Appeal No. 24-CV-0404

DISTRICT OF COLUMBIA
COURT OF APPEALS

JULIA WASHINGTON,
Appellant,
v.

D.C. DEPARTMENT OF FORENSIC SCIENCES,

and

D.C. OFFICE OF EMPLOYEE APPEALS
Appellees.

On Appeal from the Superior Court of the District of Columbia
Civil Case No. 2024-CAB-000346
(The Honorable Alfred S. Irving, Jr.)

BRIEF OF APPELLANT

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Dated: September 9, 2024

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RULE 28(a)(2) STATEMENT

List of Parties and Counsel:

Appellant	Julia Washington
Counsel for Appellant	Ryan E. Griffin, Emily R. Postman (James & Hoffman, P.C.)
Appellee	D.C. Department of Forensic Sciences
Appellee	D.C. Office of Employee Appeals
Counsel for Appellee	Lakesha Brown, Esq. (D.C. Office of Employee Appeals)
Counsel for Appellee	Caroline Van Zile, Esq. (Acting Solicitor General for D.C.)

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STATEMENT OF JURISDICTION

Appellant Julia Washington, Petitioner below, appeals from a final order of the Superior Court of the District of Columbia. This Court has jurisdiction under D.C. Code § 11–721(a)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

The overall issue on appeal is whether the Superior Court erred in denying Ms. Washington's Motion for Extension of Time to Petition for Review of Agency Decision and instead granting the motion of Appellee D.C. Department of Forensic Sciences (DFS), Respondent below, to dismiss her petition as untimely.

Resolution of this issue requires determination of two sub-issues:

1. Whether the deadline to petition for review established in Agency Review Rule 1(b)(2) is excluded from the Superior Court's general authority under Rule of Civil Procedure 6(b)(1)(B) to equitably toll non-jurisdictional filing deadlines for good cause if the moving party "failed to act because of excusable neglect"; and

2. Whether the Superior Court erred in concluding that even if it had the authority to extend the Agency Review Rule 1(b)(2) deadline, Ms. Washington failed to establish excusable neglect.

STATEMENT OF THE CASE

Ms. Washington is a former employee of DFS who was separated from service along with nine colleagues through a Reduction-in-Force (RIF) effective

October 2021. With the support of an attorney provided by their union, the National Association of Government Employees (NAGE), Ms. Washington and her colleagues challenged the RIF decision to the D.C. Office of Employee Appeals (OEA).

OEA upheld Ms. Washington's separation from employment via the RIF in a decision that became final on September 28, 2023. NAGE thereafter assigned the same attorney who represented Ms. Washington before OEA to petition the Superior Court for review of OEA's decision. Per Agency Review Rule 1(b)(2), Ms. Washington's petition was due no later than October 30, 2023, 30 days after OEA's decision became final.

Ms. Washington's union-appointed counsel did not file her petition by October 30. In fact, she did not file it, or those of Ms. Washington's colleagues, at all.

Nor did Ms. Washington's counsel timely alert her or NAGE of the missed deadline. Rather, it was not until January 5, 2024, that she informed NAGE's General Counsel that none of the petitions had been filed. NAGE's General Counsel immediately began alerting the affected members and working to secure alternate representation.

On January 18, 2024, Ms. Washington, represented by new counsel, filed her Petition for Review. Along with her petition, Ms. Washington moved for an

extension of time based on the circumstances described above. She asked the Superior Court to treat her petition as timely filed pursuant to Rule of Civil Procedure 6(b)(1)(B), which authorizes the court to equitably extend a deadline that has already passed in cases of excusable neglect, and Agency Review Rule 1(*i*), which makes certain Rules of Civil Procedure, including Rule 6, applicable to agency review proceedings.

DFS opposed Ms. Washington's motion and moved to dismiss, arguing that the Agency Review Rule 1(b)(2) deadline for petitioning for review of an agency decision may not be equitably tolled. DFS also argued that in any event, Ms. Washington had not established good cause for doing so.[1]

On March 25, 2024, the Superior Court denied Ms. Washington's Motion for Extension and granted DFS's Motion to Dismiss. It agreed with DFS that Agency Review Rule 1(b)(2) could not be equitably tolled, and ruled in the alternative that, even if it could be, Ms. Washington had not demonstrated excusable neglect. Notably, this is the opposite of the conclusion reached by other Superior Court judges in the cases of four of Ms. Washington's colleagues.

Ms. Washington now timely appeals the Superior Court's dismissal.

[1] Although OEA was also listed as a Respondent on Ms. Washington's Petition for Review, it was a nominal party only in the Superior Court and played no role beyond certifying the agency record to be reviewed. DFS was thus the only Respondent to take substantive positions.

STATEMENT OF RELEVANT FACTS AND PROCEDURAL HISTORY

1. The DFS RIF and Ms. Washington's OEA appeal.

Ms. Washington was a Forensic Science Technician in the Firearms Examination Unit of DFS. App. 004 (OEA Decision). In that position, she was represented by NAGE. *Id.*

In 2021, DFS abolished the Firearms Examination Unit and separated Ms. Washington and nine of her NAGE-member colleagues from employment through a Reduction-in-Force (RIF). *Id.* Ms. Washington's employment with DFS ended October 22, 2021. App. 005.

Ms. Washington filed a Petition for Appeal with OEA on November 29, 2021. App. 003. She, along with her nine former DFS colleagues, were represented in the OEA proceeding by counsel provided by NAGE. App. 027 (Declaration of Sarah Suszczyk, General Counsel of NAGE, in support of Ms. Washington's Motion for Extension of Time, ¶ 3).

OEA upheld Ms. Washington's separation from employment via the RIF in an Initial Decision issued August 24, 2023. App. 020. By operation of law, this decision became final on September 28, thirty-five days after it was issued. *See* D.C. Code § 1–606.03(c).

2. Ms. Washington's former counsel's failure to timely file her Petition for Review.

Following the OEA decision, NAGE, through Ms. Suszczyk, authorized the same counsel who represented Ms. Washington and her colleagues before OEA to file Petitions for Review of OEA's decisions in Superior Court. App. 027 (Suszczyk Decl., ¶ 5). Under Agency Review Rule 1(b)(2), Ms. Washington's petition was due no later than October 30, 2023, thirty days after the OEA decision became final.

Ms. Washington's counsel failed to file her petition by that deadline. She also failed to timely file petitions for any of Ms. Washington's colleagues.

Not only that, Ms. Washington's counsel failed to timely alert Ms. Washington, her colleagues, or Ms. Suszczyk that the deadlines had been missed. Instead, she waited until January 5, 2024, when she finally informed Ms. Suszczyk that none of the petitions had been filed. *Id.* (Suszczyk Decl., ¶ 6).

Ms. Suszczyk immediately sought new representation for Ms. Washington and her colleagues. *Id.* (Suszczyk Decl., ¶ 7). She initially spoke with undersigned counsel on January 10, 2024, and, after securing internal approval, secured his firm's services on behalf of Ms. Washington and her colleagues on January 15. App. 027–28 (Suszczyk Decl., ¶ 7). The same day, Ms. Suszczyk contacted Ms. Washington and her colleagues to connect them with undersigned counsel for the purpose of filing their petitions for review. App. 028 (Suszczyk Decl., ¶ 8).

3. Ms. Washington's Petition for Review and the Superior Court's dismissal.

Ms. Washington, represented by new counsel, filed her Petition for Review in Superior Court on January 18, 2024. App. 001 (Petition for Review). As soon as the petition was docketed, she also filed her Motion for Extension of Time to Petition for Review of Agency Decision, App. 023 (Motion), supported by Ms. Suszczyk's declaration. App. 027. DFS opposed Ms. Washington's motion and moved to dismiss her petition as untimely. App. 29.

On March 25, 2024, the Superior Court denied Ms. Washington's motion for extension and granted DFS's motion to dismiss. App. 041 (Superior Court's final order). It held that Agency Review Rule 1(b)(2) is a mandatory claims-processing rule and that, accordingly, the Superior Court lacks the authority to equitably toll the deadline prescribed therein. App. 059–60. The court further held, as an alternative basis for denying Ms. Washington's motion, that she would not be entitled to equitable tolling even if it were available because she was unable to establish excusable neglect. App. 60.

Ms. Washington timely noticed her appeal on April 23, 2024. App. 069 (Notice of Appeal).

4. Conflicting Superior Court opinions as to whether the Rule 1(b)(2) deadline may be extended.

Ms. Washington's nine NAGE-represented former DFS colleagues also filed petitions for review and materially identical motions to extend within days of Ms.

Washington's filings. The ten cases were docketed across eight Superior Court judges.

In seven of these cases, including this one, the parties' competing motions to extend and motions to dismiss have been fully resolved.[2]

In four of these cases, the court concluded both that Rule 1(b)(2) was susceptible to equitable tolling and that the petitioners (all relying on the same declaration from Ms. Suszczyk appearing in the record here) had made the requisite showing of excusable neglect for doing so. *Marso v. D.C. Dep't of Forensic Sciences*, No. 2024-CAB-000343 (D.C. Super. Ct. Feb. 27, 2024); *McCraw v. D.C. Dep't of Forensic Sciences*, No. 2024-CAB-000344 (D.C. Super. Ct. Mar. 22, 2024); *Beckham v. D.C. Dep't of Forensic Sciences*, No. 2024-CAB-000387 (D.C. Super. Ct. Apr. 26, 2024); *Bobek v. D.C. Dep't of Forensic Sciences*, No. 2024-CAB-000335 (D.C. Super. Ct. Apr. 26, 2024).

In two other cases, the court concluded, as here, that the Rule 1(b)(2) deadline may not be extended. *Ruiz-Reyes v. D.C. Dep't of Forensic Sciences*, No.

[2] In two of the remaining three cases, the parties' motions remain pending. *Bailey v. D.C. Dep't of Forensic Sciences*, No. 2024-CAB-000393 (D.C. Super. Ct.); *Brittinham v. D.C. Dep't of Forensic Sciences*, No. 2024-CAB-000336 (D.C. Super. Ct.). In the third case, the court initially granted DFS's motion to dismiss before giving the petitioner the opportunity to respond and, after petitioner moved for reconsideration, requested full briefing on the reconsideration motion, which remains pending. *Elder v. D.C. Dep't of Forensic Sciences,* No. 2024-CAB-000337 (D.C. Super. Ct.).

2024-CAB-000345 (D.C. Super. Ct. Apr. 11, 2024); *Gilliam v. D.C. Dep't of Forensic Sciences*, No. 2024-CAB-000339 (D.C. Super. Ct. Apr. 17, 2024).

SUMMARY OF ARGUMENT

The Superior Court committed reversible error in dismissing Ms. Washington's Petition for Review because: (1) the Agency Review Rule 1(b)(2) deadline for filing such petitions may be extended for good cause; and (2) because she demonstrated good cause for doing so.

1. That the Rule 1(b)(2) deadline may be equitably tolled is apparent from the plain text of Agency Review Rule 1 and Rule of Civil Procedure 6 as expressly incorporated therein. Rule of Civil Procedure 6(b)(1) provides general equitable authority for the Superior Court to extend deadlines after time has expired "if the party failed to act because of excusable neglect." This provision applies to agency review proceedings through paragraph (*i*) of Agency Review Rule 1, which incorporates numerous Rules of Civil Procedure including Rule 6. And while Rule 6(b)(2) places a short list of particular deadlines beyond the court's generally applicable equitable authority, the Agency Review Rule 1(b)(2) deadline is not among these express limitations.

This plain text reading of the pertinent rules is supported by multiple decisions of this Court. *Mathis v. District of Columbia Housing Authority*, 124 A.3d 1089 (D.C. 2015), held that the filing deadline in Court of Appeals Rule 15,

which is phrased identically to Agency Review Rule 1(b)(2), is a non-jurisdictional claims-processing rule and thus subject to equitable tolling. *Brewer v. District of Columbia Office of Emp. Appeals*, 163 A.3d 799 (D.C. 2017), confirmed that Agency Review Rule 1(b)(2) was likewise a claims-processing rule subject to equitable tolling, at least where the responding agency did not timely object. And *Baldwin v. District of Columbia Office of Employee Appeals*, 226 A.3d 1140 (D.C. 2020), found that the time limit under D.C. Code § 1-606.03(c) for appealing an OEA Administrative Judge's decision to the OEA Board is subject to equitable tolling. Critically, Section 1-606.03 is the same statutory provision that authorizes the appeal in this case from a final OEA decision to the Superior Court. *See* D.C. Code § 1-606.03(d).

Nor is this reading of the pertinent rules at all inconsistent with recent decisions from the U.S. Supreme Court and this Court holding finding certain deadlines to constitute mandatory claims-processing rules that may not be equitably tolled over the timely objection of the non-moving party. Both *Nutraceutical Corp. v. Lambert*, 586 U.S. 188, 193 (2019), and *Dixon v. United States*, 304 A.3d 966, 969 (D.C. 2023), reach such a result. But both cases do so based on express exclusions from the respective court's equitable authority pertaining to the specific deadlines at issue in those cases.

2. Ms. Washington demonstrated the "excusable neglect" required by Rule of Civil Procedure 6(b)(1) for extending the Agency Review Rule 1(b)(2) deadline, "taking account of all relevant circumstances surrounding" her delayed filing. *Pioneer Inv. Servs. Co. v. Brunswick Assocs.*, 507 U.S. 380, 392, 395 (1993).

First, DFS was not prejudiced in any way by the timing of Ms. Washington's petition. This case entails a written review of a closed agency record. There is no possibility of discovery, or of an evidentiary hearing or a trial, and thus no risk that DFS will be burdened by the unavailability of witnesses, or by the need to preserve evidence, or by any other issue that might give rise to prejudice in a normal civil proceeding. Rather, as Respondent, DFS simply needs to prepare a written defense of the closed agency record, and this task will be precisely the same regardless of whether the petitioning deadline is extended.

Second, the extension that Ms. Washington seeks would have no impact on the judicial proceedings in this case for the simple reason that there were not any proceedings to speak of until she filed her petition and motion. No briefing schedules, or evidentiary hearings, or trial schedules would be altered as a result of the requested extension, nor would there be any risk of the overall length of the case becoming excessive.

Third, the reasons for Ms. Washington's filing delay were entirely understandable and eminently reasonable. She had every reason to believe that the

same attorney who represented her throughout the lengthy OEA process would be able to meet what was effectively the next deadline in her ongoing case. And she had every reason to believe that the attorney would not require additional input from her to do so given that, as noted above, this proceeding involves the review of the closed OEA record with which the attorney was already intimately familiar.

Fourth, Ms. Washington acted in good faith by promptly acting to correct the error once she learned through her union of the missed deadline on January 5, 2024. Her union arranged for her prior counsel and indicated it would arrange a replacement. As soon as it was able to do so, on January 15, Ms. Washington immediately connected with her new attorney and was thus able to file her petition three days later on January 18.

In sum, Agency Rule 1(b)(2) is subject to equitable tolling, and Ms. Washington established good cause for doing so. The Superior Court's dismissal should therefore be reversed, her Motion for Extension through the date of her petition should be granted, and the case should be remanded for proceedings on the merits.

ARGUMENT

I. The Agency Review Rule 1(b)(2) deadline may be equitably tolled.

A. Standard of review and applicable legal framework.

1. Applicable standard of review.

The sole question on this issue is whether Agency Review Rule 1(b)(2) allows for equitable tolling. "The proper construction of court rules of procedure is a legal question that we review de novo." *Dixon*, 304 A.3d at 968 (citing *Jenkins v. United States*, 75 A.3d 174, 195 (D.C. 2013)).

2. The presumption in favor of equitable tolling.

"[O]nly deadlines contained in statutes can be jurisdictional. . . ." *Brewer*, 163 A.3d at 801–02 (internal quotation omitted). Conversely, "claim-processing deadlines contained in court-made rules" are inherently non-jurisdictional. *Id* at 802. (internal quotation omitted); *see also Mathis*, 124 A.3d at 1102 ("[T]he Supreme Court has made clear that the modern 'bright line' default is that procedural rules, even those codified in statutes, are 'nonjurisdictional in character.'" (quoting *Sebelius v. Auburn Regional Med. Ctr.,* 568 U.S. 145 (2013) (cleaned up)).

Non-jurisdictional claim-processing deadlines "are presumptively subject to equitable tolling." *Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199, 208–09 (2022) (citing *Irwin v. Dep't of Veterans Aff.*, 498 U.S. 89, 95–96 (1990),

and *Lozano v. Montoya Alvarez*, 572 U.S. 1, 10–11 (2014)) (explaining that "[e]quitable tolling is a traditional feature of American jurisprudence and a background principle against which Congress drafts limitations periods."). Thus "[t]he procedural requirements that . . . govern the litigation process are only occasionally as strict as they seem." *Harrow v. Dep't of Defense*, 601 U.S. 480, 483 (2024).

The presumption in favor of equitable tolling can be overcome where "the pertinent rule or rules invoked show a clear intent to preclude tolling" *Nutraceutical*, 586 U.S. at 192–93 (citation omitted). Courts "look at the Rule's text and its surrounding context to discern the drafter's intent." *Dixon*, 304 A.3d at 969 (citing *Nutraceutical Corp. v. Lambert*, 586 U.S. 188, 139 (2019)). If the court finds "clear intent" to preclude tolling, the claims-processing rule is classified as "mandatory," meaning that it "may require a court's strict enforcement" if timely invoked, although "dismissals for noncompliance with such rules may be forfeited if the party seeking dismissal does not timely raise the issue." *Brewer*, 163 A.3d at 802 (citing *Manrique v. United States*, 581 U.S. 116 (2017)).

Absent such a clear intent to preclude tolling, the presumption in favor of equitable tolling remains: the deadline can be equitably tolled even over the timely objection of the opposing party.

3. Pertinent principles of statutory interpretation.

The interpretation of rules and statutes is "a holistic endeavor." *Washington v. District of Columbia*, 137 A.3d 170, 173 (D.C. 2016) (quoting *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc.,* 484 U.S. 365, 371 (1988)).

The starting place is the text because, "[a]s a general rule, 'the intent of the lawmaker is to be found in the language that he [or she] has used . . .'" *Id.* (quoting *Eaglin v. District of Columbia,* 123 A.3d 953, 955 (D.C.2015)); *see also Nutraceutical*, 586 U.S. at 192 ("Whether a rule precludes equitable tolling turns . . . on whether the text of the rule leaves room for such flexibility." (internal citation omitted)).

In construing the text, a "basic principle[s] of statutory and regulatory construction" is that a rule or statute "must be read as a whole." *Bolz v. District of Columbia*, 149 A.3d 1130, 1137 (D.C. 2016) (citing *Wash. Mobilization Comm. v. Cullinane*, 566 F.2d 107, 118 (D.C. Cir. 1977), and *Washington*, 137 A.3d at 174). Thus the Court's textual analysis "must not be guided by a single sentence or member of a sentence," but should instead "look to the provisions of the whole law . . . ." *Washington*, 137 A.3d at 174 (quoting *United States Nat'l Bank v. Ind. Ins. Agents of Am.*, 508 U.S. 439, 455 (1993)). The Court's "task is to fit, if possible, all parts into a harmonious whole." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100

(2012) (quoting *Fed. Trade Comm'n* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389 (1959)).

Finally, the Court should conduct its textual analysis "in light of 'the entire enactment against the backdrop of its policies and objectives.'" *Washington*, 137 A.3d at 174 (quoting *O'Rourke v. District of Columbia Police and Firefighters' Ret. and Relief Bd.,* 46 A.3d 378, 384 (D.C.2012)). The purpose of doing so is to avoid an interpretation that is "plainly at variance with the policy of the legislation as a whole." *Columbia Plaza Tenants' Ass'n v. Columbia Plaza Ltd. P'ship*, 869 A.2d 329, 332 (D.C. 2005). "Consequently, in appropriate cases, [the Court] also consult[s] the legislative history of a statute." *Id.*

To that end, the Court recognizes equitable tolling as a "background principle" against which procedural deadlines are drafted. *Boechler*, 596 U.S. 199 at 208–09 (internal citations omitted). The Court has noted that although most claims processing rules "read as categorical commands," they must be understood "against the backdrop of judicial doctrines creating exceptions," which are "typically expect[ed] . . . to apply." *Harrow*, 601 U.S. at 483 (citing *Minerva Surgical, Inc.* v. *Hologic, Inc.*, 594 U.S. 559, 571–572 (2021)). Of particular relevance to this case is the longstanding principle that "a court may be able to excuse the party's non-compliance for equitable reasons." *Id.*

B. The availability of equitable tolling is supported by text, policy, and precedent.

1. The plain text of the pertinent rules permits equitable tolling.

Civil Procedure Rule 6(b)(1) supplies the Superior Court with broad equitable authority to extend deadlines in appropriate circumstances. Specifically, this provision provides that "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time: . . . (B) on motion made after the time has expired if the party failed to act because of excusable neglect."

Agency Review Rule 1(*i*), in turn, extends this equitable authority to agency review proceedings. Specifically, Rule 1(*i*) states: "Except where inconsistent with a statute or with this rule, the following Superior Court Rules of Civil Procedure apply to proceedings under this rule: . . . 6 (Computing and Extending Time; Time for Motion Papers) . . . ."

In short, by virtue of Agency Review Rule 1(*i*), Civil Procedure Rule 6(b)(1) applies with respect to the deadline at issue here, the 30-day window for petitioning for review of an agency action under Agency Review Rule 1(b)(2). And thus, when the pertinent provisions of Agency Review Rule 1 and Rule of Civil Procedure 6 are "read as a whole," see *supra* at 14, the plain text clearly indicates that the Agency Review Rule 1(b)(2) deadline is susceptible to equitable tolling.

Finally, this reading is confirmed by Rule of Civil Procedure 6(b)(2), which enumerates certain narrow exceptions to the Court's broad general authority under 6(b)(1). Specifically, Rule 6(b)(2) provides that the court "must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." Critically, the Agency Review Rule 1(b)(2) deadline is not among these express carve-outs to the court's general equitable authority.

In sum, the Agency Review Rule 1(b)(2) deadline is subject to equitable tolling because Rule of Civil Procedure 6(b)(1) gives the Superior Court this power and Agency Review Rule 1(*i*) applies it to agency review proceedings. This plain-text interpretation is further corroborated by an analysis of pertinent policies and objectives, as explained below.

2. Allowing equitable tolling of the Agency Review Rule 1(b)(2) deadline accords with three important policy objectives.

The text of Agency Review Rule 1 and Rule of Civil Procedure 6 alone is sufficient basis to find that the Agency Review Rule 1(b)(2) deadline may be equitably tolled, as explained above. To the extent the Court looks beyond the text, however, the correctness of this result is confirmed by its consistency with three broader policy objectives.

The first is the policy objective reflected in Rule of Civil Procedure 6(b)(1) itself—to ensure the court has broad equitable authority to extend deadlines where

justice so requires, subject to the narrow limits prescribed in subparagraph (b)(2). *See also* D.C. R. Civ. P. 1 (stating that the Rules of Civil Procedure "should be construed, administered, and employed by the court . . . to secure the just . . . determination of every action and proceeding"). Critically, this policy objective is wholly in line with the Supreme Court's longstanding recognition that "[e]quitable tolling, a long-established feature of American jurisprudence," is a background principle of common-law adjudication against which limitations periods are drafted. *Lozano*, 572 U.S. at 10 (citing *Young v. United States*, 535 U.S. 43–50 (2002)) (additional citations omitted).

The policy underlying Rule 6(b)(1) is further confirmed by the express statement of policy underlying the identical provisions of Federal Rule of Civil Procedure 6(b). Specifically, as the Advisory Committee for the 1946 amendment to that rule explained:

> *[Federal] Rule 6(b) is a rule of general application giving wide discretion to the court to enlarge these time limits or revive them after they have expired*, the only exceptions stated in the original rule being a prohibition against enlarging the time specified in Rule 59(b) and (d) for making motions for or granting new trials, and a prohibition against enlarging the time fixed by law for taking an appeal.

See Fed. R. Civ. P. 6, Notes of Advisory Committee on Rules – 1946 Amendment.

In short, D.C. Rule of Civil Procedure 6(b), like its federal counterpart, reflects the well-established principle that "nonjurisdictional limitations periods are

presumptively subject to equitable tolling," and the Court should not understand other provisions of the rules "to alter that backdrop lightly. . . ." *Boechler*, 596 U.S. at 201, 209 (citing *Irwin*, 498 U.S. at 95–96).

Second, this Court has long expressed a "strong judicial and societal preference for determining cases on the merits." *Vizion One, Inc. v. District of Columbia Dep't of Health Care Fin*., 170 A.3d 781, 791 (D.C. 2017) (*citing Abell v. Wang*, 697 A.2d 796, 800 (D.C. 1997)); *see also Walker v. Smith,* 499 A.2d 446, 448-49 (D.C. 1985) ("We adhere to the strong judicial policy favoring adjudication on the merits of a case."). A strong default rule favoring the availability of equitable tolling for good cause, unless expressly foreclosed by rule or statute, advances this objective by ensuring that cases are not dismissed for procedural failings in circumstances where fairness dictates a different result.

Finally, recognizing the availability of equitable tolling under Agency Review Rule 1(b)(2) would be wholly consistent with the express statutory purpose of the Comprehensive Merit Personnel Act (CMPA), which supplies the statutory authority for the OEA appeal process and the jurisdiction for the petition for review at issue in this case. *See* D.C. Code § 1–606.03(a)–(d) (establishing the OEA review process and providing for appeal to the Superior Court). Specifically, the "Policy" provision of the CMPA states: "It is the intent of the Council that the

District's personnel management system provide for *equitable application of appropriate rules or regulations* among all agencies." D.C. Code § 1–604.01.

In sum, the plain-text reading of the rules making equitable tolling available is entirely consistent with the three pertinent policy objectives implicated in this case. This Court's jurisprudence is likewise in alignment with both text and policy, as explained below.

3. This Court's precedent supports equitable tolling of the Agency Review Rule 1(b)(2) deadline.

The Agency Review Rule 1(b)(2) deadline, like all non-statutory deadlines contained in court rules, is non-jurisdictional. See *supra* at 12; *see also Brewer*, 163 A.3d at 802 (holding that the petition for review deadline, which in a prior codification appeared in paragraph (a) of Agency Review Rule 1, "is not jurisdictional"). The question in this case is thus whether it is regular claim-processing rule that is presumptively toll-able, or rather one of the narrow class of mandatory claim-processing rules that overcome that default presumption.

This Court found it unnecessary to resolve this question in *Brewer* because the "extended inaction" by the responding agency in objecting to the timeliness of the petition "at the very least le[ft] open the possibility of equitable tolling as allowed in *Mathis*." *Brewer*, 163 A.3d at 803–04 ("We need not decide in this appeal whether Super. Ct. Agency Rev. R. 1 (a) is a mandatory claim-processing

rule . . . .”). Nonetheless, at least three decisions of this Court suggest that the petition for review deadline is susceptible to tolling.

The first is *Mathis*, in which this Court held that the deadline to petition for review in this Court under Appellate Rule 15 is “subject to equitable tolling.” 124 A.3d at 1103. *Mathis* is not entirely controlling because, as the Court noted in *Brewer*, “[i]n *Mathis*, the question of whether the motion to dismiss had been timely raised was not presented as an issue and the court did not address it as a possible limitation on the invocation of equitable tolling.” *Brewer*, 163 A.3d at 803 n.7 (citing *Mathis*, 124 A.3d at 1098). It is highly persuasive, however, because, as *Brewer* further recognized, Appellate Rule 15 and Agency Review Rule 1 “both involve agency appeals with time limit provisions that closely trace each other.” *Id.* at 802.

The second case is *Brewer* itself. Although *Brewer* does not directly resolve the mandatory/non-mandatory question, as noted above, it does weigh heavily in the non-mandatory direction, for two reasons. For one thing, it tolls the Agency Review Rule 1 deadline and thus demonstrates that extending this deadline is permissible in at least some circumstances. *Id.* For another, it acknowledges that “[t]here is no legitimate basis to differentiate” between Agency Review Rule 1 and Appellate Rule 15, *id.*,., thus reaffirming that *Mathis* is persuasive authority on this question as well.

The third decision is *Baldwin*, in which the Court held that the time limit provided in D.C. Code § 1-606.03(c) for appealing an OEA Administrative Judge's initial decision to the OEA Board is a claim-processing rule that "may be tolled [or relaxed or waived] if equity compels such a result." 226 A.3d at 1144 (citing *Mathis*, 124 A.3d at 1101). Notably, Section 1-606.03 is the same statutory provision that authorizes the appeal in this case from a final OEA decision to the Superior Court. *See* D.C. Code § 1-606.03(d). Again, this decision, like *Mathis* and *Brewer*, did not have occasion to directly resolve the question of whether a timely objection affects the availability of equitable relief. *See Baldwin*, 226 A.3d at 1144 (explaining that the OEA Board decision the Court was reviewing did not address the question of equitable relief because it erroneously treated the statutory deadline as jurisdictional). But, like those cases, it points strongly in the direction of equitable relief being available.

In sum, three of this Court's recent decisions, although not directly controlling, demonstrate a clear and consistent expectation that equitable tolling is available in the context of Agency Review Rule 1 and materially similar filing deadlines. The question thus becomes whether recent jurisprudence on mandatory claims-processing rules changes this outcome. It does not, as explained below.

4. Neither this Court's nor the Supreme Court's recent decisions on mandatory claim-processing rules weigh in favor of reading the Agency Review Rule 1(b)(2) as mandatory.

Two recent cases, one from the U.S. Supreme Court and one from this Court, have identified certain procedural rules as mandatory claim-processing deadlines that may not be equitably extended over the objection of an opposing party. The rules in both cases are distinguishable from Agency Review Rule 1(b)(2), however. Thus, neither case alters the presumptive availability of equitable tolling as reflected in *Mathis*, *Brewer*, and *Baldwin*.

The first case is *Nutraceutical*. The issue here was whether the non-jurisdictional time period prescribed by Federal Rule of Civil Procedure 23(f) for appealing from an order granting or denying class certification could be equitably tolled. *Nutraceutical*, 139 S. Ct. at 714.

The Supreme Court held that it could not, on the grounds that "the governing rules speak directly to the issue of Rule 23(f)'s flexibility and make clear that its deadline is not subject to equitable tolling." *Id.* At 715. Specifically, the Court pointed to "Appellate Rule 26(b), which generally authorizes extensions of time, in turn includes this express carveout: A court of appeals 'may not extend the time to file . . . a petition for permission to appeal.'" *Id.* (quoting Fed. Rule App. Proc. 26(b)(1)). As the Court summarized: "In other words, Appellate Rule 26(b) says that the deadline for the *precise type of filing at issue here* may not be extended.

The Rules thus express a clear intent to compel rigorous enforcement of Rule 23(f)'s deadline, even where good cause for equitable tolling might otherwise exist." *Id.* (emphasis added).

The second case is *Dixon*. At issue here was whether the time period for filing a motion to reduce a sentence under Superior Court Criminal Rule 35(b)(1) is subject to equitable tolling. *Dixon*, 304 A.3d 966.

This Court held that it is not, for the same reason as in *Nutraceutical*—that this time period is expressly carved out from the court's general authority to extend time periods under the Criminal Rules. As the Court explained:

> Perhaps the most compelling support for construing Rule 35(b)(1) as a mandatory claim-processing rule is found in Super. Ct. Crim. R. 45. Rule 45(b)(1) provides "[w]hen an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made." But Rule 45(b)(2) specifically creates an exception for Rule 35: "The court may not extend the time to take any action under Rule 35, except as stated in that rule." Super. Ct. Crim. R. 45(b)(2). The exception stated in Rule 45(b)(2) is analogous to the "express carveout" included in Fed. R. App. P. 26(b) and discussed in *Nutraceutical Corp.*, regarding Rule 23(f). *See Nutraceutical Corp.*, 139 S. Ct. at 715.

Dixon, 304 A.3d 969.

Both *Nutraceutical* and *Dixon* are inapposite here because, unlike in those cases, Rule of Civil Procedure 6(b) does not carve out the deadline for petitioning for review under Agency Review Rule 1 from the court's general authority to

extend deadlines. Specifically, Rule of Civil Procedure 6(b), like Federal Rule of Appellate Procedure 26(b) and Superior Court Criminal Rule 45(b), contains a broad, general grant of equitable authority to extend most deadlines, coupled with a list of "express carveouts" for deadlines that may not be extended. Unlike in *Nutraceutical* and *Dixon*, however, the "precise type of filing at issue here"—the deadline for petitioning for review of agency action—is *not* among the enumerated carveouts to the general grant of authority. Thus, unlike in those cases, there is nothing in the text of the rules that clearly rebuts the presumptive availability of equitable tolling.

In short, *Nutraceutical* and *Dixon* stand for the wholly unremarkable proposition that deadlines that are expressly excluded from the court's broad equitable authority are mandatory claim-processing rules that may not be extended over the non-moving party's objection. And because the petition for review deadline is not subject to any such carveout, *Nutraceutical* and *Dixon* neither weigh in favor of finding Agency Review Rule 1(b)(2) to be mandatory nor call into question the presumptive availability of tolling recognized in *Mathis*, *Brewer*, and *Baldwin*. Failing to grasp this distinction was one of the Superior Court's most fundamental errors in this case, as discussed below.

C. The Superior Court's erroneous conclusion that Rule 1(b)(2) is a mandatory claim-processing rule rests on four analytical errors.

The Superior Court correctly recognized that "the 30-day deadline of Agency Review Rule 1(b)(2) is a non-jurisdictional claim-processing rule." App. 049. From there, however, it made four critical errors in its analysis.

The Superior Court's first error was to conduct its initial textual analysis of paragraph 1(b)(2) in isolation from the rest of the rule. Specifically, it started by noting that "Agency Review Rule 1(b)(2) indisputably uses mandatory language," then further observed that nothing in the text of paragraph 1(b)(2) itself "provides a basis for construing the thirty-day deadline flexibly." App. 051. From these propositions, it concluded: "Therefore, the plain text of Agency Review Rule 1(b)(2) favors a construction of its thirty-day deadline as a mandatory claim-processing rule." App. 052. This analysis is contrary to the basic principles of statutory construction discussed above which, among other things, require reading the text of a rule "as a whole." See *supra* at 14.

The Superior Court's second analytical mistake was to recognize "Agency Review Rule 1(*i*)'s express incorporation of Civil Rule 6," but nevertheless conclude that it "does not change the mandatory nature of Agency Review Rule 1(b)(2)." App. 052.

The court's logic on this point is somewhat hard to parse. On the one hand, it acknowledged that "Ms. Washington's arguments premised on the applicability of

Civil Rule 6 to agency review proceedings and the absence of Agency Review Rule 1(b)(2) from the enumerated exceptions to Civil Rule 6(b)'s general process for obtaining extensions of time have some facial appeal." App. 053–54 (citations omitted). But it then pointed to the initial clause of paragraph 1(*i*), which states that the enumerated civil rules are incorporated into agency review proceedings "[e]xcept where inconsistent with a statute or with this rule . . . ." App. 054. And according to the Superior Court, "[c]onstruing Civil Rule 6 to permit untimely petitions for review would be *'inconsistent with' Agency Review Rule 1(b)(2)'s plain text* setting forth a mandatory deadline." App. 054 (emphasis added).

This conclusion is wrong for the same reason noted above—the plain text of paragraph 1(b)(2) cannot be fully understood in isolation from the rest of the rule.

Beyond that, it simply makes no sense. The only "inconsistency" here is that Rule of Civil Procedure 6(b)(1) creates an exception to the deadlines to which it applies. But that is the whole point of exceptions generally, and of equitable tolling in particular, which is, by definition, "an exception to [a] rule." *Dring v. McDonnell Douglas Corp.*, 58 F.3d 1323, 1330 (8th Cir.1995). Under the Superior Court's logic, however, Rule 6(b)(1) would be meaningless, because it will always be "inconsistent" with whatever deadline is being applied to modify. And another fundamental canon of interpretation is, of course, to not construe a rule "in a manner that renders [a provision] 'entirely superfluous in all but the most unusual

circumstances.'" *Roberts*, 566 U.S. at 103 (quoting *TRW Inc.* v. *Andrews*, 534 U.S. 19, 29 (2001)).

The Superior Court's third error was to conclude that "permit[ting] Civil Rule 6 to apply to Agency Review Rule 1(b)(2)'s deadline would nullify the purpose of the deadline and threaten the finality of agency and OEA decisions in a substantive area statutorily committed to agency discretion and OEA expertise—all of which is 'inconsistent with' the statutory purposes and design of the CMPA." App. 055.

But this analysis ignores the express statutory purpose of the CMPA to "provide for *equitable application of appropriate rules or regulations* among all agencies." See *supra* at 20. And it also impermissibly disregards the clear purpose behind Rule of Civil Procedure 6(b)(1) of supplying the Superior Court with the broad equitable tolling authority that is "a long-established feature of American jurisprudence." See *supra* at 18.

The Superior Court's fourth and final analytical mistake was to completely disregard *Mathis*, *Brewer*, and *Baldwin* solely because these cases did not squarely apply the mandatory/non-mandatory distinction. App. 057 ("A close reading of the cases, however, reveals that the Court of Appeals never reached the question of what *kind* of claim-processing rule—mandatory or flexible—the language at issue establishes."). But this hardly renders them irrelevant. As explained above, all three

cases speak at a minimum to the presumptive availability of equitable tolling under Rule 1(b)(2) absent a clear intent to the contrary, see *supra* at 20-22, and here there is simply none.

* * *

In sum, the presumptive availability of equitable tolling, the plain text of the pertinent provisions of the Agency Review Rules and the Rules of Civil Procedure, and the jurisprudence of this Court and the U.S. Supreme Court all point to the conclusion that the Rule 1(b)(2) deadline may be extended. The Superior Court arrived at the opposite outcome through multiple errors of law, and its conclusion that equitable tolling is unavailable should therefore be reversed. This raises the question of whether Ms. Washington is entitled to the tolling that is available—she is, as explained below.

II. Ms. Washington demonstrated good cause for tolling the Rule 1(b)(2) deadline.

A. Standard of review and applicable legal framework.

1. Applicable standards of review.

Questions of fact are reviewed for abuse of discretion. *In re Ak. V.*, 747 A.2d 570, 574 (D.C. 2000). Such review entails "determin[ing] whether the decision maker failed to consider a relevant factor, whether [the decision maker] relied upon an improper factor, and whether the reasons given reasonably support the

conclusion." *Bishop v. United States*, 310 A.3d 629, 641 (D.C. 2024) (internal citations omitted).

Mixed questions of law and fact are reviewed under the "usual deferential standard of review for factual findings, but "apply de novo review to the ultimate legal conclusions based on those facts." *C.R. Calderon Constr., Inc. v. Grunley Constr. Co*., 257 A.3d 1046, 1051 (D.C. 2021) (citing *Hilton v. United States*, 250 A.3d 1061, 1068 (D.C. 2021)).

An excusable neglect finding is one such "ultimate legal conclusion[]" to be decided de novo. Thus, where the Court reviews a dismissal on timeliness grounds and finds that the record establishes a showing of excusable neglect, it will reverse the dismissal and remand for further proceedings on the merits. *Brewer*, 163 A.3d at 804; *Savage–Bey v. La Petite Acad.*, 50 A.3d 1055, 1063 (D.C. 2012); *but see Admasu v. 7-11 Food Store*, 108 A.3d 357, 364 (D.C. 2015) (remanding for proper application of the *Pioneer* factors discussed below).

2. The excusable neglect standard.

Rule of Civil Procedure 6(b)(1)(B) permits the Court to toll the Agency Review Rule 1(b)(2) deadline upon a showing of "excusable neglect."

Excusable neglect "is a somewhat 'elastic concept'" and "is at bottom an equitable one." *See Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 392, 395 (1993) (quoting 4A C. Wright & A. Miller, Fed. Prac. and Proc.

§ 1165, p. 479 (2d ed. 1987)). It "is not limited strictly to omissions caused by circumstances beyond the control of the movant" *id.* at 392, but rather must be "understood to encompass situations in which the failure to comply with a filing deadline is attributable to negligence," *Id.* at 394. In short, this standard entails "taking account of all relevant circumstances surrounding the party's omission." *Id.* at 395.

Pioneer identifies four factors to guide this equitable inquiry: danger of prejudice to opposing party; length of delay and potential impact on judicial proceedings; the reason for delay; and good faith by the moving party. *See Admasu*, 108 A.3d at 362 (citing *Pioneer*, 507 U.S. at 395). Of these, "the reason for the delay is the most important factor to consider when applying the *Pioneer* test." *Id.*

As to the danger of prejudice to the opposing party, "delay in and of itself does not constitute prejudice." *Oladokun v. Corr. Treatment Facility*, 309 F.R.D. 94, 99 (D.D.C. 2015), citing *Canales v. A.H.R.E.*, Inc., 254 F.R.D. 1, 11 (D.D.C. 2008) (to establish prejudice, the non-moving party must show that the delay caused a concrete impact, such as "loss of evidence and increased difficulties in discovery.") Indeed, this Court has repeatedly declined to find prejudice absent a particularized showing that the nonmoving party's ability to defend itself in the litigation has been compromised by the delay.

In *Savage-Bey v. La Petite Academy*, for example, the Court reasoned as follows:

> Although the appeal was filed more than two months after the mailing date indicated in the claims examiner's certification, *nothing in the record indicates that this span of time prejudiced the employer in its ability to present its case*. Valinda Farmer, the employer's Assistant Program Director and its witness about the reasons for Savage-Bey's termination, remained in La Petite Academy's employ and was present to testify on both the initial hearing date and the date when the hearing resumed.

50 A.3d at 1062 (emphasis added).

Likewise in *Mathis*, the Court stated:

> On the other side of the ledger, we discern no prejudice that would flow to the DCHA if we were to toll Rule 15's timing requirement and reach the merits of this case. *The DCHA fully briefed and argued the merits issue in supplemental briefing and at a second oral argument. At no time did it indicate it had been hampered in doing so by the passage of time*.

Mathis, 124 A.3d at 1106 (emphasis added).

Similarly, the Court noted in *Brewer*: "[The Agencies'] ability to challenge the petition was in no respect affected by the delayed filing and no claim is made of any fiscal or budgetary impact." *Brewer*, 163 A.3d at 804.

In short, a party is not prejudiced merely by having to defend against an action that it could have avoided on timeliness grounds but for an extension. And this makes good sense, because otherwise the first *Pioneer* factor would always

weigh against excusable neglect and thus provide no meaningful guidance to the court's equitable inquiry.

As to the length of delay and any potential impact on judicial proceedings, this factor is less about the absolute length of time at issue when viewed in isolation and more about "potential impact on the pending judicial proceedings." *Whiteru v. Wash. Metro. Area Transit Auth.*, No. 15-cv-0844 (KBJ), 2018 BL 465442, at *3 (D.D.C. Dec. 17, 2018).

Courts thus consider the stage of the proceedings, for example, and whether extending a deadline would disrupt events in the litigation that have already been scheduled or unreasonably extend the overall length of the litigation. See *Whiteru v. Wash. Metro. Area Transit Auth.*, No. 15-cv-0844 (KBJ), 2018 BL 465442, at *3 (D.D.C. Dec. 17, 2018) ("the tardiness of the instant summary judgment filing, which comes more than two years after the initial deadline for dispositive motions, is unlikely to impact the overall proceedings" when a trial date had not yet been set, and likely would not be set for several months); *see also Giles v. Saint Luke's Northland-Smithville*, 908 F.3d 365, 368–69 (8th Cir. 2018) (finding "no showing that this relatively short [45-day] delay would impact the judicial proceedings in any appreciable way" where discovery had already closed and summary judgment was already fully briefed); *King v. City of New York*, No. 20-CV-8283 (PAC), 2021 BL 126061 (S.D.N.Y. Apr. 06, 2021), at *2–3 ("Although King's delay has

unnecessarily prolonged this litigation by several months, that delay is not significant, and the case is still less than a year old[,] . . . and [] the potential disruption to the judicial proceedings is minimal . . . .").

As to the reason for delay, this factor is, at bottom, a reasonableness inquiry. *Dada v. Children's Nat'l Med. Ctr.*, 715 A.2d 904, 908 (D.C. 1998) ("Excusable neglect seems to require . . . some reasonable basis for non-compliance within the time specified in the rules."). The Court has considered, among other things, whether the moving party's actions or inactions were understandable under the circumstances, even if ultimately mistaken or misguided. *See Savage-Bey*, 50 A.3d at 1062 ("The ALJ also found that Savage–Bey was regularly receiving claims forms from DOES, *meaning, we are persuaded, that she had no reason to think* that her mail was being sent to an incorrect address." (emphasis added)); *Mathis*, 124 A.3d at 1105–06 ("Mathis pursued the only avenue that he *reasonably understood* was available to him: to go to Superior Court." (emphasis added)).

One comment element of this inquiry is whether the moving party reasonably but mistakenly relied on advice or action or another. *See Savage-Bey*, 50 A.3d at 1062 ("As to the reason for the delay, Savage-Bey delayed acting because, as the ALJ found, she was told by DOES staff that she 'would receive something in the mail.'"); *Mathis*, 124 A.3d at 1105 ("The notice the DCHA

provided him about his right to judicial review was at best ambiguous and at worst misleading.").

As to the moving party's good faith, this factor generally requires little more than a showing that the movant acted promptly to correct a mistake once it was discovered. *See Brewer*, 163 A.3d at 804 (finding "[t]he argument for equitable tolling in this case [] compelling" based on a finding that, among other things, "[w]hen, a month later, [the petitioner] was alerted to her error by our show cause order, she promptly sought to file a motion to permit her to late-file in the Superior Court"); *Admasu*, 108 A.3d at 363 ("Admasu filed the appeal once he received notice of the determination, two days after his return. . . . [He] promptly exercised his right to appeal, which is a demonstration of good faith."); *Cryer v. Intersolutions, Inc.*, No. 06-2032 (EGS), 2007 BL 7936, at *7 (D.D.C. Apr. 20, 2007) ("Finally, the Court finds that plaintiffs acted in good faith [because] [a]s soon as plaintiffs learned of the decision in *Howard*, plaintiffs acted promptly to file their motion for extension of time . . . .").

Beyond that, good faith is typically presumed absent specific evidence of bad faith. *See, e.g.*, *West End Tenants Ass'n. v. Geo. Wash. Univ.*, 640 A.2d 718, 726 n.13 (D.C. 1994) (explaining how a statutory provision requiring good faith did not affirmatively define that term, but instead enumerated factors indicative of bad faith); *Columbia Plaza Tenants Ass'n. v. Antonelli*, 462 A.2d 433, 437 (D.C.

1983) (observing that "good faith on the part of the Owners must be deemed to be implied" absent evidence to the contrary).

B. Ms. Washington established excusable neglect.

The record before the Superior Court demonstrated that all four *Pioneer* factors weighed in Ms. Washington's favor.

First, as to any potential prejudice to DFS resulting from Ms. Washington's requested extension, this case is exactly like *Savage-Bey*: "nothing in the record indicates that this span of time prejudiced the [Agency] in its ability to present its case." See *supra* at 32.

Critically, this proceeding, unlike regular civil litigation, merely involves judicial review of a closed agency record. There is no possibility of future discovery, or of an evidentiary hearing or trial, and thus no possibility of DFS being prejudiced by witnesses becoming unavailable, or by needing to preserve evidence, or by any other issue that might arise in the normal course of a civil case. Rather, the demands on DFS if the extension is granted will be precisely the same as what it would have faced had the case gone forward on the original schedule—it will simply need to defend the Agency record in a brief in response to Ms. Washington's petition. And, as in *Mathis*, "[a]t no time did [DFS] indicate it [would be] hampered in doing so by the passage of time." *See supra* at 32.

Second, as to the length of delay and any potential impact on judicial proceedings, the analysis is similar—there is simply no evidence (and indeed, no possibility) of any concrete impact on the proceedings. This is because Ms. Washington filed her Motion for Extension in conjunction with her case-initiating Petition for Review, meaning there was no schedule of events to disrupt. Nor could prolonging a newly filed case by a mere matter of months be considered significant. *See King*, 2021 BL 126061, at *3.

Third, Ms. Washington's reason for delay—reliance on her prior counsel—was eminently reasonable even if ultimately mistaken. Simply put, she had every reason to believe her attorney would timely file her Petition for Review. For one thing, the attorney, whose services were secured Ms. Washington's union, NAGE, had been duly authorized by NAGE to do so for Ms. Washington and other affected members. App. 027. For another, this was the same attorney who had been representing Ms. Washington and her colleagues throughout each stage of the lengthy OEA review process, which had been ongoing for nearly two years. App. 027. As noted above, this proceeding is limited to review of the closed OEA record and, as her lawyer for that proceeding, Ms. Washington's attorney was already intimately familiar with that record. Thus, Ms. Washington had every reason to believe that her attorney would handle the Petition for Review preparation and filing as assigned.

Finally, as to Ms. Washington's good faith, there is simply no indicia of bad faith in the record, and no doubt that both she and her union acted promptly to secure new counsel to file her petition as soon as they learned of the missed deadline. NAGE's General Counsel immediately began seeking a new attorney for Ms. Washington and other affected members within days of learning on January 5, 2024, that their petitions had not been filed. App. 027. She was able to identify and secure internal approval for new counsel by January 15, App. 027-28, after which Ms. Washington immediately connected with her new attorney, making it possible to file her petition and motion only days later on January 18 and 19, respectively. App. 001; App. 023.

In sum, Ms. Washington's actions were entirely understandable and eminently reasonable "taking account of all relevant circumstances surrounding" the delayed filing of her petition. See *supra* at 31. She is thus entitled to an extension of the Rule 1(b)(2) deadline, and the Superior Court's conclusion to the contrary constitutes reversable error, as explained below.

C. The Superior Court misunderstood and misapplied the *Pioneer* factors.

The Superior Court misunderstood and misapplied the *Pioneer* factors to the undisputed record in this case. Its "ultimate legal conclusion" that Ms. Washington failed to demonstrate excusable neglect thus constitutes reversible error.

Starting with question of potential prejudice to DFS, the Superior Court found this factor to favor DFS based on its interest in finality and in not having to defend itself once the appeal clock has run. *See* App. 062 ("Once the time for appeal has run, Respondents—as with all other actors within the CMPA's ambit—reasonably rely on the final decision in the exercise of their powers and rights with the expectation that the matter is conclusively settled.").

But as explained above, a party is not automatically prejudiced merely by the loss of an untimeliness defense and instead having to defend itself on the merits because, if this were the case, the first *Pioneer* factor would always point in the direction of prejudice. See *supra* at 30-31. Rather, the pertinent question is whether there is any actual indication that the party would be materially hampered in its ability to defend itself at a later time, and here—where DFS is simply presenting a written defense of a closed agency record—there is simply no indication that this is the case.

As to the length of the delay and its impact on judicial proceedings, the Superior Court focused on the absolute length of the delay ("some eighty days after the expiration of the deadline for filing a petition for judicial review") and opined that "engaging in full-blown judicial proceedings on the substantive merits of a plainly untimely petition for review subverts the purpose of the stated deadlines

and the design of the wider statutory and rule-based regimes governing employee appeals and appeal of agency actions generally." App. 062–63.

But as explained above, this prong of the *Pioneer* analysis is directed at concrete impacts on the immediate proceeding, not on any broader policy concerns the court might have. See *supra* at 33-34. And as the Superior Court itself conceded, there were no such impacts. *See* App. 062 (acknowledging that "the sole next event in this case is a remote initial scheduling conference, with substantive events yet to be scheduled").

As to the reason for the delay, the Superior Court started by imputing the acts of Ms. Washington's former attorney to Ms. Washington despite acknowledging that her failure to file Ms. Washington's petition may have been "outrageously in violation of . . . [the first attorney's] implicit duty to devote reasonable efforts in representing [her] client . . . ." App. 064–65. From there, it reasoned that because Ms. Washington did not explain why her first attorney failed to file her petition, it could not determine whether Ms. Washington's own conduct was "reasonable (and excusable) in view of the circumstances." App. 064–65.

But this framework puts Ms. Washington in an impossible situation. How is she supposed to prove the reasons her former attorney failed to act—even if the former attorney had told her, such statements would simply be hearsay.

In any event, the court had plenty of information to find that Ms. Washington acted reasonably and excusably under the circumstances. As explained above, she had a union-provided attorney who had already been representing her and her former colleagues through two years of litigation on the same subject before OEA, who had been duly authorized to continue doing so in the Superior Court, and who already had all of the information she needed from Ms. Washington to do so. Any reasonable person in Ms. Washington's shoes would have done exactly what she did—counted on her attorney to file the petition in accordance with the relevant procedural rules and timelines, trusted that it was done, and then anxiously awaited the court's decision in her case.

Finally, as to good faith, the Superior Court acknowledged there was no indication in the record of bad faith, and further "credit[ed] Ms. Washington's efforts to secure new counsel upon discovery of her first attorney's failure." App. 066. It nevertheless this prong of the *Pioneer* analysis to be "at best neutral," citing a lack of information about "the representations made by Ms. Washington's first attorney to Ms. Washington and NAGE's General Counsel during the permitted filing period . . . ." App. 066–67.

But again, however, this misses the point. The absence of bad faith is not a "neutral" fact—it is a fact that weighs in Ms. Washington's favor, as do her efforts to secure new counsel upon discovery of the error. See *supra* at 35-36. Thus, even

if the lack of information regarding her former attorney's motivations could be regarded as neither helping nor hurting Ms. Washington in the 'good faith' analysis, the overall assessment of *Pioneer* factor four weighs decidedly in Ms. Washington's favor.

* * *

In sum, Ms. Washington reasonably and understandably relied on her former attorney and thus made the showing of excusable neglect necessary to extend the Rule 1(b)(2) deadline. The Superior Court reached the opposite outcome not based on factual errors, but rather through misunderstandings of the *Pioneer* factors that tainted its ultimate conclusion of law. Its decision on this point should therefore be reversed.

CONCLUSION

For the foregoing reasons, the Superior Court's dismissal of Ms. Washington's Petition for Review should be reversed, and the case should be remanded with an order to grant her motion and treat her petition as timely filed under the equitably extended deadline.

Dated: September 9, 2024

Respectfully submitted,

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