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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
NOT YET SCHEDULED FOR ORAL ARGUMENT

CHEROKEE CONCERNED CITIZENS, *Petitioner*, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., *Respondents*.	No. 23-1096

PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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INTRODUCTION

This case challenges the order of Respondent U.S. Environmental Protection Agency ("EPA") authorizing Chevron to produce eighteen novel chemicals derived from plastic waste. EPA, *TSCA Section 5 Order for a New Chemical Substance* (att. to Petition for Review, Doc. 1994141) (the "Order"). In the Order, EPA found that Chevron's waste-derived chemicals threaten serious environmental harm and pose alarming health risks—including cancer risks more than 100,000 times greater than EPA's benchmark for "unreasonable" risks that require mitigation through regulatory controls. Yet EPA authorized the chemicals' production without developing any safeguards to limit exposure among people living near Chevron's production facility and without requiring Chevron to develop any information to fill data gaps EPA identified concerning the chemicals' full health risks.

More than six months after EPA signed the Order, the members of Petitioner Cherokee Concerned Citizens were notified of the Order's existence and the fact that it authorizes Chevron to produce and store these highly toxic chemicals approximately one mile from their homes—at Chevron's Pascagoula, Mississippi, refinery. That notification did not come from EPA—which never provided public notice of its Order—but rather from reporting by an investigative journalist.

EPA now claims its Order is immune from judicial review because no aggrieved party managed to ferret it out from EPA's online database within sixty days of when EPA's staff uploaded it. That argument is foreclosed by controlling precedent establishing EPA's obligation to provide reasonable public notice of its actions to trigger the statute of limitations and Cherokee Concerned Citizens' entitlement to equitable tolling of the limitations period. Accordingly, this Court should deny EPA's motion to dismiss.

STATUTORY BACKGROUND

EPA issued the Order under section 5 of the Toxic Substances Control Act ("TSCA"), which requires EPA to evaluate new chemicals before they enter commerce and regulate them to prevent unreasonable risks to health and the environment. 15 U.S.C. § 2604. If EPA concludes—as it did here—that it lacks sufficient information to make a reasoned risk determination but the information EPA possesses indicates that the new chemicals may present unreasonable risk, EPA must issue an order under TSCA section 5(e) "prohibit[ing] or limit[ing] the manufacture, processing, distribution in commerce, use, or disposal of such substance . . . to the extent necessary to protect against an unreasonable risk of injury to health or the environment." *Id.* § 2604(e)(1)(A); *see* Doc. 1994141 at 14.

TSCA section 19(a)(1)(A) permits "any person" to petition this Court for judicial review of EPA's section 5(e) orders "not later than 60 days after the date on which . . . [the] order is issued." *Id.* § 2618(a)(1)(A).

FACTUAL BACKGROUND

Cherokee Concerned Citizens is a volunteer-run non-profit organization established by residents of the Cherokee Forest neighborhood in Pascagoula, Mississippi. Decl. of Barbara Weckesser ¶¶ 1, 3. The group organized in 2013 to advocate for protection from the persistent toxic pollution its members experience from more than half a dozen industrial sites near their neighborhood, including the Chevron refinery located approximately one mile from their homes. *Id.* ¶ 3. These facilities release millions of pounds of toxic chemicals every year, including nearly half a million pounds of hazardous air pollutants. *Id.* ¶ 4. In addition to noxious odors and alarming noise from the facilities, Cherokee Forest residents experience acute and chronic health effects—including rashes, burning eyes, asthma, and cancer—that are associated with the toxic exposures they experience. *Id.* ¶¶ 5–9.

To inform their advocacy, Cherokee Concerned Citizens' members monitor pollution incidents that impact their neighborhood as well as permitting and other regulatory actions that affect operations at Chevron and other nearby industrial

facilities. *Id.* ¶¶ 10–12. Despite these ongoing efforts, Cherokee Concerned Citizens' members first learned of EPA's Order on February 23, 2023—more than six months after EPA signed it, Doc. 1994141 at 7—when ProPublica published an article describing the Order and its authorization for Chevron to produce chemicals derived from plastic waste at its Pascagoula refinery that EPA determined could cause cancer in up to one in four people exposed. Weckesser Decl. ¶¶ 14–16, Ex. 2.[1]

Alarmed that EPA had authorized new chemical production near their homes that threatens to add substantially to the existing toxic pollution burden, Cherokee Concerned Citizens' members investigated strategies for challenging EPA's Order, secured pro bono legal counsel, and filed their petition for review within forty-

[1] In its risk assessment supporting the Order, which EPA withheld from the public until June 2023, EPA found that fourteen of the eighteen chemicals it approved exceed EPA's health risk benchmarks. Decl. of Katherine K. O'Brien ¶¶ 4–5; EPA, *Integrated Risk Assessment for Chevron Waste Plastic Fuels* 76–83 ("Risk Assessment") (O'Brien Decl. Ex. 1); EPA, *Chevron Waste Plastics Risk Summary and Characterization* 10–11 ("Risk Characterization") (O'Brien Decl. Ex. 6) (summarizing risk benchmarks). EPA concluded that two of Chevron's chemicals pose cancer risks exceeding one-in-ten—a risk level that is more than 100,000 times greater than EPA's benchmark for unreasonable cancer risks to the general population. Risk Assessment 81–82; Risk Characterization 11.

seven days of when the Order and its impact on Pascagoula were first publicized. *Id.* ¶¶ 17–19.

ARGUMENT

EPA's timeliness argument fails because EPA did not provide notice of the Order sufficient to trigger the statute of limitations more than sixty days before Cherokee Concerned Citizens filed suit. Even assuming for the sake of argument that EPA had done so, the Court should hold that the limitations period was equitably tolled until the Order's existence and impact on Pascagoula were first made reasonably ascertainable to the public on February 23, 2023.

I. EPA'S FAILURE TO PROVIDE PUBLIC NOTICE OF THE ORDER AND ITS EFFECTS IS FATAL TO ITS TIMELINESS ARGUMENT

EPA's timeliness argument fails because EPA cannot identify any action it took more than sixty days before Cherokee Concerned Citizens filed suit that provided reasonable public notice of the Order's existence. Further, the Order itself provides inadequate notice of its effect on people living near Chevron's Pascagoula refinery to trigger the limitations period.

It is "self-evident[]" that the statute of limitations does not begin to run on challenges to agency action "until the agency has decided a question in a manner that reasonably puts aggrieved parties on notice of the [action's] content." *RCA*

Glob. Commc'ns v. FCC, 758 F.2d 722, 730 (D.C. Cir. 1985). Yet EPA ignores this principle, which has been affirmed repeatedly by this Court and others. *See, e.g., JEM Broad. Co. v. FCC*, 22 F.3d 320, 326 (D.C. Cir. 1994) (affirming that this Court will "recognize[] exceptions to the limitations period when agency action fails to put aggrieved parties on reasonable notice of the rule's content"); *Pub. Citizen v. Nuclear Regul. Comm'n*, 901 F.2d 147, 153 (D.C. Cir. 1990) ("Before any litigant reasonably can be expected to present a petition for review of an agency rule, he first must be put on fair notice that the rule in question is applicable to him.") (alteration omitted) (quoting *Recreation Vehicle Indus. Ass'n v. EPA*, 653 F.2d 562, 568 (D.C. Cir. 1981)); *Pub. Citizen v. Mineta*, 343 F.3d 1159, 1167 (9th Cir. 2003) ("[T]he public must be notified of regulations affecting the right of interested parties to seek judicial review before those rights may be implicated"). This precedent forecloses EPA's theories that the limitations period in TSCA section 19, 15 U.S.C. § 2618(a)(1)(A), began running either two weeks after the Order was signed or when EPA uploaded the Order to its "ChemView" database.

A. Neither the Passage of Two Weeks Following the Order's Signing nor EPA's Uploading it to ChemView Triggered the Limitations Period

EPA does not articulate a firm position on when the statutory period for judicial review of its Order began. EPA first states that, by operation of its

regulation at 40 C.F.R. § 23.5, the Order "is deemed to have been issued" on September 8, 2022, two weeks after it was signed by EPA and Chevron. Resp'ts' Mot. to Dismiss 10–11 (Doc. 2026024) ("EPA Mot."). EPA rightly declines to argue that this triggered the limitations period, *see id.*, as the passive running of the clock for two weeks following EPA and Chevron's private exchange of signed copies of the Order provided no notice to aggrieved parties, let alone "reasonable notice," of the Order's existence or content, *JEM Broad.*, 22 F.3d at 326. Further, in promulgating the regulation it invokes, EPA explained that the regulation was not intended to "bar[] from obtaining review" someone who "has no notice of the action." Final Rule, Judicial Review Under EPA-Administered Statutes; Races to the Courthouse, 50 Fed. Reg. 7,268, 7,269 (Feb. 21, 1985) (explaining that claims of inadequate notice "can be raised in judicial proceedings if [they] arise[] in practice").

Accordingly, EPA is left to argue that the limitations period commenced on October 29, 2022, when—sixty-five days after EPA and Chevron had signed the Order—EPA staff uploaded it to an online database called ChemView.[2] EPA Mot.

[2] **[MATERIAL UNDER SEAL DELETED]**

11. This argument fails because EPA provided no notice when the Order became "publicly available on ChemView," Decl. of Jeffrey Santacroce ¶ 6 (Doc. 2026024), and EPA's theory that affected members of the public would have retrieved the Order in October 2022 by "monitoring EPA's publicly accessible website" with "reasonable diligence," EPA Mot. 16, is farfetched at best.

EPA fails to explain how members of the public would locate the Order by "monitoring" ChemView. *Id.* As explained in the accompanying declaration of Dr. Maria Doa, who led ChemView's development during her twenty-two-year career in EPA leadership, ChemView is an online database designed principally to help commercial chemical users make safer chemical choices, not to provide the general public with notice of EPA decisions or practicable access to new chemical information. Decl. of Maria Doa ¶¶ 7–8.

To access information from ChemView, one must use various search tools on the ChemView website. *See id.* ¶¶ 9, 12; ChemView, https://chemview.epa.gov/chemview/#. EPA's motion ignores the serious limitations of ChemView's search functionality. *See* Doa Decl. ¶¶ 11–17. For example, users cannot search ChemView for EPA orders or other new chemical information by location. *Id.* ¶ 11. Accordingly, a user could not search ChemView

for TSCA section 5 orders authorizing new chemical production in Pascagoula, Mississippi; Jackson County, Mississippi; or relevant zip codes. *See id.* Moreover, although ChemView's "Advanced Search" tool purports to facilitate searches for TSCA section 5 orders by company name, conducting such a search for orders associated with Chevron's Pascagoula refinery returns *no results*. *Id.* ¶¶ 12–13, 18. Running the same search with company names containing the more general "Chevron" also yields *no results*. *Id.* ¶ 13.

Given that, it is unclear how EPA believes members of the public concerned about operations at Chevron's Pascagoula refinery would have obtained the Order in October 2022 by "monitoring" ChemView. EPA Mot. 16. Indeed, the fact that ChemView invites a search for TSCA section 5 orders pertaining to Chevron's Pascagoula Refinery that returns no results is affirmatively misleading, as it would give a person attempting to monitor for such orders false comfort that none exists. "An agency may not put up signs inducing" members of the public "to turn aside and then claim they had constructive notice of what they would have found at the end of the road." *Nat'l Air Transp. Ass'n v. McArtor*, 866 F.2d 483, 485 (D.C. Cir. 1989).

Even if EPA could concoct some search methodology that a person concerned about Chevron's Pascagoula refinery theoretically could have deployed to retrieve the Order from ChemView, EPA's unannounced uploading of the Order still would not trigger the statute of limitations under this Court's precedent. In *Public Citizen v. Nuclear Regulatory Commission*, this Court rejected as "border[ing] on the frivolous" the agency's argument that "mere placement of a decision in an agency's public files, without any other announcement, can start the clock running for review . . . ." 901 F.2d at 153. The Court affirmed that potential litigants "must be put on fair notice" of agency decisions "before [they] reasonably can be expected to present a petition for review," *id.* (quotation omitted), and held that "[p]otential petitioners cannot be expected to squirrel through the [agency's] public document room in search of papers that might reflect final agency action," *id.* As in *Public Citizen*, EPA's silent placement of the Order on ChemView, months after it was signed and "without any other announcement," cannot "start the clock running for review." *Id.*[3]

[3] The fact that EPA published a notice in the Federal Register in July 2021 that it had received Chevron's new chemical applications does not change the result. *See* Notice, Certain New Chemicals; Receipt and Status Information for June 2021, 86 Fed. Reg. 38,475, 38,477 (July 21, 2021). That notice does not mention Pascagoula or ChemView. Instead, it directs readers seeking EPA's determinations on new

In sum, because EPA cannot point to any action more than sixty days before Cherokee Concerned Citizens filed suit that "put [them] on fair notice" of the Order, EPA's timeliness argument fails. *Id.* (quotation omitted).

B. The Order Provides Inadequate Notice of its Effect on Residents Near Chevron's Pascagoula Refinery to Trigger the Limitations Period

Even if EPA had announced the Order's availability in a manner that reasonably apprised aggrieved parties—which EPA did not—the Order itself provided "inadequate notice that the petitioner would be affected by the action" to trigger the limitations period. *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 911–12 (D.C. Cir. 1985).

First, contrary to EPA's assertion, Chevron's intent to manufacture the chemicals in Pascagoula was not "made public in the redacted version of the order" uploaded to ChemView, EPA Mot. 6–7—**[MATERIAL UNDER SEAL DELETED]**

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chemical applications to a different website that also does not mention Pascagoula or ChemView and does not contain the Order. *See id.* at 38,476, 38,477 (citing EPA, *Status of Pre-Manufacture Notices Reviewed Under Section 5 of the Toxic Substances Control Act (TSCA)*, https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/status-pre-manufacture-notices (last visited Dec. 7, 2023)).

[MATERIAL UNDER SEAL DELETED]. Instead, EPA acceded to Chevron's preference to withhold that information. *See* AR0014878 (Chevron email to EPA stating Chevron "would prefer to use the parent company name in our consent order rather than the site name").

Unable to point to where it identified the production facility in its Order, EPA relies on the fact that an employee from Chevron's Pascagoula refinery signed the Order. EPA Mot. 15; Doc. 1994141 at 7. But the fact that a Pascagoula-based employee signed the Order does not establish the production location, and this Court does not require aspiring petitioners to preserve their rights through surmise from ambiguous agency decisions. Instead, "when an agency leaves room for genuine and reasonable doubt as to the applicability of its orders or regulations, the statutory period for filing a petition [for] review is tolled until that doubt is eliminated." *Recreation Vehicle Indus. Ass'n*, 653 F.2d at 569; *see also McArtor*, 866 F.2d at 485 (holding agency failed to provide notice of action adequate to trigger limitations period even where a "thorough and alert reader" could have ascertained the action's scope and effect from the poorly structured decision document).

EPA's argument that Chevron's production facility was adequately identified in Chevron's new chemical applications—known as premanufacture notices, or "PMNs"—also fails. *See* EPA Mot. 7–8. "PMN Page 8" in EPA's PMN form requires the submitter to provide the name and address of "the site at which the operation will occur." *See, e.g.*, O'Brien Decl. Ex. 2 at 27. However, when Chevron submitted its PMNs, **[MATERIAL UNDER SEAL DELETED]**, and EPA agreed to withhold that information from the public, AR0014319. Accordingly, in the first consolidated PMN covered by the Order, which includes Chevron's PMNs for chemicals P-21-0144–P-21-0147 and contains two copies of "PMN Page 8," the production site information is redacted and marked "Confidential"[4]:

[4] O'Brien Decl. Ex. 2 at 27, 33.

PMN2021P8

SANITIZED SUBMISSION

Part II-- HUMAN EXPOSURE AND ENVIRONMENTAL RELEASE

Section A -- INDUSTRIAL SITES CONTROLLED BY THE SUBMITTER

Mark (X) the "Confidential" box next to any item you claim as confidential

The information on pages 8 and 8a refer to consolidated chemical number(s): [X] 1 [X] 2 [X] 3 [ ] 4 [ ] 5 [ ] 6

Complete section A for each type of manufacture, processing, or use operation involving the new chemical substance at industrial sites you control. Importers do not have to complete this section for operations outside the U.S.; however, you may still have reporting requirements if there are further industrial processing or use operations after import. You must describe these operations. See instructions manual

1. Operation description
   a. Identity -- Enter the identity of the site at which the operation will occur.

Confidential

Name	XXX			[X]
Site address (number and street)	XXX			
City	XXX	County	XXX	
State	XXX	ZIP code	XXX	

If the same operation will occur at more than one site, enter the number of sites. Identify the additional sites on a continuation sheet, and if any of the sites have significantly different production rates or operations, include all the information requested in this section for those sites as attachments. → XXX [X]

Mark (X) this box if the data continues on the next page. [ ]

b. Type -- Mark (X) Manufacturing [ ] Processing [ ] Use [ ] [X]

c. Amount and Duration -- Complete 1 or 2 as appropriate

Confidential

1. Batch	Maximum kg/batch (100% new chemical substance)	Hours/batch	Batches/year	[ ]
2. Continuous	Maximum kg/day (100% new chemical substance)	Hours/day	Days/year	[X]
	XXX	XXX	XXX	

d. Process description — **Mark** (X) to indicate your willingness to have your process description binding. → [ ]

(1) Diagram the major unit operation steps and chemical conversions. Include interim storage and transport containers (specify- e.g. 5 gallon pails, 55 gallon drum, rail car, tank truck, etc.).
(2) Provide the identity, the approximate weight (by kg/day or kg/batch on a 100% new chemical substance basis), and entry point of all starting materials and feedstocks (including reactants, solvents, catalysts, etc.), and of all products, recycle streams, and wastes. Include cleaning chemicals (note frequency if not used daily or per batch).
(3) Identify by number the points of release, including small or intermittent releases, to the environment of the new chemical substance. If releasing to two media at the same step, assign a second release number for the second medium.

[X]

XXX

Thus, even a person who managed to obtain the Order and PMNs from ChemView would reasonably conclude that the production site identity was not disclosed in the PMNs.

Indeed, since Chevron claimed, and EPA agreed, that Chevron could withhold this information, Chevron's failure to redact it consistently in two of its five consolidated PMN submissions appears inadvertent. Regardless, it is absurd to argue that a person reviewing the PMNs should suspect that information redacted in both copies of "PMN Page 8" in the first consolidated PMN covered by the Order would be disclosed in subsequent copies of the same form.[5] *See McArtor*, 866 F.2d at 485 (holding agency may not put up "signs inducing [members of the public] to turn aside and then claim they had constructive notice of what they would have found at the end of the road"). More fundamentally, EPA cites no support for the proposition that a regulated party's apparently inadvertent, buried disclosure of its own supposedly confidential business information can provide

[5] Chevron's facility identity also is redacted in two of the three copies of "PMN Page 8" in the consolidated PMN for chemicals P-21-0148–P-21-0150 and in all six copies of the form in the consolidated PMNs for chemicals P-21-0152–P-21-0154 and P-21-0159–P-21-0163. O'Brien Decl. Ex. 3 at 21, 35; *id.* Ex. 4 at 20, 27, 35; *id.* Ex. 5 at 28, 35, 42.

sufficient public notice of an EPA action's effects on aggrieved parties to trigger the limitations period.

Second, even assuming for the sake of argument that one could ascertain Chevron's intent to produce the chemicals in Pascagoula, the Order is "utterly opaque" regarding the risks that chemical-production activity poses to people living near Chevron's facility. *RCA Glob. Commc'ns*, 758 F.2d at 730. The Order states that Chevron's chemicals "may present an unreasonable risk of injury to health or the environment." Doc. 1994141 at 14. It does not state where those risks would occur, including whether people living near Chevron's refinery face unreasonable risk.[6]

Indeed, when EPA made its risk assessment supporting the Order publicly available—ten months after signing the Order—EPA simultaneously published a memo asserting that, in key respects, the Order does not mean what it says. *See generally* Risk Characterization, *supra* n.1. For example, EPA's memo asserts that

[6] In Appendix 2 to the Order, EPA summarizes its determinations concerning "Risk to Workers," "Risk to General Population," and "Risk to Consumers," Doc. 1994141 at 36–38, but does not explain what "General Population" refers to—*i.e.*, people living near Chevron's refinery where the chemicals will be produced and stored, people living near facilities where the chemicals will be used, or something else, *see id.* at 37–38.

what the Order characterizes as risks to the "general population" from "inhalation of stack air," Doc. 1994141 at 38, does not, as that term suggests, describe risks from breathing air pollution emitted from the Chevron refinery stacks. Instead, EPA's memo states that the Order's discussion of risks from "stack air" inhalation actually describes the risks from breathing *non-stack* emissions from mobile pollution sources such as airplanes that burn fuel made with Chevron's new chemicals. Risk Characterization 14–15. The memo further asserts that the Order's calculations of those "stack air" risks were incorrect, without providing revised risk calculations. *Id.* While EPA cannot rely on its post hoc memo to justify the Order, the memo belies EPA's claim that the Order reasonably apprised affected members of the public of the risks they face from the activities the Order authorizes, including people at risk from exposure to stack emissions and other air and water pollution associated with production of the new chemicals at Chevron's refinery.

This Court has held repeatedly that such misleading or confusing agency decision documents do not provide sufficient notice to trigger the period for judicial review. *E.g., Recreation Vehicle Indus. Ass'n*, 653 F.2d at 569; *McArtor*, 866 F.2d at 485; *RCA Glob. Commc'ns*, 758 F.2d at 730–31. "Otherwise the agency could promulgate a confusing regulation and, after expiration of the time for any

judicial contest, clarify it to the surprise and prejudice of a party whose opportunity for judicial review meanwhile has been extinguished." *Recreation Vehicle Indus. Ass'n*, 653 F.2d at 568.

"Although an agency has considerable latitude in determining the event that triggers commencement of the judicial review period, it must do so reasonably." *Public Citizen*, 901 F.2d at 153 (quotation and internal citation omitted). Because the Order does not disclose Chevron's intent to produce the waste-derived chemicals at its Pascagoula refinery and is at turns ambiguous and—according to EPA's post hoc memo—erroneous in characterizing the risks to people living near Chevron's refinery, it could not provide people impacted by the Order the notice required to trigger the limitations period. *See id.*

II. ASSUMING *ARGUENDO* THAT THE LIMITATIONS PERIOD COMMENCED MORE THAN SIXTY DAYS BEFORE CHEROKEE CONCERNED CITIZENS FILED SUIT, THEY ARE ENTITLED TO EQUITABLE TOLLING

For the reasons described above, EPA cannot identify an event more than sixty days prior to Cherokee Concerned Citizens' petition for review that triggered TSCA's statute of limitations. Even assuming EPA could do so, the Court should hold that the statute of limitations was equitably tolled until the existence of EPA's Order and its effects were publicized by ProPublica on February 23, 2023.

A. TSCA's Statute of Limitations is Subject to Equitable Tolling

The deadline in TSCA section 19(a)(1)(A), 15 U.S.C. § 2618(a)(1)(A), is subject to equitable tolling because it is a nonjurisdictional filing deadline and nothing in the provision indicates congressional intent to preclude tolling.

"[N]onjurisdictional limitations periods are presumptively subject to equitable tolling." *Boechler, P.C. v. Comm'r of Internal Revenue*, 596 U.S. 199, 209 (2022) (citation omitted). Courts may "treat a procedural requirement as jurisdictional only if Congress clearly states that it is." *Id.* at 203 (quotation omitted)).[7]

"Under this clear statement rule," the analysis of TSCA section 19(a)(1)(A) "is straightforward." *Wilkins v. United States*, 143 S. Ct. 870, 876 (2023). The Supreme Court "ha[s] made plain that most time bars are nonjurisdictional," and "[n]othing about [section 19(a)(1)(A)'s] text or context gives reason to depart from this beaten path." *Id.* at 876–77 (quotation omitted). Section 19(a)(1)(A) states that "any person may file a petition for judicial review" of an EPA order issued under

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[7] *Boechler* precludes reasoning by analogy to prior Circuit decisions that held filing deadlines to be jurisdictional without engaging in a clear statement analysis. *See* 596 U.S. at 203, 208 (rejecting reliance on lower court decisions holding analogous filing deadline is jurisdictional); *cf. RCA Glob. Commc'ns*, 758 F.2d at 730 (stating without qualification that "statutory time limitations on judicial review of agency action are jurisdictional").

TSCA section 5(e), 15 U.S.C. § 2604(e), "not later than 60 days after . . . the date on which [the] order is issued," *id.* § 2618(a)(1)(A). This provision lacks a clear statement of congressional intent to make the time bar jurisdictional. To the contrary, it "'speaks only to a claim's timeliness,' and its 'mundane statute-of-limitations language say[s] only what every time bar, by definition, must: that after a certain time a claim is barred.'" *Wilkins*, 143 S. Ct. at 877 (quoting *United States v. Wong*, 575 U.S. 402, 410 (2015)).

That section 19(a)(1)(A) also includes the jurisdictional grant to the Court of Appeals does not change the outcome because "nothing conditions the jurisdictional grant on the limitations period." *Id.* (alterations omitted) (quoting *Wong*, 575 U.S. at 412). In *Myers v. Commissioner of Internal Revenue Service*, this Court held that a limitations period was not jurisdictional—although it appeared in the same sentence as the jurisdictional grant—because the statutory provision lacked language "linking" the two requirements. 928 F.3d 1025, 1034–35 (D.C. Cir. 2019). The same conclusion applies here, as the limitations period and jurisdictional grant are in different sentences and nothing links them. 15 U.S.C. § 2618(a)(1)(A); *cf. M.M.V. v. Garland*, 1 F.4th 1100, 1109–10 (D.C. Cir. 2021) (holding statutory provision that "twice conditions the relevant jurisdictional grant upon the associated limitations period . . . makes the time limit itself

jurisdictional") (quotations omitted). "[T]he Government must clear a high bar to establish that a statute of limitations is jurisdictional," *Wong*, 575 U.S. at 409, and EPA cannot do so here.

Further, nothing in section 19(a)(1)(A) rebuts the presumption that its deadline is subject to equitable tolling. Like the provision in *Boechler,* section 19(a)(1)(A), 15 U.S.C. § 2618(a)(1)(A), "does not expressly prohibit equitable tolling"; its deadline is directed at the petitioner, not the court; and it includes neither "detailed technical language" nor enumerated exceptions that imply tolling is precluded. 596 U.S. at 209–210 (quotation omitted). To the contrary, its succinct and commonplace language contains no signal that Congress intended to alter the "background principle" that tolling is available. *Id.* at 209.

B. Tolling is Justified

Equitable tolling addresses situations when, "due to circumstances external to the party's own conduct, it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Robinson v. Dep't of Homeland Sec.*, 71 F.4th 51, 58 (D.C. Cir. 2023) (quotation omitted). Equitable tolling is justified to permit the members of Cherokee Concerned Citizens to challenge EPA's unlawful authorization for chemical production that poses serious risks to the health of its members and their children and grandchildren. A contrary

conclusion would reward EPA's failure to provide public notice of its Order and its consequences for human health and the environment by immunizing that decision from judicial review.

To demonstrate their entitlement to equitable tolling, a party "must show '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way.'" *Id.* (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)). At the same time, "[t]he Supreme Court has emphasized that equitable tolling must be applied flexibly, case by case, without retreating to 'mechanical rules' or 'archaic rigidity.'" *Menominee Indian Tribe of Wis. v. United States*, 764 F.3d 51, 58 (D.C. Cir. 2014) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)).

Here, extraordinary circumstances precluded Cherokee Concerned Citizens' filing their petition for review before the February 23, 2023, ProPublica article publicized EPA's Order and its applicability to Chevron's Pascagoula refinery. As EPA acknowledges, Cherokee Concerned Citizens may establish "extraordinary circumstances" justifying tolling by demonstrating that, "despite all due diligence," they were "unable to obtain vital information bearing on the existence of [their] claim." EPA Mot. 16 (quoting *Lattisaw v. Dist. of Columbia*, 118 F. Supp. 3d 142,

158 (D.D.C. 2015)); *accord Oviedo v. Wash. Metro. Area Transit Auth.*, 948 F.3d 386, 393–94 (D.C. Cir. 2020). EPA's failure to provide public notice of the Order and the impracticability of discovering the Order's existence and effect prior to publication of the ProPublica article, as described *supra*, Point I, constitute "extraordinary circumstances" justifying tolling. EPA's actions are, by definition, "circumstances beyond [Cherokee Concerned Citizens'] control" and were not "a product of [Cherokee Concerned Citizens'] own misunderstanding of the law or tactical mistakes in litigation." *Young v. SEC*, 956 F.3d 650, 655 (D.C. Cir. 2020) (quoting *Menominee Tribe*, 764 F.3d at 58). As explained above, the Order's existence and effects on Cherokee Concerned Citizens' members were unknown and effectively undiscoverable to them before ProPublica's publication of investigative reporting explaining that "the cancer burden" from Chevron's chemical manufacturing "will disproportionately fall on people who have low incomes and are Black because of the population that lives within 3 miles of the refinery in Pascagoula, Mississippi" where the chemicals will be produced. Sharon Lerner, *This 'Climate-Friendly' Fuel Comes With An Astronomical Cancer Risk*, ProPublica (Feb. 23, 2023), https://www.propublica.org/article/chevron-pascagoula-pollution-future-cancer-risk (Weckesser Decl. Ex. 2). Indeed, Cherokee Concerned Citizens is not aware of any interested party besides Chevron who

identified the Order before ProPublica's reporting, and public statements by a U.S. Senator who "sound[ed] the alarm" about the Order's consequences only after publication of ProPublica's article indicate that other parties interested in Chevron's operations were in the dark about the Order until the article's publication.[8]

Further, Cherokee Concerned Citizens pursued their rights with reasonable diligence. "The diligence required for equitable tolling purposes is reasonable diligence, not maximum feasible diligence." *Holland*, 560 U.S. at 653 (quotations omitted). "Reasonable diligence does not require an overzealous or extreme pursuit of any and every avenue of relief. Rather, it requires the effort that a reasonable person might be expected to deliver under his or her particular circumstances." *Gibbs v. Legrand*, 767 F.3d 879, 890 (9th Cir. 2014) (quotations omitted).

Cherokee Concerned Citizens' efforts before and after learning of the Order satisfy this standard. Cherokee Concerned Citizens has no employees; its members—many of whom are elderly, suffer from serious health problems, and

[8] *See* Sen. Jeff Merkley, *Chairman Merkley Sounds the Alarm on EPA Program That Streamlined Cancer Causing Chemicals from Plastic Burning* (Apr. 5, 2023), https://www.merkley.senate.gov/chairman-merkley-sounds-the-alarm-on-epa-program-that-streamlined-cancer-causing-chemicals-from-plastic-burning/.

have substantial caretaking responsibilities—work together to track pollution events and regulatory developments to the best of their ability at the industrial facilities that impact their neighborhood. Weckesser Decl. ¶¶ 1, 8–13. Among other ongoing efforts, Cherokee Concerned Citizens' volunteer leadership reviews all regulatory notices from Mississippi's environmental agency, and members of the group "attend every public meeting that is announced by Chevron or [the Mississippi Department of Environmental Quality] concerning the Chevron refinery." *Id.* ¶¶ 10–13, 15. They also monitor media sources for information about the Chevron refinery, as evidenced by the fact that Cherokee Concerned Citizens' members located and shared the ProPublica article describing EPA's Order the day the article was published. *Id.* ¶ 14. After learning of EPA's Order, Cherokee Concerned Citizens' leadership promptly launched a search for pro bono counsel. *Id.* ¶¶ 18–19. Within two weeks of identifying potential counsel, they filed their petition for review. *Id.* ¶ 19. These efforts meet any reasonable standard for "reasonable diligence" under Cherokee Concerned Citizens' circumstances. *Gibbs*, 767 F.3d at 890.

EPA's contrary argument rests on the claim that, had Cherokee Concerned Citizens "exercised reasonable diligence in monitoring EPA's publicly accessible website, it would have obtained the pertinent information needed to file the instant

petition in October 2022." EPA Mot. 16. As explained *supra*, Point I, that claim is false and fails to grapple with the serious limitations of ChemView and the Order itself.

CONCLUSION

For the foregoing reasons, this Court should deny EPA's motion to dismiss and consider the merits of Cherokee Concerned Citizens' challenge to the Order.

Respectfully submitted this 15th day of December, 2023.

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CERTIFICATE OF COMPLIANCE

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