 4). The certificate of service accompanying the order states that PHMSA mailed a physical copy of the Chief Counsel's Order to 1 East Porter Street, Cartersville, Georgia 30120. *See* October 8, 2021 Certificate of Service (attached as Ex. 5). PHMSA knew or should have known that 1 East Porter Street was not Petitioner's mailing address because Petitioner's email correspondence with PHMSA listed a Springport, Michigan, P.O. Box as its mailing address. Since 2020, 1 East Porter Street

[3] During this exchange of correspondence, Petitioner also shared with PHMSA its tax documents, which list the Springport, Michigan P.O. Box as Petitioner's address.

has been the address of Creekside Custom Cabinetry, an unrelated business.[4] Because USPS's one-year mail forwarding service had expired, anything DOT mailed to Petitioner using the 1 East Porter Street location would have been returned to sender as undeliverable and unable to be forwarded.[5]

On October 22, 2021, presumably after its initial mailing was returned as undeliverable, PHMSA sent a new copy of the Chief Counsel's Order to BRME's P.O. Box in Calhoun, Georgia. *See* Order of the Chief Counsel at Certificate of Service, In the Matter of: Metal Conversion Technologies, LLC, PHMSA Case No. 18-0086-HMI-SW (Oct. 22, 2021) ("Resent Chief Counsel's Order") (attached as Ex. 8).[6] BRME received the Order on November 1, 2021, scanned it, and forwarded it by email to Petitioner on the same day. *See* BRME's Nov. 1, 2021 email to Petitioner (attaching Resent Chief Counsel's Order) (attached as Ex. 9). In other words, Petitioner received notice of the Chief Counsel's Order from a third party, not PHMSA. Petitioner timely filed an administrative appeal of the Chief Counsel's Order on December 14, 2021. Ms.

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[4] *See Our Location*, Creekside Custom Cabinetry, https://creeksidecabinetry.com/contact/ (last visited Feb. 14, 2023).

[5] To test this claim, on January 13, 2023, Petitioner's counsel sent a blank letter by USPS addressed to Metal Conversion Technologies, LLC, to 1 East Porter Street, Cartersville, Georgia 30120. Metzing Decl. ¶ 2 (attached as Ex. 6); January 13, 2023. Envelope (attached as Ex. 7). As expected, USPS returned that envelope as undeliverable on February 7, 2023. *Id.* ("RETURN TO SENDER[.] ATTEMPTED – NOT KNOWN[.] UNABLE TO FORWARD[.]")

[6] PHMSA also resent the Chief Counsel's Order to an outdated P.O. Box in Cartersville, Georgia.

Deitra Crawley, an attorney at Taylor English Duma LLP, represented Petitioner in that appeal. Notice of Appeal (Dec. 14, 2021) (attached as Ex. 10).[7]

On July 25, 2022, PHMSA's Chief Safety Officer Harold McMillan issued the Final Order assessing a civil penalty against Petitioner. *See* Final Order (Doc. 1-2, Ex. A). On August 2, 2022, the agency again attempted to serve the Final Order by mailing it to 1 East Porter Street, Cartersville, Georgia 30120. August 2, 2022 Certificate of Service (attached as Ex. 11). The agency knew or should have known that was not Petitioner's mailing address, and USPS would have once again returned that copy to PHMSA as undeliverable. PHMSA never mailed a copy of the Final Order to Petitioner's address in Springport, Michigan. Nor did PHMSA email Petitioner or otherwise notify Petitioner.

The August 2, 2022 Certificate of Service also indicates PHMSA mailed a physical copy of the Final Order to Ms. Crawley's office at Taylor English Duma LLP.

[7] Petitioner's administrative appeal argued that: (1) a former BRME employee and not Petitioner was responsible for conduct that allegedly violated the HMR; (2) BRME has taken corrective actions; (3) Petitioner lacks the financial resources to pay the civil penalty; (4) PHMSA failed to consider Petitioner's rights under the Small Business Regulatory Enforcement Fairness Act; and (5) PHMSA misapplied the "knowingly" standard required for a civil penalty under 49 U.S.C. § 5123(a)(1). Notice of Appeal at 3-5.

Id. Ms. Crawley, however, either did not receive that copy, or, if she did receive it, she did not inform Petitioner.[8]

II. PETITIONER LEARNED OF DOT'S FINAL ORDER AND APPOINTMENTS CLAUSE VIOLATION FROM A THIRD PARTY

On October 18, 2022, Jerry Cox, a third-party attorney, contacted Petitioner by phone and email to inform it that PHMSA issued a Final Order assessing a civil penalty. *See* Patterson Decl. ¶ 11; *see also* October 18, 2022 email from J. Cox to J. Patterson (memorializing phone call) (attached as Ex. 13). Mr. Cox's email attached the Final Order. This phone call and email were the first time Petitioner learned that PHMSA had issued the Final Order. Patterson Decl. ¶¶ 11-13. Mr. Cox also informed Petitioner that DOT was aware that Mr. McMillan, the PHMSA official who presided over Petitioner's administrative appeal, was unconstitutionally appointed. *Id.* ¶ 14-15. But DOT did not inform Petitioner of that constitutional violation; instead, it allowed the improperly appointed Mr. McMillan to assess a civil penalty against Petitioner.

Mr. Cox's email to Petitioner attached a July 22, 2022 motion DOT filed in a separate challenge in the Sixth Circuit against a civil-penalty order issued by Mr.

[8] Ms. Crawley told Petitioner's counsel in this case that she did not receive a physical copy of the Final Order from DOT. Petitioner's counsel has asked Ms. Crawley to confirm that initial understanding, but Ms. Crawley has not responded to those requests. *See* Emails from S. Li to D. Crawley dated Dec. 7, 2022; Dec. 12, 2022; and January 31, 2023 (attached as Ex. 12). In any event, Ms. Crawley never informed Petitioner that PHMSA had issued the Final Order. Patterson Decl. ¶ 13.

McMillan.[9] *See* Motion to Vacate and Remand at 2, *Polyweave Packaging, Inc. v. DOT*, No. 21-4202 (6th Cir. July 22, 2022), Doc. 29 ("DOT Mot.") (attached as Ex. 14). In that Sixth Circuit case, the challenger argued, *inter alia*, that Mr. McMillan was improperly appointed under *Free Enterprise Fund v. PCAOB*, 561 U.S. 477, 495-97 (2010), and thus he could not have lawfully issued a civil-penalty order. *Polyweave Packaging, Inc. v. DOT*, No. 21-4202, 2023 WL 1112247, at *1 (6th Cir. Jan. 27, 2023) (citing *Free Enter.*, 561 U.S. at 495-97). DOT apparently discovered in July, 2022 that Mr. McMillan was never properly appointed to adjudicate administrative enforcement proceedings under *Lucia*, 138 S. Ct. at 2044. DOT Mot. at 2. DOT's July 22, 2022 motion to the Sixth Circuit acknowledged Mr. McMillan's defective appointment and requested that court to vacate the civil-penalty order he had issued against Polyweave. *Id.* at 3. The Sixth Circuit granted that request on January 27, 2023. *Polyweave,* 2023 WL 1112247, at *1.

DOT did not, however, inform Petitioner (or apparently any other affected parties) that Mr. McMillan was unconstitutionally appointed, even though Petitioner's December 2021 administrative appeal had been pending before Mr. McMillan for months when DOT discovered in July 2022 that he had been improperly appointed. DOT's own motion admitted that its subsequent ratification of Mr. McMillan's appointment "does not cure the problem" under *Lucia* because a "regulated party is entitled to a decision by a 'properly appointed' and different official who has 'not

[9] Mr. Cox represented the challenger in the Sixth Circuit case.

adjudicated [the matter] before." DOT Mot. at 2-3 (quoting *Lucia*, 138 S. Ct. at 2055). In other words, Petitioner was entitled to "what *Lucia* requires: an [new] adjudication untainted by an Appointments Clause violation." *Cody v. Kijakazi*, 48 F.4th 956, 962 (9th Cir. 2022). Yet, DOT did not reassign Petitioner's administrative appeal to a properly appointed and different official or inform Petitioner he had had fallen victim to the agency's Appointments Clause violation. Instead, DOT allowed the unconstitutionally appointed Mr. McMillan to issue a Final Order assessing a civil penalty against Petitioner on July 25, 2022—just three days after DOT urged the Sixth Circuit to vacate a civil-penalty order in the *Polyweave* case issued by that same defectively appointed official.

ARGUMENT

The Court may exercise jurisdiction over this petition for review filed more than 60 days after DOT's Final Order issued on July 25, 2022, because 49 U.S.C. § 5127(a)'s 60-day time bar is non-jurisdictional. *See Wong*, 575 U.S. at 410. As such, that 60-day filing deadline is subject to tolling. *Id.* Petitioner is entitled to tolling for two independent reasons.

First, because of DOT's mailing error, Petitioner did not learn of the July 25, 2022 Final Order until October 18, 2022. *See Amy v. Anderson*, No. 5:16-CV-212 (MTT), 2017 WL 1098823, at *8 (M.D. Ga. Mar. 23, 2017) (statute of limitations does not run until discovery of injury where plaintiffs "had no way to know they had been injured" until "authorities notified them"). The 60-day deadline under Section 5127(a) thus did

not start to run until Petitioner learned of the Final Order on October 18, 2022, which means its December 15, 2022 filing was timely.

Second, Petitioner is entitled to equitable tolling on its Appointments Clause claim because DOT knew the official presiding over Petitioner's administrative appeal was improperly appointed but concealed that blatant constitutional violation. Due to that misconduct, Petitioner was "unable to obtain vital information bearing on the existence of [its Appointments Clause] claim" until October 18, 2022, when Mr. Cox revealed DOT's unconstitutional behavior to Petitioner. *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990). Petitioner is thus entitled to toll Section 5127(a)'s 60-day filing deadline to October 18, 2022, which means its December 15, 2022 filing was timely.

I. THE 60-DAY REQUIREMENT UNDER SECTION 5127(a) IS NON-JURISDICTIONAL AND THUS SUBJECT TO TOLLING

The 60-day filing deadline in 49 U.S.C. § 5127(a) is not jurisdictional and thus subject to tolling because Congress "provided no clear statement indicating that § [5127(a)] is the rare statute of limitations that can deprive a court of jurisdiction." *Wong*, 575 U.S. at 410.

The Supreme Court has "emphasized—repeatedly—that statutory limitation periods and other filing deadlines 'ordinarily are not jurisdictional' and that a particular time bar should be treated as jurisdictional 'only if Congress has "clearly stated" that it is.'" *Sec'y, U.S. Dep't of Lab. v. Preston*, 873 F.3d 877, 881 (11th Cir. 2017) (quoting *Musacchio v. United States*, 577 U.S. 237, 246 (2016)). Moreover, "the Government must

clear a high bar to establish that a statute of limitations is jurisdictional." *Wong*, 575 U.S. at 409. It is not enough that a deadline "is important (most are)" or "framed in mandatory terms (again, most are)." *Id.* at 410. Rather, "Congress must do something special, beyond setting an exception-free deadline, to tag a statute of limitations as jurisdictional and so prohibit a court from tolling it." *Id.*

Here, Congress did nothing special to indicate Section 5127(a)'s deadline strips this Court of jurisdiction. Rather, Section 5127(a) contains a garden-variety deadline that simply states: "The petition must be filed no more than 60 days after the Secretary's action becomes final." That language is nearly identical to timeliness language in 49 U.S.C. § 32909(b), which states: "The petition must be filed not later than 59 days after the regulation [of a different DOT agency] is prescribed[.]" The Second Circuit easily concluded that "Section 32909 contains no indication, much less a 'clear statement,' that its filing deadline … requirements were meant to be jurisdictional." *NRDC v. Nat'l Highway Traffic Safety Admin.*, 894 F.3d 95, 107 (2d Cir. 2018). "Consequently, Section 32909 is subject to equitable tolling." *Id.* The same is true for Section 5127(a).

It is of no moment that Section 5127(c) grants "exclusive jurisdiction" to courts of appeals because a deadline "does not become jurisdictional simply because it is placed in a section of a statute that also contains jurisdictional provisions." *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 155 (2013). The Supreme Court unanimously held that a statutory provision stating that "the Tax Court shall have jurisdiction" in the same sentence as a 30-day filing deadline does not render the filing deadline jurisdictional

because there is no "clear tie between the deadline and the jurisdictional grant." *Boechler, P.C. v. Comm'r*, 142 S. Ct. 1493, 1499 (2022). Section 5127 likewise lacks a clear tie between the 60-day deadline in subsection (a) and the grant of exclusive jurisdiction in subsection (c).

Because Section 5127(a) lacks special language stripping jurisdiction, the Court has jurisdiction to review this petition and toll the statute of limitations. *See id.* at 1500. ("[N]onjurisdictional limitations periods are presumptively subject to equitable tolling.").

II. PETITIONER IS ENTITLED TO POSTPONEMENT OR TOLLING OF SECTION 5127(a)'S FILING DEADLINE

A. The Discovery Rule Postpones Section 5127(a)'s Filing Deadline

The 60-day filing deadline in 49 U.S.C. § 5127 is subject to the discovery rule, which "tolls the limitations period until the plaintiff learns of his cause of action or with reasonable diligence could have done so." *Stephens v. Clash*, 796 F.3d 281, 284 (3d Cir. 2015). Put another way, the rule "postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured." *Cada*, 920 F.2d at 450. Petitioner's filing on December 15, 2022—58 days after it became aware of the Final Order on October 18, 2022—is therefore timely.

Whether a statutory deadline is governed by the discovery rule depends on the statutory text and scheme. The discovery rule applies where there is "a clear Congressional directive or a self-concealing violation." *MSPA Claims 1, LLC v. Tower*

Hill Prime Ins. Co., 43 F.4th 1259, 1265 (11th Cir. 2022). Here, Congress provided a clear directive. Section 5127 states a "petition must be filed not more than 60 days after the Secretary's action *becomes final*." (Emphasis added). When a civil-penalty order becomes final is in turn guided by 49 U.S.C. § 5123(b), which instructs that "[t]he Secretary shall impose a penalty under this section by giving the person *written notice of the amount of the penalty*." (Emphasis added). As such, the Final Order did not "become[] final," and Section 5127(a)'s 60-day deadline did not begin to run, until Petitioner received "written notice of the amount of the penalty," which occurred on October 18, 2022.

The statutory scheme reinforces this result because Section 5127(a)'s purpose is to provide aggrieved parties with an opportunity to challenge agency adjudications in federal court, which "would be thwarted without the discovery rule." *Stephens*, 796 F.3d at 286. An agency could insulate its adjudications from judicial review simply by delaying notice to adversely affected parties or by deliberately sending notice to bad addresses. Absent a discovery rule, an agency's delay—whether intentional or negligent—would cut short an aggrieved party's filing deadline and potentially eliminate it if the delay were long enough. In this case, PHMSA waited until August 2, 2022 to mail the July 25, 2022 Final Order and then sent it to the wrong address. USPS would have returned that copy of the Final Order as undeliverable to PHMSA. But PHMSA did not follow up to notify

Petitioner by phone, email, or at the current mailing address that Petitioner had provided the agency.[10] Judicial review would be easily dodged without a discovery rule.

Finally, agency adjudications inflict a "self-concealing" injury for which the discovery rule is appropriate. *MSPA Claims*, 43 F.4th at 1265. The Supreme Court has explained that:

> The discovery rule exists in part to preserve the claims of victims who do not know they are injured and who reasonably do not inquire as to any injury. Usually when a private party is injured, he is immediately aware of that injury and put on notice that his time to sue is running. But when the injury is self-concealing, private parties may be unaware that they have been harmed. Most of us do not live in a state of constant investigation; … And the law does not require that we do so.

Gabelli v. SEC, 568 U.S. 442, 450-51 (2013).

The discovery rule thus applies to statutes that concern self-concealing injuries, *i.e.*, where a party normally would not be immediately aware of having been injured. That includes circumstances where parties "had no way to know they had been injured" without being notified by another. *Anderson*, 2017 WL 1098823, at *8. The injury at issue in Section 5127(a)—being adversely affected by an agency adjudication—is self-concealing because the target of an agency enforcement action has no way of knowing that it had been adversely affected unless and until the agency notifies it of the adjudication's outcome.

[10] Such delay appears to be routine as PHMSA's mailing error also delayed notice of its October 7, 2021 Chief Counsel's Order.

The statute's text, purpose, and the self-concealing nature of the injury it addresses all indicate that the discovery rule governs Section 5127(a)'s 60-day deadline. That deadline did not begin to run until Petitioner discovered it was adversely affected by the Final Order on October 18, 2022. Its filing 58 days later, on December 15, 2022, is therefore timely.

That Ms. Crawley's office may have received a copy of the Final Order does not change this conclusion because, under the discovery rule, a deadline only runs after *a party* becomes aware that it has been injured. That did not happen until October 18, 2022. Even if Ms. Crawley's office received the Final Order, she never informed Petitioner about it, and there was no reasonable way for Petitioner to learn of the Final Order on its own.

Moreover, 49 U.S.C. § 5123(b) specifically requires DOT to give written notice to *the person* that violated a statute or regulation when assessing a civil penalty, not that person's counsel. Indeed, there is no requirement for enforcement targets to be persons represented by counsel at Section 5123 hearings, and most are not represented. Section 5123(b) therefore cannot be read to require notice to counsel in lieu of the actual regulated entity. Such an understanding is confirmed by DOT's own regulation at 49 C.F.R. § 107.325, which states: "If the Administrator, PHMSA, affirms the order in whole or in part, the respondent must comply with the terms of the decision within 20 days of the respondent's receipt thereof[.]" The respondent is in turn defined as the

"person upon whom the PHMSA has served a notice of probable violation," *id.* § 107.1, which here is Petitioner.

B. Petitioner Is Entitled to Equitable Tolling

Even if DOT had properly notified Petitioner—it did not—Petitioner's Appointments Clause claim would still be timely under the doctrine of equitable tolling, which "permits a [party] to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim." *Cada*, 920 F.2d at 451. Equitable tolling "differs from the [discovery rule] in that the [party] is assumed to know that he has been injured … but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant." *Id.*

"Equitable tolling is appropriate when a movant untimely files because of *extraordinary circumstances* that are both beyond his control and unavoidable even with diligence." *Arce v. Garcia*, 434 F.3d 1254, 1261 (11th Cir. 2006) (emphasis in original). "The most common example of an extraordinary circumstance is when the defendant's misconduct induced the plaintiff into allowing the filing deadline to pass." *Arce v. Garcia*, 400 F.3d 1340, 1347 (11th Cir. 2005), *superseded by* 434 F.3d 1254 (collecting cases). The misconduct surrounding Respondent's Appointments Clause violation is nothing short of jaw-dropping.

For four years, DOT flouted the Supreme Court's clear command in *Lucia*, 138 S. Ct. at 2044, that agency officials who preside over administrative adjudications must

be appointed by either the President or a Department head.[11] It allowed Mr. McMillan, an improperly appointed official, to adjudicate numerous post-*Lucia* PHMSA proceedings.[12] The Justice Department recently told the Supreme Court this precise scenario would constitute an "extreme case[]" justifying mandamus relief: "if an agency … had flouted *Lucia* and in the wake of *Lucia* had continued to conduct adjudications

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[11] It apparently also ignored the Solicitor General's July 2018 memorandum instructing federal agencies to correct *Lucia* appointment errors. *See* Memorandum from Solic. Gen. to Agency Gen. Couns., Guidance on Admin. Law Judges after *Lucia v. SEC* (S. Ct.) (July 23, 2018), https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf (last visited Feb. 14, 2023).

[12] *See, e.g., In re Seagrave Coating Corp.*, No. PHMSA-2021-0057, 2022 WL 1813681 (Mar. 10, 2022), https://www.regulations.gov/document/PHMSA-2021-0057-0002; *In re Dynasty Enterprises, LLC d/b/a Dynasty Propane*, No. PHMSA-2021-0001, 2021 WL 8697907 (May 5, 2021), https://www.regulations.gov/document/PHMSA-2021-0001-0002; *In re Enviromart Industries, Inc.*, No. PHMSA-2021-0005, 2021 WL 2291841 (Apr. 22, 2021), https://www.regulations.gov/document/PHMSA-2021-0005-0002; *In re J&J A/C Supply, Inc*, No. PHMSA-2020-0110, 2021 WL 2291842 (Apr. 7, 2021), https://www.regulations.gov/document/PHMSA-2020-0110-0002; *In re Sochem Solutions, Inc.*, No. PHMSA-2020-0035, 2020 WL 9889598 (Dec. 16, 2020), Decision on Appeal not available on regulation.gov; *In re Fireaway, Inc.*, No. PHMSA-2020-0058, 2020 WL 9889579 (Oct. 23, 2020), Decision on Appeal not available on regulation.gov; *In re Bluewater Scuba*, No. PHMSA-2020-0034, 2020 WL 9889575 (Sept. 11, 2020), https://www.regulations.gov/document/PHMSA-2020-0034-0002; *In re Havillah Lumber*, No. PHMSA-2020-0019, 2020 WL 9889580 (July 24, 2020), Decision on Appeal not available on regulation.gov; *In re Unger, W E & Associates, d/b/a W.E. Unger Associates*, No. PHMSA-2019-0099, 2020 WL 9889599 (May 15, 2020), Decision on Appeal not available on regulation.gov; *In re 3-G Propane Services*, No. PHMSA-2019-0066, 2020 WL 9889574 (May 8, 2020), https://www.regulations.gov/document/PHMSA-2019-0066-0002; *In re DVG Packaging, Inc.*, No. PHMSA-2019-0053, 2019 WL 12361210 (Dec. 12, 2019), https://www.regulations.gov/document/PHMSA-2019-0053-0002; *In re National Power Corporation, Inc.*, No. PHMSA-2018-0044, 2019 WL 12361211 (May 16, 2019), https://www.regulations.gov/document/PHMSA-2018-0044-0002.

through ALJs who had not been appointed in conformity with the Appointments Clause, then mandamus review could have been granted." Transcript of Oral Argument at 68-69, *Axon Enter., Inc. v. FTC*, No. 21-86 (U.S. Nov. 7, 2022).[13]

It gets worse. When DOT learned in July 2022 that Mr. McMillan was improperly appointed, it was required to reassign Petitioner's case to a properly appointed official so that Petitioner can "receive what *Lucia* requires: an adjudication untainted by an Appointments Clause violation." *Cody*, 48 F.4th at 962. Instead, DOT ignored what it knew to be a constitutional defect in Petitioner's proceeding and *without saying a word* allowed Mr. McMillan to enter a civil-penalty order against Petitioner on July 25, 2022—just three days after DOT urged the Sixth Circuit to vacate, on the basis of improper appointment, an earlier civil-penalty order he issued. DOT Mot. at 2-3.

In other words, DOT not only knew about Mr. McMillan's improper appointment but also acknowledged in a court filing that any civil penalty he imposed was invalid. It nonetheless kept that information from Petitioner and allowed Mr. McMillan to assess a civil penalty. DOT's years-long flouting of *Lucia* and concealment of a constitutional violation easily satisfy the extraordinary-circumstances requirement for equitable tolling. *Baldwin Cnty. Welcome Ctr. v. Brown*, 466 U.S. 147, 151 (1984)

[13] Available at: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-86_4f15.pdf (last visited Feb.14, 2023).

(equitable tolling is available where "affirmative misconduct on the part of a defendant lulled the plaintiff into inaction") (collecting cases).

With disgraceful agency behavior like this, no amount of diligence would have allowed Petitioner to "obtain vital information bearing on the existence of [its Appointments Clause] claim." *Cada*, 920 F.2d at 451. DOT argued that the petitioner in the *Polyweave* case "could not have known that [Mr. McMillan] was not properly appointed." DOT's Reply Br. at 3, *Polyweave v. DOT*, Case No. 21-4202, Doc. 31 (filed August 8, 2022) (quotation marks omitted) (attached as Ex. 15). *A fortiori*, the same is true for Petitioner here. Indeed, even DOT claims it did not know about the Appointments Clause violation until July 2022. *See* DOT Mot. at 2. The only way Petitioner could possibly have learned about the Appointments Clause defect is if it endlessly scoured PACER and happened to find DOT's July 22, 2022 motion in the *Polyweave* case.[14] "'The diligence required for equitable tolling purposes is 'reasonable diligence,' not 'maximum feasible diligence,'" *Holland v. Florida*, 560 U.S. 631, 653 (2010) (citation omitted), and certainly not the absurd vigilance that would have been necessary for Petitioner to have found DOT's July 22, 2022 motion on its own.

Petitioner exercised reasonable diligence by immediately engaging new counsel after learning about DOT's undisclosed Appointments Clause violation on October 18,

[14] The only reason Mr. Cox knew about DOT's admission is that he was Polyweave's counsel in the Sixth Circuit proceeding in which DOT (strategically) acknowledged Mr. McMillan's unconstitutional appointment.

2022, and by filing this petition within 60 days. Petitioner's December 15, 2022 filing is timely because it is entitled to equitable tolling.

CONCLUSION

For the foregoing reasons, this Court has jurisdiction to review this timely filed petition.

February 14, 2023

Respectfully submitted,

/s/ Sheng Li

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CERTIFICATE OF COMPLIANCE

This jurisdictional response contains 4,956 words. This response was prepared using Microsoft Word 2013 in Garamond, 14-point font, a proportionally-spaced typeface

/s/ Sheng Li

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2023, an electronic copy of the foregoing brief was filed with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit using the CM/ECF filing system and that service upon counsel for the parties will be accomplished using the CM/ECF system.

/s/ Sheng Li