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 U.S. COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Eleventh Circuit held that Federal Rule of Appellate Procedure 26(b) trumps federal statutes authorizing equitable tolling under *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). That is plainly wrong. Court-adopted procedural rules cannot eliminate equitable tolling authorized by Congress. The Government does not defend the Eleventh Circuit's analysis, which is reason enough to grant certiorari. Nor does it deny the importance of the question presented, which affects virtually every statutory deadline for challenging agency action directly in courts of appeals. Although the Government tries to justify the Eleventh Circuit's bottom-line holding on alternative grounds, those reasons are equally baseless.

The Eleventh Circuit's decision deepens an existing circuit split on an exceptionally important question of federal law. Whereas three circuits embrace the Eleventh Circuit's view that Rule 26(b) trumps *Irwin* as to deadlines for challenging agency action in appellate courts, at least two circuits reject that approach and allow equitable tolling of such deadlines. The Government is wrong to deny the split.

This Court's intervention is warranted to resolve the circuit conflict, reverse the Eleventh Circuit's misinterpretation of Rule 26(b), and vindicate equitable tolling authorized by Congress. The petition should be granted.

ARGUMENT

I. THE GOVERNMENT DOES NOT DEFEND THE ELEVENTH CIRCUIT'S ERRONEOUS RULE 26(b) HOLDING

Below, the Eleventh Circuit rejected equitable tolling of 49 U.S.C. § 5127(a)'s 60-day filing deadline because "the text of [Rule 26(b)] precludes flexibility." *See* App.4a-5a. That holding is indefensible. A mere rule of procedure cannot trump a statutory deadline that itself authorizes equitable tolling. And the Government's convoluted alternative argument against tolling is equally meritless.

1. This Court has repeatedly held that "nonjurisdictional limitations periods are presumptively subject to equitable tolling." *Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199, 209 (2022) (citing *Irwin*, 498 U.S. at 95-96). That presumption fully applies to statutes—like § 5127(a)—establishing deadlines to challenge agency orders directly in appellate court. In *Harrow v. Department of Defense*, the Court recently invoked *Boechler* and *Irwin* to hold that 5 U.S.C. § 7703(b)(1)'s 60-day deadline for appealing an MSPB order directly to the Federal Circuit is "presumptively subject to equitable tolling." Slip op. at 9 (quoting *Boechler*, 596 U.S. at 209). Under *Irwin*, *Boechler*, and *Harrow*,

§ 5127(a) itself empowers courts to grant equitable tolling in appropriate circumstances.[1]

Procedural rules promulgated by this Court cannot supersede statutory deadlines (or tolling rules) enacted by Congress. The Rules Enabling Act specifically provides that the federal rules "shall be consistent with the Acts of Congress" 20 U.S.C. § 2071(a), and "shall not abridge, enlarge or modify any substantive right," *id.* § 2072(b). Allowing Rule 26(b) to trump § 5127(a)'s authorization of equitable tolling violates that statutory command. *Cf. SCA Hygiene Prods, Aktiebolag v. First Quality Baby Prods., LLC*, 580 U.S. 328, 334 (2017) (rejecting judicially created rule overriding "a congressional decision" about the "timeliness of covered claims"). It also violates the Constitution, which establishes bicameralism and presentment as baseline requirements for enacting, modifying, or repealing federal statutes. Pet.20-21.

The Eleventh Circuit's Rule 26(b) theory would have sweeping implications across a wide range of statutes governing judicial review of agency action directly in federal appellate courts. For example, it would eliminate equitable tolling of 28 U.S.C.

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[1] *Harrow* refutes the Government's fleeting implication (at 11) that *Irwin*'s presumption never applies to statutory deadlines for challenging agency action directly in appellate courts.

§ 2401(a)'s default 6-year statute of limitations for APA cases, as well as of similar statutory deadlines for direct appellate-court review of agency action by FTC, SEC, FCC, EPA, FAA, OSHA, and other agencies. *E.g.*, 15 U.S.C. §§ 45(c), 78y(a)(1); 29 U.S.C. § 660(a); 42 U.S.C. § 4915(a); 47 U.S.C. § 402(c); *see* Pet.13-14.[2] Doing so would senselessly harm diligent litigants who miss statutory review deadlines due to government misconduct or other circumstances outside their control.

2. In this Court, the Government does not even try to defend the Eleventh Circuit's view that Rule 26(b)—by its own force—can overcome a statutory deadline authorizing equitable tolling. *See also Harrow* Oral Arg. Tr. 47-49 (disclaiming this argument). Instead, the Government advances a convoluted alternative theory that it did not raise below—and that no court has ever accepted.

According to the Government, Rule 26(b)—a procedural rule this Court promulgated in 1968—shows that Congress never intended to authorize

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[2] Contrary to the Government's suggestion (at 12), § 2401(a)'s default time limit governs cases that must be filed directly in the courts of appeals, not just those filed in district court. *See, e.g.*, *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 981 F.3d 1360, 1383 (Fed. Cir. 2020); *Perez–Guzman v. Lynch*, 835 F.3d 1066, 1077 (9th Cir. 2016).

equitable tolling for § 5127(a) and other post-1968 statutes imposing deadlines to challenge agency action directly in the courts of appeals. The Government argues that Rule 26(b)'s no-tolling rule provided the "relevant backdrop" against which Congress enacted such statutes, thereby rebutting *Irwin*'s presumption that Congress authorized equitable tolling. BIO7-10; *see also* Gov't *Harrow* Br. 42-44.

This *post hoc* effort to justify the Eleventh Circuit's bottom-line conclusion fails for three primary reasons.

First, it rests on a fundamental misinterpretation of Rule 26(b). By its terms, Rule 26(b) only forbids tolling deadlines "prescribed *by these rules* [the Federal Rules of Appellate Procedure] or *by* [*a court's*] *order* to perform any act." It does not apply to *statutory* filing deadlines, such as § 5127(a)'s 60-day time limit for petitions for review. Pet.22. Rule 26(b) cannot rebut *Irwin*'s presumption that Congress intended equitable tolling of such deadlines.

The Government notes that from 1968 to 1998, Rule 26(b) addressed a broader category of deadlines "prescribed *by law*," not "prescribed *by these rules*." BIO10-11. But so what? Section 5127(a)—the statute at issue here—was enacted in 2005, after Rule 26(b) was clarified to govern *only* deadlines "prescribed by these rules." In any event, the better reading is that Rule 26(b) *never* lawfully affected statutory deadlines, as explained above. *Supra* 2-4. Indeed, the whole point of *Irwin* is to presume that equitable tolling is authorized for all filing deadlines "prescribed by law."

Second, even if Rule 26(b) purported to modify statutory deadlines, that could not rebut *Irwin*'s presumption that Congress authorized equitable tolling of § 5127(a). As this Court emphasized in *United States v. Wong*, "*Irwin* requires an *affirmative indication from Congress* that it intends to preclude equitable tolling," and such indication must be specific to the "*particular* statute of limitations" at issue. 575 U.S. 402, 420 (2015) (emphases added).

Rule 26(b) does not come close to satisfying *Wong*'s test. Rule 26(b) is a judicially enacted, background procedural rule. It is *not* a statement from Congress; it is *not* specific to § 5127(a); and its plain text is best read *not* to affect statutory deadlines at all. Moreover, nothing in § 5127(a)'s text, structure, or legislative history suggests that Congress considered Rule 26(b) at all when it enacted § 5127(a) in 2005—much less that Congress (mis)interpreted Rule 26(b) to displace *Irwin* and foreclose equitable tolling. The Government's legislative-backdrop argument here is far weaker than analogous theories this Court has rejected in prior cases, including *Wong* itself. *See* 575 U.S. at 417-19 (legislative backdrop created by Supreme Court precedent cannot rebut *Irwin*'s presumption).

The Government's policy argument (at 9) that appellate courts are ill-suited to adjudicate fact-based equitable-tolling disputes also fails. Policy concerns cannot rebut *Irwin*'s presumption. And if Congress agreed with the Government's policy point, it would have expressly precluded tolling for *all* appellate-review statutes, instead of relying on a weak inference

from Rule 26(b) that applies only to statutory deadlines enacted between 1968 and 1998.

Finally, the Government's Rule 26(b) theory is unworkable. It resurrects the pre-*Irwin* "'ad hoc,' law-by-law approach to determining the availability of tolling" that "produced inconsistency and 'unpredictability'" for litigants and lower courts alike. *Id.* at 408 (quoting *Irwin* 498 U.S. at 95). Identical statutory language would be interpreted differently depending on whether the statute at issue was enacted before or after Rule 26(b) was adopted in 1968—with perhaps a different rule applying to statutes enacted after the 1998 revision. *Supra* 5; BIO10-11.

The Government's theory would also upend the settled interpretation of 28 U.S.C. § 2401(a), which Congress originally enacted in 1948, but then amended twice after Rule 26(b) was adopted in 1968 (and once after Rule 26(b)'s language changed in 1998). The Government's theory would read those subsequent amendments—enacted against the backdrop of Rule 26(b)—to signal Congress's intent to foreclose equitable tolling. But that would contradict holdings in at least five circuits that § 2401(a) *allows* equitable tolling. *See infra* 10 n.4.

The Government's Rule 26(b)-as-backdrop argument is just as flawed as the Eleventh Circuit's view that Rule 26(b) directly supersedes statutory timing rules established by Congress. This Court should reject both theories and confirm that Rule 26(b) in no way interferes with the baseline

presumption of equitable tolling recognized in *Irwin*, *Wong*, *Boechler*, *Harrow*, and other cases.

II. THE CIRCUIT SPLIT IS GENUINE

The Government is wrong to deny (at 12-14) the circuit split over whether equitable tolling is available for statutory deadlines to challenge government action in the federal courts of appeals. Whereas three circuits understand Rule 26(b) to categorically reject such tolling, other circuits apply *Irwin* and allow it.

1. On one side of the split, the Eleventh Circuit's decision below rejected equitable tolling under *Irwin* and held that "even claims-processing rules are not subject to equitable tolling if the text of the rule [*i.e.*, Rule 26(b)] precludes flexibility." App.4-5a.

That ruling directly tracks the Federal Circuit's analysis in *Oja v. Dep't of Army*, which likewise applied Rule 26(b) to reject equitable tolling of a statutory deadline for challenging agency action directly in the court of appeals. 405 F.3d 1349, 1359 (Fed. Cir. 2005) (rejecting tolling of 5 U.S.C. § 7703(b)(1)'s deadline for challenging MSPB orders in Federal Circuit).

The Tenth Circuit has also invoked Rule 26(b) as a categorical bar to tolling deadlines for filing appellate-court challenges to unlawful agency action. *Mesa Airlines v. United States*, 951 F.2d 1186, 1189 (10th Cir. 1991) (rejecting equitable tolling of deadline in 8 U.S.C. § 1324(b)(1)(i) because "Rule 26(b) forbids this court from granting extra time for filing an appeal from an order of an administrative agency 'except as specifically authorized by law'"); *see also Kern v. SEC*,

724 F. App'x 687, 687-88 (10th Cir. 2018) (Mem.) (applying *Mesa* and invoking Rule 26(b)(2) to reject equitable tolling of statutory deadlines in 15 U.S.C. §§ 77i, 78y(a)(1), 80b-13).

2. On the other side of the split, two courts of appeals squarely hold that deadlines for challenging agency action in federal courts *are* subject to equitable tolling under *Irwin*. Those holdings flatly contradict the Tenth, Eleventh, and Federal Circuit decisions rejecting such tolling based on Rule 26(b).

The best example is the Second Circuit's decision in *NRDC v. NHTSA*, which held that 49 U.S.C. § 32909's deadline for seeking court-of-appeals review of orders issued by the Department of Transportation is subject to equitable tolling. 894 F.3d 95, 106-07 (2d Cir. 2018) (relying on *Wong*). The Government downplays (at 13-14) the Second Circuit's tolling analysis as "dicta," but that analysis constitutes an independent and alternative holding entitled to full binding effect. *See Pyett v. Pa. Bldg. Co.*, 498 F.3d 88, 92 (2d Cir. 2007), *rev'd on other grounds sub nom. 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 251 (2009).[3]

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[3] The Government wrongly implies that the Second Circuit might reconsider *NRDC* in light of *Nutraceutical Corp. v. Lambert*, 586 U.S. 188 (2019). *Nutraceutical* did not involve equitable tolling of a statutory deadline, and the Second Circuit was no

Another example is the D.C. Circuit's decision in *New York Republican State Committee v. SEC*, 799 F.3d 1126 (D.C. Cir. 2015). There, the court applied *Irwin* and held that 15 U.S.C. § 80b-13's 60-day deadline for challenging SEC orders directly in the court of appeals is "capable of equitable tolling." *Id.* at 1134. That ruling squarely contradicts the Tenth Circuit's rejection of equitable tolling of the same statutory deadline—based on Rule 26(b)(2)—in *Kern*.

More generally, a critical mass of appellate courts—including the Second, Fifth, Sixth, Eighth, and D.C. Circuits—has recognized that 28 U.S.C. § 2401(a)'s six-year default statute of limitations is nonjurisdictional and thus also subject to equitable tolling.[4] The Government is right (at 12) that these cases have thus far arisen in district court, but § 2401(a) also governs cases filed in the courts of

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doubt already familiar with Rule 26(b) when it decided *NRDC*. *See* Pet.21-22.

[4] *See* Pet. 23; *DeSuze v. Ammon*, 990 F.3d 264, 271 (2d Cir. 2021); *Clymore v. United States*, 217 F.3d 371, 373-75 (5th Cir. 2000); *Herr v. U.S. Forest Srv.*, 803 F.3d 809, 818 (6th Cir. 2015); *N.D. Retail Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys.*, 55 F.4th 634, 641-42 (8th Cir. 2022), *cert. granted on other grounds sub nom. Corner Post, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys.*, 144 S. Ct. 478 (Sept. 29, 2023); *Jackson v. Modly*, 949 F.3d 763, 778 (D.C. Cir. 2020).

appeals. *Supra* 4 n.2. The Government offers no good reason to think these courts would apply § 2401(a)'s timing rules differently to such direct-appeal cases.

3. In short, the circuit split is real. And the lower-court disagreement will likely grow over time: Although the Government has refused to defend the Eleventh Circuit's flawed theory in this Court, it has actively embraced that theory in the lower courts.[5] It will presumably continue to do so until forced to stop.

Federal tolling rules should apply the same way nationwide. This Court should resolve the circuit split and ensure that litigants are treated fairly and equally across the country.

III. THIS CASE PROVIDES AN IDEAL VEHICLE

In *Harrow*, the Government itself urged this Court to address the important Rule 26(b) and equitable issues now presented here. Gov't *Harrow* Br. 42-44; *Harrow* Oral Arg Tr. 44-51. The Court declined because the question was not properly preserved. Slip op. at 9. This case offers an ideal vehicle for resolving the debate.

The Government does not deny that this case squarely tees up the equitable tolling question for

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[5] *See, e.g.*, Resp. Br., *Jory v. NTSB*, No. 20-1380, at 18 (D.C. Cir. Oct. 8, 2021), 2021 WL 4710000; Resp. Br., *Young v. SEC*, No. 16-1149, at 29-30 (D.C. Cir. June 14, 2019), 2019 WL 2490757.

decision. That's for good reason: Petitioner fully preserved its equitable tolling arguments in the proceedings below, and the Eleventh Circuit's ruling squarely rejected those arguments on purely legal grounds.

The Government nonetheless argues that this is a poor vehicle because (in its view) Petitioner's Appointments Clause challenge will ultimately fail on the merits. BIO15-16. This merits assertion is premature. Because the Eleventh Circuit erroneously dismissed this case at the threshold, the parties have not yet briefed the substance of Petitioner's Appointments Clause claim—so the Eleventh Circuit did not consider it. That court should address the constitutional merits in the first instance, on remand, after this Court reverses the no-tolling analysis below.

To the extent it matters at this stage, Petitioner's case on the merits is strong. The Government has confessed in another case that Chief Safety Officer McMillan was unconstitutionally appointed until July 15, 2022, just ten days before ruling on Petitioner's appeal. Pet.6. Its assertion (at 15) that "all agree" McMillan was properly appointed on that date is wrong: Petitioner does *not* agree McMillan was properly appointed then.

McMillan's purported July 15 appointment was invalid because it was made in secret, through a non-public letter. *See* Pet.7 n.1. Such secret appointments defeat the core purpose of the Appointments Clause, which is "to ensure public accountability for both the making of a bad appointment and the rejection of a good one." *Edmond v. United States*, 520 U.S. 651, 660

(1997). For that reason, the prior Solicitor General advised agencies that *post hoc* ratifications of improperly appointed adjudicators should be "accompanied by an appropriate degree of public ceremony and formality" to "underscore that the Department Head has satisfied the purposes of the Appointments Clause by accepting public responsibility for the appointment[.]"[6]

Even if McMillan's July 15 appointment was valid, that would not empower him to adjudicate Petitioner's case. In *Lucia v. SEC*, this Court held that "the 'appropriate' remedy for an adjudication tainted with an appointments violation is a new 'hearing before a [different] properly appointed' official." 585 U.S. 237, 251-52 & n.5 (2018). Here, McMillan received Petitioner's administrative appeal in December 2021 and had authority over it for *seven months* before any (purported) ratification of his appointment took place in July 2022. McMillan's improper authority cannot be cured by secretly and belatedly ratifying his appointment just days before he finished his work and

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[6] Mem. from the Solicitor General to Agency Gen. Counsels, Guidance on Administrative Law Judges After *Lucia v. SEC* (S. Ct.) at 6 (July 2018), *available* https://static.reuters.com/resources/media/editorial/20180723/ALJ--SGMEMO.pdf (last visited June 3, 2024).

rejected Petitioner's appeal. *Id.* *Lucia* requires a new hearing by an untainted adjudicator.

The Government is right that no Appointments Clause challenge involving "similar circumstances" has yet been decided, but that simply reflects (1) the unique chain of events presented here—involving an agency ignoring this Court's ruling for years—and (2) the relatively short period of time in which such claims have become viable post-*Lucia*. The absence of binding precedent either way is no reason to ignore the Eleventh Circuit's flawed rejection of equitable tolling.

The Government's erroneous vehicle arguments should not obscure the fundamental impropriety of its conduct. For years, the Department of Transportation let McMillan unconstitutionally adjudicate agency cases—and then it hid the constitutional violation until after Petitioner's statutory appeal deadline expired. Such deliberate concealment perfectly illustrates why equitable tolling is so important. The Court should use this case to overturn the Eleventh Circuit's holding and vindicate fair access to judicial review of unlawful agency action.

CONCLUSION

The petition for certiorari should be granted.

Respectfully,

/s/ *Sheng Li*

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